PEACE, ORDER AND GOOD GOVERNMENT

This article is induced by, although it only incidentally concerns, a recent decision of the Supreme Court of Canada on a reference as to the legislative authority of the Parliament of Canada to abolish Canadian appeals to His Majesty in Council. Four of six judges (a fifth concurring in part) ruled that Parliament has that authority to the fullest conceivable extent. The sixth judge dissented in toto.

There has been, of recent years, considerable dissatisfaction with the reasoning and tendency of certain decisions of the Judicial Committee of the Privy Council which, construing the intent of sections 91 and 92 of the British North America Act, have, as has been contended, deprived the Parliament of Canada of that legislative authority which ought to be a concomitant of a nation described by the Balfour declaration of 1929 as an "autonomous community within the British Empire, equal in status, in no way subordinate" to the United Kingdom itself. A consequential demand for remedial action has given rise to three different and inconsistent proposals, now stated in the order of their conception.

The first is that the B.N.A. Act should be re-written or extensively amended to "bring it up to date". Only people who live and think in some province of Canada, as distinguished from Canada, are enamoured of this proposal. It is in the realm of the impossible.

The second is that appeals to His Majesty in Council should be abolished. Back of this proposal, of course, is the idea that the Supreme Court of Canada will, afterwards, re the B.N.A. Act, "bring it up to date". There is a sharp division of opinion in Canada concerning this proposal. Some are just pro, some are just con, and some who would be pro are, and will be, con until the Supreme Court of Canada is reconstituted, enlarged and strengthened.
The third is that the B.N.A. Act needs no amendment at all, but, because the impugned decisions of the Judicial Committee of the Privy Council are inconsistent with the text of sections 91 and 92 of the B.N.A. Act, the proper remedy is "enforced observance of the terms of the Act" to be brought about by means of a declaratory Imperial Act restoring the purity of a sufficient text which erroneous interpretation has polluted. This proposal involves insistence that the Act is "up to date" but that the decisions lag behind it.

This third proposal, first made in 1939, proceeded from W. F. O'Connor, K.C., Parliamentary Counsel of the Senate, in an extensive report to that body requested by it for its purposes. Restore, he argued, to the "peace, order and good government" clause of section 91 its intended force, compel judicial recognition that laws validly enacted under that clause are as exclusive (as against section 92) as are the 29 enumerated provisions of section 91, and all legitimate objections to the sufficiency of section 91 for Dominion purposes will disappear. This writer proposes to examine, and to some extent review, the Senate Counsel's intriguing opinion.

Mr. O'Connor neither supported nor opposed the abolition of appeals to His Majesty in Council, but discussing the Statute of Westminster, he said that—

An effect of section 2 is to enable the Dominion to abolish appeals by special leave to His Majesty in Council. The statute does not expressly deal with the matter. Nadan v. The King, [1926] A.C. 482 (P.C.) had held that there was a double barrier in the way of Dominion action,—(1) Repugnancy under the Colonial Laws Validity Act, and (2) inability of the Dominion to enact laws having extra-territorial operation. Sections 2 and 3 removed the barriers, but section 7 (3) restricted the Dominion to action within its legislative competence. In British Coal Corporation v. The King, [1935] A.C. 500, an appeal which stood forbidden by a Dominion Act relating to appeals in criminal cases, the Judicial Committee of the Privy Council upheld the Act, "the Criminal Law" being within the legislative competency of the Dominion. Whether the provincial legislatures of Canada have jurisdiction to abolish appeals relating to matters coming within provincial competency is another matter. The Colonial Laws Validity Act is not now in their way (see sections 2 and 7 (2)), but section 3, granting the right to enact legislation with extra-territorial effect does not extend to the provinces. It is probable, however, that the Dominion will be held to have jurisdiction by way of properly framed legislation under section 101 of the B.N.A. Act, to control all appeals whatsoever, whether as of right or of grace. Whether it has time will tell. There is another possibility. The very fact that the provinces have not jurisdiction in the premises may be held to establish (in conjunction with the doctrine that Canada's distribution of legislative
power under Part VI of the B.N.A. Act is exhaustive) that since the legislative power in question does not "come under" section 92 of the Act it is a "matter" that necessarily comes under the opening words of section 91, as a power not distributed to the provinces, and so within the Dominion's legislative competence.

The majority opinion of the Supreme Court of Canada on the reference, above mentioned, to that Court, upholds the Dominion's legislative competence on both suggested possible grounds. Sir Lyman Duff C.J., one of the majority, summed up his decision as follows:

My opinion, therefore is:

First, that, since by the Statute of Westminster, the obstacles have been removed which prevented the Parliament of Canada giving full effect to legislation for objects within its powers affecting the appeal to His Majesty in Council, there is now full authority under the powers of Parliament in relation to the peace, order and good government of Canada in respect of the objects within the purview of section 101, to enact the Bill in question.

Secondly, that neither the prerogative power of His Majesty to admit appeals from Canadian courts, nor the exercise of that power in admitting such appeals, nor the jurisdiction of the statutory tribunal, the Judicial Committee of the Privy Council, in respect of such appeals, or in respect of appeals as of right, is subject matter for the legislative jurisdiction of the provinces as comprised within the local matters assigned to the legislatures by section 92, and all such matters are, therefore, within the general authority in relation to peace, order and good government.

These remarks are noteworthy in two respects:

1. In that Sir Lyman Duff C.J. treats section 101 of the B.N.A. Act (which reads that "The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance and organization of a general Court of Appeal for Canada" . . . . ) not as if that section were a class of legislation similar to an enumerated class of section 91, but as matter coming "under the powers of Parliament in relation to the peace, order and good government of Canada". This manner of treatment recognizes the exhaustive character of the distribution of legislative power as between Dominion and provinces which sections 91 and 92 effect. In Valin v. Langlois (1879), 5 App. Cas. 115 (which relates to section 41 of the B.N.A. Act, concerning alteration of the election law) Lord Selborne (proceeding as did Sir Lyman Duff C.J.) said—"If the subject matter is within the jurisdiction of the Dominion Parliament it is not within the jurisdiction of the provincial parliament and that which is excluded by the 91st
section from the jurisdiction of the Dominion Parliament is not anything else than matters coming within the classes of subjects assigned exclusively to the legislatures of the provinces."

2.—In holding that, since neither the prerogative power involved, nor its exercise, nor the jurisdiction of the Judicial Committee, come under section 92 of the B.N.A. Act, and that "all such matters are therefore within the general authority" (of the Dominion) "in relation to peace, order and good government", Sir Lyman Duff, C.J., gives refreshing effect to the text of section 91 and Valin v. Langlois, (supra), as aided by the Statute of Westminster, but, in view of certain assaults and limitations to which that "peace, order and good government" clause has been subjected, it may be that a fight must yet be made, overseas, to restore the integrity of that clause to the extent which the Chief Justice concedes.

It is possible to exhibit in brief form the views expressed within a decade by the Judicial Committee concerning the proper construction of sections 91 and 92. These, as will be seen, do not in all respects cohere.

In A.-G. for Canada v. A.-G. for British Columbia, [1929] A.C. 111, Lord Tomlin (for a Board of which Lords Sankey L.C., Darling and Thankerton and Sir Lancelot Sanderson were also members) laid down four propositions. These were afterwards confirmed, per Lord Sankey L.C. in the Aeronautics Case, [1932] A.C. 54, and per Viscount Dunedin in Re Silver Bros., Ltd., A.-G. for Quebec v. A.-G. for Canada, [1932] A.C. 514. The four propositions, with the authorities in support, as cited by Lord Tomlin, now follow:—

Questions of conflict between the jurisdiction of the Parliament of the Dominion and provincial jurisdiction have frequently come before their Lordships' Board, and as the result of the decisions of the Board the following propositions may be stated:—

(1) The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in section 91, is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by section 92: see Tennant v. Union Bank of Canada, [1894] A.C. 31.

(2) The general power of legislation conferred upon the Parliament of the Dominion by section 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in section 92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body

(3) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in section 91: see Attorney-General of Ontario v. Attorney-General for the Dominion, [1894] A.C. 189; and Attorney-General for Ontario v. Attorney-General for the Dominion [1896] A.C. 348.

(4) There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail: see Grand Trunk Ry. of Canada v. Attorney-General of Canada, [1907] A.C. 65. . . .

As to proposition No. 1, it is based on Tennant v. Union Bank of Canada, [1894] A.C. 31. In that case the matter of the Act concerned was held to “come within” one of the enumerated classes of section 91. What would happen in a case where a matter did not “come within” an enumerated class, but did “come within” the peace, order and good government clause of section 91 was not before the Board for determination but, in delivering judgment, Lord Watson limited by purely obiter remarks the paramountcy of Dominion legislation to “subjects of legislation expressly enumerated in section 91”. No such distinction had ever before been made. In the recently decided Privy Council Appeals reference Sir Lyman Duff C.J. observed—

We have been obliged to say in some cases, and have said with the approval of the Judicial Committee, that observations orming no part of the ratio decidendi in judgments of the Judicial Committee do not necessarily acquit us of the responsibility of deciding for ourselves on the point dealt with. (Dominion of Canada v. Province of Ontario, [1910] A.C. 637.)

Perhaps, sometime, these words may become fruitful.

As to proposition No. 2, it is based on A.-G. for Ontario v. A.-G. for Canada, [1896] A.C. 348. This case arose out of a reference. That is to say the decision was not one in a suit, so it was advisory only. Lord Watson, referring back to his own obiter expression in Tennant v. Union Bank (supra) as authority, confirmed his own previous subjection to inferiority of the Dominion’s general as distinguished from its enumerated legislative powers.

first of these states, at large, the ancillary powers doctrine, but does not support the proposition. The second has already been referred to.

Proposition No. 4 need not be considered for present purposes.

In the Aeronautics Case (supra) Lord Sankey L.C. observed, concerning these four propositions, that—

Their Lordships particularly emphasize the second and third of these categories, and refer to the remarks made by Lord Watson in Attorney-General for Ontario v. Attorney-General for Canada, [1896] A.C. 348, 361, where he says: "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.

When, in 1929, Lord Tomlin was writing his four propositions, he left out of account the Board of Commerce Case, [1922] 1 A.C. 191, the Fort Frances Case, [1923] A.C. 695, and the Snider (Lemieux Act) Case, [1925] A.C. 396. These had fully developed the "emergency" or "national peril" doctrine, which had about put an end to the "peace, order and good government" clause of section 91 as a piece of effective legislation, so it remained for Lord Atkin, in the Weekly Rest Case, A.-G. for Canada v. A.-G. for Ontario et al., [1937] A.C. 326, to disclose the whole history of the decisions since 1894, which demanded that Lord Tomlin’s four propositions be subjected to a trimming process.

But the validity of the legislation under the general words of section 91 was sought to be established, not in relation to the treaty-making power alone, but also as being concerned with matters of such general importance as to have "attained such dimensions as to affect the body politic," and to have "ceased to be merely local or provincial and to have become matters of national concern." It is interesting to notice how often the words used by Lord Watson in A.-G. for Ontario v. A.-G. for Canada, [1896] A.C. 348, have unsuccessfully been used in attempts to support encroachments on the Provincial legislative powers given by section 92. 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. . . . . It is only necessary to call attention to the phrases in the various cases, "abnormal circumstances", "exceptional conditions", "standard of necessity" (Board of Commerce Case, [1922] 1 A.C. 191), "some extraordinary peril to the national life of Canada," "highly exceptional", "epidemic of pestilence" (Snider’s Case, [1925] A.C. 396), to show how far the present case is from the conditions which may override the normal distribution of powers in sections 91 and 92.
The reader will not have failed to note that the two propositions which their Lordships in the Aeronautics Case (supra) "particularly emphasized" are those which in the Weekly Rest Case they particularly scorned and that we now have something called "the normal distribution of powers in sections 91 and 92", which seems to mean, qua section 91, the enumerated powers of that section, so that only in such "highly exceptional" circumstances as are presented by war, pestilence or the like can recourse be had to its peace, order and good government clause. Yet (as in the recently decided reference concerning appeals to London) we do, as we must, resort from time to time to that clause as the basis of Dominion legislative authority. Else the B.N.A. Act will not work.

It is relieving, in these circumstances, to turn to the O'Connor report for light and a way out of the morass into which decided authorities have led us. The Senate Counsel discards them. He goes back to the text of the Act, construing it as if doing so de novo as of July 1st, 1867, which, in substance, is what the Senate, for its purposes, asked him to do. [These purposes were evidently political, but not partisan. The Senate regards itself as in a special sense the Parliamentary guardian of the constitution.] The report (it is one of over seven hundred printed pages) takes the form of a talking brief written from the viewpoint, and presented in the manner, of an advocate.

The daring of the opinion is, perhaps, exceeded by its convincing nature. It propounds one single proposition where-with, in logical order, its hundreds of pages of arguments and proofs connect. The proposition is that a construction of section 91 of the B.N.A. Act which, subordinating its "peace, order and good government" clause to its 29 enumerated classes of legislation, holds that such enumerated classes alone can have paramountcy in a proper case over the provisions of section 92 is an erroneous construction having regard to the text of the section. Avoid that error of construction, maintains Mr. O'Connor, and every reason heretofore advanced for amendment of the Act in the Dominion interest fails. He advises, ultimately, an Imperial "British North America Act Interpretation Act," which should declare, preferably in the words of the Judicial Committee itself, the law as it was before Lord Watson's obiter pronouncement in the Tennant Case.

It may not be "good form" to mention it, but there is an "orphan" case, decided in 1921, but ever since ignored, which,

But that section only declares that it is to be lawful for the Sovereign, with the advice of the Dominion Parliament, to make laws for the peace, order and good government of Canada generally, in relation to all matters not coming within the classes of subjects by the Act exclusively assigned to the Legislatures of the provinces, and the enumeration of matters which follows in section 91 to which the exclusive authority of the Dominion Parliament extends is only a declaration that certain subjects fall under this description.

The Senate counsel's reasoning is bold and compelling, as the following necessarily restricted attempt to restate it will shew. The numerals and order of arrangement are this writer's own.

1.—That Part VI of the Act makes, as between the Dominion and the provinces, an exhaustive distribution of all that legislative authority which, up to July 1st, 1867, had been enjoyed by the provinces then confederated as the Dominion.

2.—That sections 91 and 92 of the Act distribute, as between the Dominion and the provinces, two separate and mutually exclusive realms of legislative authority. That this mutual exclusiveness exists necessarily, as in all cases where any one thing, material or immaterial, is divided into two things, but that, additionally, since the exclusiveness of the provisions, as a whole, of section 92 is statutorily enacted and the residuum (of the total grant to Dominion and provinces) which is produced by subtraction of the grant to the provinces is granted to the Dominion, the exclusiveness, as a whole, of the Dominion's legislative authority as against the provinces requires no further enactment, because it inevitably results.

3.—That because the text of section 91 provides that only "matters" (meaning subject matters of statutes or parts thereof) which do not come within any of the classes of section 92 do come within section 91, Dominion legislative authority is wholly residuary, and any specific "matter" (once its proper "aspect" has been determined) must be readily assignable to the operation of the one section or the other, without "overlapping". That, accordingly, determination of the "aspect" of the "matter" in hand is an essential prerequisite to proper assignment of the "matter" to its "class" in either section, or to the residuary clause of section 91, as the case may be.
4.—That the opening words (residuary clause) of section 91 of the Act, which words should be read along with section 92, enact that exhaustive distribution of legislative authority which is mentioned in No. 1 above, and render impossible any suggestion that the 29 enumerated “classes” of section 91 confer upon the Dominion further or additional legislative authority. That these 29 “classes”, introduced, as they are, by merely declaratory words instead of ordinary words of enactment, are instances of the scope of the opening words of the section, which, read along with section 92, exhaust that precise grant of legislative authority as between Dominion and provinces which the Act intends.

5.—That recognizing as fact what No. 4, above, contends, section 91, “for greater certainty, but not so as to restrict the generality” of the exhaustive “foregoing terms” (meaning the residuary clause) does not purport to enact further authority in the Dominion, but, instead, declares, “notwithstanding anything in this Act”, that an exclusiveness which already necessarily exists (see Nos. 2 and 4 above) “extends” from and by virtue of the residuary clause of section 91 to its 29 enumerated “classes” of legislation. That the word used is “extends”, and those cases which cite the section as reading “shall extend” misquote the text of the Act.

6.—That the words of declaration in section 91 are merely interpretative, relate merely to exclusiveness as against section 92 and enact no primacy of the enumerated provisions over the enactive opening words of section 91.

7.—That certain of the declaratory words of section 91, however, (“notwithstanding anything in this Act”) operate so as to recognize all valid Dominion laws, whether or not enacted under an enumerated power, as exclusively enacted and paramount to all provincial laws.

8.—That the purpose of the enumerations of section 91 (their paramountcy having been already declared by the words “notwithstanding anything in this Act”) is to name 29 specific classes of subjects which, even in their local aspects are to be deemed to be general “laws for the peace, order and good government of Canada”. [Note in this connection the concluding words of section 91, which, Mr. O’Connor contends, relate in terms only to the 16th of the classes of section 92.]

9.—That construction of the Act as above indicated operates so as to apply an intent which coincides as well with the history
of the Act as with its terms, which enact that only laws made for the peace, order and good government of Canada in relation to matters not coming within any of the 16 classes of section 92 are within Dominion competency. That whether such laws so made do or do not come within any of the enumerated classes of section 91, they are paramount to laws enacted under section, 92. That by reason of the "deeming clause" of section 91 (meaning the final words of the section) legislation under that section in relation to a matter coming within a class enumerated in that section may (notwithstanding the exclusiveness of section 92 (16)), be merely local or private in its nature, although legislation under section 91 in relation to a matter not coming within a class enumerated in it must be of Dominion import and must not be merely local or private in its nature. [Mr. O'Connor questions none of the pre-1896 decisions. L'Union St. Jacques v. Belisle (1874), L.R. 6 P.C. 32; Dow v. Black (1875), L.R. 6 P.C. 272; Valin v. Langlois (1879), 5 App. Cas. 115; Cushing v. Dupuy (1880), 5 App. Cas. 409; Citizens Insurance Co. v. Parsons (1881), 7 App. Cas. 96; Russell v. The Queen (1882), 7 App. Cas. 829 and Hodge v. The Queen (1883), 9 App. Cas. 117 were all, he thinks, rightly and consistently decided. Doubtless, he would agree, as well, with the Judicial Committee's disposition of the unreported case concerning the validity of the Dominion Liquor Licence Act of 1883. It was invalid because it did not come within an enumerated power of section 91 and could not, because of its local nature, come within the peace, order and good government clause of that section, which is minus matters coming within classes of legislation committed to the provinces. In that case, classes 9 and 16 of section 92 prevailed, so the Act in question did not "come within" section 91.]

10.—That accordingly, if the "double paramountcy" (or rather paramountcy over section 92 and primary over the peace, order and good government clause of section 91) which, since 1894, has been accorded to the enumerated classes of section 91, were done away with and the single paramountcy, over section 92, of the provisions (unenumerated as well as enumerated) of section 91, which prevailed before 1894, were restored, the B.N.A. Act would become again satisfactorily workable without recourse to amendment, which promises nothing but further dissatisfaction and confusion.

Having thus attempted to summarize the Senate Counsel's construction of the text of sections 91 and 92 there remains to
be shown how, in his opinion, the properly construed text should be applied to specific enactments of the Dominion or of a province, as the case may be, so that each enactment may be assigned to the control of the section within which such enactment properly "comes". He stresses, in this connection the words "make laws in relation to", which appear in both sections. He contends that Parliament may, under its general, undefined, powers (i.e. by virtue of the "peace, order and good government" clause of section 91) make any law the subject matter whereof is not so local or private in its nature as to come within any of the enumerated classes of section 92, and that the legislatures of the provinces (subject to the words of section 91 which follow enumeration 29 thereof, may, under their general, undefined, powers (i.e., under class 16 of section 92) make any law the subject matter whereof is so local or private in its nature as to come within that enumeration. But, he maintains, to be a provincial law "in relation" to a subject "matter" of legislation that can be held to "come within" any of the enumerated classes of section 92, such law must, in pith and substance, so directly relate to the class of section 92 that such law can be accurately described as, e.g., "a Law in relation to Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes" (sec. 92 (2)) or "a Law in relation to the Borrowing of Money on the Sole Credit of the Province" (sec. 92 (3)) or "a Law in relation to Property in the Province", (sec. 92 (18)) or "a Law in relation to Civil Rights in the Province" (sec. 92 (13)) or "a Law in relation to . . . . being a Matter of a merely local or private Nature in the Province", (sec. 92 (16)) or as the case may be. The provincial law, if enacted, need not be so described, but, to exclude Dominion legislative authority, it must be that kind of a law. If the legislative authority in question cannot be located as in the province then that authority is in the Dominion, and it is immaterial whether the authority is ascribable to the opening words of section 91 or to any other of the words of that section. Likewise, the Senate Counsel contends, to be a Dominion law "in relation to" a "matter" that can be held to "come within" any of the enumerated classes of section 91, the subject matter of the Dominion law must, in pith and substance, so directly relate to the class of section 91 that such Dominion law can be accurately described as, e.g., "a Law in relation to the Regulation of Trade and Commerce" or "a Law in relation to Bills of Exchange and Promissory Notes", or as the case may be. Again, the law, if enacted, need not be so
described, but, to exclude provincial legislative authority that is the only kind of law that will suffice.

Mr. O'Connor wisely warns us that we must not think of the Dominion or the provinces as having exclusive jurisdiction over particular fields of law. In all the provinces except Quebec the whole body of the common law of England applies except as varied by competent legislative authority. In Quebec the Civil Code and certain French and ancient Canadian jurisprudence apply, but a very large body of the common law of England applies as well. All that the British North America Act does is to give exclusive authority to the Dominion or the provinces, as the case may be, to legislate in relation to these extraneously existing fields of law, mainly unwritten, according to the "aspect" of the legislation. Thus the Senate Counsel admits that fields of law can and do overlap as between the Dominion and the provinces, but he stoutly denies the possibility (under the scheme of distribution of legislative authority which sections 91 and 92 of the B.N.A. Act provide) of any field of legislative jurisdiction overlapping as between sections 91 and 92, and, in truth, the text of the Act seems to support him, for it provides that such matters of legislation as do come within section 92 come within it exclusively, and that only such matters of legislation as do not come within section 92 can come within section 91.

Note the vital importance, in the case of an argument such as this, of assigning to the word "matter" its proper meaning. The Senate Counsel, relying upon the text of sections 91 and 92, contends that it means "subject matter of legislation". Although he neither cites nor relies upon them, the cases, in general, seem to support his view, although in many of them the importance of the point made by him seems to have been overlooked and enumerated classes of sections 91 and 92 have been treated as exclusive fields of law, instead of as general classes of possible legislation within which particular subject matters of actual legislation may "come"—that is, to which such particular subject matters ought to be assigned.

To Mr. O'Connor, the "aspect" of legislation seems to be almost everything necessary to allocation of the legislation to section 91 or 92. He thinks, evidently, that some authorities, such as the Snider Case, supra, (re the Industrial Disputes Investigation Act) which, (merely because they present no enumerated provision of section 91 to which an impeached Dominion statute can be assigned) have been judicially excluded from
the operation of the residuary clause of section 91 on the ground that the "matter" of the impeached Dominion statute "came within" one or more of the provisions of section 92, have been wrongly decided, because of insufficient weight being attached to the "aspect" of the concerned legislation. Taking the Snider Case as an example, he would maintain that the Dominion Act was not one "in relation to" contracts in a province but was one "in relation to" the prevention of strikes and lockouts in the Dominion; hence it came within the residuary clause of section 91, which is capable of including an infinity of "classes" of "laws for the peace, order and good government of Canada in relation to matters of legislation not coming within the classes of subjects by the B.N.A. Act assigned exclusively to the legislatures of the provinces." Within that infinity could come "laws in relation to the prevention of strikes and lockouts in the Dominion." The provinces, he would urge, have not exclusive jurisdiction over property, civil rights, contracts, torts, etc., as fields of law. Instead, they have exclusive legislative authority to enact property laws, civil rights laws, contract laws, torts laws etc., as and being such, and being of provincial scope and nature.

This reasoning, an attempted paraphrasing of the Senate Counsel's contentions, is, of course, supplementary to his primary thesis that legislation coming within the residuary clause of section 91 has the same paramountcy (over legislation which seems to come within section 92) as that which is judicially conceded to legislation coming within an enumerated provision of section 91. He seems, as he writes, content to rely upon the non obstante provision of section 91 to support the paramountcy of the enumerated provisions of section 91. But when he claims paramountcy for the residuary clause of section 91 he goes further, boldly contending, with the apparent support of the text of section 91, that since only matters of legislation which do not come within section 92 can come within section 91, actual conflict between the two sections is impossible and seeming conflict will disappear in any specific case where the "aspect" of impeached or propounded legislation is properly determined. Such error as has occurred, he claims, has been, largely, in the deciding of, or in the omission to consider at all, the "aspect" of the concerned legislation. Danger of invasion of provincial rights in case of fearless application of the text of the Act, is, he maintains, negligible. The courts have sternly repulsed all legislative attempts to seize legislative jurisdiction under a false
guise. Dominion legislation must be of a general nature, either in fact or as deemed (although local) pursuant to the concluding words of section 91. Cases such as those involving the rejection of the Dominion Licence Act of 1883 and parts of the various Dominion Insurance Acts show that the courts know how to distinguish a general Act, viz., one essentially of Dominion import, from a local Act, viz., one essentially of provincial import.

It might be well to remind the reader again that the Senate Counsel, when construing the text of the B.N.A. Act, did not purport to state the law as judicially propounded, but, instead, as requested, stated his own construction of sections 91 and 92, from the text alone, for a legislative body desiring information to guide it in determining whether or not the text of the Act ought to be amended, and in what respect, if any. He produced a convincing document. His suggestion of a declaratory Act restoring the purity of the text of the B.N.A. Act, instead of amending it, will certainly be regarded, by those who concur with him in thinking that the decisions conflict with the text, as the simplest and most effective solution of a serious constitutional situation. Read over section 91 of the Act, if you can, as if for the first time. Give thought, as you read, to Mr. O'Connor's contentions, as based on the text alone. Forget the decided authorities. You will find it hard to disagree with him.

The remainder of these pages consists of relevant material not discussed in the O'Connor report.

When Lord Watson in Tennant v. Union Bank of Canada, [1894] A.C. 31, and the Provincial Prohibition Case, [1896] A.C. 348, was laying the ground, by an obiter pronouncement, for most of the previously discussed four rules of Lord Tomlin, he, as Lord Haldane discloses, was knowingly re-writing the British North America Act, "as statesman as well as jurist", in performance of a function deemed by him to be one properly appertaining to a member of the Judicial Committee of the Privy Council. In Volume 11 of the Judicial Review, at page 279, Lord Haldane wrote of Lord Watson as follows:

He was an Imperial judge of the first order. The function of such a judge, sitting in the supreme tribunal of the Empire, is to do more than decide what abstract and familiar legal conceptions should be applied to particular cases. His function is to be a statesman as well as a jurist, to fill in the gaps which Parliament has deliberately left in the skeleton constitutions and laws that it has provided for the British colonies.
The Imperial legislature has taken the view that these constitutions and laws must, if they are to be acceptable, be in a large measure unwritten, elastic, and capable of being silently developed, and even altered as the colony develops and alters. This imposes a task of immense importance and difficulty upon the Privy Council judges, and it was this task which Lord Watson had to face when some fifteen years ago he found himself face to face with what threatened to be a critical period in the history of Canada.

Lord Haldane goes on to tell of the "provincial rights" conflict, of a tendency of the Supreme Court of Canada to centralize legislative authority in the Dominion Parliament, of appeals asserted as of grace and of Lord Watson's efforts to change the course of the current of constitutional law in Canada. This, he says, was how it all happened —

Lord Watson made the business of laying down the new law that was necessary his own. He completely altered the tendency of the decisions of the Supreme Court, and established in the first place the sovereignty (subject to the power to interfere of the Imperial Parliament alone) of the legislatures of Ontario, Quebec and the other provinces. He then worked out as a principle the direct relation, in point of exercise of the prerogative, of the lieutenant-governors of the Crown. In a series of masterly judgments he expounded and established the real constitution of Canada.

Now, if Lord Watson had "expounded and established the real constitution of Canada" from and upon the text of the British North America Act, he would have been entitled to the thanks of all Canada. But Lord Haldane's point is that Lord Watson, being "an Imperial judge of the first order", did nothing of the kind, but "as statesman as well as jurist" wrote for Canada the kind of constitution that he (in alleged disagreement with the Supreme Court of Canada, consisting of jurists only, impeachable if they should descend to political considerations) considered that he could write, but which the Supreme Court of Canada (bound by the text of the Act as enacted) could not write.

In 1922 Lord Haldane (writing in the Cambridge Law Journal) said of Lord Watson —

Particularly he rendered an enormous service to the empire and to the Dominion of Canada by developing the Dominion constitution.

He added that —

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 on the bones of the constitution,
and so covered them over with living flesh that the constitution of
Canada took a new form.

There can be no doubt that a Privy Councillor who could
write so admiringly of another Privy Councillor and of the
office, powers and duties of a Privy Councillor, exposed, as he
thus wrote, his own rule of life as "statesman as well as jurist." So,
of Lord Watson's conduct, as an "Imperial judge . . . .
sitting in the supreme tribunal of the Empire" as Empire
"statesman as well as jurist" and deeming himself, unlike the
Judges of the Supreme Court of Canada, to be not only free,
but obliged "to do more than decide what abstract and familiar
legal conceptions should be applied to particular cases" involving
construction of the text of the British North America Act,
1867, an imperial Act, we have only the testimony of Lord
Haldane, who, however, ought to be a credible witness: but,
of Lord Haldane's own conduct in the same place and connection
we have what, perhaps, may be termed his unrepentent
confession. Lord Haldane's contention is that Lord Watson gave
"a new form" to "the constitution of Canada", regardless (in
case of conflict between conceived Imperial statesmanship and
legal principles) of "abstract and familiar legal conceptions";
and this upon the theory that the "function" of a member of
the Judicial Committee of the Privy Council "is to be a states-
man as well as a jurist, to fill in the gaps which Parliament
has deliberately left in the skeleton constitution and laws that it
has provided for the British colonies". We have here a claim
that Canada's ultimate appeal tribunal is, or at any rate was,
a delegate of the Imperial Parliament to supplement and even
re-make Canada's constitution. Such a claim gives rise to the
problem: If all this be so — if the B.N.A. Act is a mere flexible
skeleton constitution which was re-formed and developed by Lord
Watson and other Privy Councillors into "the real constitution"
of Canada as we now have it, re-formed and developed whilst
Canada was regarded as a mere "colony" under the tutelage of
the Imperial Parliament and of its delegate the Judicial Com-
mittee of the Privy Council, re-formed and developed to answer
the needs and rights of a mere colony — does that "real
constitution" of Canada remain so "elastic and capable of
being silently developed and even altered as the colony develops
and alters" that the Judicial Committee of the Privy Council
may, having in mind the Balfour declaration of 1929 and the
Statute of Westminster, now alter, in the sense of reverse, such
of its decisions of the past as, founded originally upon Imperial statesmanship, and apparently regarded as part of the "real constitution" of Canada, have become inconsistent with Dominion status, whereunder—

"They" (Great Britain and the Dominions) "are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations."

The Judicial Committee of the Privy Council has, unquestionably, rendered a great and universally appreciated service to Canada. Only in relation to decisions concerning the distribution of legislative power as between the Dominion and the provinces is complaint heard of Privy Council decisions, and, in truth, the Supreme Court of Canada might have made no better, if as good, a job, finally, of the task of interpreting Part VI of the B.N.A. Act. Many of that Court's early attempts in that connection are by no means inspiring. But it does seem that the Judicial Committee in earlier days than ours has, in relation to that Part VI, failed to adhere to the text of the Act, and Lord Haldane, who is chargeable with no inconsiderable share of responsibility in that connection, has declared that, with deliberation, decisions which now bind his successors and all Canadian Courts were conceived and written on grounds of policy, so as to prevent the "position" and statutes of the Dominion from being or becoming superior to those of the provinces. The Dominion, it must be admitted, did, in the early stages of its life, raise some untenable claims as to the "position" of the provinces, and nobody now quarrels with the decisions, adverse to the Dominion, which accord to the provinces sovereignty within their ambit of legislative powers. Lord Watson performed in that connection a great service, not only to the provinces, but, as well, to the Dominion. Present day objections are confined to the specific location of powers, as to whether they are, respectively, in the Dominion or in the provinces. The "position" of the Dominion, however, is, withal, as always intended, superior to that of the provinces. In this respect all attempts to provide for Canada a "real constitution", resembling an upside down constitution of the United States of America, have failed. The intended superiority of the Dominion—of the whole Dominion over its parts—is evidenced in a dozen places in the Act, but notably in section 90. The Dominion may disallow any provincial statute whatever upon any ground or
none. In *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575, Lord Hobhouse said (in the pre-Watson era) for the Judicial Committee—

Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces, a *carefully balanced constitution under which no one of the parts can pass laws for itself except under the control of the whole, acting through the Governor-General.*

Is it not possible that the Judicial Committee, if asked, in the light of changed conditions in Canada, to reverse such of its decisions as have impaired the textual effect of the residuary clause of section 91 of the B.N.A. Act, might do so, thus obviating the necessity of any amendment of, or any declaratory Act concerning, section 91 of that Act, and, maybe, of any Act abolishing appeals to His Majesty?

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Ottawa.