"PEACE, ORDER AND GOOD GOVERNMENT" RE-EXAMINED

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I

It is not good husbandry to plow tilled land and it may be equally a display of folly to venture on a re-examination of the judicially determined content of the introductory clause of section 91 of the British North America Act. That clause has been the favourite "whipping-boy" of most of the articles and comments on Canadian constitutional law[1] and justification for another inquiry into it might, understandably, be required to rest on some substantial ground. But if the amount of literature on Canadian constitutional law is a reflection of the interest which the subject holds for the legal profession, no one who dares to write on it need offer any apology, regardless of the weight of his contribution. Even if extenuation is necessary, there is at least this to be said: (1) the opinion of the Privy Council in *Attorney-General of Ontario* v. *Attorney-General of Canada* (*Reference re Privy Council Appeals*),[2] making it possible for the Parliament of Canada to vest final and exclusive appellate jurisdiction in respect of all Canadian causes in the Supreme Court of Canada, is an invitation to review our constitutional position; and (2) the opinions of the Privy Council in the *Canada Temperance Federation* case[3] and in the *Japanese Canadians Deportation* case[4] contain propositions bearing on the introductory words of section 91 which, on one view, neutralize much of what had been said by the Judicial Committee on the matter in the past twenty-five years and, on another view, merely add to the confusing course of judicial pronouncements on the "peace, order and good government" clause.

There are several high points in the judicial history of this clause which may well serve as focal points for any thorough consideration of its content. I nominate as members of this

[1] See: Kennedy, The Interpretation of the British North America Act (1943), 8 Camb. L. J. 146; MacDonald, Judicial Interpretation of the Canadian Constitution (1936), 1 Univ. of Tor. L. J. 260; Tuck, Canada and the Judicial Committee of the Privy Council (1941), 4 Univ. of Tor. L. J. 33; Richard, Peace, Order and Good Government (1940), 18 Can. Bar Rev. 243; Jennings, Constitutional Interpretation — The Experience of Canada (1937) 51 Harv. L. Rev. 1; O'Connor, Report to the Senate on the B.N.A. Act (1939), Annex 1, pp. 52-78.

[2] [1947] 1 D.L.R. 801.

[3] *Attorney-General of Ontario* v. *Canada Temperance Federation*, [1946] 2 D.L.R. 1.

[4] *Co-Operative Committee on Japanese Canadians* v. *Attorney-General of Canada*, [1947] 1 D.L.R. 577.

select company (1) *The Dominion Insurance Act* reference,[5] (2) the *Snider* case,[6] (3) the *Natural Products Marketing Act* reference[7] and (4) the *Canada Temperance Federation* case. The *Local Prohibition* case[8] must, of course, be included in this group, but in some respects its stature is of retrospective magnitude just as that of the *Russell* case[9] (also a "must" for the group) is, from a certain point of view, of retrospective insignificance.

The dominant judicial personalities in the history of the introductory clause of section 91 appear to be Viscount Haldane on the Judicial Committee and, on the Supreme Court of Canada, its former Chief Justice, Sir Lyman Duff. While the practice of the Privy Council to give but a single, ostensibly unanimous, opinion has hidden from view any possible dissenter, the freedom of the members of the Supreme Court to express their individual opinions produced an opponent to the Haldane-Duff viewpoint in the person of Sir Lyman's predecessor, the late Chief Justice Anglin.[10] Viscount Haldane's views on the distribution of legislative power under the British North America Act were not uninfluenced by his long apprenticeship, when at the Bar, as counsel for the provinces in at least ten cases, although this may be discounted by several appearances as counsel for the Dominion.[11]

[5] *Attorney-General of Canada* v. *Attorney-General of Alberta*, [1916] 1 A.C. 588.

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

[7] *Reference re Natural Products Marketing Act*, [1936] S.C.R. 398, affirmed [1937] A.C. 377 (*sub nom. Attorney-General of British Columbia* v. *Attorney General of Canada*).

[8] *Attorney-General of Ontario* v. *Attorney-General of Canada*, [1896] A.C. 348.

[9] *Russell* v. *The Queen* (1882), 7 App. Cas. 829.

[10] See *In re Board of Commerce Act, etc.* (1920), 60 S.C.R. 456; *The King* v. *Eastern Terminal Elevator Co.*, [1925] S.C.R. 434.

[11] As counsel for the provinces: *St. Catherines Milling & Lumber Co.* v. *The Queen* (1888), 14 App. Cas. 46; *Attorney-General of Ontario* v. *Attorney-General of Canada*, [1894] A.C. 189; *Brophy* v. *Attorney-General of Manitoba*, [1895] A.C. 202; *Attorney-General of Ontario* v. *Attorney-General of Canada*, [1896] A.C. 348; *Attorney-General of Canada* v. *Attorney-General of Ontario*, [1897] A.C. 199; *Brewers & Maltsters' Association of Ontario* v. *Attorney-General of Ontario*, [1897] A.C. 231; *C.P.R.* v. *Notre Dame de Bonsecours*, [1899] A.C. 367; *Union Colliery* v. *Bryden*, [1899] A.C. 580; *Madden and Attorney-General of British Columbia* v. *Fort Sheppard Ry.*, [1899] A.C. 626; *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association*, [1902] A.C. 73. As counsel for the Dominion: *Attorney-General of Canada* v. *Attorney-General of Ontario*, [1898] A.C. 248; *Attorney-General of Canada* v. *Attorney-General of Ontario*, [1898] A.C. 700.

I do not discount the influence of Lord Watson, especially that stemming from his opinion in the *Local Prohibition* case; but so far as the introductory clause of section 91 is concerned, it was Viscount Haldane that gave it its particular character. It should be noted, however, that Viscount Haldane magnanimously has credited Lord Watson for the form of the British North America Act under judicial interpretation. In an article on the Privy Council in (1922), 1 Camb. L. J. 143, at p. 150, Viscount Haldane says:

> "Particularly [Lord Watson] rendered an enormous service to the Empire and to the Dominion of Canada by developing the Dominion Constitu-

Sir Lyman's views on the "peace, order and good government" clause were not solely the result of the compulsion of Privy Council decisions. The "locus classicus" accolade bestowed by the Privy Council[12] on his judgment in the *Natural Products Marketing Act* reference[13] may, in part, have been merely a self-serving tribute to a skilful and faithful exposition of its own course of decision but Sir Lyman showed, as early as the *Board of Commerce* case,[14] that he had embarked on that course as much by his own choice as by the dictate of *stare decisis*.

Even on the most generous view of the Privy Council's labours in constitutional interpretation on behalf of the Canadian people, one must find them false to their own oft-declared purpose of discussing each question as it arose and refusing to lay down principles which might later be applied to unforeseen circumstances.[15] Unnecessary, if not also innocuous, dicta in various cases became precious formulae for the decisions in later cases. One can readily admit that any judge may yield to a well-nigh irresistible urge to go beyond what is strictly necessary for his decision, and he ought not to be blamed if his successors treat his dicta as binding upon them. The power of members of an ultimate court to bind their successors (something which the "sovereign" legislature does not admit in relation to its successors) is perhaps peculiar to the judicial function of the House of Lords. The Judicial Committee has, in words at least, declared that it is not absolutely bound by its own decisions,[16] but it has hastened to qualify this by the statement that "on constitutional questions it must be seldom indeed that the Board would depart from a

tion. At one time, after the British North America Act of 1867 was passed, the conception took hold of the Canadian Courts that what was intended was to make the Dominion the centre of government in Canada, so that its statutes and its 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 a new form. The Provinces were recognized as of equal authority co-ordinate with the Dominion, and a long series of decisions were given by him which solved many problems and produced a new contentment in Canada with the Constitution they had got in 1867. It is difficult to say what the extent of the debt was that Canada owes to Lord Watson, and there is no part of the Empire where his memory is held in more reverence in legal circles."

[12] In *Attorney-General of Canada* v. *Attorney-General of Ontario*, [1937] A.C. 326.

[13] [1936] S.C.R. 398.

[14] (1920), 60 S.C.R. 456.

[15] *E.g.*, *Citizens Insurance Co.* v. *Parsons* (1881), 7 App. Cas. 96. In the *Manitoba Licence Holders' Association* case, [1902] A.C. 73, the Board referred in this connection to "the advice often quoted but not perhaps always followed".

[16] *E.g.*, *Tooth* v. *Power*, [1891] A.C. 284.

previous decision which it may be assumed will have been acted upon both by governments and subjects".[17] It is unfortunate that this type of hindsight could not have been matched by an equal degree of foresight as to the possible consequences, for succeeding generations of Canadians, of introducing generalities into cases where they had no place.

It would be too much of a threshing of old straw to review at length those Privy Council opinions which resulted in (1) separating the introductory words of section 91 from the declaratory enumerations in that section, and (2) reducing the introductory clause to a position supplementary to the declaratory enumerations. It is sufficient for the purposes of this article merely to state these results, while pointing out that in terms (1) the introductory clause constitutes the Dominion's sole grant of legislative power, and (2) the enumerations are merely illustrations of what is included in the power to make laws for the peace, order and good government of Canada.[18] The righteous indignation of many writers who have commented on this inverted interpretation of the introductory clause is understandable, but I believe that there has been an exaggerated belabouring of this judicial rearrangement of the terms of section 91; and its overemphasis (as in the case of the O'Connor Report) has distracted attention from a more fruitful point of attack, namely, the lame and artificial application of the "aspect" doctrine to the introductory clause of section 91.[19] Any discussion of the scope of federal legislative power cannot, of course, be divorced from a consideration of the opening words of section 91 as being an original or a supplementary grant of authority. But a sufficient appreciation of "aspect" could have surmounted even the "supplementary" view which the Privy Council espoused. My understanding of the group of Canadian "new deal" cases indicates this to be so.[20]

The *Russell* case was the first occasion upon which the Judicial Committee was invited to sustain Dominion legislation under the introductory words of section 91. It rose to the invita-

[17] *Canada Temperance Federation* case, *supra*, note 3, at p. 6.

[18] The subject is canvassed in the O'Connor Report, *supra*, note 1, and in Kennedy, *op. cit.*, *supra*, note 1.

[19] The "aspect" doctrine is laid down in *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, in these words: "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".

[20] These cases involved decisions on a group of ten federal enactments among which were the Natural Products Marketing Act, 1934, the Employment and Social Insurance Act, 1935, and three statutes implementing international labour conventions. The cases are discussed in MacDonald, The Canadian Constitution Seventy Years After (1937), 15 Can. Bar Rev. 401.

tion in an opinion in which it initially characterized the impugned legislation, the Canada Temperance Act. The emphasis in this characterization was laid not so much on the subject matter of the Canada Temperance Act as on the purpose to which it was directed. As later cases put it, the Privy Council ascertained the pith and substance of the legislation so as to discover its "aspect" because that was the cardinal inquiry in assessing its validity under sections 91 and 92 of the British North America Act.[21] The approach from the standpoint of "aspect" rather than "subject matter" has depended on giving due weight to the phrase "in relation to matters" which recurs in sections 91 and 92 and which precedes the reference and listing in those sections of "classes of subjects". In those cases (and there are a number)[22] where the Privy Council has talked of "subject matter" rather than of "aspect", it has been guilty, if I may paraphrase a sentence of Mr. Justice Duff (as he then was), of a failure to distinguish between legislation "in relation to" and legislation "affecting".[23] No such failure is evident in the *Russell* case, because throughout its opinion in that case the Judicial Committee measured its characterization of the legislation against a number of classes of subjects enumerated in section 92 as well as against the grant of legislative power to the Dominion in section 91.

The considerations which moved the Privy Council to uphold the Canada Temperance Act as a valid exercise of power to legislate for the peace, order and good government of Canada may best be underlined in the Board's own words. Thus, "the primary matter dealt with" was "one relating to public order and safety"; the "declared object of Parliament in passing the Act is that there should be uniform legislation in all the provinces respecting the traffic in intoxicating liquors with a view to promote temperance in the Dominion"; "Parliament deals with the subject as one of general concern to the Dominion upon which uniformity of legislation is desirable, and the Parliament alone can so deal with it"; "there is no ground or pretence for saying that the evil or vice struck at . . . is local or exists only in one province"; "the present legislation is clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion".[24] The feature of these statements is their suggested connection with data which would support the existence of a temperance problem

[21] *E.g.*, *Attorney-General for Ontario* v. *Reciprocal Insurers*, [1924] A.C. 328.
[22] *E.g.*, *Board of Commerce* case, [1922] 1 A.C. 191; *Dominion Insurance Act* reference, [1916] 1 A.C. 588.
[23] *Gold Seal Ltd.* v. *Attorney-General of Alberta* (1921), 62 S.C.R. 424, at p. 460
[24] 7 App. Cas. 829, at pp. 841-2.

on a national scale. Such an approach infuses some realism into the "aspect" doctrine, permitting it to reflect the social facts of Canadian life.

The Privy Council in the *Russell* case spoke of the Canada Temperance Act as "legislation meant to apply a remedy to an evil which is assumed to exist throughout the Dominion". Assumed by whom? The answer must be that the Parliament of Canada made the assumption and that the Judicial Committee was prepared to respect it. One could wish for a recital of the specific facts on which the assumption was made or given credence. But it is at least important that the judgment of the Parliament of Canada was persuasive for the Judicial Committee. While this is perhaps nothing more than the application of a doctrine of "presumption of constitutionality" its import is a far-reaching one if we remember that the *Russell* case was decided in a period when the use of extrinsic aids in interpretation was extremely narrow.[25] About forty years later, in the *Board of Commerce* case, the Judicial Committee in invalidating certain federal anti-profiteering legislation recited that "it can therefore be only under necessity in highly exceptional circumstances, such as cannot be assumed to exist in the present case, that the liberty of the inhabitants of the Provinces may be restricted by the Parliament of Canada and that the Dominion can intervene in the interests of Canada as a whole in questions such as the present one".[26] The Board is now unwilling to make any assumption in favour of the validity of Dominion legislation for the peace, order and good government of Canada; and, what is more, we are left without any discussion by the Judicial Committee of the factual considerations which underlay the enactment of the rejected federal legislation. It may be as unwise for a court to make assumptions in favour of legislative power as against it, when it can easily call for factual material by which it can reach a conclusion on reasonable grounds. But given a decided judicial attitude against resort to extrinsic aids in interpretation, an assumption in favour of constitutionality offers a court a way of reconciling its enormous power of judicial review with the great responsibilities that rest upon Canada's democratically-elected legislatures to satisfy the social wants of a free people. As I shall attempt to show, Viscount Haldane, during the period when he was spokesman for the Privy Council, gave his decisions in terms of cold abstract logic, purporting to find its points of reference within the four

[25] See MacDonald, Constitutional Interpretation and Extrinsic Evidence (1939), 17 Can. Bar Rev. 77.

[26] [1922] 1. A.C. 191, at pp. 197-8.

corners of the B.N.A. Act, and uninformed and unnourished by any facts of Canadian living which might have afforded a rational basis for his constitutional determinations. The fact that extrinsic aids have been resorted to more freely in the last two decades has seemingly had no effect upon the rigid abstractions with which Canadian constitutional interpretation was surrounded at the close of Viscount Haldane's period of Judicial Committee service.

Honest men may well disagree on whether available data do or do not justify legislation of a particular character and on whether the reasonable inference from such data supports a federal "aspect" in such legislation. But a sense of unreality is the result of constitutional interpretation which has an anchorage only in the mind and unsupported predilections of the judge, whose task it is (as in the case of the British North America Act) to determine from time to time the reach of the governmental functions of the Dominion and the Provinces respectively.

The course of decision respecting the meaning and content of the introductory clause of section 91 suggests that it can conveniently be discussed under three heads: (1) its relation to the so-called "trenching" and "ancillary" doctrines; (2) its position as an "emergency" power; and (3) its position as a "residuary" power.

II

The so-called "trenching" doctrine, the origin of which is usually ascribed to *Tennant* v. *Union Bank of Canada*[27] is, at bottom, merely a bit of embroidery on the "aspect" doctrine. Unfortunately it has become, in the hands of some judicial potters, a kind of clay used to stop up alleged over-extensions of federal power to legislate for the peace, order and good government of Canada. There is a disarming charm about the trenching doctrine when, in Privy Council terms, it champions the paramountcy of federal legislation enacted under the enumerated classes of subjects listed in section 91. But, on closer examination, it becomes merely an apology to the provincial legislatures for any validation of Dominion legislation. Its use to explain a privileged encroachment on provincial legislative authority is purely gratuitous because once a court is satisfied that impugned legislation carries a federal "aspect", no invasion of provincial legislative authority exists.

A similar conclusion must be the result of any close examination of the operation of the so-called ancillary doctrine or the

[27] [1894] A.C. 31.

doctrine of "necessarily incidental", the origin of which is usually ascribed to *Attorney-General of Ontario* v. *Attorney-General of Canada*[28] (*Voluntary Assignments* case). To say that the Dominion in legislating in relation to a matter coming within an enumerated class of subject in section 91 can also enact provisions which are necessarily incidental to effective legislation under the enumerated class is a tortuous method of explaining the "aspect" doctrine. It has the effect, however, not only of bisecting Dominion legislation but of enlarging the area of exercise of provincial legislative power. The latter result (in the absence of conflicting Dominion legislation) is perhaps not particularly objectionable but the former makes a travesty of the "aspect" doctrine. Legislation, as the Judicial Committee has itself said from time to time, must be considered as a whole and its aspect ascertained in the light of all its provisions.[29] To make what can only be an artificial distinction between those provisions of a federal enactment which are strictly in a federal aspect and those necessarily incidental to the effective operation of the legislation, is to trifle with legislative objectives and with the draftsman's efforts to realize them. Even so close and critical a student of constitutional law as Dean MacDonald accepts the reality of a distinction between the aspect and ancillary doctrines, though it may be that he does so more in terms of resignation than of conviction. He puts the difference in this way:

> The distinction between the 'aspect' and 'ancillary' doctrines is that under the former the provision in question is validly within the scope of an enumerated Dominion power, the only peculiarity being that, from some other aspect or for some other purpose, similar legislation might also be enacted by a province; while, under the latter doctrine, the provision in question is invalid *per se* as being legislation within an exclusive provincial head but in its particular context it derives validity because of its necessity to effective legislation under an admitted Dominion head.[30]

To me this is a distinction without a difference, a super-refined and unnecessary embellishment of the aspect doctrine which can only divert attention from the need for close and careful consideration of the problem of aspect.

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[28] [1894] A.C. 189. And see *Attorney-General of Canada* v. *Attorney-General of British Columbia*, [1930] A.C. 111 (*Fish Canneries* case) where the Judicial Committee summed up in four propositions its approach to the distribution of legislative power under sections 91 and 92. The second proposition, although hewing to the "no trenching" line in relation to the Dominion's general power, is more consistent with the "aspect" doctrine than with any notion of emergency.

[29] *E.g.*, *Great West Saddlery Co.* v. *The King*, [1921] 2 A.C. 91.

[30] *Supra*, note 1, at p. 274, footnote 52.

There was nothing in the *Russell* case to indicate any notion of "trenching" or of the idea of "necessarily incidental"; nor did these ideas appear in the *Hodge* case[31] which, in upholding the validity of the Ontario Liquor Licence Act, proceeded simply on the "aspect" approach. Not until the *Local Prohibition* case is there a suggestion that the "trenching" and "ancillary" doctrines (which had been enunciated in the meantime) might operate to confine the exercise of federal power to legislate for the peace, order and good government of Canada. The matter is mentioned in a queer isolated sentence in the *Manitoba Licence Holders' Association* case.[32] In *Montreal* v. *Montreal Street Railway*[33] the Judicial Committee woodenly repeats (and with an error which is also perpetuated by Chief Justice Duff in the *Natural Products Marketing Act* reference) statements in the *Local Prohibition* case.[34] In the *Dominion Insurance Act* reference in 1916, Viscount Haldane in a sweeping statement, unsupported by citation of authority but clearly resting on his understanding of the *Local Prohibition* case (in which he was one of counsel for the province) puts the matter in terms of finality:

> It must be taken to be now settled that the general authority to make laws for the peace, order, and good government of Canada, which the initial part of s. 91 of the British North America Act confers, does not, unless the subject-matter of legislation falls within some one of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matters entrusted to the provincial Legislatures by the enumeration in s. 92. There is only one case, outside the heads enumerated in s. 91, in which the Dominion Parliament can legislate effectively as regards a province, and that is where the subject-matter lies outside all of the subject-matters enumeratively entrusted to the province under s. 92.[35]

It is my submission that the above statement is unwarranted not only in its finality but in its pose as a clear reflection of antecedent interpretation.

The *Local Prohibition* case involved a reference to the Supreme Court of Canada in which that court held unanimously that a provincial legislature has no legislative jurisdiction to prohibit the manufacture of intoxicating liquor within the province, and held

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[31] (1883), 9 App. Cas. 117.
[32] [1902] A.C. 73.
[33] [1912] A.C. 333.
[34] Lord Atkinson in the *Montreal Street Ry.* case, in stating certain propositions in the words of the *Local Prohibition* case, says: " . . . . The exception contained in s. 91 near its end was not meant to derogate from the legislative authority given to provincial Legislatures by *the 16th subsection* of s. 92", etc. Lord Watson in the *Local Prohibition* case said the "16" subsections of s. 92, not the 16th.
[35] [1916] 1 A.C. 588, at p. 595.

by a majority that a provincial legislature has no legislative jurisdiction to prohibit the sale within the province of intoxicating liquor.[36] In reversing the Supreme Court, the Judicial Committee stated that a province could, *in the absence of conflicting legislation by the Parliament of Canada,* prohibit the manufacture of intoxicating liquor in the province if the manufacture were so carried on as to make its prohibition a merely local matter; and that the province could prohibit the sale of intoxicating liquor in so far as there was no conflict "with the paramount law of Canada". Lord Watson stated:

> If the prohibitions of the Canada Temperance Act had been made imperative throughout the Dominion, their Lordships might have been constrained by previous authority to hold that the jurisdiction of the Legislature of Ontario . . . had been superseded.[37]

This then would indicate that with respect to the actual issues before it, the Judicial Committee recognized the paramountcy of federal legislation over provincial legislation in a situation where in the absence of Dominion legislation the province might competently legislate; in other words, even accepting the artificial "trenching" doctrine, the Dominion could "trench" in the exercise of legislative authority for the peace, order, and good government of Canada.

A long dictum in the *Local Prohibition* case seems, however, at variance with this position, and it is important to set this dictum out in full, as follows:

> The general authority given to the Canadian Parliament by the introductory enactments of s. 91 is '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 it is declared, but not so as to restrict the generality of these words, that the exclusive authority of the Canadian Parliament extends to all matters coming within the classes of subjects which are enumerated in the clause. There may, therefore, be matters not included in the enumeration, upon which the Parliament of Canada has power to legislate, because they concern the peace, order, and good government of the Dominion. But to those matters which are not specified among the enumerated subjects of legislation, the exception from s. 92, which is enacted by the concluding words of s. 91, has no application; and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by s. 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to

[36] (1894), 24 S.C.R. 170.
[37] [1896] A.C. 348, at p. 369.

> such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92.[38]

It may be observed, with respect to this long passage, that it is the source of Viscount Haldane's positive assertion in the *Dominion Insurance Act* reference, already quoted. In so far as it applies the concluding clause of section 91 to all the enumerations of section 92 and not only to the 16th enumeration, it has been the subject of competent criticism elsewhere;[39] and it can hardly be gainsaid that if the concluding clause of section 91 is necessary (as the Privy Council holds) to justify the exclusiveness of the Dominion enumerations as against the whole of section 92, this means that the classes of subjects in section 92 are the dominant ones save to the extent necessary to give scope to those enumerated in section 91. The legerdemain displayed by the Privy Council in dealing with the concluding clause of section 91 gives the surprising result that only the matters within the enumerations of section 91 are deemed to be outside of section 92, whereas any careful reading of sections 91 and 92 indicates that only the matters in section 92 are excluded from Dominion power under section 91 and that the content of the classes of subjects in section 92 is, moreover, cut down by the enumerations in section 91.

The passage previously quoted, in so far as it enjoins the Dominion, when exercising power to legislate for the peace, order, and good government of Canada, from trenching "upon provincial legislation with respect to any of the classes of subjects enumerated in Section 92", conflicts with what was actually decided in the case. Reconciliation of the contradiction is possible only if we ignore the language of the dictum and re-interpret it in terms of the "aspect" doctrine. On such a view, the pieces of an otherwise insoluble puzzle fall into place because there must be a ready acceptance of the proposition that power to legislate for the peace, order, and good government of Canada relates to matters which are "unquestionably of Canadian interest and importance".

I referred earlier to a "queer isolated sentence" in the *Manitoba Licence Holders* case. That case is the counterpart for Manitoba of the *Hodge* case and the *Local Prohibition* case, and it

[38] *Ibid.*, at p. 360.

[39] *Supra*, note 18. The concluding clause of s. 91 reads as follows: "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". Jennings, *op. cit.*, *supra*, note 1, at p. 4 accepts the view finally taken by the Judicial Committee in the *Local Prohibition* case that the concluding clause of s. 91 refers to all 16 heads of s. 92 and not merely to s. 92 (16).

repeats what was said in the latter case that "it is not incompetent for a provincial legislature to pass a [liquor] measure . . . . . provided the subject is dealt with as a matter 'of a merely local nature' in the province and the [provincial] Act itself *is not repugnant to any Act of the Parliament of Canada*".[40] Lord Macnaghten speaking for the Privy Council assigned the provincial enactment to section 92 (16) rather than section 92 (13), purporting to apply what he conceived to be the Board's opinion in the *Local Prohibition* case. He goes on, however, to say this: "Indeed, if the case is to be regarded as dealing with matters within the class of subjects enumerated in No. 13 [of section 92] it might be questionable whether the Dominion Legislature could have authority to interfere with the exclusive jurisdiction of the province in the matter".[41] This sentence, a sort of biologic sport in the context of the whole opinion, appears to be an attempt to reconcile practically the actual results in the *Local Prohibition* and the *Manitoba Licence Holders* cases with the long dictum from the *Local Prohibition* case quoted earlier. Besides wearing a strange look in preferring a dictum to the actual ratio, the sentence drives a wedge between section 92 (16) and the other enumerations of section 92. This seems the more remarkable when one considers how, in relation to the concluding clause of section 91, the Judicial Committee in the *Local Prohibition* case went out of its way to oppose *all* the enumerations of section 92 to those in section 91. It said, in that connection, that "all the matters enumerated in the sixteen heads of Section 92 [were] from a provincial point of view of a local or private nature".[42] The suggestion of the *Manitoba Licence Holders* case goes beyond merely segregating section 92 (16) from the other enumerations in section 92 and making it alone subservient to the federal power to legislate for the peace, order, and good government of Canada. Its necessary consequence is further to reduce the effectiveness of the peace, order and good government clause, because by giving that clause a hollow paramountcy over section 92 (16) (a sort of provincial residuary clause)[43] it can the more easily be dismissed in relation to other more effective enumerations of section 92 such as No. 13. It is significant in this connection that only in respect of liquor legislation has this dubious preference been accorded to the federal power, so that it represents a whittling down of the "aspect" doctrine as applied in *Russell* v. *The Queen* and *Hodge* v. *The Queen*. Viscount Haldane lends support

[40] [1902] A.C. 73, at p. 78.
[41] *Ibid.*
[42] [1896] A.C. 348, at p. 359.
[43] See, Note (1946), 24 Can. Bar Rev. 223.

to this conclusion because in the *Dominion Insurance Act* reference he refers to the aspect doctrine as "a principle which is now well established but [which] none the less ought to be applied only with great caution".[44] His statement in that case, already quoted, on the subordination of the peace, order and good government clause to the enumerations in section 92 shows the extent to which he ignores the aspect doctrine. He speaks there of "subject matter of legislation" and of "subject-matters entrusted to the provincial lgislatures"; and further on in his opinion in the case he refers to the *Russell* case as one where "the Court considered that the particular subject-matter in question lay outside the provincial powers". It is clear, of course, that the particular subject-matter was within provincial powers in a local aspect and outside such powers only where the purpose of the legislation was such as to give it a federal "aspect".

A great deal has been made, both by Sir Lyman Duff[45] and by Viscount Haldane,[46] of the unreported *McCarthy Act* decision of the Judicial Committee. There the Board, without giving reasons, invalidated the Dominion Liquor License Act, 1883, affirming, in so doing, the opinion of the Supreme Court of Canada.[47] It is important to note that this decision followed decisions of the Judicial Committee upholding the Canada Temperance Act and the Ontario Liquor License Act. An examination of the Dominion Liquor License Act reveals it to have been a purely local licensing statute, contemplating decentralized administration through district Boards of License Commissioners. The whole tenor of the Act indicated that it was dealing with the liquor traffic as a purely local problem in local licence districts. It is hardly a matter of surprise that the Supreme Court of Canada should have invalidated the enactment; but even so, the majority of the court saved those parts of the enactment relating to the carrying into effect of the provisions of the Canada Temperance Act. It is difficult hence to understand why Viscount Haldane in the *Snider* case should have felt that it was hard to reconcile the *Russell* case with the *McCarthy Act* decision; or why he so artfully says, "as to this last decision it is not without significance that the strong Board which delivered it abstained from giving any reasons for their

[44] [1916] 1 A.C. 588, at p. 596.

[45] In the *Board of Commerce* case (1920), 60 S.C.R. 456, at pp. 509, 511; and in the *Natural Products Marketing Act* reference, [1936] S.C.R. 398, at pp. 409, 411.

[46] In the *Snider* case, [1925] A.C. 396. See also another reference in the *Dominion Insurance Act* reference, [1916] 1 A.C. 588, at p. 596, which states the result accurately.

[47] See schedule to 1885 (Can.), c. 74.

conclusions".[48] For, if the *McCarthy Act* case affirms anything, it affirms the application of the aspect doctrine already referred to in the *Hodge* case.

There is, of course, a constant temptation to apportion legislative power under the B.N.A. Act according to subject-matter of legislation, to read sections 91 and 92 as if they distribute fields of law-making instead of legislative power directed to various purposes, whether those purposes be related to the peace, order and good government of Canada or to matters within enumerated classes of subjects. To yield to this temptation involves ignoring the qualitative and quantitative character of a particular legislative problem. Moreover, having regard to the course of decision which reduced the peace, order and good government clause to a supplementary position and having regard to the use made of the "trenching" and "ancillary" doctrines with respect to that clause, constitutional interpretation becomes a mechanical process in which the substantial inquiry in connection with the validity of federal legislation for the peace, order and good government of Canada is whether the subject-matter of the legislation is part of "property and civil rights in the province" within section 92(13).

III

There can surely be nothing more remarkable in judicial annals than the Privy Council's treatment of the peace, order and good government clause from the *Russell* case in 1882 to the *Japanese Canadians Deportation* case in 1946. Beginning with the *Board of Commerce* case in 1921 and carrying through the *Fort Frances* case[49] and culminating in the *Snider* case in 1925, Viscount Haldane laboriously built a doctrine of "emergency" around the clause, only to have Viscount Simon puncture the doctrine in no uncertain fashion in the *Canada Temperance Federation* case in 1946. But at the close of 1946 the Judicial Committee, speaking through Lord Wright in the *Japanese Canadians Deportation* case, reverted to the language of emergency with a strange detachment and a seemingly innocent unconcern which expressed itself in an omission to mention the *Canada Temperance Federation* case decided earlier in the same year.

The germ of the "emergency" character of the introductory clause is attributed to two sentences in Lord Watson's opinion in the *Local Prohibition* case, reading as follows:

[48] [1925] A.C. 396, at p. 411.
[49] *Fort Frances Pulp & Power Co.* v. *Manitoba Free Press*, [1923] A.C. 695.

> Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.[50]

It is well to note that these sentences are more consistent with an appreciation of the aspect doctrine than of any doctrine of power in extraordinary circumstances. *Ex facie*, they make allowance for a social and economic development of Canada which might transform local problems into national ones, so that they might require federal rather than provincial solutions. When Chief Justice Duff comes to deal with these two sentences in his judgment in the *Natural Products Marketing Act* reference, not only does he drain them of any vitality but he makes them ridiculous.

The learned Chief Justice begins by warning that the two sentences must be read in their context, and this admits of no contradiction. He refers to them as being "in . . . carefully guarded language"; and he continues as follows:

> It has been assumed, apparently, that they lay down a rule of construction the effect of which is that all matters comprised in any one of the enumerated sub-divisions of section 92 may attain "such dimensions as to . . . cease to be merely local or provincial" and become in some other aspect of them matters relating to the "peace, order and good government of Canada" and subject to the legislative jurisdiction of the Parliament of Canada.
>
> The difficulty of applying such a rule to matters falling within the first subdivision, for example, of section 92, which relates to the amendment of the provincial constitutions 'notwithstanding anything in this Act', must be very great. On the face of the language of the statute, the authority seems to be intended to be absolute. In other words, it seems to be very clearly stated that matters comprised within the subject matter of the constitution of the province 'except as regards the office of Lieutenant-Governor' are matters local and provincial,

[50] [1896] A.C. 348, at p. 361. In the *Labour Conventions* case, [1937] A.C. 326, at p. 353, the Judicial Committee said of Lord Watson's two sentences: "They laid down no principle of constitutional law, and were cautious words intended to safeguard possible eventualities which no one at the time had any interest or desire to define". This seems a little incongruous when the Judicial Committee proceeds in its next sentence to approve Chief Justice Duff's analysis of the introductory clause of section 91 in the *Natural Products Marketing Act* reference, an analysis which certainly treated the two sentences as expressing a principle of constitutional law. That it is difficult to understand its application is another matter.

and that they are not matters which can be comprised in any of the classes of subjects of section 91.

Then the decision in . . . *Montreal Park and Island Railway* v. *City of Montreal* seems to be final upon the point that local works and undertakings, subject to the exceptions contained in subdivision no. 10 of section 92 and matters comprised within that description, are matters local and provincial within the meaning of section 92 and excepted from the general authority given by the introductory enactment of section 91.

The same might be said of the solemnization of marriage in the province. Marriage and divorce are given without qualification to the Dominion under subdivision 26 of section 91, but the effect of section 92 (12), it has been held, is to exclude from the Dominion jurisdiction in relation to marriage and divorce the subject of solemnization of marriage in the province. It is very difficult to conceive the possibility of solemnization of marriage, in the face of this plain declaration by the legislature, assuming aspects which would bring it within the general authority of the Dominion in relation to peace, order and good government, in such fashion, for example, as to enable the Dominion to prohibit or to deprive of legal effect a religious ceremony of marriage. The like might be said of no. 2, Taxation within the Province; the Borrowing of Monies on the Sole Credit of the Province; Municipal Institutions in the Province; and the Administration of Justice, including the constitution of the Courts and Procedure in Civil Matters in the Courts.[51]

This, with respect, merely sets up a man of straw in order that he may easily be knocked down. The term "matters" has no meaning apart from legislative issues which may call for the exercise of legislative powers. Those issues depend not on artificial presuppositions but on the existence of facts and circumstances which give rise to some social pressure for legislation. There is no difficulty hence in understanding that the "some matters" in Lord Watson's two sentences could well relate to issues finding concrete support for federal treatment and that they do not necessarily comprehend the abstractions in which Chief Justice Duff seeks to envelop them.

The learned Chief Justice's conclusions as to the meaning of the two sentences are as follows:

As we have said, Lord Watson's language is carefully guarded. He does not say that every matter which attains such dimensions as to affect the body politic of the Dominion falls thereby within the introductory matter of section 91. But he said that 'some matters' may attain such dimensions as to affect the body politic of the Dominion and, as we think the sentence ought to be read having regard to the context, in such manner and degree as may 'justify the Canadian Parliament in passing laws for their regulation or abolition . . .'. So, in the second sentence, he is not dealing with all matters of 'national concern' in the broadest sense of those words, but only those which are matter

[51] [1936] S.C.R. 398, at p. 418.

> of national concern 'in such sense' as to bring them within the jurisdiction of the Parliament of Canada.[52]

This statement involves a *circulus inextricabilis*. On the Chief Justice's analysis, only "some matters" which attain such dimensions as to affect the body politic of the Dominion fall within federal power. To the question, What are those matters?, the answer given by the Chief Justice seems to be that they are matters of national concern in such sense as to bring them within federal jurisdiction. Surely this is merely turning the phrase "some matters" in upon itself and amounts to a definition in the terms of the phrase to be defined. It is well to mention at this point that the Judicial Committee in the *Labour Conventions* case said of the judgment of Chief Justice Duff that "[it] will, it is to be hoped, form the *locus classicus* of the law on this point and preclude further disputes"; and again, that "they consider that the law is finally settled by the current of cases cited by the Chief Justice on the principles declared by him".[53] There is certainly a strange and hollow sound to these words when one considers that Viscount Simon in the *Canada Temperance Federation* case categorically rejected any notion of "emergency" in an opinion which did not bother to mention either Chief Justice Duff's *locus classicus* or the approbation given it by the Privy Council.

It is in the *Board of Commerce* case that the notion of emergency appears in recognizable form. The federal legislation impugned in that case was clearly of a far-reaching character, but nowhere in their opinions in the case do the Supreme Court or Privy Council challenge the necessity for stringent legislation. Admittedly, this is no argument upon which to support a federal exercise of power — or any provincial exercise of power for that matter. But if the necessity for restrictive legislation rests on the existence of a condition which is not local or provincial but general, and the legislation enacted to cope with it is predicated on the generality of the evil to be struck at, a federal "aspect" may well be found in such legislation. There may, of course, be a difference of opinion as to what inferences may legitimately be drawn from facts in evidence and as to whether any questioned legislation is fairly based on reasonable inferences from proved facts. That, however, is part of the necessary travail of constitutional adjudication unless the adjudication proceeds without a firm basis in the facts and circumstances surrounding the question to be determined.

[52] *Ibid.*, at p. 419.
[53] [1937] A.C. 326, at p. 353.

The Supreme Court in the *Board of Commerce* case was divided on the question of the validity of the federal legislation there considered. Mr. Justice Anglin, for half of the court, was of opinion that it was a valid exercise of legislative authority in relation to the regulation of trade and commerce and, moreover, that it was supportable as legislation for the peace, order and good government of Canada. In this latter connection he said:

> Effective control and regulation of prices so as to meet and overcome in any one province what is generally recognized to be an evil — 'profiteering' — an evil so prevalent and so insidious that in the opinion of many persons it threatens to-day the moral and social well-being of the Dominion — may thus necessitate investigation, inquiry and control in other provinces. It may be necessary to deal with the prices and the profits of the growers or other producers of raw material, the manufacturers, the middlemen and the retailers. No one provincial legislature could legislate so as to cope effectively with such a matter and concurrent legislation of all the provinces interested is fraught with so many difficulties in its enactment and in its administration and enforcement that to deal with the situation at all adequately by that means is, in my opinion, quite impracticable.
>
> Viewed in this light it would seem that the impugned statutory provisions may be supported, without bringing them under any of the enumerative heads of s. 91, as laws made for the peace, order and good government of Canada in relation to matters not coming within any of the classes of subjects assigned exclusively to the legislatures of the provinces, since, in so far as they deal with property and civil rights, they do so in an aspect which is not 'from a provincial point of view local or private' and therefore not exclusively under provincial control.[54]

On the other hand, Duff J. held the legislation to be invalid, and it is instructive to note his reasoning. Thus he says:

> There is no case of which I am aware in which a Dominion statute not referable to one of the classes of legislation included in the enumerated heads of sec. 91 and being of such a character that from a provincial point of view, it should be considered legislation dealing with 'property and civil rights', has been held competent to the Dominion under the introductory clause.[55]

It is a matter of surprise that such a generalization should be based on but a single decision, namely, the *Dominion Insurance Act* reference — especially when it can be countered by the *Russell* case. If we exclude the "company" cases,[56] these were the only cases up to the time of the *Board of Commerce* case in which the Judicial Committee was called on to sustain federal

[54] (1920), 60 S.C.R. 456, at p. 467.
[55] *Ibid.*, at p. 508.
[56] There was also, of course, the *McCarthy Act* decision in 1885 where no reasons were given. As to the "company" cases, see *John Deere Plow Co. Ltd.* v. *Wharton*, [1915] A.C. 330.

legislation under the introductory clause of section 91. And the "company" cases can by no stretch of the imagination qualify for inclusion under that clause if as a condition thereof "it is essential that the matter dealt with shall be one of unquestioned Canadian interest and importance as distinguished from matters merely local in one of the provinces".[57]

There is no suggestion of "emergency" in the passage quoted from Duff J.'s judgment but rather a playing up of the provincial power under section 92 (13). The *Russell* case is dismissed with the statement that "it must be remembered that *Russell's* case was in great part an unargued case".[58] This is, of course, a barb (repeated again by Sir Lyman in his judgment in the *National Products Marketing Act* reference[59]) directed to the admission, made by Mr. Benjamin as counsel for the appellant in the *Russell* case, that if the Canada Temperance Act had been made imperative throughout Canada without local option it would have been valid. There is certainly nothing in the *Russell* case to indicate that this admission was fatal; and since the Act was in fact a local option statute it might have been good tactics to make an admission which was relevant to something not before the court. Presumably, Mr. Justice Duff is pointing out that counsel failed to make an argument which might have produced a different result in the *Russell* case. This does not lead anywhere because it should be equally possible to overturn other decisions in the same way. And treated as a plea against the too rigid application of *stare decisis* to constitutional decisions, the argument of Mr. Justice Duff apparently defeats the purpose he has in making it.

Mr. Justice Duff comes to actual grips with the problem in the *Board of Commerce* case in a passage which delineates in terms more reasonable than abstract the objections to easy enlargement of the content of the introductory words of section 91. It is as follows:

> The scarcity of necessaries of life, the high cost of them, the evils of excessive profit taking, are matters affecting nearly every individual in the community and affecting the inhabitants of every locality and every province collectively as well as the Dominion as a whole. The legislative remedy attempted by section 18 is one of many remedies which might be suggested. One could conceive, for example, a proposal that there should be a general restriction of credits, and that the business of money lending should be regulated by a commission appointed by the Dominion Government with powers conferred by Parliament. Measures to increase production might conceivably be proposed and

[57] (1920), 60 S.C.R. 456, at p. 506, *per* Duff J.
[58] *Ibid.*, at p. 507.
[59] [1936] S.C.R. 398, at p. 420.

> to that end nationalization of certain industries and even compulsory allotment of labour. In truth if this legislation can be sustained under the residuary clause, it is not easy to put a limit to the extent to which Parliament through the instrumentality of commissions (having a large discretion in assigning the limits of their own jurisdiction, see sec. 16), may from time to time in the vicissitudes of national trade, times of high prices, times of stagnation and low prices and so on, supersede the authority of the provincial legislatures. I am not convinced that it is a proper application of the reasoning to be found in the judgments on the subject of the drink legislation, to draw from it conclusions which would justify Parliament in any conceivable circumstance forcing upon a province a system of nationalization of industry.[60]

The argument which Duff J. makes, for all its plausibility, is directed to a question which was not before the court. The legislation in the *Board of Commerce* case established a board empowered to prohibit the formation and operation of combines and the making of unfair profits, to prevent the accumulation of (defined) necessaries of life beyond reasonable amounts and to require the sale of any surplus at fair prices. The issue of nationalization raised by the learned justice almost appears as an attempt to parade the horrors which might ensue from an enlargement of the content of the "peace, order and good government" clause. We may note that he omits to tell us whether nationalization would be more acceptable in provincial garb. But whether the issue be nationalization or anti-profiteering and anti-combine legislation, the "aspect" approach cannot admit of denial of legislative power "in any conceivable circumstance". The British North America Act does not enshrine, in its distribution of legislative power, any particular economic theory, although it does express some economic policy, as for example, in section 121 which provides for free entry into each province of products of any sister province.[61] It is understandable judicial technique to worry about the next case, but the judge in a constitutional case cannot justifiably fix the sights so far ahead as to detach himself completely from his immediate surroundings. And no more should he loll about in the past if that would also place him in an unreal environment.

When the *Board of Commerce* case reached the Privy Council the notion of the "extraordinary" or "abnormal" character of federal power under the opening words of section 91 makes its appearance in the argument of provincial counsel; and in the opinion of Viscount Haldane this idea is given countenance by

[60] (1920), 60 S.C.R. 456, at p. 512.

[61] Section 121 reads as follows: "All articles of the growth, produce or manufacture of any one of the provinces shall, from and after the union, be admitted free into each of the other provinces".

his reference to the facts that the impugned legislation was (1) passed after the conclusion of the war of 1914-18,[62] and (2) was not fashioned as a temporary control measure. Undoubtedly these facts may be relevant in determining whether the aspect of the legislation falls within the introductory words of section 91; but to fasten on them to the exclusion of the actual circumstances and conditions which induced the legislation seems to be arbitrary. Yet that is what Viscount Haldane does as the following passage reveals:

> The first question to be answered is whether the Dominion Parliament could validly enact such a law. Their Lordships observe that the law is not one enacted to meet special conditions in wartime. It was passed in 1919, after peace had been declared, and it is not confined to any temporary purpose, but is to continue without limit in time, and to apply throughout Canada. No doubt the initial words of s. 91 of the British North America Act confer on the Parliament of Canada power to deal with subjects which concern the Dominion generally, provided that they are not withheld from the powers of that Parliament to legislate, by any of the express heads in s. 92, untrammelled by the enumeration of special heads in s. 91. It may well be that the subjects of undue combination and hoarding are matters in which the Dominion has a great practical interest. In special circumstances, such as those of a great war, such an interest might conceivably become of such paramount and overriding importance as to amount to what lies outside the heads in s. 92, and is not covered by them. The decision in *Russell* v. *The Queen* appears to recognize this as constitutionally possible, even in time of peace; but it is quite another matter to say that under normal circumstances general Canadian policy can justify interference, on such a scale as the statutes in controversy involve, with the property and civil rights of the inhabitants of the Provinces. It is to the Legislatures of the Provinces that the regulation and restriction of their civil rights have in general been exclusively confided, and as to these the Provincial Legislatures possess quasi-sovereign authority.[63]

Having rebuffed the Dominion in any "normal" resort to the power to legislate for the peace, order and good government of Canada, Viscount Haldane proceeds to place the power on an "abnormal" level, as follows:

> It has already been observed that circumstances are conceivable, such as those of war or famine, when the peace, order and good Government of the Dominion might be imperilled under conditions so exceptional that they require legislation of a character in reality beyond anything provided for by the enumerated heads in either s. 92 or s. 91 itself. Such a case, if it were to arise, would have to be considered closely before the conclusion could properly be reached that it was one which could not be treated as falling under any of the heads enumerated.

[62] It was enacted, however, before the Treaty of Versailles became effective.

[63] [1922] 1 A.C. 191, at p. 197.

> Still, it is a conceivable case, and although great caution is required in referring to it, even in general terms, it ought not, in the view their Lordships take of the British North America Act, read as a whole, to be excluded from what is possible. For throughout the provisions of that Act there is apparent the recognition that subjects which would normally belong exclusively to a specifically assigned class of subject may, under different circumstances and in another aspect, assume a further significance. Such an aspect may conceivably become of paramount importance, and of dimensions that give rise to other aspects. This is a principle which, although recognized in earlier decisions, such as that of *Russell* v. *The Queen*, both here and in the Courts of Canada, has always been applied with reluctance, and its recognition as relevant can be justified only after scrutiny sufficient to render it clear that the circumstances are abnormal. In the case before them, however important it may seem to the Parliament of Canada that some such policy as that adopted in the two Acts in question should be made general throughout Canada, their Lordships do not find any evidence that the standard of necessity referred to has been reached, or that the attainment of the end sought is practicable, in view of the distribution of legislative powers enacted by the Constitution Act, without the co-operation of the Provincial Legislatures.[64]

It is of some significance that Viscount Haldane makes no reference to Lord Watson's opinion in the *Local Prohibition* case; and it may hence be justifiably said that the "emergency" colouring given to the introductory clause of section 91 was a product of Viscount Haldane's craftsmanship. War, after all, was a serious matter and Viscount Haldane, as a former British War Minister, could be counted on to appreciate the wide sweep of authority that must be confided in a central authority during a time of war. Presumably, the problems of peace-time living were capable of decentralized treatment regardless of their proportions. But, that he should have sought to support his doctrine on the basis of the *Russell* case, which involved a local option statute, merely emphasizes its sham quality. It may be noted that the suggestion for co-operation between the Dominion and provincial legislatures to attain ends denied to federal legislation alone was not original with Viscount Haldane but was made earlier by Mr. Justice Duff.[65] As is well known, the co-operation theory, which was miraculously put to a concrete test in respect to the marketing of natural products, was despatched in its first encounter with the Privy Council.[66]

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[64] *Ibid.*, at p. 200.

[65] (1920), 60 S.C.R. 456, at p. 506.

[66] *Attorney-General of Canada* v. *Attorney-General of British Columbia*, [1937] A.C. 377. Nevertheless, the Judicial Committee in this case still advised the Dominion and provinces to try co-operation (p. 389). See Royal Commission on Dominion-Provincial Relations (1940), Appendix 7, Difficulties of Divided Jurisdiction, by J. A. Corry, chap. 2.

The *Board of Commerce* case, in retrospect, was a companion case to *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press*, and both were merely a dress rehearsal for *Toronto Electric Commissioners* v. *Snider*. The *Fort Frances* case involved a federal statute which, although enacted after the cessation of hostilities in the war of 1914-1918, provided for the continuation, until the proclamation of peace, of newsprint controls which had been inaugurated under the War Measures Act. Here was an enactment which met the *Board of Commerce* case test of a temporary statute strictly related to a condition of war and Viscount Haldane had no trouble in pulling himself up by his own bootstraps and finding the statute to be valid.

In so doing, however, he overextended himself even in relation to the *Board of Commerce* case. In the first place, he speaks of implied powers arising in time of war. This naturally makes one wonder why, if in time of war the Dominion can rely on implied powers, it should have been necessary to fit the "peace, order and good government" clause into an emergency jacket. As a constitutional "Houdini", Lord Watson succeeded merely in reducing the clause to a supplementary position; Viscount Haldane's magic is strong enough to make it disappear altogether and to make it reappear as a spirit. In the second place, it is clear that practical considerations are unimporant for Viscount Haldane in respect to his co-operation theory. The tensions in a federal state which make legislative co-operation practically impossible in normal times are ignored by him. A time of war is, practically speaking, the only sure guarantee of effective co-operation; but the exercise of legislative power in war-time, says Viscount Haldane, "is not one that can be reliably provided for by depending on collective action of the Legislatures of the individual Provinces agreeing for the purpose".[67]

In the *Snider* case, Viscount Haldane reaches his apotheosis. It is there that he tries to bury the *Russell* case which he had used as a springboard for his "emergency" doctrine in the *Board of Commerce* case. The passage in his opinion in which he explains the decision in the *Russell* case as predicated on intemperance being at the time "a menace to the national life of Canada", requiring intervention by the federal Parliament "to protect the nation from disaster", is well known and has been well heaped with the ridicule it deserves.[68] It is a typical "Haldane" touch to find in the *Snider* case the statement that "it is plain from the

[67] [1923] A.C. 695, at p. 704.

[68] *Cf.* Anglin C. J. in *The King* v. *Eastern Terminal Elevator Co.*, [1925] S.C.R. 434, at p. 438; Kennedy, *op. cit.*, *supra*, note 1.

decision in the *Board of Commerce* case that the evil of profiteering could not have been so invoked, for provincial powers, if exercised, were adequate to it."[69] Here is the arbiter *sans peur et sans reproche* ready to solve any problem by a prepared formula, invariable in its compounds, regardless of the matter to be solved; not for him any stress or doubts such as have agitated the minds and hearts of great constitutional judges in other federal countries. He has fashioned the Procrustean bed; let the constitution, the British North America Act, lie on it.

The *Snider* case affords a typical example of a legislative problem which had undergone a change in character with the passing of years but which was met by the Judicial Committee with the inflexible concepts that are often the product of a neat mind, unwilling in the interests of some sort of formal logic to disarrange thought patterns that had been nicely fitted together. The Industrial Disputes Investigation Act, 1907, as amended, introduced a scheme for conciliation of labour disputes which involved the mandatory postponement of strikes or lockouts pending the termination of conciliation efforts. A number of serious work stoppages preceding and following the enactment of the statute had indicated and buttressed the need for legislative establishment of federal machinery of conciliation. All the factors that weighed so heavily with the Judicial Committee in the *Russell* case were evident in the *Snider* case: there was the need for public order in industrial relations, there was generality, there was uniformity, there was the attempt "to remedy an evil which [was] assumed to exist throughout the Dominion". The genuineness of the legislation in these respects was reflected in the reach of its provisions, which covered employers "employing ten or more persons and owning or operating any mining property, agency of transportation or communication, or public service utility, including . . . railways, . . . steamships, telegraph and telephone lines, gas, electric light, water and power works".[70] The Appellate Division of the Supreme Court of Ontario, with only one of its five members dissenting, found the Act to be valid as an exercise of federal legislative power in relation to the regulation of trade and commerce and in relation to the criminal law.[71] Certainly that seemed to be a substantial enough ground of decision, at least in relation to most, if not all, of the industries covered by the Act. Viscount Haldane had, however, disabled himself by previous opinions from finding any support for the legis-

[69] [1925] A.C. 396, at pp. 412-13.
[70] 1907 (Can.), c. 20, s. 2(c).
[71] (1924), 55 O.L.R. 454, Hodgins J. A. dissenting.

lation in the "trade and commerce" clause.[72] And in dealing with it as an exercise of the "criminal law" power, part of his reasoning makes for despair, as where he says:

> It is not necessary to investigate or determine whether a strike is per se a crime according to the law of England in 1792. A great deal has been said on the subject and contrary opinions expressed. Let it be assumed that it was. It certainly was so only on the ground of conspiracy. But there is no conspiracy involved in a lock-out; and the statute under discussion deals with lock-outs pari ratione as with strikes. It would be impossible, even if it were desirable, to separate the provisions as to strikes from those as to lock-outs, so as to make the one fall under the criminal law while the other remained outside it; and, therefore, in their Lordships' opinion this argument also fails.[73]

It could not, of course, have been very surprising to find Viscount Haldane rejecting the contention that the Industrial Disputes Investigation Act was an exercise of power to legislate for the peace, order and good government of Canada. One is inclined to agree in this result but only because adequate power to regulate industrial relations (at least in respect of industries having an impact beyond the province of their location) ought to be found in the "trade and commerce" power. Recent judgments by the British Columbia Court of Appeal in *Reference re Hours of Work Act to C.P.R. Hotel Employees*[74] and by Bigelow J. of the Saskatchewan Supreme Court in *C.P.R. and C.P. Express Co.* v. *Attorney-General of Saskatchewan*[75] may well mark the development of a tendency to this view.

What makes the *Snider* case significant is the revealed impotence of the "peace, order and good government" power in the face of the wide sweep given to section 92 (13). Viscount Haldane does not treat the phrase "property and civil rights in the province" in the context of the British North America Act as a class of subject for the exertion of provincial legislative power, but rather as relating to attributes of the citizenry of the Dominion which are beyond the reach of Dominion legislation wherever any portion of them can be the subject of provincial legislation. It is this unusual conception of section 92 (13) which has produced the paralysis in the Dominion power to legislate for the peace, order and good government of Canada, a paralysis so forcibly exposed to Canadian view in the group of "new deal" cases decided by the Judicial Committee early in 1937. How else can one explain the following barren comment by Viscount

[72] By his opinions in the *Dominion Insurance Act* reference and in the *Board of Commerce* case.
[73] [1925] A.C. 396, at p. 409.
[74] [1947] 2 D.L.R. 723.
[75] [1947] 4 D.L.R. 329.

Haldane in the *Snider* case: "It does not appear that there is anything in the Dominion Act which could not have been enacted by the Legislature of Ontario, excepting one provision. The field for the operation of the Act was made the whole of Canada."[76]

The Haldane conception of section 92 (13) in association with his "emergency" doctrine stands responsible for the striking down of the Dominion legislation involved in the *Employment and Social Insurance Act* reference.[77] The Act provided for compulsory unemployment insurance, to be administered by a commission and supported by contributions from employer, employee and government; and it was enacted in the midst of an unemployment crisis and with a view to forestalling for the future the degree of distress which then existed. It is interesting that Duff C.J., whose analysis of the introductory clause of section 91 in the *Natural Products Marketing Act* reference made it impossible for the Supreme Court to uphold the Employment and Social Insurance Act under that clause, was prepared to find the Act valid as an exercise of legislative power in relation to the public debt and property (section 91(1)) and the raising of money by any mode or system of taxation (section 91(3)).[78] There would certainly seem to be a greater heterodoxy involved in attempting to uphold it under these powers than if it were supported as an exercise of authority to legislate for the peace, order and good government of Canada.

The Judicial Committee, when the case came before it, affirmed the invalidity of the Act in a short opinion, almost shocking in its casualness unless one remembers that the "emergency" fixation settled the fate of the Act so far as the introductory clause of section 91 was concerned and that the "insurance" cases likewise were a premonition of its doom as an encroachment on provincial power under section 92(13). On both heads, the Privy Council gives us the now monotonous formulae of earlier cases: "It is sufficient to say that the present Act does not purport to deal with any special emergency"; "It is an Act whose operation is intended to be permanent"; "this Act is an insurance Act affecting the civil rights of employers and employees in each Province".[79] Not even a pretence at analysis, no effort expended

[76] [1925] A.C. 396, at pp. 403-4. This notion was expressed by Duff J. much earlier in *In re Sections 4 and 70 of the Canadian Insurance Act, 1910* (1913), 48 S.C.R. 260.

[77] *Attorney-General of Canada* v. *Attorney-General of Ontario*, [1937] A.C. 355.

[78] [1936] S.C.R. 427. Duff and Davis JJ. dissented from the holding that the act was invalid.

[79] [1937] A.C. 355, at p. 367.

to give explicit consideration to the effects of years of national unemployment in the 1930's, to the need for legislating preventively as well as curatively; the "law" on the subject was beyond recall or redefinition. The whole sorry story of the Judicial Committee's decisions in the Canadian "new deal" cases was discussed in a special number of this Review in 1937.[80] In the perspective of the past decade, its performance in those cases is surely a monument to judicial rigidity and to a complacence which admits of no respectable explanation unless it be that the blinders fashioned by Viscount Haldane's opinions permitted no deviation from the course on which he set Canadian constitutional interpretation. This is far from convincing, but it serves to explain why the social, factual considerations in the "new deal" legislation were largely irrelevant. To admit their relevancy would make it impossible to maintain a mythical consistency predicated on a fixed notion of the meaning of "property and civil rights in the province".

Viscount Simon's opinion in the *Canada Temperance Federation* case may be likened to the removal of shutters from a house which has been kept dark for many years. From one point of view, namely in its affirmation of the *Russell* case and of the validity of essentially the same statute as was there involved, it is nothing more than an echo of the *Russell* case, perhaps doomed to the same isolation; and, unfortunately, the "emergency" language of the *Japanese Canadians Deportation* case threatens this consequence. Again, it is difficult to say what deduction may properly be drawn from Viscount Simon's failure to mention the "new deal" cases. Does this leave the authority of Duff C.J.'s *locus classicus* unimpaired or is this seemingly intentional ignoring of that judgment a prelude to re-invigoration of the "peace, order and good government" clause? If language means anything, the second alternative must be favoured; because Viscount Simon goes much further than is strictly necessary in deflating the *Snider* case not only in its appraisal of the *Russell* case but also in its actual approach to the "peace, order and good government" clause. Thus Viscount Simon expresses himself as follows:

> The first observation which their Lordships would make on this explanation of *Russell's* case is that the British North America Act nowhere gives power to the Dominion Parliament to legislate in matters which are properly to be regarded as exclusively within the competence of the Provincial Legislatures, merely because of the existence of an emergency. Secondly, they can find nothing in the judgment of the Board in 1882 which suggests that it proceeded on the ground of emer-

[80] (1937), 15 Can. Bar Rev. 393-507.

> gency; there was certainly no evidence before that Board that one existed. The Act of 1878 was a permanent, not a temporary, Act and no objection was raised to it on that account. In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as for example in the *Aeronautics* case [1932] A.C. 54 and the *Radio* case [1932] A.C. 304) then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters specially reserved to the Provincial Legislatures. War and pestilence, no doubt, are instances; so too may be the drink or drug traffic, or the carrying of arms. In *Russell* v. *The Queen* Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a provincial legislature dealing with an aspect of the same subject in so far as it specially affects that province.
>
> It is to be noticed that the Board in *Snider's* case nowhere said that *Russell* v. *Reg.* was wrongly decided. What it did was to put forward an explanation of what it considered was the ground of the decision, but in their Lordship's opinion the explanation is too narrowly expressed. True it is that an emergency may be the occasion which calls for the legislation, but it is the nature of the legislation itself, and not the existence of emergency, that must determine whether it is valid or not.[81]

And further:

> Moreover, if the subject matter of the legislation is such that it comes within the province of the Dominion Parliament that legislature must, as it seems to their Lordships, have power to re-enact provisions with the object of preventing a recurrence of a state of affairs which was deemed to necessitate the earlier statute. To legislate for prevention appears to be on the same basis as legislation for cure. A pestilence has been given as an example of a subject so affecting, or which might so affect, the whole Dominion that it would justify legislation by the Parliament of Canada as a matter concerning the order and good government of the Dominion. It would seem to follow that if the Parliament could legislate when there was an actual epidemic it could do so to prevent one occurring and also to prevent it happening again.[82]

These words contain expressions of opinion such as have not been heard from the Judicial Committee since 1882. And brave as they are, must they not be diluted in the light of a further statement by Viscount Simon that "their Lordships have no intention, in deciding the present appeal, of embarking on a fresh disquisition as to relations between sections 91 and 92 of the British North America Act, which have been expounded in so

[81] [1946] 2 D.L.R. 1, at p. 5.
[82] *Ibid.*, at p. 7.

many reported cases"? [83] One can also be disturbed in this respect by Viscount Simon's reference in the first of his quoted passages to the requirement that the subject-matter of legislation go beyond local or provincial concern or interests and from its *inherent nature* be the concern of the Dominion as a whole. Does this contemplate some fixed category of Dominion objects of legislation, or are we, at long last, to be able to judge the validity of legislation in the context of our society and its contemporary problems?

A bold judiciary can find in Viscount Simon's opinion all the material necessary for "a fresh disquisition as to the relations between sections 91 and 92" and, that being so, it was unnecessary for that learned judge to embark on it himself.

No doubt some persons will be disquieted by Viscount Simon's view that an emergency may be the occasion for legislation but that it is the nature of the legislation and not the existence of the emergency which will determine its validity. This raises the question whether the emergency may be not only the occasion but also the justification for the legislation. If it is the justification for the legislation what happens when the emergency ceases? Should the court be able to invalidate legislation the *raison d'etre* of which rests on the existence of a state of war, for example? In the *Fort Frances* case Viscount Haldane suggested that such legislation may become *ultra vires* but that "very clear evidence that the crisis had wholly passed away would be required".[84] The *Japanese Canadians Deportation* case reiterates the "emergency" language of the *Fort Frances* case but adds something new in the following statement:

> Again if it be clear that an *emergency has not arisen* or no longer exists, there can be no justification for the exercise or continued exercise of the exceptional powers . . . But very clear evidence that an emergency has not arisen or that the emergency no longer exists is required to justify the judiciary even though the question is one of *ultra vires*, in overruling the decision of the Parliament of the Dominion that exceptional measures were required or were still required.[85]

This passage expresses the view, seemingly contrary to what is indicated in the *Board of Commerce* case, that some kind of presumption exists in favour of the validity of Dominion legislation where the legislation is predicated on an emergency. It goes beyond the *Fort Frances* case which went only the length of saying that, accepting the existence of an emergency and of legislation

[83] *Ibid.*, at p. 6.
[84] [1923] A.C. 695, at p. 706.
[85] [1947] 1 D.L.R. 577, at p. 585.

valid for that reason, the court will defer to some extent to the opinion of the federal authorities that the emergency is still operative and hence that the legislation is still valid.

It should be noted that Lord Wright in the *Japanese Canadians Deportation* case does not mention the *Canada Temperance Federation* case and one can properly speculate on how the opinions in the two cases fit together. It is clear that the *Fort Frances* case viewed the introductory clause of section 91 as conferring only an emergency power; and the *Japanese Canadians Deportation* case suggests the same thing. Viscount Simon, however, indicates a scope for the clause beyond conditions of emergency. In so far, however, as an emergency is both the occasion and justification for federal legislation, a question of *ultra vires*, in the sense of the *Japanese Canadians Deportation* case, may well arise once the emergency is gone or if, in fact, no emergency existed. Nevertheless, legislation may be validly enacted under the "peace, order and good government" clause which needs no justification of emergency; and there is no room here for any subsequent declaration of invalidity. The opportunity certainly offered itself in the *Canada Temperance Federation* case but *stare decisis* bulked large in the Judicial Committee's affirmation of the validity of the Canada Temperance Act.

IV

The Judicial Committee has admitted some scope for invocation of the introductory clause of section 91 as a "residuary" power. In the terms of its own formulae of interpretation, the Board has recognized valid exertions of legislative power under the opening words of section 91 in relation to (1) the incorporation of companies with Dominion objects,[86] and (2) radio communication.[87] These are illustrations of a "residuary power of legislation beyond those powers that are specifically distributed by the two sections [91 and 92]".[88] The *Aeronautics* case reflected a little confusion in the minds of the Judicial Committee as to the "emergency" and "residuary" features of the introductory clause. In that case it stated that "aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion".[89] Certainly there was no emergency in the *Snider* case sense although it could reasonably be said, using

[86] *Great West Saddlery Co.* v. *The King*, [1921] 2 A.C. 91.
[87] *In re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304.
[88] *In re Initiative and Referendum Act*, [1919] A.C. 935, at p. 943.
[89] [1932] A.C. 54. at p. 77.

Privy Council language, that aerial navigation did not come within a provincial class of subject or within a Dominion enumeration so that it must be within the Dominion's residuary power. In the *Labour Conventions* case, however, the Judicial Committee retrospectively assigned the legislation in the *Aeronautics* case to section 132 of the British North America Act.[90] On an "aspect" view it would seem, clearly enough, that the legislation fell within the scope of the "peace, order and good government" clause, if not also within the "trade and commerce" power.

In its application of the introductory clause of section 91 to cover federal incorporation of companies, the Judicial Committee has sounded a few notes that seem dissonant when one recalls its tune in relation to that clause generally. Thus we are told that the clause confers an exclusive power; and further, that "the effect of the concluding words of s. 91 is to make the exercise of this capacity of the Dominion Parliament prevail in case of conflict over the exercise by the Provincial legislatures of their capacities under the enumerated heads of s. 92".[91] There is no sign here that the Dominion Parliament cannot "trench" when acting under the introductory clause of section 91. And we are also introduced to the notion, novel in the light of the Judicial Committee's prior interpretations, that the concluding words of section 91 secure the paramountcy of legislation under the introductory clause over legislation under the enumerations in section 92. This means, of course, that the Dominion's power under the introductory clause is covered by the phrase "classes of subjects enumerated in this section" in the concluding clause of section 91. It is a significant reading of section 91 but one which Viscount Haldane did not resort to in the *Board of Commerce* case or in the *Fort Frances* case or in the *Snider* case. It is a reading which is in line with the aspect doctrine and it is hardly required if the introductory clause of section 91 is deemed to confer effective federal legislative power only in the residuary sense suggested by the Privy Council in the "company" cases. It does become important, however, if the introductory clause is given a content compatible with the approach indicated in the *Russell* case.

V

The vicissitudes of the "peace, order and good government" clause, the Dominion's general legislative power, indicate that

[90] [1937] A.C. 326, at p. 351.

[91] [1921] 2 A.C. 91, at p. 115. *Cf.* Scott, The Consequences of the Privy Council Decisions (1937), 15 Can. Bar Rev. 485, at pp. 488-9 where he says: "The concluding paragraph of sec. 91 was obviously intended to apply to every subject specified in 91, including the general power of the residuary clause . . . . ".

the Judicial Committee sought to give it a fixed content in terms of subject-matter of legislation. Thus, it might be read (at least before 1946) as empowering the Parliament of Canada to make laws for the emergencies of war, famine or pestilence, for the incorporation of companies with Dominion objects and for the regulation of radio communication. This nightmarish association of subjects is distinguished by the same sort of affinity that has characterized the Judicial Committee's numerous pronouncements on the Dominion's general power. It is quite a price to pay for realizing Lord Watson's wish, as expressed in the *Local Prohibition* case, to secure the autonomy of the provinces.[92]

But has provincial autonomy been secured? In terms of positive ability to meet economic and social problems of interprovincial scope, the answer is no. A destructive negative autonomy exists, however, which has as a corollary that the citizens of a province are citizens of the Dominion for certain limited purposes only. This does not, of course, herald the break-up of our federal system. The individual provinces have a considerable stake in federation, beyond the mere maintenance of autonomy, and the plenary federal taxing power in its rather rough way gives the people of all the provinces some sense of a Canadian community. Our international commitments have, of course, the same effect.

Some sixty years ago the Judicial Committee said in *Riel* v. *The Queen* that the words "peace, order and good government" were words "apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to".[93] The remark was not made in relation to sections 91 and 92 of the British North America Act and in the context of the Act it is undoubtedly too wide. But in its reference to legislative objects it indicates the type of problem which a court must face in interpreting sections 91 and 92. It is beside the point that the words of the introductory clause are too large and loose for comfortable adjudication. The Judicial Committee has not been reticent about its ability to give content to the large and loose provincial legislative power in relation to property and civil rights in the province, although it may be noted that it has done so largely in terms of thwarting exercises of federal legislative power, whether for the peace, order and good government of Canada or in relation to the regulation of trade and commerce.

[92] [1896] A.C. 348, at p. 361.

[93] (1885), 10 App. Cas. 675, at p. 678. This was said in relation to the British North America Act, 1871 (Imp.), c. 28, giving the Dominion power in s. 4 " to make provision for the administration, peace, order and good government of any territory not for the time being included in any province".

It has been said that the Judicial Committee's course of interpretation has been perhaps the inevitable result of its perhaps inevitable choice to treat the British North America Act as a statute rather than as a constitution.[94] My examination of the cases dealing with the Dominion's general power does not indicate any inevitability in the making of particular decisions; if anything, it indicates conscious and deliberate choice of a policy which required, for its advancement, manipulations which can only with difficulty be represented as ordinary judicial techniques. But since these decisions are with us, willy-nilly, can we expect for the future that an ultimate court, whether it be the Judicial Committee or the Supreme Court, will depart from them? Able commentators feel that this is asking too much of the judiciary and that we must, if we seek a change in our constitutional interpretation, seek a change in our constitution.[95] One is justified, however, in being as optimistic for the prospect of a change in interpretation as for the prospect of a change in the constitution. At least, one can point to a beginning in the erosion of the old decisions by the opinion in the *Canada Temperance Federation* case; and one can point as well to the "constitution" approach to the British North America Act expressed by Viscount Jowitt in the *Privy Council Appeals* reference.

It is clearly preferable that the constitution be kept fluid through judicial interpretation than through repeated amendment, and the "aspect" doctrine is a ready tool for the purpose. It would be rash indeed to state that the inertia of *stare decisis* can easily be overcome with respect to the accumulated body of Privy Council doctrine. But, viewing this as a consummation devoutly to be wished, its practical realization would seem to involve at least the following steps: (1) enactment of federal legislation to vest in the Supreme Court of Canada ultimate judicial power; (2) full exercise by members of the court of the privilege of writing separate opinions; and (3) care by the federal government to bring before the court, in its initial exercise of ultimate power, legislation drafted with the utmost possible skill and not having any subject-matter connection or similarity to prior legislation invalidated by the Privy Council. This is worth a fair trial with a Canadian court operating in a Canadian climate of opinion; and amendment as a postulated alternative may not be without effect in the matter.

[94] Jennings, *op. cit., supra*, note 1. See also Kennedy, The British North America Act: Past and Future (1937), 15 Can. Bar Rev. 393.

[95] Kennedy, *op. cit., supra*, note 94; MacDonald, The Canadian Constitution Seventy Years After (1937), 15 Can. Bar Rev. 401.

Undoubtedly, many will say that this would amount to a clear attempt to subvert the court. On the contrary, it would represent an attempt in a federal context to appeal to those sentiments in existing constitutional doctrine which express principles of growth. The present-day common-law lawyer is prone to forget that his forbears made the same appeal in trying to keep the common law flexible, and that he himself does this today notwithstanding the encrustation of *stare decisis*. Our constitutional case law offers enough choices for fresh beginnings to enable a court to mark out a new trail without doing violence to judicial techniques. It may be true that "Judges are not the most competent people to determine high matters of state".[96] But their tradition of impartiality and a security of tenure which mirrors their independence are offsetting compensations. We are saddled in any event with judicial review so long as our federal system subsists. We ought not to forego the opportunity of trying to place it on the higher level of constitutional interpretation as opposed to keeping it on the lower level of statutory interpretation. Limiting judicial techniques are operative at both levels, as even the judgments of the Supreme Court of the United States reveal. We can always seek final refuge in amendment.

A DEVELOPING INTERNATIONAL LAW

But the ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nation, including those which now sit here in judgment. We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law. This trial represents mankind's desperate effort to apply the discipline of the law to statesmen who have used their powers of state to attack the foundations of the world's peace and to commit aggressions against the rights of their neighbors. (From the Opening Address of the Hon. Robert H. Jackson at the trial of War Criminals at Nuremberg)

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[96] Jennings, *op. cit., supra,* note 1, at p. 39.