THE CONSTITUTION IN A CHANGING WORLD

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The Constitution should be a clear statement of powers designed for prompt action and effective administration. It should never be allowed to be a legal excuse for the non-performance, or a legal hindrance to the performance of duties and things necessary for just government and social welfare.[1]

I. *Introduction*

Accepting, as one must today, the idea that Constitutional Law cannot properly be conceived as limited to lawyers' law to the exclusion of other matters such as those of a political or conventional nature which both underlie and qualify the operation of strict law, one is faced with the fact that Constitutional Law in this wide sense does not lend itself to brevity of treatment. Accordingly this article will be confined to *Legislative Power* as possessed by the various legislatures under the governing Imperial statutes. Since the provisions of those statutes that relate to legislative power have been the subject of much judicial exposition, this article will be concerned mainly with the attitudes of judicial approach to them, the decisions as to their meaning and their application to varying types of question which have come before the courts.

The writer has taken the liberty of extending the starting point of this survey from the year 1923 (when the Review was founded) to the year 1926. The stream of constitutional development failed to divide itself coincidentally with the launching of the Review. The year 1925 can, however, be regarded as a culmination of a genus of interpretation which may be taken to have begun in 1896 and to have come to a conclusion (temporarily) in 1925 with the *Snider* case.[2]

In a study of the interpretative process actual results in terms of decision are no more important than the observation of trends. Indeed, constitutional law "viewed in the large presents broad patterns and trends which register the abiding trends of our national life; the accurate study and observation of those trends often gives a surer clue to the line of its future development than the mere matching of cases and comparison of precedents".[3]

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[1] Opening address of the Prime Minister. Report of Dominion-Provincial Conference (Ottawa: King's Printer, 1941), at p. 10.

[2] [1925] A.C. 396.

[3] John Dickinson, Defect of Power in Constitutional Law (1935), 9 Temple L.Q. 388.

It seems well, therefore, that this article should record not merely the effect of decisions *per se*, but also the trends implicit in them, and particularly in the reasoning contained in them. It is worthy of remark that the hands of later draftsmen have affected the text of the Constitution so relatively little that we may accept almost as axiomatic the dictum of Hughes that "the Constitution is what the judges say it is".[4]

To a much greater extent, however, the effectiveness of our Constitution (and the allocation of law-making power it makes) has been affected by matters extraneous to it — by the rapid march of political, economic, social and ideological change which has been one of the predominant facts of the last quarter-century. Such changes in the frame of circumstances in which our Constitution stands, and to which it must be applied, as the ultimate source and channel of governmental power, have found little formal expression in our equipment of basic law. They have found some expression, however, in the course of the judicial unfolding of the meaning and application of the terms of that text as related to issues which those extra-legal changes have produced. Thus, for example, the Privy Council, dealing with the question as to the right of a Canadian legislature to regulate appeals thereto, has said "it is irrelevant that the question is one which might have seemed unreal at the date of the B.N.A. Act".[5]

These changes in the world about the Constitution have found such expression as they have found in the decisions through the impact they have had upon the personnel of the Privy Council who, on occasion, have consciously accepted new facts as elements in their reasoning; or unconsciously translated into law their own views as to what is right or expedient in the realm of government, in accordance with or contrary to such changes in the context of events.[6] As illustrative of the former may be cited the significance attached in the recent *Privy Council Appeals* case[7] to "the political conception which is embodied in the British Commonwealth of Nations" and to the consideration that "the regulation of appeals, a prime element in Canadian

[4] It has been affected to some extent, however, by the Statute of Westminster, 1931 — which has removed certain incapacities upon Canadian legislative power and also coloured the interpretation of the Constitution itself.

[5] *Privy Council Appeals* case, [1947] A.C. 127; [1947] 1 D.L.R. at p. 814.

[6] For a discussion of the effect of the particular personalities (and their dominant views) upon the course of interpretation, see Jennings, Constitutional Interpretation: the Experience of Canada (1937), 51 Harv. L. Rev. 1.

[7] *Supra*.

sovereignty, would be impaired, if at the will of its citizens, recourse could be had to a tribunal in the constitution of which it had no voice". As illustrative of the latter may be cited the earlier refusal of the same body to allow any operative effect in terms of interpretation to far-reaching changes in the traditional methods whereby treaty obligations become binding upon Canada.[8] This latter attitude is also illustrated by the desire (so often reflected in the decisions) to establish and maintain from impairment the kind of Provincial autonomy which their Lordships regarded as essential to a federal system;[9] but which was contrary to the special kind of centralized or quasi-federalism embodied in the B.N.A. Act.[10]

The impact of external change upon judicial decision, however, has not been as great as the character of that change might suggest or require; for, in the main, the Constitution has been approached as if it were — what it palpably is not — an ordinary statute; and one, moreover, to be interpreted by the evidences of the intention of its makers collectible from its own terms and scheme, rather than from authoritative guides to that intention known to every educated Canadian. Thus, in but few cases has the Privy Council sought for the meaning of terms rather than intention; and in still fewer has it allowed to such terms a meaning other than that which they bore in 1867.

When consideration is given to the significant pageant of new facts, such as changes in Canada's international and intra-Empire status and changes in her economy and in the accepted philosophy of the function of government, the conclusion is well-nigh irresistible that judicial interpretation has played a very small role in adapting the Constitution to new conditions. Some recent indications there have been of a new judicial approach allowing a greater infiltration of external facts into the interpretative process so as to yield results more consonant with current need; but such an interpretation has yet to be applied in any great measure to the vital terms of sections 91 and 92. Indeed, some of the most literalistic and restrictive interpretations occurred between the early affirmations of the

[8] *Labour Conventions* case, [1937] A.C. 326; [1937] 1 D.L.R. 673; MacDonald, The Canadian Constitution Seventy Years After (1937), 15 Can. Bar Rev. at p. 415.

[9] *Citizens' Insurance Co.* v. *Parsons* (1881), 7 App. Cas. at p. 108; *Liquidators of Maritime Bank* v. *Receiver General*, [1892] A.C. at p. 437; *Local Prohibition* case, [1896] A.C. 348; *Employment and Social Insurance* case, [1937] A.C. at p. 367; *Labour Conventions* case, *supra*.

[10] See Scott, The Special Nature of Canadian Federalism (1947), 13 Can Jour. Ec. and Pol. Science 13.

necessity of a "liberal interpretation"[11] and the latest declaration as to the need of a "flexible interpretation. . . that changing circumstances require";[12] whilst it is notable that this last came but a few months after a decision that exemplified the older tradition.[13]

Accordingly, there is reason to doubt that the Privy Council will maintain any constant effort to bring and keep the Constitution up-to-date as the source of power adequate to present needs. To the extent that this is true, we must rely on *legislative amendment* as the avenue through which we may attain a better functional division of legislative power; but with the sobering reflection that constitutional amendment in jurisdictional matters will not be easy to achieve.

II. *The Changing Background: 1926–1947*

> Whatever powers Confederation was intended to confer on the Dominion, these intentions cannot provide answers for many of the questions which agitate us now for the simple reason that the conditions out of which present difficulties arise were not even remotely considered as possibilities.[14]

It is a prime function of a Federal Constitution to regulate the flow of governmental power to the particular agency of government upon which is imposed the responsibility of dealing with various classes of matters as defined in the document. Like other Federal Constitutions, ours provides an elaborate dichotomy of legislative power and does so in terms of conceptions and of language current at the time of its enactment.

The character of the issues which present themselves for judicial resolution as to wherein lies the legislative power to meet them is determined by the changing pattern of external and internal facts; and but rarely do these issues present themselves in terms coincident with the language whereby power is conferred. Conversely the decisions of the judiciary will operate upon the very environment of fact which produced the necessity for them. In short, it is the existence of facts outside the Constitution which both sets the judicial process in motion and provides the field for the operation of the results of that process.

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[11] *Persons'* case, [1930] A.C. 124; *British Coal* case, [1935] A.C. 500.

[12] *Privy Council Appeals* case, *supra.*

[13] *Canada Temperance* case, [1946] A.C. 193; [1946] 2 D.L.R. 1; note by Brewin (1946), 24 Can. Bar Rev. 223.

[14] Report of Commission on Dominion-Provincial Relations (Ottawa, 1940), Book 1, p. 36.

Some of the developments — external and internal — which have affected the government of Canada over the last quarter-century were:—

A. The Great Depression of the thirties involved much unemployment and the payment of huge sums in direct relief beyond the capacity of the Provinces to bear, and required great ameliorative measures by the National Parliament. These measures when taken as part of the (so-called) Social Reform programme of legislation failed of legal effect as relating almost entirely to matters within Provincial jurisdiction.

B. Canada attained to Dominion status in *intra-Empire affairs* in terms of an established constitutional or conventional position, defined as to some matters by the Imperial Conference of 1926, and as to others in the recitals of the Statute of Westminister, 1931. This status later ripened into a position of national independence.[15]

C. Canada entered into World War II as the result of her own independent action and rose to the full status of nationhood in *international affairs*, and as such took an active part in the deliberations of the United Nations, to the Security Council of which she has just been elected.[16]

D. By developing constitutional usage the Dominion Executive obtained power to make treaties without recourse to any external executive.[17]

E. *The Statute of Westminster, 1931*, by removing certain disabilities to which Canadian legislative power was subject, enabled Parliament and the Provincial legislatures to legislate repugnantly to Imperial legislation — existent or future; enabled Parliament to give extra-territorial effect to its legislation;[18] and enlarged the competence of Parliament in the matter of shipping legislation.[19]

F. By virtue of the Statute of Westminister, 1931, the Canadian Parliament was enabled to *abolish appeals to the Privy Council* in criminal cases,[20] and in civil cases.[21]

[15] Scott, The End of Dominion Status (1945), 23 Can. Bar Rev. 725.
[16] Scott, *op. cit.*; Dawson, The Government of Canada (Toronto, 1947), Ch. 3.
[17] MacDonald, The Canadian Constitution Seventy Years After (1937), 15 Can. Bar Rev. 401; *vide* other writers in the same volume, pp. 393-507.
[18] *B. C. Elect. Co.* v. *The King*, [1946] A.C. 527.
[19] Generally see Wheare, The Statute of Westminster (2nd ed., 1947); O'Connor, Report to the Senate, Annex 5, p. 17.
[20] Which it did in the form of an amendment to the Criminal Code, held valid in the *British Coal Corporation* case, [1935] A.C. 500.
[21] *Privy Council Appeals* case, *supra*, holding that this could be done by way of an amendment to section 101 of the B.N.A. Act.

G. Canada participated in World War II, in the course of which by virtue of its *emergency power*[22] the central Government and Parliament converted the whole economy to the great objective of war as if Canada were a unitary state and that Parliament one of unlimited power; and, of course, incurred a staggering burden of debt.[23]

H. In the post-war transition period lines of jurisdictional division blotted out during the war-time emergency are returning to their normal operation with the consequence that power to meet conditions due to the aftermath of war is now largely in the hands of the Provinces exclusively.

I. Factors of great importance have been the increasing *industrialization and political centralization* of Canada. There has been also a growing *concentration of power* in the hands of great corporations; and in the hands of great international and national *labour organizations* which have demonstrated their ability to exert pressures on large segments of our economy with resultant injury to industries and persons not immediately related to those in dispute.

J. There has been a tremendous *expansion in governmental activity* produced, in part, by the character of problems which beset a modern state in an interdependent world and, in part, by a *new concept of the function of government.* Modern conditions have required, and modern citizens have urged, the necessity of governments everywhere taking a more positive part in the control of the economy and in the provision of social welfare and social security measures. All governments in Canada have been subject to the impact of these new conditions and new ideas. All these new factors have tended to magnify the role of the central government as the body best able to accomplish radical changes in the regulation of economic activities, and to provide social welfare and security measures and to administer and pay for them. It has been found, however, that such schemes are often impossible to put into practice.[24]

K. Consequential upon the expansion of government activity there has been a great growth in *administrative personnel* and

[22] Enunciated and applied in the *Fort Frances* case, [1923] A.C. 695, and reiterated and applied in the *Reference re Japanese Canadians*, [1947] A.C. 87.

[23] Scott, Constitutional Adaptations to Changing Functions of Government (1945), 11 Can. Jour. Ec. and Pol. Sc. 329.

[24] See Corry, Democratic Government and Politics (Toronto, 1946), Ch. 3.

in the delegation of law-making and administrative powers to subordinate officials and agencies.

L. *Dominion-Provincial fiscal relations* as envisaged by the B.N.A. Act have proved quite inadequate to provide the Provinces with revenues commensurate with their jurisdictional responsibilities.[25]

This (along with evils growing out of mal-distribution of legislative powers) led to the appointment in 1937 of a Royal Commission on Dominion-Provincial Relations to undertake "a re-examination of the economic and financial basis of Confederation, and of the constitutional allocation of revenue sources and government burdens to the Dominion and Provincial governments". The Commission in its Report made in 1940 found a fundamental disequilibrium to exist between provincial revenues and responsibilities, and made comprehensive proposals designed to secure a better fiscal relationship between the sources of revenue and responsibilities of the various governments. Unfortunately a Dominion-Provincial Conference called in 1941 to consider the Commission's recommendations failed to accomplish anything.

M. During the war and since, there has developed *a revolutionary concept of public finance* which has found acceptance in Canada, as elsewhere. This involves a new Budgetary Policy, which consists in budgeting in terms of National Income, National Expenditure and National Debt instead of in terms of mere government receipts, etc.; and in budgeting for a cycle of years. It involves also a dynamic concept of public finance as directed to the maintenance of economic stabilization expressed in the planned use of the taxing power and of public funds in the endeavour to promote business activity and control employment.[26]

N. Influenced by this concept, as well as by the necessity of improving Dominion-Provincial fiscal relations, the Dominion Government made certain proposals to the Provinces at a Dominion-Provincial Conference on Reconstruction in 1945[27] designed to give the Dominion Government a freer hand in matters of taxation in return for annual and compensatory payments calculated on a per capita basis (but subject to variation with changes in the gross National Debt) so as to give the Provincial Governments funds adequate to their responsibilities in matters of social welfare

[25] Dawson, The Government of Canada (Toronto, 1947), Ch. 6.
[26] See Shirras, Federal Finance in Peace and War (London, 1944), pp. XIV and 233.
[27] Proposals of the Government of Canada (Ottawa: King's Printer, 1945).

and security, etc.[28] These proposals failed to secure Provincial acceptance at the Conference; but were subsequently accepted *individually* by seven of the Provinces for a short term of years.

So far as legislative power is concerned, this situation is important as affecting an informal amendment of the B.N.A. Act in so far as it provides for financial aid to Provinces other than is provided in the Act, and in so far as the parties in question have agreed to abandon use of certain taxing powers.

O. By a change in the wording of the Royal Letters Patent in 1947 the Governor General is now empowered with the advice of the Privy Council for Canada to exercise all powers and authorities belonging to the King in respect of Canada without the necessity of submitting measures to His Majesty for the Royal assent.[29]

III. *Legislative Power: 1926–1947*

> . . . an occasional tendency to encrust unwarranted interpretations upon the Constitution and thereafter to consider merely what has been judicially said about the Constitution rather than to be primarily controlled by a fair conception of the Constitution. . . But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.[30]
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> Useful as decided cases are, it is always advisable to get back to the words of the Act itself and to remember the object with which it was passed.[31]

A. *Legislative Power in Terms*

There is no need to review the historic purposes of the Fathers of Confederation as to the type of federalism they desired, or in particular as to how they wished legislative power to be distributed as between the central and provincial legislatures; for that is an oft-told and well-known tale.[32] Moreover, they appear from the terms of the B.N.A. Act, particularly from the terms of sections 91 and 92; for after an exhaustive examination the learned Parliamentary Counsel to the Senate reported that "there are not any material differences between the scheme of

[28] See Dawson, *op. cit.*

[29] See Letters Patent Constituting the Office of Governor General of Canada (Ottawa: King's Printer, 1947).

[30] *Per* Frankfurter J. in *Graves* v. *New York, ex rel. O'Keefe* (1939), 306 U.S. at p. 491.

[31] *Per* Lord Sankey L.C. in the *Aeronautics* case, [1932] A.C. at p. 70.

[32] See MacDonald, Judicial Interpretation of the Canadian Constitution (1936), 1 Univ. Tor. L.J. 260-63; Scott, The Special Nature of Canadian Federalism (1947), 13 Can. Jour. Ec. and Pol. Sc. 13; McInnes, Canada, a Political and Social History (1947), Ch. 13; Kennedy, The Canadian Constitution (2nd ed., 1938), Ch. 19; O'Connor, Report to Senate (1939), Annex 4, pp. 22-76; Dawson, *op. cit.*, Chs. 2 and 5.

distribution of legislative powers . . . as apparently intended at the time of Confederation and the like legislative powers as expressed by the text of Part VI of the B.N.A. Act 1867".[33]

As matter of language, these sections clearly show that the whole area of provincial jurisdiction is that contained in the sixteen classes enumerated in section 92; and in the event of a matter not coming within any of these classes it must belong to the Dominion exclusively under its authority to legislate for the peace, order and good government of Canada. This could not be affected by the mere enumeration in section 91 of twenty-nine Dominion classes of subjects; for they were but illustrations or examples of the ambit of the Dominion power under the initial words of section 91, the generality of which was not to be restricted by that enumeration. Similarly it is clear from the *non obstante* clause that the Dominion was to have as regards matters falling within the enumerated classes of subjects the same exclusiveness of jurisdiction as regards matters falling under the introductory enacting clause. Moreover it seems clear that the function of the concluding paragaph of section 91 was to require that any matter coming under any one of the 29 enumerated classes in section 91 and also appearing to come under the provincial residuary clause No. 16 ("Generally all matters of a merely *local or private nature* in the Province") must be deemed to come under the former, thus resolving any apparent conflict in favour of the Dominion.[34]

B. *Judicial Interpretation to 1925*

Applying the prevailing rule of interpreting the Act as an ordinary statute with little reference to extraneous sources, the courts interpreted the language of those sections during the first twenty-five years or so in a way largely consonant with their *ex facie* meaning.

In the nineties, however, the Privy Council put an unwarranted gloss upon this language, which completely perverted the function of the various important branches of those sections and gave to them as a totality a reading that belied their plain terms. These seeds of judicial errancy were planted first in *Tennant* v. *Union Bank*[35] and were raised to towering importance

[33] O'Connor, *op. cit.*, p. 11.
[34] O'Connor, *op. cit.*, *passim*.
[35] [1894] A.C. 31.

by Lord Watson in the *Local Prohibition* case,[36] by a process of reasoning the invalidity of which has been demonstrated.[37]

The immediate results of this process of misinterpretation have been aptly described by an eminent constitutional authority:

> *we find by 1896 a situation where:* (i) the enumerated matters of section 91 are divorced from the introductory words on which they undoubtedly depend; (ii) the enumerated matters of section 91 are given an exclusiveness by the concluding words of the section and not by the prior *non obstante* clause; (iii) the concluding words of section 91, in clear terms and intent a limiting power on the provincial power in clause 16 of section 92, become, by application to all the clauses of section 92, a limitation on the scope of the federal legislative authority; (iv) the federal power to legislate for the 'peace, order and good government' of Canada — its *sole* power — the residuary power — is erected into a power *separate* from its illustrations, and reduced to a position of exercise only in some extraordinary cases, and that, without any exclusiveness or paramountcy as provided for in the Act.[38]

What is more important, however, is that this basic misreading of these vital sections dominated judicial interpretation[39] for the next three decades and, after a short interruption in the thirties, still exerts a predominant influence.[40]

Flowing from these basic errors of interpretation the course of decision from 1896 to 1925 was marked by three main processes: (a) the declension of the residuary power of the Dominion largely to the status of a reserve power to be used in case of war, famine or other national emergency; (b) the restriction of the "trade and commerce" power to a point where its exercise by way of general regulation of trade appeared to be confined to supplementing Dominion powers elsewhere conferred; (c) the enlargement of the provincial power over "property and civil rights" to the extent that it seemed to be the real residuary power in relation to legislation in normal times. Near the end of the period, however, the "Peace, Order and Good Government" clause was re-invigorated to the extent of being

[36] [1896] A.C. 348.

[37] O'Connor, *op. cit.*, Annex 1, pp. 18-52.

[38] Kennedy, The Interpretation of the British North America Act (1943), 8 Camb. L.J. at p. 155.

[39] There was one notable exception: *C. P. Wine Co.* v. *Tuley*, [1921] 2 A.C. at pp. 422-3.

[40] It found notable expression in *Snider's* case, [1925] A.C. 396, and formed the basis of three of the "four established propositions" stated by Lord Tomlin in *A-G for Canada* v. *A-G for British Columbia*, [1930] A.C. at p. 118, and later approved in the *Aeronautics* case, [1932] A.C. at pp. 71-2, and in *Re Silver Brothers*, [1932] A.C. at p. 521; though in 1937 their Lordships felt compelled to repudiate one of Lord Watson's propositions as having "laid down no principle of constitutional law": *Labour Conventions* case, *supra*; as to these "propositions" see (1940), 18 Can. Bar Rev. at p. 248.

held to include implied power to deal adequately with national emergencies such as those arising out of war and the immediate aftermath thereof.[41]

C. *The Interpretative Process: 1926–1947*

(1) *Method of Approach*

Up to the beginning of this period the approach, in general, was based on the rule stated in 1887 that in questions as to legislative power the Act is to be treated "by the same methods of construction which [courts of law] apply to other statutes".[42] With some exceptions, construction had been directed to ascertaining the intention of the Act, or (what comes to the same thing) the meaning of its terms as of 1867.[43] Moreover, in ascertaining the intention or meaning of the Act, the great rule was that they were to be found without reference to matters extraneous to the Act itself; for "if the text is explicit *the text is conclusive.* . . . When the text is ambiguous . . . recourse must be had to *the context and scheme of the Act*".[44]

This classic method of approach was qualified in certain instances in the period now under review; but in circumstances that make it difficult to assess the present situation.

Thus, in 1930 (in a case not involving legislative power), Lord Sankey said:

> The British North America Act planted in Canada *a living tree* capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. . . Their Lordships do not conceive it to be the duty of this Board — it is certainly not their desire — to cut down the provisions of the Act by a narrow and technical construction, *but rather to give it a large and liberal interpretation.*[45]

This new approach to the Act as a Constitution requiring a liberal interpretation was expressed again in 1935 in the *British Coal Corporation* case as follows:

> In construing the words of that Act, it must be remembered what the nature and scope of the Act are. . . Indeed, in interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted.[46]

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[41] See footnote 23.

[42] *Lambe's* case (1887), 12 App. Cas. at p. 579.

[43] For a recent exception, see *Re Alberta Bill of Rights Act*, [1947] 4 D.L.R. 1 (P.C.), where the term "Banking" was interpreted generically and not by reference to the kind of business done by banks in 1867.

[44] *A-G for Ontario* v. *A-G for Canada*, [1912] A.C. at p. 583. As to the propriety of these rules of approach, see MacDonald, Constitutional Interpretation and Extrinsic Evidence (1939), 17 Can. Bar Rev. 77.

[45] *Persons'* case, [1930] A.C. 124, at p. 136.

[46] [1935] A.C. at p. 517.

But in between these two statements there intervened two other cases[47] involving legislative power to perform treaty obligations which exemplified an ultra-literalistic approach to section 132, in which the Privy Council refused to construe it liberally in the light of important extraneous developments in the matter of treaty-making.[48]

Moreover, the group of Social Reform cases decided in 1937 (discussed *infra*) constituted an undeniable reversion to the older narrow approach to the Act, in which such reference as there was to extraneous matters was certainly not made in the attempt to ascribe a sense to the text that new developments in treaty-making and in conditions of world-wide depression and modern trade, etc., required.

Finally (and again in relation to a matter outside sections 91 and 92) the Privy Council in the recent *Privy Council Appeals* case[49] has swung to the more liberal approach; for it has not only re-stated that doctrine, but has imported into its consideration of the right to abolish such appeals various extra-legal matters. Thus their Lordships said:

> it appears to their Lordships that *it is not consistent with the political conception which is embodied in the British Commonwealth of Nations* that one member of the Commonwealth should be precluded from setting up, if it so desires, a Supreme Court of Appeal having jurisdiction both ultimate and exclusive of any other member. The regulation of appeals is, to use the words of Lord Sankey in the *British Coal Corporation Case*, a '*prime element in Canadian sovereignty*', which would be impaired, if at the will of its citizens recourse could be had to a tribunal, in the constitution of which it had no voice. It is, as their Lordships think, irrelevant that the question is one that might have seemed unreal at the date of the B.N.A. Act. *To such an organic statute the flexible interpretation must be given that changing circumstances require*, and it would be alien to the spirit, with which the preamble to the Statute of Westminister is instinct, to concede anything less than the widest amplitude of power to the Dominion Legislature under s. 101 of the Act.

Welcome as this affirmation of the need of a "flexible interpretation that changing circumstances require" must be, it must not be over-estimated in view of what happened to the "living tree" doctrine in 1937; and in view of the very opposite approach

[47] *Aeronautics* case, *supra*; *Radio* case, [1932] A.C. 304.

[48] MacDonald, Canada's Power to Perform Treaty Obligations (1933), 11 Can. Bar Rev. 581, and 664. In the latter of these cases — the *Radio* case — the residuary clause was interpreted to comprehend power to perform a treaty negotiated in the newer manner and form; but it was to be re-interpreted drastically in the *Labour Conventions* case, [1937] A.C. 326.

[49] [1947] A.C. 127; [1947] 1 D.L.R. 801.

manifested in 1946 in the *Canada Temperance* case [50] in its references to the emergency power of the Dominion.[51]

(2) *The Decisions*

It would be difficult to describe the course of decision in terms of chronology; for there have been oscillations more or less paralleling the trends in the judicial approach just described.[52] Accordingly, it seems better to mention briefly a few topics with which the courts have been much concerned in this period and to indicate wherein jurisdiction lies as to each of them.

(a) *The Dominion's Residuary Power* [53]

The residuary clause enables the Dominion to legislate (a) in relation to matters not enumeratively entrusted to the Provinces or to the Dominion, *i.e.* matters coming under the Peace, Order and Good Government clause as a *drag-net clause*, and (b) in circumstances of grave national emergency, *i.e.* under a special doctrine of implied powers.

The first class includes: the incorporation of companies with other than Provincial objects;[54] the performance of international agreements not falling under section 132, or under the enumerated heads of section 91 or in section 92;[55] and executive reference of questions to the Supreme Court of Canada.[56]

The second class includes: measures for the control of the supply and price of newsprint paper during World War I and their continuance until the formal proclamation of peace;[57] and the deportation of Japanese, whether aliens or natural or naturalized subjects (and their families).[58]

This second, or emergency class, has been held *not to include* legislation for the regulation of labour disputes;[59] for the control

[50] [1946] A.C. 193; [1946] 2 D.L.R. 1.

[51] References which were in effect contradicted by the Privy Council a few months later: *Re Japanese Canadians*, [1947] A.C. 87; [1947] 1 D.L.R. 577.

[52] For general discussions of both see the following: the symposium on the Social Reform cases of 1937 in (1937), 15 Can. Bar Rev. 393–507; MacDonald, Judicial Interpretation of the Canadian Constitution (1935), 1 Univ. Tor. L. J. 260; Jennings, Constitutional Interpretation, the Experience of Canada (1937), 51 Harv. L. Rev. 1; Tuck, Canada and the Judicial Committee of the Privy Council (1941), 4 Univ. Tor. L. J. 33; O'Connor, *op. cit.*; Report of Royal Commission on Dominion-Provincial Relations (Ottawa, 1940); Book 1, pp. 55-9, 247-252; Dawson, *op. cit.*, Chs. 5 and 7. See also Laskin (1947), 25 Can. Bar Rev. 1054.

[53] See O'Connor, *op. cit.*, Annex 1, pp. 52-77; also Laskin (1947), 25 Can. Bar Rev. 1054.

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

[55] *Labour Conventions* case, *supra.*

[56] *References* case, [1912] A.C. 571.

[57] *Fort Frances* case, *supra.*

[58] *Re Japanese Canadians*, *supra.*

[59] *Snider's* case, *supra.*

of profiteering in food and hoarding in a period immediately following a war;[60] for the regulation of the business of insurance;[61] for the regulation of maximum hours, minimum wages and weekly rest of labour;[62] for the provision of Unemployment Insurance for labour;[63] or for the regulation, within the Provinces, of marketing in natural products.[64] The fact that legislation is directed to conditions or problems of widespread character or undoubted national importance will not bring it under the residuary power unless such conditions and problems have reached the status of a real national emergency.[65]

In any event, the competence of legislation of this second class is dependent upon the provable existence and continuance of an emergency as a question of fact; but when Parliament has declared that an emergency has arisen or is continuing, the courts will not reverse that declaration upon speculative grounds, but will act only upon very clear evidence of the non-existence or cessation of the declared emergency.[66]

In the *Canada Temperance* case,[67] the Privy Council laid down the doctrine that there is no such thing as an emergency power *per se*, but that *an emergency* is merely an occasion of *an enactment*. This is absurd in the face of the *Fort Frances* case, *supra*, and can hardly be true in face of the subsequent *Japanese Deportation* case.[68]

(b) *Treaty-Performing Power*

Three recent decisions of the Privy Council[69] have dealt with the treaty-implementing power.

The first case held that the Dominion was competent to implement the obligations of Canada as part of the British Empire under a Convention relating to Aerial Navigation made in terms by "the British Empire". This power was held to arise

[60] *Board of Commerce* case, [1922] 1 A.C. 191.
[61] *The Insurance Reference*, [1916] 1 A.C. 588.
[62] *Labour Conventions* case, *supra*.
[63] *Re Employment and Social Insurance Act*, [1937] A.C. 355; but see now s. 91, No. 2A, "Unemployment Insurance", added in 1940.
[64] *Re Natural Products Marketing Act*, [1937] A.C. 377.
[65] *Re Natural Products Marketing Act*, *supra*, and *Re Unemployment and Insurance Act*, *supra*.
[66] *Re Japanese Canadians*, *supra*.
[67] [1946] A.C. 193; [1946] 2 D.L.R. 1.
[68] For present purposes it seems safe to regard it as simply upholding the *Russell* case in its validation of the *C. T. Act* in 1882 and as involving no new doctrine nor unsettling old doctrines.
[69] The *Aeronautics* case, [1932] A.C. 54; the *Radio* case, [1932] A.C. 304; and the *Labour Conventions* case, [1937] A.C. 326.

under section 132 and to be exclusive and to justify legislation on provincial matters.

The second decision upheld the validity of Dominion legislation implementing a Convention expressed to be made as between "the governments" of the parties thereto, and to which Canada was a signatory. It was regarded as significant that "the Convention here is not a treaty between the Empire as such and foreign countries, for Great Britain does not sign as representing the Colonies and Dominions", whereas section 132 only envisaged *"treaties by Great Britain"*. Since the particular *type of treaty* did not fall within section 132 that section was inapplicable; but the legislation was competent to the Dominion under the residuary clause of section 91.

However, as explained in the third case, *infra*, "the true ground of the [second] decision was that the convention in that case dealt with *classes of matters* which did not fall within the enumerated classes of subjects in section 92 or even within the enumerated classes of section 91". It therefore fell within Dominion power under the residuary clause of section 91. Thus, this second decision must be taken to have upheld legislation which *did not encroach on provincial jurisdiction.*

The third case, that of 1937, dealt with the three Dominion statutes which sought to implement certain draft conventions adopted by the International Labour Conference of which Canada was a member. Section 132 was held inapplicable because "the obligations are not obligations of Canada *as part of the British Empire,* but of Canada, by virtue of her new status as an international person, and do not arise under *a treaty between the British Empire and foreign countries*", the legislative power to perform which are distinct from "the legislative power of the Dominion to perform *obligations created by the Dominion executive responsible to and controlled by the Dominion Parliament*". The rule was laid down that the power to perform obligations under treaties outside section 132 rests with the Dominion or the Provinces accordingly as the *subject matter* falls within a Dominion or a Provincial class of subject. Accordingly, since the subject matter of the Conventions fell within Provincial jurisdiction, the Dominion legislation was *ultra vires.*

In general, the legal situation is that *as to treaties falling within section 132* (*i.e.* as to treaties which are made in terms by "the British Empire" or as to which Canada is bound in law as "part of the British Empire" by the act of the Imperial

Executive), the Dominion possesses exclusive and plenary powers of implementation *regardless of the subject matter. As regards all other classes of treaty,* the power of implementation depends upon the *classes of subjects to which the treaty relates.* The consequence is that treaty performing capacity as to a given treaty resides wholly in the Dominion (as in the case of the Radio Convention) or wholly in the Provinces (as in the Labour Conventions), or partly in each (in which case they must be dealt with "by co-operation between the Dominion and the Provinces"). In short as to all treaties in this category the existence of a treaty is unimportant; for the Dominion and the Provinces have precisely the power of legislation they would have had without the treaty.[70]

(c) *Regulation of Trade and Commerce*[71]

Paraphrasing the construction put upon these words by the Privy Council in *Parsons'* case,[72] they enable the Dominion to legislate in relation to the regulation of (a) *external,* (b) *inter-provincial* trade, and (c) "the *general* regulation of trade affecting the whole Dominion". By 1925, however, this clause had apparently fallen so low that Anglin C.J. felt moved to protest:

> That it should be denied all efficacy as an independent enumerative head of Dominion legislative jurisdiction — that it must be excluded from the operation of the concluding paragraphs of S. 91, except for the subsidiary and auxiliary purposes indicated in recent decisions,— these are propositions to which I find it difficult to accede. They seem to me, with deference, to conflict with fundamental canons of construction and with the view expressed in *Parsons' Case.*[73]

The Privy Council, by 1931, had come to realize the necessity of re-habilitating the clause; for in the *Combines* case it said:

> Their Lordships merely propose to disassociate themselves from the construction suggested in argument of a passage in the judgment in the *Board of Commerce Case,* under which it was contended that the power to regulate trade and commerce could be invoked only in furtherance of a general power which Parliament possessed independently of it. No such restriction is properly to be inferred from that judgment. *The words of the statute must receive their proper construction where they stand as giving an independent authority to Parliament over the particular*

[70] Daggett, Treaty Legislation in Canada (1938), 16 Can. Bar Rev. 158; and symposium on the 1937 decisions in (1937), 15 Can. Bar Rev. 393–507.

[71] O'Connor, *op. cit.,* Annex 1, pp. 78–109.

[72] (1881), 7 App. Cas. 96.

[73] *The King* v. *Eastern Terminal Elevator,* [1925] S.C.R. 434, at p. 441.

> *subject-matter*. But . . . their Lordships in th present case forebear from defining the extent of that authority.[74]

The Supreme Court of Canada has expressed the view that the restrictions placed upon the Trade and Commerce clause to which the foregoing statements referred were confined to branch three of the description given in *Parsons'* case, *i.e. "general regulation of trade affecting the whole Dominion"*, and have no application to the other branches, namely to "external trade" and "inter-provincial trade", as to which the clause has an independent operation.[75]

Even if this be true, we still lack a statement from the Privy Council "defining the extent of that authority" comprehended in section 91 (2); and in particular as to the extent to which that authority justifies legislation for the *general regulation* of trade and whether such legislation can trench upon provincial classes of subjects. So far as the decisions go, this power to regulate trade in general has been applied only in the sense of enabling the Dominion to prescribe the extent to which Dominion trading companies shall be entitled to trade in the Provinces;[76] and to create a national trade-mark and to prescribe conditions as to its application to commodities.[77] On the other hand, it is clear that Provincial power, under section 92, Nos. 13 and 16, extends to the regulation of intra-provincial trade in all possible phases.

It is clear, however, that neither the Dominion nor a Province can invade the field of the other; and so the courts have invalidated Dominion legislation because, intentionally or otherwise, it interfered with trade within a Province;[78] and Provincial legislation has shared the same fate when held to interfere with inter-provincial or external trade.[79] The course of the decisions emphasizes the fact "that the power to regulate economic life is divided between the Provinces and the Dominion and that neither one can encroach on the sphere of the other".[80]

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[74] [1931] A.C. at p. 326.

[75] Thus, speaking for the Supreme Court in the *Natural Products Marketing* case, [1938] S.C.R. 398, affirmed by [1937] A.C. 377, after a full review of the cases, Duff C.J. said:

"It would appear to result from these decisions that the regulation of trade and commerce does . . . . embrace the regulation of external trade and the regulation of inter-provincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers" (p. 410).

[76] *John Deere Plow Co.* v. *Wharton*, [1915] A.C. 330, at p. 340.

[77] *Dominion Trade and Industry Commission* case, [1937] A.C. 405.

[78] *Eastern Terminal Elevator Co.* v. *The King*, [1925] S.C.R. 434.

[79] *Lawson* v. *Interior Committee*, [1931] S.C.R. 357; *In Re Grain Marketing Act*, [1931] 2 W.W.R. 146.

[80] Report of Commission on Dominion-Provincial Relations, Book I, p. 250.

The reality of this division of power in the field of trade regulation may be seen by comparing types of Dominion legislation held to be invalid with types of Provincial legislation held to be valid.

The following Dominion legislation has been held *invalid* as being in relation to matters coming under heads 13 or 16 of section 92: legislation for the abolition of the liquor traffic;[81] for the regulation of "through traffic" over Provincial and Dominion railways;[82] prohibiting trade combinations and hoarding and regulating the sale and fixation of prices of commodities;[83] for the regulation of the grain trade of Canada and of the business of those who deal in grain as warehousemen, etc.;[84] regulating sales and deliveries of eggs within a province;[85] for the regulation of individual forms of trade within a province such as marketing transactions in natural products having no connection with inter-provincial or external trade;[86] for the validation of agreements between persons in an industry as to competition in a trade within a Province;[87] regulating the licensing of fish canneries and the trade processing of fish;[88] and legislation for regulation of the business of non-Dominion insurance companies.[89]

The following Provincial legislation has been held competent under sections 92, Nos. 13 and 16: legislation for the suppression and regulation of the liquor traffic, the creation of a government monopoly of sale of liquors, and the compulsory licensing of brewers and distillers;[90] as to the content and form of contracts of insurance and the regulation of the insurance business generally within a Province;[91] as to the marketing of natural products generally within a province;[92] creating a monopoly of sale of a commodity within a province;[93] and finally it appears that the Provinces may "regulate, by licensing persons engaged in the production, the buying and selling, the shipping for sale

[81] *A. G. for Ontario* v. *A .G. Dominion*, [1896] A.C. 348.
[82] *Montreal* v. *Montreal Street Ry.*, [1912] A.C. 333.
[83] *Board of Commerce* case, [1922] 1 A.C. 191.
[84] *Eastern Terminal Elevator Co.* v. *The King*, *supra*.
[85] *R.* v. *Zaslavsky*, [1935] 3 D.L.R. 788; *R.* v. *Thorsby Traders Ltd.*, [1935] 3 W.W.R. 475; *R.* v. *Brodsky*, [1936] 1 W.W.R. 177.
[86] *A. G. British Columbia* v. *A. G. Canada*, [1937] A.C. 377.
[87] *Re Trade and Industry Act*, [1936] S.C.R. 379; *Cf.* [1937] A.C. 405.
[88] *A. G. Canada* v. *A. G. British Columbia*, [1930] A.C. 111.
[89] See MacDonald, The Regulation of Insurance in Canada (1946), 24 Can. Bar Rev. 257.
[90] *Brewers and Maltsters* case, [1897] A.C. 231; *Manitoba Liquor License* case, [1902] A.C. 71.
[91] See footnote 89.
[92] *Shannon* v. *Lower Mainland Dairy Board*, [1938] A.C. 708.
[93] *Re Grain Marketing Act*, *supra*.

or storage and the offering for sale, *in an exclusively local and provincial way of business* of any commodity or commodities".[94]

The Provinces also possess a measure of power to regulate trade by virtue of their jurisdiction in relation to Direct Taxation and Licensing; similarly the Dominion has additional power by virtue of its jurisdiction to impose customs duties on goods imported into Canada.[95]

In several cases the courts have enunciated the *"co-operation" theory, viz.*, that as to given topics where jurisdiction is divided so that neither the Dominion nor the Provinces can effect a desired object, they might in co-operation attain that object by each legislating in such a way as together to cover the topic in the manner desired.[96]

One of the co-operative devices adopted in the effort to overcome divided jurisdiction in matters of trade regulation has been that of "dove-tailing" or "conjoint" or "complementary" legislation by the Dominion and the Provinces.

Thus the Dominion legislation that was held *ultra vires* in *The Natural Products Marketing Act* case, *supra*, was designed to co-operate with provincial Acts in relation to marketing, *e.g.* it provided for the exercise by the Dominion Board of any powers conferred thereon by provincial legislation. Moreover, every Province had co-operated in setting up marketing boards and had enacted special legislation to provide for this co-operation and to dove-tail in with the Dominion Act. Nevertheless, the result was that because the Dominion Act, in addition to dealing with foreign and inter-provincial trade, *also covered*, in terms not severable, *transactions completed in a Province*, it was *ultra vires* as a whole.

Counsel for British Columbia had argued "that there are really practical reasons why this legislation [the Dominion Act] should be supported: it was obviously designed to fit in along with Provincial Acts in relation to marketing . . . experience in British Columbia had shown that the two Acts were working in complete accord; the same Board could function in two capacities — both as a Federal and as a Provincial Board".

Their Lordships rejected this contention and said the last word on the theory of conjoint legislation as follows:

> It was said that as the Provinces and the Dominion between them possess a totality of complete legislative authority, it must be possible

[94] *Natural Products Marketing* case, [1936] S.C.R. at p. 412, affirmed, [1937] A.C. 377.
[95] *Customs Duties* case, [1924] A.C. 222.
[96] See *e.g.*, *Montreal Street Railway* case, *supra*.

> to combine Dominion and Provincial legislation so that each within its own sphere could *in co-operation* with the other achieve the complete power of regulation which is desired. Their Lordships appreciate the importance of the desired aim. Unless and until a change is made in the respective legislative functions of Dominion and Province it may well be that satisfactory results for both can only be obtained by co-operation. *But the legislation will have to be carefully framed, and will not be achieved by either party leaving its own sphere and encroaching upon that of the other.* In the present case their Lordships are unable to support the Dominion legislation as it stands.

In the result, so far as effective marketing legislation requires the subject to be covered by legislation dealing with it in its three-fold aspects as foreign, inter-provincial and local trade regulation, it is *legally possible* to do so by "properly-framed" legislation of a "conjoint" or "complementary" character, but close to being *practically impossible.*[97]

(d) *Regulation of Labour*

There is no provision in the B.N.A. Act referring in terms to labour or employment or wages or strikes or collective bargains or trade unions, etc., and accordingly jurisdiction to legislate as to such matters can be found only by detailed reference to the decisions on the various heads of sections 91 and 92. It appears, however, that such matters fall within the exclusive competence of the Provinces as relating to Property and Civil Rights in the Province; and that the jurisdiction of the Dominion is confined to such matters in their relation to territories not forming part of a Province and to its own servants.[98]

At all events the courts have held *invalid* Dominion legislation for the prevention of strikes and lockouts and the settlement of industrial disputes between employers and employees,[99] and relating to weekly rest, minimum wages and limitation of hours of labour; [100] and the validity of the Dominion Trade Unions Act has been doubted judicially.[101]

Legislation concerning labour relations now includes an important new topic, *viz.*, the regulation of the right of collective bargaining between employers and employees, by means of compulsory negotiations and the official certification of bargaining agents. Jurisdiction as to such a topic undoubtedly resides

[97] As to the difficulties of divided jurisdiction, see Corry, Appendix 7, Report of Royal Commission on Dominion-Provincial Relations, *supra.*

[98] *Snider's* case, [1925] A.C. 396; *A. G. Canada* v. *A. G. Ontario,* [1937] A.C. 326 at p. 350; *Re Legislative Jurisdiction over Hours of Labour,* [1925] S.C.R. 505.

[99] *Snider's* case, *supra.*

[100] *A. G. Canada* v. *A. G. Ontario, supra.*

[101] Trade Union Law in Canada, Department of Labour (Ottawa, 1935).

mainly with the Provinces. Though various works or industries *as such* come within Dominion jurisdiction under section 92(10), there is no certainty that such jurisdiction extends to the regulation of collective bargaining between employers and employees engaged in their operation. Thus there appears to be no ground for the assumption that legislative power as to labour relations necessarily follows the divisions of power as to such works or industries.[102]

(3) *The Present Situation*

Though there has been a recent indication of a desire to approach the B.N.A. Act as a Constitution and to give it the flexible interpretation that changing circumstances require, that indication came only in 1947 and in relation to a matter outside sections 91 and 92. The basic fact is that judicial interpretation as a whole still merits the considered finding of the late W. F. O'Connor, K.C., that "many pronouncements of the Judicial Committee . . . are materially in conflict . . . with the scheme of distribution provided by the Act", and that there has been "most serious and persistent deviation on the part of the Judicial Committee from the actual text of the Act". In short, the cases reveal the perpetuation of judicial over-concern for Provincial autonomy, and of the vital misreading of the main branches of sections 91 and 92 induced by that attitude in the nineties.

In terms of established legislative power the present disequilibrium can be put in a few general propositions:—

A. *The Dominion's residuary clause* affords no power to deal with matters of great national concern and importance, or to respond to, or rectify, wide-spread conditions and evils; unless they have reached such stature that they must be held to constitute national emergencies of a very high order.

B. *The Dominion's Trade and Commerce clause* has been so restricted in favour of competing Provincial clauses as to afford practically no power to enable comprehensive regulation of business at large, or of any particular trade, however widespread it may be throughout the national economy, or however numerous — and dispersed — its practitioners may be. Even the Dominion's established power to legislate in relation to external or inter-provincial trade is one largely lacking effectiveness because of the practical impossibility of preventing measures so

[102] *Re Lunenburg Sea Products*, [1947] 3 D.L.R. 195; *cf.* (1944), 22 Can. Bar Rev. 402.

directed from being held to have related also to intra-provincial trade and thereby become *ultra vires*. Indeed, even if the Dominion and the Provinces co-operate in the endeavour to secure effective regulation of trade in the common interest it is highly doubtful if they can succeed; for satisfactory results "will not be achieved by either party leaving its own sphere and encroaching upon that of the other".[103] In the result the Dominion's power is so largely devoid of legal efficacy that it is not only ineffective as against the Provinces, but will defeat objectives desired by the Provinces as well.

C. *The Dominion's power of treaty implementation* is absolute as to types of treaty now obsolete. It is, however, almost non-existent as to many types of treaty called for by modern conditions; for these latter tend in point of subject-matter to fall, entirely or largely, within Provincial heads of jurisdiction, as greatly expanded by judicial interpretation. This is a fact of the utmost importance in a day requiring co-operative action of many nations to control international forces of an economic, social or political character.[104]

D. *In the field of Labour* the Dominion (with few important exceptions) lacks ability to deal effectively with such vital subjects as (1) the prevention and settlement of industrial disputes, and (2) collective bargaining in industry.

As to the former it is notable that the Industrial Disputes Investigation Act, which was invalidated by the Privy Council in *Snider's* case in 1925, operated in a country in which only 270,000 workers were members of labour unions, relatively few of which were units of international organizations. Similar legislation today would have to operate under conditions where over 830,000 workers are members of 4,635 unions, the vast majority of which are affiliated with, or branches of, great international labour organizations.[105] Under such conditions there are few labour disputes that can be regarded as "local" in any real sense. More often they are the outcome of policies decided upon by parent organizations far remote from the actual locale of dispute.

As to collective bargaining, the facts of modern industrial and labour organization have given legislation on this subject a great importance. There can be little doubt that (except as

[103] See *Natural Products Marketing* case, *supra*.

[104] Angus, The Canadian Constitution and the United Nations Charter (1946), 12 Can. Jour. Ec. and Pol. Sc. 127.

[105] Labour Gazette (Ottawa, 1947), Vol. 47, p. 1259. These figures are for the year 1946.

to its own servants and possibly as to industries and works falling under section 92 (10)) the Dominion is unable to legislate in relation to collective bargaining. Indeed this view has been widely accepted and most of the Provinces have enacted legislation governing collective bargaining. It remains to be seen, however, whether Provincial legislation can effectively deal with various problems which the set-up in terms of national and international labour organizations now present; for it may well be that provincial authorities will fail to find answers in provincial legislation for problems that in their nature demand answers in national legislation.

Finally one must recall the present inadequacies of the constitution as effecting a division of revenue sources as between the Dominion and the Provinces, commensurate with their respective responsibilities in relation to governmental and social services.[106]

IV. *The Future*

> It is our hope . . . that [The Fathers of Confederation] transmitted to us a constitution capable of development, not only through judicial interpretation but through amendment as well, to meet the new situations and problems which were bound to arise incidental to the vast and unforseeable changes which lay before the people of Canada seventy years ago.[107]

Under this heading I desire to express my own opinion upon a few matters arising out of the previous survey.

I believe that the cardinal fact in Canada today is that the Constitution fails to arm either the Dominion or Provincial Governments with *that combination of legal power and financial resource* needed by each for its proper role. The adequacy of a federal constitution at any time must always be tested by reference to the character of its allocation of power and resources as between governments relative to the character of their respective responsibilities. Upon such a test the Canadian Constitution is defective.

The truth is that as to various important matters demanding legislative action, the appropriate body to take such action often lacks the legal power to do so; whilst the body having the legal power often lacks the capacity to make its legislation effective in fact. Moreover, the two bodies acting in concert may be unable to attain a desired end because of their inability to avoid

[106] See Dawson, *op. cit.* Ch. 6; O'Connor, *op. cit.*, Annex 1, p. 40; and see footnotes 26 to 28, *supra.*

[107] Report of Royal Commission on Dominion-Provincial Relations, Book II, p. 9.

impinging upon the sphere of the other. To the extent that these things are true they retard or frustrate the legislative solution of current problems; and when, as now, those problems are numerous and pressing they impair the efficiency of the whole governmental system.

One of the plain facts that emerges from the survey made in this article is that the Constitution (rightly or wrongly) embodied a Centralized Federalism in which Dominion legislative power was of paramount importance. Another plain fact is that the course of judicial interpretation has yielded a Decentralized Federalism in terms of legislative power; and one, moreover, that is ill-adapted to present needs. There is great room for criticism of the Privy Council for having adopted attitudes of approach, and applied rules of interpretation, which have imposed on us a Constitution foreign to our historic purposes and present needs; provided, of course, due allowance is made for the inherent difficulty of interpretation in periods of rapid change. To examine the processes that led to this result is not to express criticism *per se* so much as it is to seek guidance for the future. Such an examination must reveal the stark fact that there has been a fundamental distortion of the scheme of division, as the result of which Dominion power has declined vastly with a corresponding increase in the range of provincial power. That in itself might be an unimportant thing or even a good thing. The real gravamen of criticism is that it is an unfortunate result to have reached in present circumstances; for it is undeniable that the course of events has tended in all federal countries to require a large measure of central action as the necessary response to great changes in conditions and modes of thought.

It is in relation to such practical matters that I have noted at some length the degree to which the power of the central legislature has been sapped or negated in respect of matters that do require national action. I trust, however, that the statement of the infirmities of the power of the Dominion does not imply a failure to realize fully that Provincial power must also be adequate to the very great part that the Provinces must take in the affairs of our federal system.

Accepting the need of change in the present division of powers, it remains to consider how it can be brought about. This can be done over the years by way of *judicial interpretation*, particularly if that process is marked by a more conscious endeavour to give to the B.N.A. Act a liberal interpretation appropriate to a Constitution; but improvement by this method is by no

means inevitable, and it is necessarily slow. Indeed, unless something is done to free the final court of interpretation from the shackles of previous decisions it is likely that judicial interpretation will prove a very doubtful source of adaptation. It may be that the Supreme Court of Canada — if given the power — would be a better agency of constitutional adaptation than the Privy Council (as I incline to think it would); but to give solid foundation to such a hope it would be necessary to emancipate the former from the necessity of following the past decisions of the latter — itself a measure fraught with some danger to stability. *Direct constitutional amendment,* therefore, seems the only practical means to the changes which I believe to be immediately necessary to adjust law-making power to modern needs. It is not necessary to dwell on the obstacles to the accomplishment of such amendment — whether in terms of changes in particular heads of jurisdiction to meet particular needs, or in terms of securing a general enabling power of amendment.

I do venture, however, to suggest that there is one type of amendment which might gain common acceptance, and which if made could go a long way towards enabling a re-adjustment of the present unsatisfactory division of legislative power. That is an amendment enabling the Dominion on the one hand, and any or all of the Provinces on the other hand, to delegate to the other or others its legislative power in relation to specified matters for defined periods. Such a view has the support of the Commission on Dominion-Provincial Relations, which stressed the desirability of such an amendment as providing "for a measure of flexibility which is much needed in our federal system".

At all events for us to decline to seek needed reform by way of constitutional amendment in the circumstances that now beset us would provide "the most remarkable illustration in history of a national community refusing to trust its own judgment in the determination of its domestic arrangements and its way of life".[108]

[108] Rogers, The Constitutional Impasse (1934), 41 Queen's Quarterly 475.