THE SUPREME COURT AND THE CANADIAN CONSTITUTION*

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For approximately twenty years the Supreme Court of Canada has been the final appeal tribunal in Canada. The author examines the performance of the Court in relation to constitutional controversies during that period. He concludes that while it has modified the guidelines of the Judicial Committee of the Privy Council, the Supreme Court of Canada has remained sensitive to the demands of the federal and provincial governments and has maintained a credible balance between those conflicting forces.

I. INTRODUCTION

In any federal state, some mechanism for resolving the conflict of values postulated by a division of legislative powers must be found. The mode of resolution need not be judicial or primarily judicial. [1] Or, it may be that, while judicial machinery is provided, the task of balancing competing claims may be undertaken primarily at a political level. In a system which provides machinery for judicial review, the task of resolving the claims of the centre and the units falls in some measure inescapably upon the judiciary. Clearly, when such issues reach the judicial forum, the ultimate decision must necessarily displease some. The final appeal tribunal thus faces an invidious task: that of reaching a viable solution consonant with both the text of the constitution and the needs of the nation. Nowhere has the nature of the court's duty been better stated than in the opinion of Mr. Chief Justice Marshall in *McCulloch v. Maryland.* [2] Dealing with state legislation providing for the taxation of bank notes issued by the second national bank of the United States, he said this of the court's duty:

> No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. [3]

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[1] *See generally* K. WHEARE, FEDERAL GOVERNMENT ch. 3 (3d ed. 1953).

[2] 17 U.S. (4 Wheat.) 316 (1819).

[3] *Id.* at 400-01.

This inquiry is directed to the manner in which the Supreme Court of Canada has performed its role as final appeal tribunal since securing its independence from the Privy Council. The Court is now *maître chez soi*, and enough time has elapsed to enable an interim assessment of its performance to be made. Such an assessment is timely. The past few years have seen far reaching suggestions for change in its composition and functions. Of Mr. Azard's strictures on the Court as an interpreter of Droit Civil I propose to say nothing. I am not competent to evaluate his criticism, and his suggestion for a court with separate chambers for the hearing of civil-law and common-law appeals seems reasonable. [4] But more far-reaching changes have been suggested. Professor Beetz has drawn attention to Quebec's desire to maintain intact the jurisprudence of the Privy Council in order to secure an inviolate framework within which the province can undertake an extensive programme of modernisation. [5] Quebec courts too, have disclosed a similar interest. In *Swait v. Board of Trustees of the Maritime Transp. Unions*, [6] a case turning, one would have thought, almost exclusively on section 91(10) (the federal enumerated power over shipping), Justices Brossard and Rinfret virtually dragged in the general power as a basis for federal jurisdiction in order to make clear their view that the power is primarily, as Viscount Haldane had held, an emergency power. And indeed some of the changes suggested, particularly by Professor Morin, reveal a distrust in Canadian federalism ultimately compatible only with separation. [7] It is probable that this is a minority view, and I would not wish to suggest that change as such is undesirable. Nonetheless, the structure of federalism will reflect our desires translated into action in terms in part of what we know about our institutions.

The scheme of distribution under sections 91 and 92 clearly favours federal power, though to what extent has always been a hotly debated subject. A lengthy account of the interpretation of these sections by the Judicial Committee would be out of place here. In outline, however, the noteworthy features of it were the following.

Most Privy Council decisions permitted the Dominion to rely on the residuary peace, order and good government clause only where the subject

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[4] Azard, *La cour suprême du Canada et l'Application du droit civil de la Province de Québec*, 43 CAN. B. REV. 553 (1965). It should be noted, however, that Professor Le Dain has argued persuasively against such a solution on the ground that cases involving civil law often have an added federal dimension requiring the application of federal statutes and sometimes common-law principles as well. *See* Le Dain, *Concerning the Proposed Constitutional and Civil Law Specialization at the Supreme Court Level*, [1967] 2 REV. JURID. THÉMIS 107.

[5] Beetz, *Les Attitudes changeantes du Québec à l'endroit de la Constitution de 1867*, *in* THE FUTURE OF CANADIAN FEDERALISM 113 (P. Crepeau & C. MacPherson ed. 1965) [hereinafter cited as FUTURE OF FEDERALISM].

[6] [1967] Que. B.R. 315, 61 D.L.R.2d 317.

[7] *See* Morin, *Vers un nouvel équilibre constitutionnel au Canada*, in FUTURE OF FEDERALISM 141; and Morin, *La conclusion d'accords internationaux par les provinces canadiennes à la lumière du droit comparé*, 3 CAN. Y.B. INT'L L. 127 (1965).

matter of legislation was not enumerated in either section 91 or section 92. Otherwise, it could be relied upon only as an emergency power when familiar problems seemingly presented new, federal aspects for consideration. The Dominion could not, by passing a statute of general application, legislate over matters which would competently be dealt with by each province. Nor could it, in reliance on the general power, "trench" on the provincial field. Hence, Dominion power was closely confined. [8] The commerce power justified federal regulation of international and interprovincial trade, but not local trade, which remained a matter for the province. Therefore until an article entered the flow of extra-provincial trade and commerce it could not be federally regulated. Thus a clear distinction in terms of categories was drawn. Of course this rule sometimes invalidated provincial schemes. But again, under the commerce power, the Dominion could not, by enacting a statute general in application, regulate trade which could be classified as local in each province. The criminal-law power was subject to similar limitations, though in general it was treated more flexibly. It could not be used to regulate local trade in a negative aspect unless some element of public danger or detriment were present and, as a result, insurance could be regulated neither under the commerce power nor under the criminal-law power. [9] On the other hand, the provincial limitation to direct taxation was, in the field of purchase taxes, virtually eroded.[10] A consumer of fuel oil or gasoline could be made to pay purchase tax because he was the ultimate consumer of it. While the cost could be passed on in the form of higher carriage charges, the passing on was not of the tax in relation to the commodity taxed. [11] Finally, we may note that where valid federal and provincial legislation clashed, federal legislation was given paramount effect. The doctrine of paramountcy was not developed extensively by the Judicial Committee. Its breadth remained uncertain. [12]

In time, it became apparent that the Dominion was effectively disabled from dealing with situations of stress. In particular it was unable to deal effectively with the results of the great depression. Legislation intended to implement unemployment benefits was struck down as an intrusion into the field of property and civil rights. The I.L.O. Labour Convention could not be fully implemented for similar reasons. This reflection of federal im-

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[8] For a discussion of the evolution of the general power see Laskin, *"Peace, Order and Good Government" Re-examined*, 25 CAN. B. REV. 1054 (1947). A contrary assessment of the Judicial Committee's contribution is G. BROWNE, THE JUDICIAL COMMITTEE AND THE BRITISH NORTH AMERICA ACT (1967).

[9] *See generally*, A. SMITH, THE COMMERCE POWER IN CANADA AND THE UNITED STATES (1964).

[10] *See* G. LA FOREST, THE ALLOCATION OF TAXING POWER UNDER THE CANADIAN CONSTITUTION 76-80 (1967).

[11] Attorney-General for British Columbia v. Kingcome Nav. Co., [1934] A.C. 45, [1934] 1 D.L.R. 31 (P.C. 1933).

[12] *See* Attorney-General for Canada v. Attorney General for British Columbia, [1930] A.C. 111, [1930] 1 D.L.R. 194 (P.C. 1929). The development of the paramountcy doctrine by the Judicial Committee is dealt with in B. LASKIN, CANADIAN CONSTITUTIONAL LAW 104-11 (3d ed. 1966).

potence in the face of economic disaster provided an impetus which ultimately led to the abolition of appeals to the Judicial Committee. It was hoped by many Canadian lawyers that the Supreme Court, freed from its former bonds, would adopt frankly centralizing policies of a social welfare character,[13] though some scholars, Professor Clokie in particular, were not optimistic.[14] And in fact, though national evils required national remedies, the Privy Council's emphasis on provincial jurisdiction also responded to deep-seated feelings regarding the proper sphere of the provinces. The Privy Council's ventures into the field of Canadian federalism were founded on a valid insight into some of our needs and aspirations. The need for strong central government presented itself in an acute form as a result of conditions which no one had foreseen. Curiously, the opportunity to play a centralising role was presented to the Supreme Court at a time when co-operation between levels of government had become sufficiently sophisticated to render the need for strong judicial intervention less acute.[15]

II. Peace, Order and Good Government

The heads of legislative power which have just been mentioned are clearly sensitive in character. The general power and the commerce power, if given a wide sweep, can clearly perform a centralising function. In Canada, the criminal-law power, vested exclusively in Parliament, also has a considerable centralising potential. The division of taxing powers under which the provinces are restricted to direct taxation within the province enables the courts to promote free-trade policies without resource to section 121 of the British North America Act.[16] The Judicial Committee, aware of these possibilities, developed the restrictive interpretations referred to, assigning matters of possible national dimensions to the provinces as matters of property and civil rights, or matters local and provincial in character. To what extent have these doctrines subsequently been modified? Two significant issues emerge. The first concerns the fate of the proposition that Parliament cannot, by passing a statute national in scope of operation, legislate in relation to matters which otherwise could have been legislated upon by the provinces individually. The second concerns the doctrine

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[13] *See* Laskin, *The Supreme Court of Canada: A Final Court of and for Canadians*, 29 Can. B. Rev. 1038 (1951).

[14] H. Clokie, Canadian Government and Politics (1950).

[15] *See* McWhinney, *Federalism, Constitutionalism, and Legal Change; Legal Implications of the "Revolution" in Quebec*, *in* Future of Federalism 157, at 160-61; Corry, Comment, *in* Future of Federalism 36. Such legislation as the tax-sharing legislation and the tax abatement devices attest to federal-provincial co-operation. *See* Established Programs (Interim Arrangements) Act, Can. Stat. 1964-65 c. 54; Crown Corporation (Provincial Taxes and Fees) Act, Can. Stat. 1964-65 c. 11; and Canadian Pension Plan, Can. Stat. 1964-65 c. 51. Unfortunately the Tax Structure Committee, in its inception a hopeful venture in institutional arrangements, seems, in its 1966 report to attest to a distinctly strained federal structure. *See* Federal-Provincial Tax Structure Committee Report (1966).

[16] G. La Forest, The Allocation of Taxing Power under the Canadian Constitution 73-77 (1967).

of federal paramountcy.

We may begin by considering the fact of the general power. The Judicial Committee towards the end of its period as final appeal tribunal had left the status of the general power in doubt. Statements could be found for and against the proposition that its general status was that of an emergency power.[17] In what the late Mr. Justice MacDonald[18] has termed the Sphinx-like judgment in *Johannesson v. Rural Municipality of W. St. Paul*[19] the Court grappled with the problem. Essentially, the case concerned the power of a province to empower municipalities to regulate and prohibit the use of land for aerodromes. The legislation was held to be ultra vires, but the grounds for decision were various. Aeronautics, the Court agreed, was a matter falling exclusively within federal competence under the general power. The most troublesome problem was one of aspect. The province argued that even granted federal competence over aeronautics, the power was not such as to preclude the province from dealing with the location of aerodromes from a planning aspect. Such preclusion would trench upon provincial competence. Mr. Chief Justice Rinfret and Mr. Justice Locke essentially decided the case on the occupied field doctrine; that is, whatever competence the province might have had, its legislation had been overborne by the Dominion Aeronautics Act. This amounts to an extension of federal power since legislation enacted under the peace, order and good government clause was being allowed to "trench" on a provincial area. Justices Kerwin, Taschereau and Estey essentially adopted a view less favourable to federal power, holding the provincial legislation invalid as in relation to aeronautics and not in relation to planning. Justices Kellock and Cartwright expressed themselves more widely. Finding aeronautics to be an inseverable field, they concluded that the use of property for aerodromes could not be divorced from aeronautics as a whole. The province lacked an aspect on which it could rely. Thus a provincial power under section 92(13) over planning is modified in some judgments by reference to a subject-matter over which Parliament has competence under the peace, order and good government clause. The point regarding inseverability is also potentially important. It raises the possibility that as regards other matters the courts would be reluctant to find provincial aspects for legislation where formerly they might have done so. There is at least a suggestion in *Francis v. The Queen*[20] that the

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[17] Attorney-General for Ontario v. Canada Temperance Fed'n, [1946] A.C. 193, [1946] 2 D.L.R. 1 (P.C.), appeared to rescue the general power from its position as an emergency power only. The Board, however, reverted to its previous expressions in Canadian Fed'n of Agriculture v. Attorney-General for Quebec, [1951] A.C. 179, [1950] 4 D.L.R. 689 (P.C. 1950), and in C.P.R. v. Attorney-General for British Columbia, [1950] A.C. 122, [1950] 1 D.L.R. 721 (P.C. 1949).

[18] MacDonald, *Legislative Power and the Supreme Court in the Fifties*, *in* THE COURTS AND THE CANADIAN CONSTITUTION 152, at 168 (W. Lederman ed. 1964).

[19] [1952] 1 Sup. Ct. 292, [1951] 4 D.L.R. 609 (1951).

[20] [1956] Sup. Ct. 618, 3 D.L.R.2d 641.

divided treaty-implementing power may have to be re-assessed. On the other hand, interprovincial trade and commerce has been treated as severable from local trade, [21] and federal power over connecting works and undertakings extends only to "essential elements." [22] Securities regulation similarly is treated as severable into securities regulation and criminal law aspects, [23] and while attempts have been made to render the ancillary doctrine more flexible, its continued existence remains a matter of note.[24]

The question of modification of provincial power by reference to matters contained in the peace, order and good government clause has also risen in the civil-liberties cases. In *Winner v. S.M.T. (E.) Ltd.*, [25] Mr. Justice Rand found that while a province could regulate the use of its highways, it could not prohibit their use by a non-resident since to do so would be to derogate from public rights enjoyed in virtue of a common Canadian citizenship. The question to what extent such modification can take place was also raised by the dissenting judges in *Saumur v. City of Quebec.* [26] At what point, if any, is provincial legislation passed under a head of section 92 invalid as unduly affecting civil liberties—a field in which the Dominion may have exclusive legislative power? This aspect of the trenching problem has engaged the attention of the lower courts. It has not attained recent prominence in the civil-liberties cases, largely because the Supreme Court has recently classified certain civil-liberties issues as matters of property and civil rights. With these we will deal presently.

On one level at least, the issue seems to have been concluded in favour of federal competence. In *Munro v. National Capital Comm'n*, [27] the Supreme Court has affirmed that the peace, order and good government clause is not an emergency power, and that legislation enacted under it can affect property and civil rights in the province. The question is whether the matter goes beyond local or provincial interests and concerns Canada as a whole. Once it is determined that the matter in relation to which the statute is passed is one which falls within the power of the Parliament of Canada, it will not be held invalid simply because its operation affects

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[21] *In re* Farm Products Marketing Act (Ontario), [1957] Sup. Ct. 198, 7 D.L.R.2d 257; Murphy v. C.P.R., [1958] Sup. Ct. 626, 15 D.L.R.2d 145, especially per Rand, J. *See also* V. MacKinnon, Comparative Federalism 7-8, 56 (1964).

[22] Commission du Salaire Minimum v. Bell Tel. Co. of Canada, [1966] Sup. Ct. 767, 59 D.L.R.2d 145.

[23] Smith v. The Queen, [1960] Sup. Ct. 776, 25 D.L.R.2d 225.

[24] Attorney-General of British Columbia v. Smith, [1967] Sup. Ct. 702, 65 D.L.R.2d 82, restates the trenching doctrine. In *In re* Validity & Application of The Indus. Rels. & Disputes Investigation Act, [1955] Sup. Ct. 529, at 548-49, [1955] 3 D.L.R. 721, at 742, Mr. Justice Rand sought to render the doctrine more flexible stating that the test is not whether the ancillary provision is absolutely necessary to the implementation of the legislative scheme, but rather "it is the appropriateness, on a balance of interests and convenience, to the main subject matter or the legislation."

[25] [1951] Sup. Ct. 887, [1951] 4 D.L.R. 529, *aff'd sub nom.* Attorney-General for Ontario v. Winner, [1954] A.C. 541, [1954] 4 D.L.R. 657 (P.C.).

[26] [1953] 2 Sup. Ct. 299, [1953] 4 D.L.R. 641.

[27] [1966] Sup. Ct. 663, 57 D.L.R.2d 753.

property and civil rights in the province. This doctrine was again applied in *In re Ownership of and Jurisdiction over Offshore Mineral Rights.*[28] There the question before the Court was whether lands and minerals in the sea-bed beyond the low-water mark were the property of or under the legislative jurisdiction of Canada or of British Columbia. Similar questions were asked respecting the power to exploit mineral and natural resources in the continental shelf. The Court found that offshore lands did not vest in British Columbia either before or after it entered confederation. Rights recognised over the sea-bed were recognised by international law, at a relatively late date and after Canada had attained sovereignty, as vesting in Canada.[29] That being so, Canada must have exclusive property in and legislative jurisdiction in respect of the bed of the territorial sea, under either section 91(1)(a) or the peace, order and good government clause. As respects the continental shelf, the case was a fortiori. Legislative jurisdiction vests exclusively in Canada since the matter does not fall within any of the classes of subjects enumerated in section 92. Furthermore, as the Court points out, rights in the territorial sea arise by international law;[30] Canada is the entity recognised as having rights conferred by existing international conventions; and: "it is Canada... that will have to answer the claims of other members of the international community for breach of the obligations and responsibilities imposed by the Convention."[31] It might have been possible for the Court to have separated *dominium* and *imperium*, at least over the sea-bed, and thereby to recognise legislative jurisdiction of some character as vesting in the province. Canada's competence might have been restricted to legislation in relation to defence, navigation and shipping and fisheries. This is a course which American courts declined to take and to which, as Professor Head has demonstrated, the gravest objection can be taken.[32] To refer to the Court's opinion as "not technically unsound" and "not consonant with current decentralist pressures" and therefore perhaps unwise[33] is, I submit, unfortunate. The decision is closely reasoned and well-warranted by authority. It does not imply an indifference to provincial claims. "Provincial rights" is a slogan which may fit the mood of the moment, but no responsible court could accord to it an absolute value.

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[28] [1967] Sup. Ct. 792, 65 D.L.R.2d 353. [The opinion will be hereinafter cited as Offshore Mineral Rights Opinion].

[29] In Attorney-General for British Columbia v. Attorney-General for Canada, [1914] A.C. 153, at 174, 15 D.L.R. 308, at 319 (P.C. 1913), *cited in* Offshore Mineral Rights Opinion, [1967] Sup. Ct. at 801, 65 D.L.R.2d at 361, the Privy Council recognized that the precise status of rights over the sea-bed does not depend upon municipal law alone.

[30] Except so far as these have been asserted by competent municipal legislation.

[31] Offshore Mineral Rights Opinion, [1967] Sup. Ct. at 821, 65 D.L.R.2d at 380.

[32] Head, *The Legal Clamour over Canadian Off-Shore Minerals*, 5 ALTA L. REV. 312 (1967); *The Canadian Offshore Minerals Reference: The Application of International Law to a Federal Constitution*, 18 U. TORONTO L.J. 131 (1968).

[33] Hubbard, Note, 2 OTTAWA L. REV. 212, at 213, 216 (1967).

These decisions do not, I submit, mean that the provinces now exercise their powers on Parliament's sufferance. The *Johannesson* [34] case concerned aeronautics, an area pre-eminently of national concern and one previously so classified by the Judicial Committee. The locus of jurisdiction over civil liberties is in doubt. The *Munro* [35] case concerned the validity of federal powers of expropriation under the National Capital Act, [36] a statute intended to secure the proper development of a capital area. The subject-matter is clearly extra-provincial. The same comment applies to the *Offshore Mineral Rights Opinion*. [37] Other fields may not be inseverable. They have not been so treated under some of the enumerated heads of legislation. Furthermore the Court can still preserve a provincial area inviolate by continuing to classify areas as generally in relation to property and civil rights or local and private matters within the province. In many areas there is clear precedent for such a classification. The treaty-implementing power has not been reassessed. Dean Lederman argues that even were this to occur the court would draw distinctions between matters clearly required for implementation and those which are not. [38] Professor Morin, perhaps rightly, views this with some scepticism, remarking that the basis for such a distinction is uncertain. [39] Such distinctions have been made elsewhere, but of course there is no guarantee that present trends on constitutional interpretation will continue. At present, however, the Court appears to have dealt circumspectly with the general power. Indeed, it is not wholly clear that federal legislation under it will be permitted to trench on the sphere alloted to the provinces. [40]

III. The Regulation of Trade and Commerce

It has previously been remarked that the courts have not permitted Parliament's power over interprovincial and export trade and commerce to affect substantially local trade. The Judicial Committee and the Supreme Court at an early stage sought to direct trade and commerce into local aspects on the one hand and interprovincial and foreign aspects on the other. The legislatures could legislate with respect to the former, and Parliament to the latter. Each was strictly bound within an abstract ambit of jurisdiction. Thus in order adequately to regulate the given trade, Parliament was forced to declare terminal elevators to be works for the general advantage of Canada. [41] Of course in practice, this strict division

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[34] Johannesson v. Rural Municipality of W. St. Paul, *supra* note 19.

[35] Munro v. National Capital Comm'n, *supra* note 27.

[36] Can. Stat. 1958 c. 37.

[37] *Supra* note 28.

[38] Lederman, *Legislative Power to Implement Treaty Obligations in Canada*, The Political Process in Canada 171 (J. Aitchison ed. 1963).

[39] *Supra* note 7.

[40] Attorney-General of British Columbia v. Smith, *supra* note 24.

[41] The King v. Eastern Terminal Elevator Co., [1925] Sup. Ct. 434, [1925] 3 D.L.R. 1. For a summary of the legislative attempts by the Dominion to rectify the result of the decision see B. Laskin, Canadian Constitutional Law 369 (3d ed. 1966).

of jurisdiction caused difficulty. In some commerce at least, control is necessary from production through to export itself. But for these purposes, fully complementary legislation by both levels of government was required. This necessitated very careful draughtsmanship. Administrative difficulties could be overcome by both levels of government delegating powers to a common board. This became ultimately a favoured device.

Since the abolition of appeals to the Privy Council, there has been a slight trend in the Supreme Court toward a more liberal construction of federal power. In *In re Farm Products Marketing Act (Ontario)* [42] four justices, including Mr. Justice Rand, held a provincial marketing statute to be valid as regulating local trade. The justices went on to say, however, that where the goods were destined to enter interprovincial and export trade, the matter ceased to be one of purely local concern. Abstract formulations of legislative power were felt to be of little help in the demarcation between local trade and extra-provincial trade. This difficulty is apparent when dealing with the initial stages of trade, including manufacture or production. Mr. Justice Rand states: "That demarcation must observe this rule, that if in a trade activity, including manufacture or production, there is involved a matter of extra-provincial interest or concern its regulation thereafter in the aspect of trade is by that fact put beyond Provincial power." [43] The province could not therefore regulate exports either in the aspect of marketing or by imposing provincial standards. Justice Rand, however, recognised the continuing need for complementary legislation. Where the matters in issue span the boundary between the two jurisdictions, control by either alone is impracticable. This judgment therefore recognises that a transaction may be local in that it takes place within a province and yet may, by virtue of the fact that it has entered the flow of extra-provincial trade become a matter of national concern. This leaves in issue the question when a given matter will be said to have entered the flow of extra-local trade. It also perhaps revives the argument, rejected in *The King v. Eastern Terminal Elevators Co.* [44] that where a significant portion of a product will enter extra-provincial trade the whole area becomes a matter of national concern, at least where no differentiation is possible. This argument's validity depends to a degree on when the article can be said to have entered such trade. It is clearly most appealing in cases where the commodity is undifferentiated. Seemingly, where separation can take place at the time of processing, complementary legislation is still needed. The Court returned again in the *Murphy* case [45] to the theme that the commerce power, while wider than has hitherto been thought, does not comprehend local trade as such. The Canadian Wheat Board Act of

[42] [1957] Sup. Ct. 198, 7 D.L.R.2d 257.
[43] [1957] Sup. Ct. at 210, 7 D.L.R.2d at 269.
[44] *Supra* note 41.
[45] Murphy v. C.P.R., *supra* note 21.

1935, intended to ensure the orderly marketing of grain in interprovincial and export trade, requires the Canadian Wheat Board to purchase and market all grain destined for such trade, to pool the gross returns, and after deduction of expenses to distribute the net proceeds to the producers. The act forbids the shipment by a person of grain from one province to another. The appellant, a farmer, bought grain in Manitoba and sought to ship it to himself in British Columbia. The railway, relying on the act, declined to carry it. The appellant then sought to impugn the act as a violation of section 92(13), property and civil rights in the province. The Court held the legislation to be valid as in relation to interprovincial and export trade. Justice Rand, in addressing himself to the commerce power, held that it is limited in excluding local trade only as far as it is necessary to avoid the extinction of provincial authority over such matters. Those apart, Parliament's power is limited only by section 121 of the B.N.A. Act, the office of which is purely to ensure the free flow of interprovincial commerce as such.

The Supreme Court has not since dealt directly with these issues. In one lower-court decision, *The Queen v. Klassen*,[46] a very wide sweep was given to the commerce power, essentially holding in relation to the grain trade that federal regulation of local trade was permissible where this was necessary to effectuate the policy of the act in regulating extra-provincial trade. The Ontario and Quebec courts on the other hand have adhered without much difficulty to the established doctrines enunciated by the Privy Council. And in substance what the Court has afforded is a point of departure. It may be that the Court will not be astute to classify forms of commerce as requiring solely federal regulation. The "categories" approach suggested by Justice Rand must be intended to have meaning. It is clearly potentially more restrictive of federal power than the American doctrine that the commerce power extends "to those activities intrastate which so affect interstate commerce . . . . as to make regulation of them appropriate means to . . . the effective execution of the granted power to regulate interstate commerce."[47]

IV. The Criminal-Law Power

It is in connection with the criminal law that the most striking developments have been manifested. The general impression which one derives from an examination of the decisions has been one of judicial conservatism. Parliament may determine what legislation is necessary for the efficient exercise of its primary powers over the criminal law. Its power includes the power to make new laws and the power to make laws for the pre-

[46] 29 W.W.R. (n.s.) 369, 20 D.L.R.2d 406 (Man. 1959).
[47] Wickard v. Filburn, 317 U.S. 111, at 124 (1942).

vention of crime. The fact that such legislation affects provincial matters will not invalidate it provided that the aspect of the legislation is criminal law. Thus the Juvenile Delinquents Act has been upheld even though it contains welfare features, and is applied unevenly across the Dominion. [48] If valid, federal criminal legislation is paramount when it conflicts with provincial legislation. And yet despite these wide propositions, provincial autonomy has been safeguarded to a marked extent. In the field of road traffic, as in securities regulation, the power is virtually concurrent with the derivative provincial power to enforce its status under criminal penalty. [49] The Court's flexibility in determining questions of aspect must be viewed together with its narrow doctrine of repugnancy in order to obtain a balanced picture of recent developments.

The criminal-law power has been used both to uphold federal enactments and as a negative head of assignment when impugning provincial legislation. The extent to which it serves a centralising purpose depends not only on the statutes validated by reliance on it, but the extent to which these preclude provincial legislation—put shortly, the problem of paramountcy. In the field of economic regulation, the Supreme Court has moved cautiously. The danger foreseen is the possibility that the courts will permit Parliament to do under the criminal-law power, things which could not be done under other, apt, enumerations. In the *Margarine* case [50] the Supreme Court, upheld by the Judicial Committee, struck down a section of the Dairy Industry Act which prohibited the manufacture, sale and importation into Canada of oleomargarine. Unlike former legislation, the preamble of which had declared margarine to be injurious to health, the legislation in question was not so supported. It was held that it could not be upheld under the commerce power as being in relation to the regulation of local trade, nor under the criminal-law power. It was essentially legislation for the protection of the Canadian dairy industry. The combines cases could be justified as protecting the public against the evil consequences of fetters on free and equal competition. The margarine legislation disclosed no more than a preferring of one local trade over another.

It is possible that the Court may be readier to discern a federal aspect where the legislation is supported under the criminal-law power, rather than under the commerce power or the general power. But the limitation

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[48] *Supra* note 40.

[49] Leigh, *The Criminal Law Power: A Move Towards Functional Concurrency?*, 5 ALTA. L. REV. 237 (1967). The following cases are illustrative: Gregory & Co. v. Quebec Sec. Comm'n, [1961] Sup. Ct. 584, 28 D.L.R.2d 721; Smith v. The Queen, *supra* note 23; The Queen v. W. McKenzie Sec. Ltd., 55 W.W.R. (n.s.) 157, 56 D.L.R.2d 56 (Man. 1966)

[50] *In re* Validity of Section 5(a) of The Dairy Industry Act (Canada), [1949] Sup. Ct. 1, [1949] 1 D.L.R. 433 (1948), *aff'd sub nom.* Canadian Fed'n of Agriculture v. Attorney-General for Quebec, *supra* note 17.

that the legislation must not in substance be in relation to a provincial subject-matter of jurisdiction has not been derogated from in the Supreme Court. One may also concede that the criminal-law power can act as a general prohibition on certain types of trading activity and that this will limit the ambit of provincial competence. The issue will still remain of determining when a prohibition can be said to be so minutely prohibitory as to constitute negative legislation. These issues have been extensively discussed in the lower courts, the criminal-law power having been both widely and narrowly construed.[51] They have not received extensive discussion in the Supreme Court, though one may note that provincial anti-fraud provisions in the Securities Acts were upheld in the *Smith* case,[52] notwithstanding a distinct fraud orientation. This seems to indicate that the Court intends to permit a considerable scope to provincial enactment.

The use of the criminal-law power as a negative head of assignment in the civil-liberties cases is also noteworthy. Ever since the decision in *In re Alberta Statutes*[53] provincial legislation which subsequently curtailed freedom of speech or of religion has been struck down, if at all, on one of two bases. It has been invalidated on the broad ground that civil liberties, unlike civil rights, fall under the peace, order and good government clause and are therefore within exclusive federal competence. This treats the civil-liberties field as essentially inseverable, and, in its admittedly obscure dimensions, a matter for Parliament.[54] Such legislation has also been struck down on the narrower basis that it is essentially in relation to criminal law.[55] This entire process of construction has not enhanced provincial powers, though it has left the legislatures with considerable room in which to breathe. In *Switzman v. Elbling*[56] it was argued that the legislation was valid as intended to remove conditions calculated to further the development of crime, an argument founded upon a prior decision of the Court in *Bedard v. Dawson.*[57] Such an aspect was denied, the Court having held three years previously in *Johnson v. Attorney General of Alberta*[58] that slot machine legislation passed professedly to deal with conditions calculated to favour the development of crime constituted a provincial trespass into the field of criminal law. But of course even here, some provincial legislation may well be upheld as in

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[51] *See e.g.*, The Queen v. Campbell, [1964] 2 Ont. 487, 46 D.L.R.2d 83.

[52] Smith v. The Queen, *supra* note 23.

[53] [1938] Sup. Ct. 100, [1938] 2 D.L.R. 81, *vacated as moot, sub nom.* Attorney-General for Alberta v. Attorney-General for Canada, [1939] A.C. 117, [1938] 4 D.L.R. 433 (1938).

[54] Switzman v. Elbling, [1957] Sup. Ct. 285, D.L.R.2d 337.

[55] *Compare* Saumur v. City of Quebec, *supra* note 26 and Henry Birks & Sons v. Montreal, [1955] Sup. Ct. 799, [1955] 5 D.L.R. 321, *with* Robertson v. The Queen, [1963] Sup. Ct. 651, 41 D.L.R.2d 485.

[56] *Supra* note 54.

[57] [1923] Sup. Ct. 681, [1923] 4 D.L.R. 293.

[58] [1954] Sup. Ct. 127, [1954] 2 D.L.R. 625.

relation to welfare or urban renewal. [59]

In my submission those members of the Court, who relied on the criminal-law power as a negative head of assignment nonetheless sought to leave a reasonable sweep to provincial jurisdiction. The classification is really a cautious means of excepting from provincial jurisdiction, matters of national concern. To except from provincial jurisdiction legislation professedly enacted with a view to crime prevention is surely not unjustified. The context which could have been read into such an aspect is uncertain and its implications are disturbing as the occasions for its purported exercise disclose. [60] On the whole, the position which has been reached has not resulted in any striking diminution of provincial powers.

Again, the present temper of the Court is illustrated by the cases on federal paramountcy. In the slot machine cases one of the grounds for striking down provincial legislation was that it substantially duplicated provisions found in the Criminal Code. [61] This has not meant the eclipse of provincial powers. In both the fields of highway traffic and securities regulation this continued vitality is a matter of note. In 1942, the Court held that the provinces had the responsibility for regulating highway traffic including the conditions on which and the manner in which vehicles could be used. Even then, the Court predicted paramountcy on the narrow ground of identity in substance between two pieces of legislation. [62] This limited doctrine of paramountcy has allowed considerable freedom of enactment to the provinces. In four leading cases, federal legislation has been narrowly defined to this end. In *In re Validity of Section 92(4) of The Vehicles Act (Saskatchewan) of 1957*, [63] the conflict posed was between a section of the Criminal Code which admitted chemical tests of intoxication in proceedings for drunken and impaired driving, but which also provided that no person should be compelled to furnish such evidence, and a provincial section which empowered the Highway Traffic Board to suspend or revoke the licence of any operator who refused to comply with a request to take a breathalyser test. The Court denied the existence of repugnancy since the provincial test was necessary from a provincial point of view and did not obligate the operator to submit. He could, if he wished, forfeit the licence. The failure to perceive repugnancy is somewhat surprising. A number of decisions concern conflict between provincial securities and vehicles legislation and provisions of the Criminal

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[59] Chief v. Sutton, 46 W.W.R. (n.s.) 57, *sub nom.* The Queen v. Chief, 42 D.L.R.2d 712 (Man. Q.B. 1963), *aff'd* 44 D.L.R.2d 108 (Man. 1964).

[60] *Supra* note 54.

[61] Johnson v. Attorney-General of Alberta, *supra* note 58; DeWare v. The Queen, [1954] Sup. Ct. 182, [1954] 2 D.L.R. 663.

[62] Provincial Secretary of Prince Edward Island v. Egan, [1941] Sup. Ct. 396, [1941] 3 D.L.R. 305.

[63] [1958] Sup. Ct. 608, 15 D.L.R.2d 225.

Code. Whether provincial legislation is overborne by paramount federal legislation is said to depend on whether both items of legislation can live together and operate concurrently. [64] In *Mann v. The Queen* [65] it was said that the criminal-law power may not be so extended as to absorb the provincial regulatory power; "Indeed, both these powers must be rationalized in principle and reconciled in practice whenever possible." [66] Thus in *Smith* [67] the Court held that in the case of a juvenile accused, he must be dealt with under the Juvenile Delinquents Act rather than the provincial statute, since the federal act makes violation of the provincial prohibition an act of delinquency. But in general the paramountcy doctrine adopted by the Court is a narrow one. Increased flexibility has not been permitted to truncate provincial power.

The concern manifested in these cases is real and undoubtedly valid. The Court has been concerned to maintain the provinces as powerful governmental entities. This attitude is, I believe, based not so much on the dictates of abstract theories of what federation requires, as on a realisation that many matters are best handled by the provinces. It would not be surprising to find that conclusion reached in respect of highway safety, and not reached for example in respect of gaming. Highway construction and use are still, in many aspects, a matter of local concern. Provincial governments fulfilling a developmental role here, and responsible for safe construction and use, are answerable to an electorate which may well not be responsive to arguments advanced on the basis of a divided jurisdiction. Developments in the field occur with considerable rapidity. Legislation can probably be passed more expeditiously at the local level, and administrative discretion is perhaps best exercised there. The fact that after the *Winner* case Parliament delegated licensing functions to provincially appointed boards regarding vehicles engaged in inter-provincial transport may be an indication of this. [68] The like considerations may apply in the field of securities regulation, absent the adoption of some regulatory scheme by Parliament. The narrow sweep given to the doctrine of repugnancy surely, in the case of highway traffic and securities, manifests an intention to save the integrity of existing administrative schemes. In the latter field indeed the courts have virtually sanctioned interlocking provincial schemes which give a national coverage, albeit in some marginal areas rather incomplete in character. Whereas in *Gregory* [69] the Supreme Court did not pass on the validity of provincial registration provisions which apply to trading in securities from the province into other juris-

[64] Smith v. The Queen, *supra* note 23; O'Grady v. Sparling, [1960] Sup. Ct. 804, 25 D.L.R.2d 145; and Stephens v. The Queen, [1960] Sup. Ct. 823, 25 D.L.R.2d 296.

[65] [1966] Sup. Ct. 238, 56 D.L.R.2d 1.

[66] [1966] Sup. Ct. at 250, 56 D.L.R.2d at 11.

[67] Attorney-General of British Columbia v. Smith, *supra* note 24.

[68] Motor Vehicle Transport Act, Can. Stat. 1953-54 c. 59.

[69] Gregory & Co. v. Quebec Sec. Comm'n, *supra* note 49.

dictions, the Court's denial that such provisions are analogous to marketing schemes, makes it probable that such legislation would be upheld. For seemingly a province could, if the matter is not trade, legislate with extra-territorial effect. [70]

This is not to argue that the Court has not enhanced federal power. It may have done so to some extent particularly under the commerce power. Also if followed, the extreme claims for federal power made by some judges of the Court in the celebrated civil-liberties cases could withdraw from provincial competence an area of considerable, if obscure, dimensions. But the Court has not been astute to build upon these foundations. The famous citizenship thesis has been applied narrowly. In *McKay v. The Queen*, [71] the Court applied it to prevent provincially authorised planning by-laws from limiting the impact of federal election posters. But here the threat to provincial competence is at best only latent, and there is considerable former authority to surmount before a significant intrusion into the provincial field can or will be made. [72] The theme that some civil liberties are different in essence to civil rights has received little recent support in the Court. In *Oil, Chemical & Atomic Workers Union v. Imperial Oil Ltd.*, [73] a provincial statute preventing a trade union from contributing monies obtained from employees under the check-off system was held valid as tending to stabilise industrial relations within the province and as conferring a civil right not to make contributions upon employees. The civil-liberties cases by inference were relegated to the function of ensuring that the provinces could not abridge the right of persons to engage in political activities. The Court has resisted attacks on the federal taxing power, holding valid as a measure of protection for national commerce provisions subjecting foreign published magazines to surcharge. On the other hand, such decisions as *Cairns Constr. v. Saskatchewan* [75] have virtually rendered meaningless the limitation that the provinces can only raise monies by direct taxation—at least so far as purchase taxes are concerned. [76] In the result, the limitation to direct taxation does not constitute an inhibition of consequence to the provinces' ability to raise essential funds. Judicial restraint is also noteworthy in the recent decision relating to Quebec magistrates' courts where the Court

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[70] *See* The Queen v. W. McKenzie Sec. Ltd., *supra* note 49, wherein the Manitoba Court of Appeal took this view.

[71] [1965] Sup. Ct. 798, 53 D.L.R.2d 532.

[72] Price, *Mr. Justice Rand and the Privileges and Immunities of Canadian Citizenship*, 16 U. TORONTO FAC. L. REV. 16 (1958).

[73] [1963] Sup. Ct. 584, 41 D.L.R.2d 1.

[74] Readers Digest Ass'n (Canada) v. Attorney-General of Canada, 37 D.L.R.2d 239 (1962), *aff'd* 20 D. Tax Cas. 5073 (1965).

[75] 27 W.W.R. (n.s.) 297, 16 D.L.R.2d 465 (Sask. 1958).

[76] Nickel Rim Mines Ltd. v. Attorney-General for Ontario, [1967] Sup. Ct. 270, 60 D.L.R.2d 576, *aff'g* [1966] 1 Ont. 345, 53 D.L.R.2d 290 1965).

refused to embark on any issues wider than those strictly before it.[77] The contrast between its judgment and that of the lower court is instructive.[78]

In conclusion then, one may suggest that although claims to federal pre-eminence have been made by some members of the Court, a tendency most marked during the 1950's, the Court has displayed a considerable sensitivity to issues of legislative power. This tendency has become even more marked of recent years. The Court has not divorced itself from the past, nor has it disclosed an insensitivity to current trends. It has, however, introduced a new flexibility into issues of constitutional adjudication. It is, I submit, unlikely to proceed in a radical fashion in the foreseeable future. For this, there are several reasons. First, the Court functions in the English tradition. Consequently, certainty is a value highly regarded, as is the system of analytical jurisprudence. While in future we may see more overtly value-oriented judgments, it will be some considerable time before Canada obtains a Warren Court, if at all. Second, it would be unrealistic to expect the Court to upset so many existing institutional arrangements. Provincial regulatory schemes in areas where Parliament has a title to intervene have been functioning for some considerable time. There are stresses which may ultimately disclose that it is unrealistic to rely upon provincial action in some fields, but these have not yet been made manifest to the Court. Then too, the federal government seems inclined rather to use the conference than the Court as a forum for the resolution of disputes. This is perhaps a sign of growing maturity in all levels of government. All this, if valid, perhaps suggests that fears of federal domination imposed by a hostile Court are, if not unfounded, at least over-stressed. What the Court has done is to introduce a greater measure of flexibility into the adjudication of constitutional disputes. It cannot be said to have altered fundamentally the balance of power between the Parliament and the provincial legislatures. Admittedly some of the points of departure which it has created could be put to a centralizing purpose, but in my submission this is likely to occur only if it is strongly desired nationally, and by that I mean not only a consensus in Parliament but a clear reflection of provincial desire as well. If this is correct, then suggestions for amendment intended to perpetuate rigidity are not only undesirable, but dangerous. They will be dangerous if the desired result is brought about since agreed national action will be inhibited. This may meet some desires, but only at the cost of frustrating others, so introducing further strains into what is after all a fairly delicate federal structure. And what, one may ask, will be said if the proposed solution fails—if the Court agrees on a centralizing line of decision? Are

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[77] *In re* Jurisdiction of The Magistrate's Court (Quebec), [1965] Sup. Ct. 772, 55 D.L.R.2d 701.

[78] *In re* Jurisdiction of The Magistrate's Court (Quebec), [1965] Que. B.R. 1, 55 D.L.R.2d 516 (1964).

those judges who were appointed as guardians of the status quo to be regarded as traitors to their "nation" of origin? All these and other matters require careful consideration before change is agreed upon. In the meantime, an understanding of the doctrines which have been accumulated by the Court surely indicates that here at least haste is required neither in the interests of Canada nor of the provinces. It cannot be said from either quarter that the Court has acted gratuitously in such a fashion as to impose solutions unsatisfactory, or detrimental, to the interests of either level of government.