The Politics of the Judiciary: The S.C.C. and the J.C.P.C. in late 19th Century Ontario

by

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Abstract

This thesis examines the role performed by the Supreme Court of Canada and the Judicial Committee of the Privy Council in the field of federal-provincial relations in late nineteenth-century Ontario. It attempts to highlight that the judiciary, when discerning the meaning of the British North America Act and various Dominion and provincial statutes, despite appearances, was not always adjudicating according to legal principles. While this period of judicial review has been examined extensively, the case study used in the thesis- McLaren v. Caldwell- is relatively neglected and serves to illustrate how difficult it was for the judges and law lords to maintain the appearance of judicial independence and impartiality. This study demonstrates that the judiciary, in the early stages of Canada's existence, entered the political arena when striking down or validating government action; a politicization of the courts which took place under the guise of legal formalism.

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Chapter 1

Introduction

The rule of law idealizes a non-political judiciary, with judges insulated from direct political influence, impartially administering the law according to technical doctrinal principles. Judicial review of constitutional matters creates practical dilemmas for this ideal, despite conscious cultivation of the appearance of legal formalism. The Charter of Rights and Freedoms has in recent years made the judiciary's public-policy role more visible, prominent and contentious and, by extension, raises questions about the politics of the judiciary. However, our courts were not suddenly politicized in 1982. An examination of review of the British North America Act, 1867 by the Supreme Court of Canada and the Judicial Committee of the Privy Council in the late nineteenth century reveals that our courts have wielded considerable public policy discretion and influence since 1867. Their role in resolving disputes between levels of government formed an important dimension of Canadian politics. This has tended to be overshadowed by the enhancement of judicial review of disputes between individuals and the state resulting from the Charter.

Current debate about the politicization of the judiciary also neglects the pre-Confederation situation. Judicial independence from executive influence developed at a very late point in colonial British North America.[1] While in Britain security of tenure was established at the time of the Act of Settlement, 1701 and separation of powers achieved at the beginning of the nineteenth century, these formal guarantees of judicial independence only started to be implemented in the 1830s and were fully confirmed only under the British

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[1] For an extensive look at the rule of law and judicial independence, see F.L. Morton, ed., *Law, Politics and the Judicial Process in Canada* (Calgary: University of Calgary Press, 1992), pp. 1-18, 131-137.

North America Act, 1867. The establishment of formal judicial independence, however, did not close off questions about the politics of the judiciary. The role of the courts in interpreting the division of powers under the BNA Act provides a case in point. Writ large, this paper is about the political power of the judiciary and its impact on Canadian federalism.

It is presently admitted that judicial review is a natural outgrowth "to a federal form of government based on a written distribution of powers between two levels of government."[2] According to F.L. Morton,

> For a federal division of legislative powers to be effective, there must be a mutually acceptable process for settling the inescapable disputes as to where one government's jurisdiction ends and the other's begins. Neither level of government can be permitted to define unilaterally, and thus to redefine, the boundaries of federal-provincial jurisdiction. This would violate the equal status of both levels of government, which is a central principle of classical federalism. In practice, the need for a neutral umpire of federal systems has been met through judicial review by a final court of appeal.[3]

Simply stated, "judicial review is the procedure by which courts of law consider laws and executive acts in the light of whether or not these conform with the terms of the constitution and then validate or invalidate such expressions of legislative or executive will accordingly."[4]

The Judicial Committee of the Privy Council (JCPC) assumed a novel function within the British Empire by serving as the court of last resort for resolution of Canadian federal disputes in the 1880s. The British law officers and Sir John A. Macdonald's

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[2] Morton, *Judicial Process in Canada*, p. 339.

[3] *Ibid.*, pp. 339-340.

[4] Donald V. Smiley, *The Federal Condition in Canada* (Toronto: McGraw-Hill Ryerson Limited, 1987), p. 48.

Conservative party also "looked upon the appeals to the Judicial Committee as an essential link of imperial union."[5] This board was drawn from persons who had held high judicial office in Britain, together with a small number of Commonwealth judges. The Privy Council engaged in imperial judicial review before taking on federalism. It was formally constituted and given jurisdiction over all colonial courts by acts of the British Parliament in 1833 and 1844.[6]

The Privy Council was both a judicial and political tribunal which arose out of imperial administrative review. In this respect it was a departure from the prevailing model of the British high courts, although they began to deal increasingly with administrative matters in the 19th century, (but never adopted an overt public policy profile like the JCPC). Indeed, the brilliant lawyer and federal Liberal Edward Blake viewed the Privy Council as an advisory body to the British government rather than a court of law; it was seen by many Canadians as "a relic of colonialism."[7] As it turned out, "judicial review of the British North America Act both by the Judicial Committee and the Canadian courts did not evolve as an instrument for imperial control of Canadian affairs but rather as a practical device for delineating the respective legislative powers of the Parliament of Canada and the provinces."[8]

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[5] Peter H. Russell et al., eds., *Federalism and the Charter: Leading Constitutional Decisions* (Ottawa: Carleton University Press, 1993), p. 5.

[6] See G.P. Browne, *The Judicial Committee and the British North America Act* (Toronto: University of Toronto Press, 1967).

[7] Garth Stevenson, ed., *Federalism in Canada: Selected Readings* (Toronto: McClelland & Stewart Inc., 1989), p. 11.

[8] Smiley, *Federal Condition*, p. 48.

The JCPC provided 173 major judgments interpreting the BNA Act. In many scholarly works it has been mentioned that numerous decisions were looked upon as contradicting the intentions of the founders of Confederation, as well as the text of the BNA Act, by showing a bias towards provincial powers. The judgments severely curtailed federal jurisdiction in fields such as trade and commerce and made the general powers of the Dominion, as enunciated in section 91, subordinate to the specific powers enumerated in sections 91 and 92. The decentralizing current of the Judicial Committee's decisions was criticized as exhibiting an unfamiliarity with the complexities of Canadian federalism.[9]

"Unity in Diversity": Canada, 1867-1896

The British North America Act, 1867 (at present it is known as the Constitution Act, 1867) sought to weld together the separate British colonies in North America that had been left over (Nova Scotia, Quebec) or formed since the American Revolution (New Brunswick, Upper Canada). Despite the spectre of the American Civil War which suggested that state rights and successionism would plague a federal state, none of the provinces, particularly Quebec, was willing to surrender the degree of political autonomy and self-government to which they aspired, and to be subsumed under a single unitary state. At the same time, the most influential leaders of the Confederation movement, such as George Brown, recommended a strong central government based on legislative union. This type of political structure was necessary in order to avoid what they considered to have been the near-fatal weakness of the central government in American federalism in that

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[9] Alan C. Cairns, "The Judicial Committee and Its Critics," in Garth Stevenson, ed., *Federalism in Canada: Selected Readings* (Toronto: McClelland & Stewart Inc., 1989), pp. 81-117.

residual powers were granted to the states.[10] The British North America Act of 1867 represented an uneasy compromise between the conflicting goals of the provinces and the Dominion government.

Demands by Ontario, Quebec, New Brunswick and Nova Scotia to preserve local autonomy and self-rule were partially accommodated through a distribution of legislative powers, primarily in sections 91 and 92 of the BNA Act. However, the centralists' objectives were recognized by a very broad wording of the federal government's law-making powers in section 91, and by the unilateral power to strike down provincial laws through the devices of disallowance (s. 56) and reservation (s.90). The result was a written constitutional document which tended towards a highly centralized form of federalism. As it happened, this original design was modified considerably by subsequent political developments in which judicial review played an important role.

Throughout the late nineteenth century, opposition to Sir John A. Macdonald's centralist view of Confederation was fierce. At the time of Confederation, the Maritimes, Quebec, and the Clear Grits in Ontario had resisted the idea of a legislative union, or a highly centralized government with exceedingly weak local governments. The "fathers" of Confederation, between 1864 and 1867, had settled on a federal model in which power was to be more evenly distributed between the central and the local or provincial governments. After Confederation the relationship between these two jurisdictions now had to be worked out in practice.

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[10] Edward McWhinney, *Judicial Review* (Toronto: University of Toronto Press, 1965), p. 62.

Two differing perspectives of federal-provincial relations emerged in the first years of Confederation. Macdonald's Conservative government maintained that major power should reside in the federal government, contending that the phrase "peace, order and good government of Canada" and the phrase "regulation of trade and commerce", as outlined in section 91 of the British North America Act, incorporated all powers not exclusively given to the provinces. Therefore, the residuum of powers would be placed with the Dominion government. Furthermore, the lieutenant governors of the provinces- all of whom were appointees to the Dominion government- held the right to reserve and disallow provincial legislation as listed in sections 56 and 90, respectively.[11] In later chapters, the significance of the Dominion's view regarding the power of disallowance will be illustrated in the Rivers and Streams episode.

In contrast, the provincial premiers, most often Liberals, argued that the provinces were the main source of power and that they had willingly delegated only a portion of it to a central government. Advocates of provincial rights stated that as the colonial leaders themselves established the union, Confederation was a compact made between their political jurisdictions. The provincial leaders also point to the general phrase "property and civil rights in the province" in section 92 of the BNA Act which dealt with the constitutional rights of the province, as proof of the intent to give extensive powers to the provinces. Furthermore, they note that the provinces were given a structure of government similar to that of the federal government, implying that the provinces had an association with the Crown similar, and not secondary, to that of the Dominion.

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[11] Garth Stevenson, *Unfulfilled Union: Canadian Federalism and National Unity* (Toronto: Gage, 1989), p. 35.

Oliver Mowat, premier of Ontario from 1872 to 1896, with his keen legal expertise and astute political instincts, led the political and legal battles in this period and believed that the provinces should have full sovereignty in their own areas of jurisdiction. He endorsed the concept of the compact theory, declaring that Confederation was an arrangement voluntarily entered into by the provinces and one that could be altered only with their permission.[12] As Ontario premier, Mowat upheld the tactics employed by Edward Blake, who led the province before him, of making Ontario the most influential member within the dominion through issues concerning the boundary dispute, management of natural resources, and property and civil rights.[13] From 1867 to 1896, the legal disputes confronting Ontario, in relation to the constitutional uncertainty presented by the BNA Act, had to be meticulously monitored since the problem of resolving these pertinent issues was compounded by Macdonald's political desire to keep the provinces constitutionally deficient in strength and inferior to Ottawa.

The SCC and JCPC in Dangerous Waters

The division of powers in the BNA Act ambiguously affected a vast range of public policy areas, from criminal law enforcement to the regulation of liquor and insurance. This thesis focuses on jurisdiction over rivers and streams, one of the most contentious areas in the late 19th century. As federal-provincial quarrels intensified in the 1880s with the Rivers and Streams incident, the Supreme Court of Canada and the Judicial Committee of the Privy Council had great difficulty avoiding controversy when ruling on legislative acts with

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[12] Robert C. Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (New York: State University of New York Press, 1991), p. 152.

[13] A. Margaret Evans, *Sir Oliver Mowat* (Toronto: University of Toronto Press, 1992), pp. 141-181.

respect to the Canadian constitution. This is "partly the result of ambiguities in the written constitution itself, and partly the result of fundamental conflicts of interest or ideology"[14] - the political agendas of the provinces, the Dominion government and Britain. Placed at the centre of this volatile mix of interests, and expected to render objective decisions, the courts also possessed particular self conceptions and institutional self-interests.[15]

This thesis examines the role of the courts in balancing the divergent pressures on the Canadian federation up to the 1890s. In doing so it seeks to further illuminate an important dimension of judicial politics in Canadian history. This entails an examination of how judicial formalism is employed to mask what are effectively public policy decisions. Legal formalism may be defined as the use of technical legal doctrine and expositional legal reasoning to resolve disputes. This, of course, is the objective of all sound judicial decision-making, although laws are seldom sufficiently comprehensive and human nature is sufficiently complex that judges are in fact obliged to covertly exercise wide discretion. The jurisdictional disputes facing the Supreme Court of Canada and the JCPC were particularly awkward because of the novel nature of these cases and their direct political connotations. They were not readily amenable to technical disposition. Thus, while judges in these courts delivered judgments that were "formalistic" in appearance, their public policy choices about the distribution of governance went to the heart of political conflicts over the nature of the young Dominion.

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[14] Stevenson, *Federalism in Canada*, pp. 10-11.

[15] Murray Greenwood, "Lord Watson, Institutional Self-Interest, and the Decentralization of Canadian Federalism in the 1890s," in John Saywell and George Vegh, eds., *Making the Law: The Courts and the Constitution* (Toronto: Copp Clark Pitman Ltd., 1991), pp. 70-73.

Despite rulings that were hidden under legal formalism, decision-making in cases dealing with the division of powers exemplifies the heightened importance of the role of the judiciary in public policy affairs. In essence, the decisions the judiciary produced regarding constitutional cases and the reasons behind their policy choices highlight the politics of the judiciary, and how the law can act as a guise for political projects of provincialism, centralism or imperialism. Peter Russell states that:

> the process of adjudication influences and shapes the public policies that are given effect through law. For this reason the adjudicative work of judges itself is of political significance. This is a paradoxical and deeply problematic feature of adjudication. For in theory judges are supposed to be settling disputes according to pre-existing law, to be upholding rights and enforcing duties that exist under the law. But the fact remains that judges also shape and develop the law in the very process of settling disputes about it.[16]

The key reason for this problematic feature of judgments in relation to sections 91 and 92 is the unavoidable indefiniteness of law. The judiciary, when enunciating whether certain legislative measures fell under federal or provincial jurisdiction, acted under the rubric of legal formalism. They performed in this manner, however, by taking into account public policy considerations in addition to utilizing legal principles. Therefore, one can aptly describe legal formalism and the policy-making of judges along a spectrum rather than classifying these two functions of the judiciary under separate headings. In settling constitutional debates, the judiciary "had put flesh on the bare skeleton of the law and in the process shaped the substance of the law."[17]

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[16] Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson Limited, 1987), p. 13.

[17] Russell, *Judiciary in Canada*, p. 14.

Beginning in the 1880s, the Judicial Committee of the Privy Council embarked on a course of shaping and moulding the British North America Act to the political, economic and social environment of Canada. To do this, law lords such as Sir Montague Smith and Lord William Watson gave an expanded interpretation to provincial powers over property and civil rights, while confining the federal Parliament's general power related to peace, order and good government and restricting within certain limits the federal power over trade and commerce, in cases such as *Hodge v. The Queen* and the *Local Prohibition* reference.

It is important to note that judges did not suddenly become engaged with constitutional policy-making after 1867. Judicial review of administrative matters, political trials, and the exercise of common law jurisdiction all point to a whole array of politically-laden discretion that simply was supplemented by issues of federalism. It is the contention of this study that through the early decisions made by the SCC and JCPC in the 1880s and 1890s, the courts enhanced the process of judicial review in two fundamental, yet conflicting, aspects. The judges and law lords, when interpreting the BNA Act in the way of clarifying and analysing the terms spelled out in sections 91 and 92, provided legal and technical reasoning in which their decisions flowed from a mechanical, intricate course of action. As a result of their jurisprudence policy hints were evident throughout the written judgments. At the same time, the Supreme Court and Judicial Committee were instrumental in shaping the contours of Canada's political, constitutional and legal landscape by having the opportunity to express their own non-legal preferences in defining the Canadian Constitution. All along, they justified their plunge into the non-legal domain in a form of

legal dissertation which cleverly obscured the genuine determining factors of their decisions.

At the heart of the Privy Council's approach was their inclination to view "federalism as a level of sovereign jurisdictional rivalry. In endeavouring to maintain a division of powers suitable for classical federalism and thereby resist the heavily centralizing currents of the constitutional text, the Judicial Committee developed an acute sensitivity to the competing claims of the provinces and the federal government."[18] Hence, the JCPC's interpretation of the BNA Act reflects the spirited constitutional politics of the country and the legacy of the provincial rights movement in Canada. This paper is an examination of their performance in judicial review of federal-provincial relations, and an evaluation of their role in expounding or affecting the meaning of the BNA Act.

Methodological Considerations

The legal methods of the profession and the bench rely on too narrow a range of sources for an adequate understanding of the politics of judicial review. The traditional legal method is designed to illuminate legal doctrine, and is concerned with the technical details and expositional reasoning around doctrine. Narrowly drawn sources are necessary to establish acceptable ground rules for the negotiating or litigating parties and the effective functioning of courts and the traditional legal method serves the practical objective of the orderly resolution of individual disputes. To serve its practical purposes the traditional legal method contains a range of assumptions: The law is the product of consensus, it is applied consistently and administered in a neutral, non-interested and non-partisan fashion with a

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[18] Russell et al., *Leading Constitutional Decisions*, p. 7.

minimum of discretion. While technical legal doctrine must be fully examined, an important foundation in any analysis of law, it is inadequate in developing a fuller contextualized understanding of laws and their administration.

For a rigorous understanding of these issues and their relationship to political power there is a need to resort to other empirical methods. Historical research can provide a wider range of insights into why laws were passed and took the forms they did, how the law was administered in practice and how the law was experienced. It does so by accessing a wider range of sources about the law and its administration.

The limitations of such historical research must also be recognized. Generally, written historical evidence in the archives, the most authoritative sources for historians, largely reflects the hand of privileged historical actors (literate, usually official). The historian not only intervenes as an interpreter of these records, they must also fill in the gaps in the evidence to provide a coherent account or narrative of the past. The historian will, therefore, draw upon theoretical considerations to confront these issues.

The methodological problems faced in the broader historical analysis of judicial decision-making are formidable. While the history of legislative enactments can be reconstructed through a vast array of sources such as commission and committee reports and legislative debates, little information beyond the text of the judgment is available to illuminate the underlying views, values and attitudes that influenced judicial public policy choices. Again, the formalism of judicial reasoning serves to obscure or disguise policy positions. These must largely be implied from the patterns indicated in the judgments, the external activities of judges and the context in which they operated. Mindful of these

limitations, this study takes an interdisciplinary historical approach, examining the legal doctrines as well as the broader context in which the judges delivered their decisions. Historical research into legislative debates and other government records is used to supplement the examination of the cases and review of secondary literature in the area.

The issues that I will examine in the subsequent chapters are as follows. In chapter 2, I will explore the political context of Canada and the notions of provincialism, centralism, and imperialism. Key political figures, such as John A. Macdonald and Oliver Mowat, will demonstrate the amount of polarization witnessed regarding the debate on the federal structure and why centralization or decentralization were preferred. Also, I will inquire into the role of the SCC and JCPC as a dispute resolution body or public policy-making device. The origins of the judiciary and judicial review of the BNA Act will highlight the fact that the SCC and JCPC were not functioning within the commonly understood bounds of a judicial body. A brief overview of the literature will indicate the views of those who saw judicial interpretation of the BNA Act either in an activist or restrained route.

Chapter 3 will consider the legal context by examining some of the important cases that were under review by the SCC and JCPC around the time of the Rivers and Streams conflict. The nature and scope of the legislation enacted; the debates between the Dominion government and the province of Ontario; the jurisprudence- traditionalist, doctrinal interpretation or policy activist intervention when striking down laws or upholding valid legislation, will all be examined. I will scrutinize the members of the Supreme Court and the British law lords for their conception of what the BNA Act intended: were they defenders

of centralism or advocates for provincial rights? Finally, I will look at the significance of the case studies in relation to the question of law and politics in the judiciary in 19th century Canada. What effect did the cases have with respect to the make-up of Canadian federalism? What effect did the rulings have on the division of powers as described in the BNA Act, 1867?

Chapter 4 will present an in-depth case study while recognising the limitations of such an approach. It will examine the surrounding issues of politics and economic development, the nature and scope of the Rivers and Streams Act, and the decisions rendered by the trial courts, the Supreme Court of Canada and the Judicial Committee of the Privy Council. While the judgements rendered by the judiciary in *McLaren v. Caldwell* did not directly address the division of powers issue within the BNA Act, the Rivers and Streams episode very much took place within the context of jurisdictional conflict and touched a delicate nerve regarding the constitutional positions of both the Dominion government and the province of Ontario. It illustrates how defining issues in legal terms, combined with judicial formalism, transforms such conflict into a technical problem. This in-depth look at the Rivers and Streams episode is designed to shed further light on the question: are judges above politics or part of the political process?

The conclusion, chapter 5, will re-examine the essential contradiction illustrated by the SCC and JCPC, between the high degree of legal formalism that is in accordance with the role of a judiciary and the profound and lofty public policy-making role performed by the judges and law lords. The rule of law and constitutional principles versus the personal and political/legal philosophies of the judiciary and court decisions as a reflection/response

to the specific political agendas of the various actors at hand will be reviewed. It is hoped that this will provide a fresh examination of the politics of the judiciary and the legal/political function of the judges as depicted in constitutional matters over federal-provincial disputes, stemming from the division of powers set out in the BNA Act, 1867.

Chapter 2

Overview of the Institutional History of the Supreme Court and Judicial Committee, and the Political History of Early Post-Confederation Canada

As suggested in the introduction, judicial review of disputes over jurisdiction under the BNA Act meant that the courts assumed an important new public policy function in the regulation of the powers of government. The implications of this role were highly political. However, as we shall see, politics was not new to the judiciary. The partisan activities of judges outside the courts had long been in controversy in British and British North American colonial history. The institutional irony posed by the BNA Act was that, while introducing the full range of the formal guarantees of judicial independence then prevailing in the United Kingdom to deal with explicit judicial politics, it simultaneously paved the way for a new, implicitly political, dimension to judicial review. The BNA Act, which was a written and federal constitutional document, marked a significant departure from the British constitutional tradition. Even though it was preceded in Canada by written constitutions such as the Quebec Act, 1774 and the Constitution Act, 1791, these documents did not set the stage for constitutional litigation. Moreover, a judicial body did not exist to hear colonial appeals until the mid-19th century.

The public policy/political role of the judiciary has tended not to be openly admitted since the conflicts between Coke and Bacon, the controversies of the Court of Star Chamber, and the attempt to constitutionally entrench judicial independence at the end of the 17th century. In general, common law judges have been reluctant to acknowledge the policy-making function conferred on them by judicial review, as it seems to contradict and

undermine formal claims about the judicial process. Thus, the Judicial Committee of the Privy Council, despite being an advisory body and quasi-judicial institution, was at pains to operate within the narrow technical discourse of doctrines and arguments of law. By attempting to obfuscate what influenced them in the non-legal domain, Canadian and British judges transferred the techniques of statutory interpretation to constitutional interpretation, and strove to provide technical legal accounts of Canadian federalism.[1] This was especially true of the JCPC and their approach to enunciating the real meaning of the BNA Act. Nevertheless, as Garth Stevenson put it, "the courts that have interpreted Canada's constitution have not always succeeded in squaring the circle, and their rulings have often been controversial."[2] Discontent with the substance of the Privy Council's constitutional decisions led in turn to criticism of its technique of interpretation. Before we look at the criticisms concerning the JCPC's approach to judicial interpretation, we need to examine the emergence of the notion of an appeal judicial body dealing with imperial legal concerns.

The Origins of the JCPC

The development of an appellate court to deal with constitutional and imperial legal concerns emerged out of established processes of imperial review of the exercise of colonial legislative powers and two important 19th century institutional reforms. The first was the development of the modern English appeal court. The second was the modernization and juridification of the existing system of imperial legal control.

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[1] F.L. Morton, ed., *Law, Politics and the Judicial Process in Canada* (Calgary: University of Calgary Press, 1992), p. 342.

[2] Garth Stevenson, ed., *Federalism in Canada: Selected Readings* (Toronto: McClelland & Stewart Inc., 1989), p. 10.

In the 15th century, it was customary for the King's Privy Council rather than the English domestic courts to hear appeals stemming from colonial matters. This practice was eventually regulated by the Privy Council Acts of 1833 and 1844, which set up the Judicial Committee of the Privy Council, specified its membership and authorized it to hear appeals from colonial courts. Therefore, the Judicial Committee acted as the highest appellate court for the colonies. As Barry Strayer points out, the JCPC did not question its authority to review the validity of colonial legislation, since the colonies themselves possessed only limited or subordinate legislative powers.[3] According to Strayer, the British colonial system with superior jurisdiction of the imperial parliament and its administrative review of colonial legislation are the origins of constitutional and judicial review in Canada: "The constitutional law of the Empire in 1867 apparently embraced the convention that where legislative powers were granted subject to limitations the courts would enforce those limitations. The BNA Act was drafted and enacted in this context."[4] While this is true in general terms, there is more to the institutional history of the JCPC.

In the eighteenth century, England undertook a series of judicial reforms to eliminate shortcomings within judicial proceedings. According to Daniel Duman, the transformation of the English judiciary involved two steps:

> By 1727 the English courts of justice, which were the product of hundreds of years of development, conflict and reorganization, had begun to be fixed in their modern form. The common law and equity courts had gained supremacy over the ecclesiastical and prerogative courts; the judges held office during good behaviour rather than during royal pleasure; and the jurisdictions of the

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[3] Jennifer Smith, "The Origins of Judicial Review in Canada," in F.L. Morton, ed., *Law, Politics and the Judicial Process in Canada* (Calgary: University of Calgary Press, 1992), pp. 348-349.

[4] Smith, "Origins of Judicial Review," p. 349.

> three common law courts were almost entirely unified.[5] During the remainder of the eighteenth and nineteenth centuries, the reform of the judicial machinery of England continued, and despite the inertia of tradition which sometimes made the courts, judges and lawyers resistant to change, jurisdictions were clarified, the number of judges was increased, centralization was imposed, sinecures, fees and patronage were reduced, and court procedures were rationalized.[6]

Changes within the court structure reflected the discontent amongst parliamentarians and the progressive bar.[7] Perhaps the most important innovation was that of appeal courts. Despite fears of creating a new Court of Star Chamber, the utilitarian reform arguments promoting higher judicial bodies, to lend coherence to increasingly complex laws, prevailed.

By 1875, a unified Supreme Court of Judicature was organized with a High Court consisting of five divisions and a Court of Appeal.[8] The ancient jurisdiction of the House of Lords was,

> restored as the final court of appeal by the Appellate Jurisdiction Act, 1876. There were changes as the judicial sessions were no longer tied to the legislative sittings of the House. Law Lords were also created, chosen from judges of the supreme courts or members of the Bars of England, Scotland and Ireland of fifteen years' standing.[9]

Hence, the House of Lords and the JCPC became professionalized during this era. The remodelling was completed with the Judicature Acts of 1873 and 1875. As stated by

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[5] Brian Abel-Smith and Robert Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System, 1750-1965* (London: Heinemann, 1967), pp. 7-9.

[6] Daniel Duman, *The Judicial Bench in England 1727-1875: The Reshaping of a Professional Elite* (London: Royal Historical Society, 1982), p. 17.

[7] Duman, *The Judicial Bench in England 1727-1875*, p. 18.

[8] *Ibid.*, p. 18.

[9] Abel-Smith and Stevens, *Lawyers and the Courts*, p. 51.

Duman, "[t]he goals of the reform movement can be divided into two main categories: one, a rationalization and simplification of the appeals process; and two, a professionalization of those courts and judicial offices which were outside the control of the Royal Courts."[10] This reform movement originated with the proposals made by Jeremy Bentham in the 1820s.[11] The creation of a professionalized judicial body of the House of Lords ran parallel to the creation of a judicial council to deal with imperial review functions of the Privy Council. Reforms to develop the judicial apparatus of the Privy Council were initiated in 1828 by Lord Henry Brougham.[12] Consequently, the court, "with a newly created professional judiciary [heard] appeals from the rapidly expanding colonial courts. In colonial appeals it replaced an earlier committee made up of...non-professionals. According to Brougham, the Appeals Court in the Privy Council usually included one lawyer, 'but the rest were laymen.'"[13]

While the privy council's imperial committee advised the British government and colonial governors about serious legal controversies and imperial policy, review of the ongoing details about these matters were handled through the Colonial Office, under the direction, most notably, of James Stephen. Influenced by utilitarian reform ideas, Stephen sought to modernize the colonial judiciary while maintaining the levers of imperial control. A number of colonial judges had been in controversy because of their partisan activities.

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[10] Duman, *The Judicial Bench in England 1727-1875*, p. 18.

[11] Paul Knaplund, *James Stephen and the British Colonial System, 1813-1847* (Madison: University of Wisconsin Press, 1953), p. 229.

[12] P.A. Howell, *The Judicial Committee of the Privy Council, 1833-1876: Its Origins, Structure and Development* (Cambridge: Cambridge University Press, 1979), pp. 14-16.

[13] Duman, *The Judicial Bench in England 1727-1875*, p. 19.

Most judges tended to support local elites through direct and indirect influence in executive councils as well as in the courts. A minority became actively associated with reform movements in conflict with local elites, and some were requested to be removed from the bench because of this affiliation.

In 1828, before the House of Commons' select committee on Canada, James Stephen voiced a preference for having colonial judges dependent on the crown and holding office during royal pleasure, despite the fact that in Britain security of tenure was achieved by the beginning of the 18th century (Glorious Revolution, 1689 and Act of Settlement, 1701). Stephen suggested,

> If the judges were independent and irremovable, I fear he would too often become an ally of some one or other of the local parties....Holding in his hands all the power connected with the administration of justice, he would be violently tempted to abuse it to party purposes.[14]

This position was a curious inversion of the principle of security of tenure as the principle of independence was thought to necessitate holding office according to good behaviour rather than royal pleasure. As the quote suggests, royal pleasure exercised through the Crown in Britain as opposed to the Lieutenant Governor in Council was thought to make the judges more independent of local executive influences. The formal guarantee of security of tenure as enjoyed in Britain since the Act of Settlement was not instituted here until the BNA Act 1867.

The other formal guarantee of judicial independence, the separation of powers, went to the heart of Stephen's concerns about partisan colonial judiciaries. In the colonial context, the issue of the interaction between the judicial and the legislative branches of the

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[14] Knaplund, *The British Colonial System*, p. 60.

government became one of great controversy as King's Bench judges were commonly included in Executive and Legislative Councils, in spite of the ending of this practice in Britain in 1803. Judges in some jurisdictions became virtual prime ministers. According to Paul Knaplund,

> James Stephen favoured keeping them quite separate, though perhaps not so rigidly as had been attempted in the United States, yet sufficiently distinct so that a legislator should not also be the law's interpreter in court. Nor did he want the lawmakers to prescribe in detail the regulations for the courts.[15]

Thus, while the formal vestiges of judicial independence were firmly established by the early 19th century in Britain (security of tenure and separation of powers), in the colonies a hybrid was promoted: separation from the partisan influences of colonial executive government yet maintenance of imperial control through keeping tenure according to royal pleasure. In this sense, the establishment of the modern judicial function with the JCPC was an extension of the principles that lay behind Stephen's work on the colonial judiciary in the Colonial Office. The emergence of the JCPC as an imperial court of appeal reflected a combination of imperial review and appellate court reform initiatives.

The Origins of the Supreme Court of Canada

The establishment of the Supreme Court of Canada appears at first glance to be contradictory of the role envisaged for the JCPC. The JCPC was expected to hear disputes between the provincial and Dominion government, with appeals heard directly from provincial courts of appeal. The SCC appeared not only to add another layer to the appeal

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[15] *Ibid.*, pp. 229-230.

process but it was also a national institution with the potential to be used by Ottawa for strategic advantage.

As with the JCPC, judicial formalism was a feature of the Supreme Court of Canada, yet judges in the formative years fulfilled functions that ranged well beyond what is understood as normal judicial duties.[16] Constitutional scholar Peter Hogg noted that there was no general "separation of powers" in the BNA Act, 1867. Canada's constitution did not separate the legislative, executive, and judicial functions and insist that each branch of government exercise only its own function.[17]

Sir John A. Macdonald, in the early stages of his administration, seized the chance to create a supreme court.[18] In a manner consistent with his views of national policy and empire, Macdonald claimed that "the imperial government was to the Ottawa government as the Ottawa government was to the provincial governments. This relationship was to be replicated in the judicial structure."[19] He "clearly intended the court to be an instrument in overseeing the provinces but not the central government. This court was designed to deal with an inferior level of government and to be used as a device of homogenization and centralization."[20] A proposal to transfer the Judicial Committee's authority over colonial appeals was even contemplated.

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[16] James G. Snell and Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press, 1985), pp. xi-xii.

[17] Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977), p. 129.

[18] Snell and Vaughan, *Supreme Court of Canada*, pp. 4-5. For another look at the creation of the Supreme Court, see Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal & Kingston: McGill-Queen's University Press, 1992).

[19] *Ibid.*, p. 6.

[20] *Ibid.*, p. 7.

The central government was firm in its conviction that a supreme court was desirable for the resolution of constitutional questions. In order to offset the displeasure felt by some federal politicians with regard to the power of disallowance acting as an instrument of constitutional arbitration, dealing only with provincial legislation, "the need to establish a new instrument of greater perceived impartiality"[21] was seriously considered.

The first signs of disagreement between Macdonald and Mowat, over the creation of a national supreme court, occurred when Mowat objected to the clauses involving original jurisdiction. Since the BNA Act entitled the central government the "power to disallow provincial legislation and to appoint lieutenant-governors and judges of provincial superior courts, it was unnecessary, Mowat argued, to limit constitutional and other matters to the new court."[22] Cases continued to be referred to the Judicial Committee, ultimately leaving the Supreme Court in a subservient position. It quickly became obvious that the Supreme Court had little prestige and neither the bar nor politicians had much respect for the young institution. Snell and Vaughan concisely spell out the reasons for this negative view of the Court:

> First, the Supreme Court was an intermediary court that could be completely bypassed by appellants. Second, those who favoured strong provincial rights and those who feared any impairment of ties with the mother country viewed the court with distrust if not disdain. Third, the Supreme Court of Canada directly confronted a basic, persistent perception held by central politicians. "[C]onsiderable suspicion of the legal system and profession... [was] a traditional factor in Canadian politics." Politicians distrusted "a centralized and complex system of justice." The Court was thus faced with a pre-existing hostility even before commencing work.[23]

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[21] *Ibid.*, p. 9.

[22] *Ibid.*, pp. 6-7.

[23] *Ibid.*, pp. 23-24.

The legal reputation of the Supreme Court judges was not enhanced when they decided to drop the procedure employed by the Judicial Committee of reaching a single outcome on a ruling. Furthermore, the partisan conduct of the Court's members contributed to the institution's weak image. This spoiled the judicial purity of the SCC, inescapably tagging them as Ottawa's political henchmen.

Much to the provincialists' chagrin, the cast of characters within the chambers of the Supreme Court had a penchant for delivering judgments that had a strongly centralist spin on the BNA Act.[24] This is not surprising since s. 101 of the BNA Act gave the federal Parliament the power to create a "general court of appeal for Canada" and the right to appoint judges to this court.

Several groups in central Canada expressed a disenchantment with the Court and its role in the dominion. Indeed, certain sections of the legal and political community were so staunchly opposed to the presence of the Supreme Court that bills were put forward for the abolition of this institution.[25] The people of Ontario felt that they could not rely on the Supreme Court to uphold the law in that province. As the *Canada Law Journal* explained:

> The profession, as a whole, have not that confidence in it which should appertain to a court of final resort; for example, there is hardly a lawyer, in this Province at least, who would not, on a question of Ontario law, prefer the opinion of our Court of Appeal, or even of one of our Superior Courts.[26]

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[24] *Ibid.*, pp. 15, 26-27.

[25] *Ibid.*, p. 28.

[26] *Ibid.*, p. 29.

Opposition to the Supreme Court was not limited to just the province of Ontario. In Quebec, "lawyers had been unwilling to take any case to Ottawa on the basis that the justices on the Supreme Court were not familiar with the civil law system outside the province.[27]

Prime Minister Macdonald was not bewildered throughout this unrelenting assault concerning a new final court of appeal. His cool response to the scathing criticisms over the Supreme Court are summed up neatly:

> I think we ought not to repeal this Court. We ought not to wipe it out of existence. We ought to face the question, however, and enquire into the cause of the dissatisfaction which is so prevalent. It seems to me there must be a remedy...the Government desire to address themselves earnestly to this matter, and to make a full and exhaustive enquiry into the best means of making the Court, in every sense, efficient and satisfactory.[28]

Antipathy towards the existence of a national supreme court did not bode well for John A. Macdonald. He could not have been pleased to hear that critics hoped that "a reduction of the Supreme Court's jurisdiction would limit the institution's intrusion into provincial legal affairs."[29]

The provincialists and centralists were jostling for position within the Dominion. The nub of their battle revolved around the BNA Act- did the Canadian constitution comprise of true federal principles or was it premised on a legislative union? According to those disenchanted with a Canadian supreme court, they believed that this judicial body intruded "into provincial fields of jurisdiction and was imposing centrally-made decisions"

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[27] *Ibid.*, p. 30.

[28] *Ibid.*, p. 31.

[29] *Ibid.*, p. 31.

on the sovereign provinces.[30] They pointed out that the administration of law under the BNA Act was to be apportioned to the provincial governments, which had their own judicial system dating from earlier colonial times. The Supreme Court made appeals less efficient and the Dominion government wielded considerable influence through its powers on superior court appointments. The defenders of the Supreme Court took into consideration the national role this judicial institution would play in the legal affairs of the new country. It was only to be expected that the Court would receive censure from those disinclined to a strong and self-reliant dominion.[31]

In affirming its power of judicial review of federal legislation by upholding the validity of the Dominion Controverted Elections Act, Chief Justice Ritchie wrote:

> In view of the great diversity of judicial opinion that has characterized the decisions of the provincial tribunals in some provinces, and the judges in all, while it would seem to justify the wisdom of the Dominion Parliament, in providing for the establishment of a Court of Appeal such as this, where such diversity shall be considered and an authoritative declaration of the law be enunciated, so it enhances the responsibility of those called on in the midst of such conflict of opinion to declare authoritatively the principles by which both federal and local legislation are governed.[32]

The Supreme Court of Canada performed the task of enunciating what the real terms of Canadian federalism entailed. In the early stages of the Dominion, the concept of judicial independence and the separation of powers doctrine were put to the test.

The early constitutional decisions of the Supreme Court reflected "a lack of precedents from the Judicial Committee of the Privy Council and a British North America

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[30] *Ibid.*, p. 32.

[31] *Ibid.*, p. 33.

[32] *Ibid.*, p. 33.

Act which... seemed to demonstrate a desire for a strong central government- an interpretation several of the justices had enunciated before moving to Ottawa."[33] Take for example the case of *Lenoir v. Ritchie*[34] whereby Justice Gwynne, in rejecting a provincial claim, said that "nothing can be plainer than that the several Provinces are subordinated to the Dominion Government, and that the Queen is no party to the laws made by those Local Legislatures."[35] Furthermore, in *Mercer v. Attorney-General of Ontario*[36], the Supreme Court "held that in matters of escheat the provincial government did not represent the queen and that therefore the provincial attorney-general could not appropriate the property" reverted to the crown.[37] This was the judicial tenor of the Court's constitutional judgments prior to the JCPC entering the political brawls of Canadian federalism. The constitutional implications of these early decisions from the SCC were disconcerting to those who believed in the development of provincial self-government.

Snell and Vaughan point out, "in ruling for the subordinate status of the provincial governments, the justices were... interpreting the terms of the British North America Act strictly and thus giving effect to its inherently centralist principles."[38] They argue that "this was a matter of strict construction rather than a powerful centralist bias" as illustrated by *Citizens' Insurance Company v. Parsons* (1881).[39] Eventually, in the late nineteenth

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[33] *Ibid.*, p. 40.

[34] *Lenoir v. Ritchie* [1880] 3 S.C.R. 575.

[35] *Ibid.*, p. 41.

[36] *Mercer v. Attorney General of Ontario* [1883] 5 S.C.R. 538.

[37] *Ibid.*, p. 41.

[38] *Ibid.*, p. 41.

century, the Supreme Court's rulings were either replaced or confined by the binding opinions of the JCPC. Litigants in other important cases overlooked the Supreme Court entirely by referring their legal disputes straight to the Judicial Committee. Furthermore, some cases decided in the Court "were overturned or reinterpreted" from England enhancing the status of the provinces under the Canadian constitution.[40]

Two decades after Confederation, it was apparent that appointments to the SCC were a form of Macdonald's "pork barrelling" politics. Those who inhabited the judicial trough preferred to be fed a steady diet of centralist dishes. One example of this came with the death of Justice Henry in May 1888 which created an opening in the Court. The "justice minister and the prime minister considered possible replacements" and "opted to use the appointment" to steer away from a "strict regional representation" of the judicial bench.[41] The prime minister said that "we must endeavour to get a good man who will not throw Dominion rights away." Indeed, feeling uneasy "by the constitutional decisions emerging from the Supreme Court and by the challenges to the national government, Macdonald sought to influence the direction of the Court through the appointing process."[42] Snell and Vaughan make an interesting point:

> That the justices individually could advise the government of the day on minor procedural and broad policy matters relating to the Supreme Court is an indication of the close link between the judiciary and the cabinet. That link was widely perceived to be a source of strength and stability in Canadian society. Government leaders saw the courts as one of a variety of institutions through which political plans for the nation might be achieved.[43]

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[39] *Citizens' Insurance Company v. Parsons* [1881] 4 S.C.R. 215. *Ibid.*, p. 41.

[40] *Ibid.*, p. 42.

[41] *Ibid.*, p. 45.

[42] *Ibid.*, p. 46.

For example, in the Ontario-Manitoba boundary dispute, Macdonald informed the minister of justice, "By skillful steering we can go before the Privy Council with three Courts deciding in our favour."[44]

In summary, in order to identify where the Supreme Court of Canada fit into the judicial review prism, it is essential to determine what the two levels of government thought regarding this court of appeal. The provincialists looked at the Supreme Court with great distrust and uneasiness. They viewed the Supreme Court as an unnecessary layer in the appeal process. Practices were established so that appeals could be made directly to the JCPC from the provincial courts of appeals regarding jurisdictional disputes. Sir John A. Macdonald, however, looked at the SCC as a judicial outlet whereby the Dominion government could voice their legal arguments and constitutional positions concerning questions arising out of the BNA Act. Sir John A. Macdonald and his close friends within the Conservative party believed that the establishment of a Canadian supreme court could provide the legal avenue necessary to successfully pursue constitutional powers in order to build a strong and prosperous country. This tribunal was the judicial apparatus that would bolster the federal government's status when they presented their points of interest in areas of constitutional law and public policy.

The Political Context in Canada

In the "Rivers and Streams" period, which forms the focus of this study, tensions between the province of Ontario and the Dominion government were most explicit over the

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[43] *Ibid.*, p. 48.

[44] *Ibid.*, p. 48.

regulation of liquor and many of the constitutional cases examined in the chapter three overview of judicial review patterns, in one way or another, involved jurisdiction over the liquor trade. From the time of Confederation to the end of the nineteenth century, the battle for power between the provinces and the Dominion government often focused on the social issue of liquor, as "people drank, debated drinking, and regulated drinking."[45]

The provinces, led most notably by Ontario Premier Mowat, continuously challenged the opportunistic constitutional ambitions of Macdonald's dominion government. The political battle between Mowat and Macdonald, in this study, is portrayed as one between two versions of federalism. However, some academic commentators have put forward the argument that the classical federalism debated between the two political heavyweights was not actually established in 1867 and that indeed Macdonald wished to pursue constitutional development in the direction of a unitary system.[46] Macdonald believed that the BNA Act, 1867 bestowed upon the Dominion government a greater political and constitutional status than that of the provinces. The provinces, however, had become accustomed to ever wider authority that was increasingly ascribed to them after the Quebec Act 1774, Constitutional Act 1791, and most importantly the onset of responsible government. From the signing of the BNA Act to the end of the 19th century the vision of the provinces tended to triumph. The favourable results they won in the courts went a long

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[45] P. Macklem et al., *Canadian Constitutional Law*, vol. 1 (Toronto: Edmund Montgomery Publications Limited, 1993), p. 61.

[46] J.R. Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1976), pp. 3-38; J.R. Mallory, *The Structure of Canadian Government* (Toronto: Gage, 1984), pp. 367-391. Richard Simeon and Ian Robinson, *State, Society, and the Development of Canadian Federalism* (Toronto: University of Toronto Press, 1990), pp. 3-57.

way to solidifying their place next to the Dominion government as co-equal partners in the Confederation project.

These differences found a focus on policy debates around the regulation of drinking which form the context for other policy issues such as the rivers and streams issue. The temperance movement in Canada set out "the political and ideological components of the national and provincial prohibition enterprises."[47] Local governments had powers to impose temperance measures based on the federal law from 1878, the Canada Temperance Act. It "allowed the voters of a city or county to ban, by means of referendum, the sale and public consumption of alcoholic beverages."[48] As Patrick Macklem et al. succinctly point out:

> The early cases about liquor... all dealt with challenges to provincial legislation. [The cases involved two different problems that persistently afflicted the courts] until the end of the period being discussed: first, the division of the power to impose prohibition (that is, to abolish drinking by prohibiting the import, manufacturing, and sale of liquor), and the second was the scope of the provincial power to raise revenue from liquor transactions. [Initially], the results of these cases tended to favour the Dominion government.[49]

Nevertheless, since 1867, the provinces progressively gained plenty of constitutional expertise in presenting their legal arguments; reaching their constitutional zenith in the Local Prohibition reference. At stake was the "tension between the Dominion's power to regulate trade and commerce, and the province's power to tax and their police powers.

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[47] Cheryl Krasnick Warsh, ed., *Drink in Canada: Historical Essays* (Montreal & Kingston: McGill-Queen's University Press, 1993), p. 144.

[48] Krasnick Warsh, *Drink in Canada*, p. 144.

[49] Macklem et al., *Canadian Constitutional Law*, p. 62.

[This second power] suggested local regulation about social order, health, and morals; it seemed to be grounded primarily in section 92(8), municipal institutions in the province."[50]

This example helps to illustrate how the law lords, and the judiciary in general, developed these political, social and constitutional themes into judicial pronouncements. It suggests that the Supreme Court of Canada and the Judicial Committee of the Privy Council performed a political role when evaluating the nature and scope of legislative acts. As well, they effectively delineated a constitutional chart to guide courts of law in determining if laws and executive acts conformed with the terms of the BNA Act. Since the centralist and provincialist visions of Confederation were unresolvable in the form of federal-provincial bargaining for most cases, it became the duty of the courts to umpire the federal system by translating the political tensions into legal issues. This will be explained in further detail in chapter three. First it is necessary to further explore the political dimensions that form the context of the contentious appeal cases.

A course of action for a British North American national union had been considered long before the 1860s, yet the timing proved to be too early. By the 1860s internal and external forces propelled the confederation movement forward as was noted earlier. The always present danger of an American invasion resurfaced with vigour during the American Civil War. This threat coupled with British pressure pulled the British North American colonies together. Moreover, internal problems in the colonies convinced both Canadians and Maritimers of the necessity of union.[51] Such problems included the public debt from

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[50] *Ibid.*, p. 62.

[51] Garth Stevenson, *Unfulfilled Union: Canadian Federalism and National Unity* (Toronto: Gage, 1989), pp. 23-24.

extensive railway building, political deadlock and the desire to acquire the Northwest as the Hudson's Bay Company receded in importance. These distinct, largely defensive circumstances, rather than a spirit of nationalism, prepared the way for Confederation. In these early days, very few political officials could comprehend the significant role judicial review would play to help consolidate this fragile union.

From the standpoint of nation-building, the "Great Coalition of 1864"[52] was a result of both the Conservatives and Reformers working together to eliminate the political impasse that prevented the Canadas from flourishing. After Macdonald and Cartier set out the arguments in favour of confederation to the Maritimes at both the Charlottetown and Quebec conferences, an agreement was reached creating the British North America Act. At first blush, the new constitution described the Dominion's continued loyalty to the British Crown, and the commitment to a strong central government within a federal union in which the provinces retained control over their own local affairs. The danger of an American attack, British encouragement of the confederation scheme, and a longing for the Northwest, all combined to maintain the momentum of Charlottetown.[53]

As in Charlottetown, the delegates at Quebec agreed in principle on federation; however, they strongly disagreed over whether the union should have a highly centralized structure or whether it should include an equal division of powers between the central and provincial governments. Macdonald favoured a centralized legislative union, arguing that

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[52] Ged Martin, *Britain and the Origins of Canadian Confederation, 1837-1867* (Vancouver: UBC Press, 1995), pp. 50-52.

[53] G.F.G. Stanley, "Act or Pact? Another Look at Confederation," in Ramsay Cook, ed., *Confederation* (Toronto: University of Toronto Press, 1967), p. 102.

the Civil War in the United States could be attributed to overly powerful state governments. The Maritime governors and the Colonial Office in Britain agreed with Macdonald.[54] The Maritime delegates, nevertheless, fearing a loss of their identity in a legislative union, opposed such a measure. Furthermore, through their spokesman, George-Etienne Cartier, the French Canadians also insisted that the provincial governments retain control over their own religious, linguistic, and cultural rights. The delegates finally reached a compromise by granting the central government residual powers (powers not specifically assigned to the provinces), and by including under the powers of the federal government such general and vague phrases as "to make laws for the peace, order and good government of Canada."[55] In addition, the federal government gained the controversial power of disallowance- the right to reject provincial laws of which it did not approve.

There seems to be few doubts as to the intentions of the framers of Confederation to set up a predominantly centralized federal system in which the central government would exercise unyielding rule. Throughout the debates concerning Confederation, centralization played a prominent role in the views of most of the politicians. The objective of the Confederation plan was clearly spelled out by its leading architect, John A. Macdonald as he told the Canadian Assembly in 1861;

> The fatal error which [the Americans] have committed was in making each State a distinct sovereignty, in giving to each a distinct sovereign power except on those instances where they were specially reserved by the constitution and conferred upon the general Government. The true principle of a confederation lies in giving to the general government all the principles and powers of

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[54] Martin, *Britain*, pp. 238-239.

[55] Russell et al., *Leading Constitutional Decisions*, p. 771.

> sovereignty, and in the provision that the subordinate or individual States should have no powers but those expressly bestowed upon them.[56]

Macdonald's supporters thought strong central powers would provide an antidote to the "states rights" notion that seemed to have caused so much trouble in the United States.[57]

According to Robert Vipond, who has written extensively on issues of Canadian federalism, Sir John A. Macdonald:

> ...cheerfully and candidly admitted in the course of the Confederation Debates that he would have preferred a unitary [system] to a federal government. [H]e believed that what British North America most needed- strong defence, a continental outlook and material prosperity- could best be provided by a regime in which governmental authority was united, not divided. By 1864, he had reconciled himself to the [unworkable notion] of complete union and had given his support to the proposal that, he believed, would produce... a highly centralized, yet still federal, union.[58]

However, "[f]ederalism was traditionally conceived as a league or alliance in which members retained their sovereignty while creating a quasi-governmental authority for certain common, but limited, purposes."[59] The federal structure designed "by the United States Constitution and defended by James Madison... conceived of federal and state authorities as co-equal sovereignties in that each would have complete governmental powers and supremacy within its sphere of competence."[60] Despite Macdonald's preference of a federal government more powerful than the provinces, "the substance of the

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[56] Ramsay Cook, *Provincial Autonomy, Minority Rights and the Compact Theory, 1867-1921* (Ottawa: Queen's Printer for Canada, 1969), p. 7.

[57] Robert C. Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (New York: State University of New York Press, 1991), p. 25.

[58] Robert C. Vipond, "Constitutional Politics and the Legacy of the Provincial Rights Movement in Canada," in *Canadian Journal of Political Science* XVIII:2 (June 1985), p. 271.

[59] Vipond, "Constitutional Politics", p. 271.

[60] *Ibid.*, pp. 271-272.

Confederation proposals nonetheless reflected a Madisonian understanding of the legal basis of federalism."[61] On those subjects listed under section 92 of the BNA Act, only the provinces would have the power to create laws; "as the preamble to section 92 made clear, and as Macdonald himself repeatedly observed, they would have 'exclusive' authority in local affairs. In these matters, the federal government could not interfere"[62] unless they used the powers of reservation and disallowance.

To concisely summarize the features of Canadian federalism that Macdonald found to be desirable, it is interesting to note that he wanted to clarify any errors right away, more out of sheer political expediency so he could move on with his program of building a prosperous nation. Thus,

> For Macdonald, a centralized federal union seemed to offer a way to achieve both the political centralism he thought necessary to build the nation and the provincial autonomy he realized was required to [appease] the various parties to the agreement. The broad grants of power enumerated in section 91 of the BNA Act, together with the general, residual power to legislate for the 'peace, order and good government' of the country, would ensure the requisite political centralism. The exclusivity of provincial jurisdiction in local matters would secure provincial autonomy. The former would provide 'all the advantages of a legislative union under one administration'; the latter would provide "the guarantees for local institutions and local laws, which are insisted upon by so many in the provinces."[63]

Macdonald was convinced "that the Confederation settlement created 'a happy medium' between a legislative and a federal union which... would 'unite the advantages of both,

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[61] *Ibid.*, p. 272.

[62] *Ibid.*, p. 272.

[63] Waite, *Confederation Debates*, p. 44. Vipond, "Constitutional Politics", pp. 272-273.

giving us the strength of a legislative union and the sectional freedom of a federal union, with protection to local interests.'"[64]

The immediate pre-Confederation period had been dominated by consensus that a federal union had to be established in order to break the political stalemate that was suffocating the colonies. By way of contrast, the period after 1867 was influenced by disagreement over the true meaning and implications of the federal principle. In one incident after another, in the first thirty years of Confederation, the governments of Ontario, Quebec and the Maritime provinces objected that the constitutional practices of the Macdonald government contradicted the federal scheme and the basic principles of British constitutionalism. These controversies highlight how differently the provincial rights movement visualized the notion of federalism in Canada.[65]

The debate that took place over the application of the power of disallowance clearly illustrates the development of this discrepancy over the interpretation of the constitution of 1867. Disallowance was a veto power which gave "the federal government the unqualified right to strike down or nullify any act of a provincial legislature. In such matters, however, constitutional practice or convention was just as important as law."[66] Consequently, from the outset, "Macdonald was careful to balance the unqualified legal power of disallowance with clear guidelines for, and limitations upon, its use."[67] As minister of justice in the first

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[64] Waite, *Confederation Debates*, p. 43. Vipond, "Constitutional Politics", p. 273.

[65] Vipond, "Constitutional Politics", pp. 275-276. Donald Swainson, ed., *Oliver Mowat's Ontario* (Toronto: Macmillan of Canada, 1972), pp. 52-69.

[66] Vipond, "Constitutional Politics", p. 276.

[67] *Ibid.*, p. 276.

administration, Macdonald explained the situations whereby disallowance could be implemented in opposition to provincial legislation: illegal or unconstitutional acts which exceeded the boundaries of provincial competence and were deemed ultra vires the provincial legislature. Ramsay Cook points out that:

> As Minister of Justice in 1868 [Macdonald] set down the broad principles which he believed should govern the exercise of the federal veto of disallowance. It is perhaps worth noting in passing that in addition to the broad character of these principles, the important fact is that the judgment was to be made not by a court but by the federal Minister of Justice.[68]

Another point of interest is that "the opponents of Confederation, and later the critics of the Macdonald Government, focussed a great deal of attention on the question of disallowance. Both A.-A. Dorion and Oliver Mowat attacked this power as the chief threat to provincial autonomy."[69]

Mowat, a crafty legal expert, dominated the legal strategies against the dominion during his reign as Liberal premier of Ontario, focusing on the status of the provincial governments in relation to the dominion government with respect to the distribution of executive and legislative powers under the British North America Act. In addition to the antagonism encircling the two governments over the division of powers, another, separate dimension of the controversy dealt with Ontario's claim to some territory formerly belonging to the Hudson's Bay Company.[70] As premier, and especially as the attorney general of Ontario, Mowat would perform the leading role, through the law courts, in

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[68] Cook, *Provincial Autonomy*, p. 16.

[69] *Ibid.*, p. 16.

[70] J.C. Morrison, "Oliver Mowat and the Development of Provincial Rights in Ontario: A Study in Dominion-Provincial Relations, 1867-1896," (Ontario Dept. of Public Records and Archives, 1961), preface.

attempting to resolve the constitutional ambiguities in favour of the province through legal construction.[71]

In the post -1867 era the central legal and constitutional issue was whether the provincial governments were subordinate to, or coordinate with, the federal government.[72] The provincialists, including Mowat,[73] maintained that the BNA Act "had been a formal agreement between the provinces and the imperial government to establish a federal authority for the [achievement] of specific purposes which the provinces had in common."[74] Margaret Evans, in a biography of Sir Oliver Mowat, succinctly sets out the provincialist view, suggesting that the BNA Act thoroughly demarcated the constitutional capacity of the dominion government,

> but not that of the provincial governments. [They] retained all the rights and powers they had enjoyed before Confederation except those ceded to the dominion for the execution of their common goals. The validity of the claim to dominion supremacy [had to rest] on the provinces having given up their corporate rights, and that had not occurred."[75]

The compact theory of Confederation, as this provincialist approach is described, was consequently "a political concept founded on the premise that the contracting provinces in 1867 had been, and remained, sovereign polities."[76]

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[71] A. Margaret Evans, *Sir Oliver Mowat* (Toronto: University of Toronto Press, 1992), p. 141.

[72] Evans, *Sir Oliver Mowat*, p. 142.

[73] Christopher Armstrong, *The Politics of Federalism: Ontario's Relations with the Federal Government, 1867-1942* (Toronto: University of Toronto Press, 1981), pp. 8-32.

[74] Evans, *Sir Oliver Mowat*, p. 142.

[75] *Ibid.*, p. 142.

[76] *Ibid.*, p. 142.

The Mowat era was marked by recurring disputes in relation to the BNA Act. Whether it concerned the title of the lieutenant general or an examination of the division of powers, the provincialists continually "challenged the centralist interpretation"; they would appeal to "the words of the [BNA] Act" and grant "equitable considerations arising from the historical circumstances in which the act" had been created.[77] Thus, Mowat went to great lengths to put legal arguments into coherent language to give provincialists an edge over the Dominion government. Meanwhile Sir John A. Macdonald, although a lawyer himself, was primarily a political opportunist and, therefore, may have sown the seeds for the defeat of his position in terms of the agenda he prepared for the centralists.

In short, the prominent attitude regarding the role of the judiciary was connected to the principle of the separation of powers. As we have seen, a strict separation of power in Britain was not fully entrenched. The Lord Chancellor, who usually exercised control in the JCPC, was also a member of the House of Lords and a member of the cabinet. The Judicial Committee was very much an advisory panel of Her Majesty's Privy Council presenting in the constitutional domain what was essentially political advice. The same can be said of the Supreme Court of Canada with respect to the doctrine of judicial independence and the separation of powers. In light of the Supreme Court's entry into the constitutional arena, it can easily be deduced that the SCC was looked upon "as an instrument of the central government rather than an impartial umpire of federal-provincial disputes."[78]

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[77] *Ibid.*, p. 144.

[78] Stevenson, *Federalism in Canada*, p. 11.

A long history of public policy-making by judges precedes the Charter era and the Canadian Bill of Rights. The public policy role of the judiciary is particularly rich in the area of Canadian federal-provincial relations. The formal claims that judges are placed above the realm of politics had always been called into question in political trials throughout the eighteenth and early nineteenth century as well as in the uncertain role of the JCPC in imperial policy. This "third branch" of government delved heavily into the political process when "attenuating" the powers of the Dominion and bolstering the constitutional status of the provinces.[79] Since the political agendas of the provinces, Dominion government and the British were being played out in the courts, are we not in essence talking about the politics of the judiciary, and the function of the judges as illustrated in constitutional matters in the division of powers outlined in the British North America Act, 1867? The purpose of the next chapter is to re-examine the role judges and law lords played in political controversies concerning federal-provincial relations.

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[79] Russell et al., *Leading Constitutional Decisions*, p. 53.

Chapter 3

A Summary Historiography of JCPC Decisions on Canadian Federalism

In this chapter I will review pertinent portions of the constitutional decisions made by the Supreme Court of Canada and the Judicial Committee of the Privy Council in 19th century Canada. The selected judicial statements on the BNA Act examined demonstrate how the judges and law lords struggled to maintain a legally formalistic approach in assessing which level of government could rule in a given area of public policy. In chapter two an outer context in the form of an overview of institutional and political history was provided. In this chapter an inner context of public policy debates and judicial decisions supported by the existing academic commentary on these issues sets the stage for the empirical focus in the next chapter. Here I intend to illustrate a pattern in the judicial reasoning of the SCC and the JCPC that reflected a tension between public policy and formalism, a matter I hope to convincingly demonstrate and dissect in a detailed case study in chapter four.

The Legal Dimensions of the Centralist and Provincialist Positions

The BNA Act, a written and federal constitutional document, was a departure from the British constitutional tradition even though it did "not provide explicitly for judicial review."[1] As Donald Smiley puts it:

> The domestic constitutional system of the United Kingdom did not include such a procedure, since the Crown in Parliament was sovereign, and there could be no legal challenge to its will. From the early days of the British Empire, however, it had been customary to allow appeals to the Crown against enactments of colonial legislatures, and this procedure had been formalized in

[1] Donald V. Smiley, *The Federal Condition in Canada* (Toronto: McGraw-Hill Ryerson Limited, 1987), p. 48.

> the recognition by imperial statute of the Judicial Committee of the Privy Council.[2]

The controversy over the BNA Act usually centred around the issue of sovereignty. From the standpoint "of English constitutional law as authoritatively formulated by Sir William Blackstone in the mid-eighteenth century, colonial legislatures could not be sovereign: the King in Parliament at Westminster was the sole repository of sovereignty in the empire."[3] By the 1820's this was challenged by reformers who achieved significant advances by mid-century in the form of responsible government. Attorney General Mowat's arguments regarding "the dominion-provincial relationship were rooted in the reform idea of provincial sovereignty as a constitutional right".[4] As Evans points out:

> In the 1820s, W.W. Baldwin and his son Robert had declared the Constitutional Act of 1791 a "treaty" between the mother country and the colonists, under which Upper Canadians had the right to make laws for their peace, welfare and good government, and which could not be altered without their consent. There was no substantial difference between this view and that of the BNA Act as registering a compact between Britain and the provinces. Both implied the sovereignty of the contracting parties. Thus, the compact theory of Confederation was underpinned by the Baldwin doctrine of responsible government. To the Reformers, the imperial concession of responsible government in the 1840s was the irreversible recognition of the colonies' internal sovereignty, a right inherent in British colonies with representative governments.[5]

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[2] Smiley, *The Federal Condition in Canada*, p. 48.

[3] Sir William Blackstone, *Commentaries on the Laws of England*, pp. 48-49, 93-120, in, A. Margaret Evans, *Sir Oliver Mowat* (Toronto: University of Toronto Press, 1992), p. 144.

[4] Evans, *Sir Oliver Mowat*. p. 144.

[5] Paul Romney, "From Constitutionalism to Legalism: Trial by Jury, Responsible Government, and the Rule of Law in the Canadian Political Culture," *Law and History Review* 7 (1989), pp. 148, 152, in, Evans, *Sir Oliver Mowat*, pp. 144-145.

Mowat's linking of responsible government and provincial rights informed his strategies in the courts and legislatures.[6] This notion of provincial rights was incompatible with Sir John A. Macdonald's views of federalism. Undoubtedly in Macdonald's mind the province of Ontario held an inferior "position in the federal union. With equal conviction, Mowat and his colleagues, heirs to the Reform ideology of responsible government and internal provincial sovereignty, regarded dominion predominance" with disdain, claiming that Macdonald's explication of the BNA Act was inaccurate, "not truly federal"[7] and which had to be resisted.

In Quebec the legal basis of provincial autonomy had been advanced by Judge T.J.J. Loranger and supported by Quebec premier Honore Mercier. Based on his interpretation of the Quebec conference resolutions, and the role of the Imperial government in the creation of a federal compact, Loranger concluded that the "confederation of the British Provinces was the result of a compact entered into by the Provinces and the Imperial Parliament, which, in enacting the British North America Act, simply ratified it."[8]

In this context of political debate and differences over constitutional principles, the role of the courts was not only to uphold and preserve the constitution in its form and substance, but to help clarify and resolve the disputes that arose in issues of federal-provincial concern through judicial pronouncements within the rule of law. These unresolved issues were put into legal arguments and subjected to judicial review as a way

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[6] Evans, *Sir Oliver Mowat*, p. 147.

[7] *Ibid.*, pp. 180-181.

[8] Ramsay Cook, *Provincial Autonomy, Minority Rights and the Compact Theory, 1867-1921* (Ottawa: Studies of the Royal Commission on Bilingualism and Biculturalism, 1969), p. 30.

for both levels of government to try to seize the political power they requested. The rule of law was used by the Dominion government and the provinces as a mask to legitimize and galvanize challenges to each others' claims to power. The judges and law lords in stating their opinions of the relationship between a particular legislative act and the corresponding power in the BNA Act had to decide matters in a strictly legalistic fashion in order to side-step the accusation that their reading of the constitution was based on their personal, political or philosophical views.

From the first federalism case they decided in 1873 to the Local Prohibition reference[9], the JCPC consistently reduced in force and value both the federal trade and commerce power and the federal Parliament's general power to regulate the consumption and sale of liquor. During this first period of judicial review, the Privy Council amplified the powers in section 92 for the provinces. Judicial commentators have either praised the work of this final appellate court or attacked it for various reasons. The comments made by the critics of the Privy Council suggest that, despite appearances, the judiciary was not conforming to the proper, non-partisan function it was to uphold.

Various academic commentators, from Gordon Bale to Murray Greenwood, criticized very different aspects of the judiciary, implying that law lords were engaged in politics instead of law. For all of them, the decisions made by the JCPC had to be questioned because it was the legal and political philosophies of the judges that determined the outcome of the cases, and not any rule or principle of constitutional law. As Murray Greenwood put it:

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[9] *Attorney General of Ontario v. Attorney General of Canada* [1896] A.C. 348.

> [This] author takes strong issue with the positivist thesis of G.P. Browne that the federal principle was not imposed on the B.N.A. Act by Lord Watson but derived from it, and his further assertion that judges, like Themis, dispense justice free from extraneous ideological or political considerations. According to Browne, Canadian constitutional law cannot be interpreted in the light of either "policy or history." The *Liquidators* and *Local Prohibition* cases, I contend, cannot be explained without recourse to both.[10]

Undeniably, Sir Montague Smith and Lord Watson had developed their own distinct legal and political philosophy about the meaning of the BNA Act and the role of the court. This review of the series of decisions culminating with the *Local Prohibition* case re-visits the debate about whether the shape and substance of lawmaking in British North America in the late nineteenth century was controlled by the personal, political thoughts of the JCPC rather than by the basic rules of constitutional law.

One of the basic elements or mechanisms of legal reasoning utilized by the judiciary was the legal concept of stare decisis. This concept embodies the notion of judicial subservience to prior decisions or precedents. The notion is that judges are bound by and defer to precedents, thereby restricting their domain to law rather than politics.[11] Interestingly, the JCPC did not consider itself technically bound by precedents. Moreover, judicial review of federalism was a novel matter for the British courts. Hence, none of the cases in the late nineteenth century were or could be decided by reference to previous examples. The sheer complexity and confusion in the structure and wording of the division of powers certainly suggests that there was a great amount of discretionary space in

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[10] Murray Greenwood, "Lord Watson, Institutional Self-Interest, and the Decentralization of Canadian Federalism in the 1890s," *UBC Law Review*, (1974), p. 245.

[11] G.P. Browne, *The Judicial Committee and the British North America Act* (Toronto: University of Toronto Press, 1967), p. 3, 14-20.

defining the concept of federalism in Canada, especially in the early years. All of these factors suggest that the cases were ultimately resolved by reference to values and choices of a political nature.

In the formative years of judicial review, the JCPC appeared to follow a legalistic method of interpreting the constitution. While some jurists were unanimous in denouncing the provincial bias of the Judicial Committee's federalism decisions, they were far from any agreement on a diagnosis of the problem or a prescription for an acceptable Canadian jurisprudence. One school of thought criticized the JCPC for being too doctrinal and literal in its interpretation of the British North America Act, and thereby failing to make it a constitution that corresponded to the changing times. The other principal group of critics accused the Judicial Committee of not following the clear centralist bias of the text closely enough.[12] Opinions of the JCPC's performance in federal-provincial relations have been given extensive coverage by Alan Cairns in his article entitled- "The Judicial Committee and Its' Critics."

In response to Cairns' article, Frederick Vaughan neatly encapsulated the relevant points made by the major critics regarding the politics of the judiciary. His synopsis not so much counters Cairns' piece, but is a logical extension of it. For the purposes of this thesis, it is crucial to highlight some of the main arguments put forward by these constitutional experts since they bring up issues surrounding judicial lawmaking and judicial politics. G.P.Browne's *The Judicial Committee and the British North America Act* seeks to defend the Judicial Committee's understanding of the BNA Act, 1867. Browne believed that

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[12] Alan C. Cairns, "The Judicial Committee and Its Critics," in Garth Stevenson, ed., *Federalism in Canada* (Toronto: McClelland & Stewart Inc., 1989), pp. 81-141.

judges in their pursuit for the intent of Parliament must at times "resort to extrinsic aids."[13] However, the use of extrinsic aids did not extend to the history of the Act. The intention of the legislature could not, Browne insists, be gathered from the debates that took place in the legislature. The words of the BNA Act were the only legitimate means of achieving access to Parliament's intent.

Mark MacGuigan's analysis of the JCPC and SCC strikes at the very core of the tension between legal formalism and policy-making, with policy being described as what one's notion of Canadian federalism entailed. MacGuigan felt that "the Law Lords indulged in extensive judicial legislation, and that the source of their legislative wisdom was not the clamour of the colonial populace, nor even their own observation of the actual exigencies of the society, but rather an abstract and pre-existing concept of federalism."[14]

It is MacGuigan's point connecting the law lords' penchant to judicially legislate with their goal of pronouncing distinctly the true definition of federalism that strikes at the heart of what the judiciary was accomplishing in terms of making public policy rather than strictly adhering to the black letter of the law . The most significant cases in the early period were *Russell v. The Queen*[15], which upheld federal regulation of the liquor traffic under the general power, and *Hodge v. The Queen*[16], in which provincial liquor legislation

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[13] Frederick Vaughan, "Critics of the Judicial Committee: The New Orthodoxy and An Alternative Explanation," in John Saywell and George Vegh, eds., *Making the Law: The Courts and the Constitution* (Toronto: Copp Clark Pitman Ltd., 1991), p. 164.

[14] Mark MacGuigan, "The Privy Council and the Supreme Court: A Jurisprudential Analysis," in John Saywell and George Vegh, eds., *Making the Law: The Courts and the Constitution* (Toronto: Copp Clark Pitman Ltd., 1991), p. 153.

[15] *Russell v. The Queen* [1882] 7 A.C. 829.

[16] *Hodge v. The Queen* [1883] 9 A.C. 177.

not essentially different from the federal legislation approved in the *Russell* case was upheld. MacGuigan states that:

> Over the years the Privy Council established many doctrines to help them interpret the constitution. But these doctrines were merely the implements of the lawyers' craft; they were the tools by which the Law Lords rationalized their conclusions, but they were not the instruments for reaching the conclusions. In essence what the Privy Council had to decide was what meaning and purpose to assign to the whole Act and what meaning and purpose to ascribe to the relevant parts of sections 91 and 92; neither of these tasks is at bottom predetermined by logic or precedent. The ultimate decision had to be a value judgment, or, if you prefer, a policy decision.[17]

MacGuigan finds fault with the JCPC "not on the score of judicial legislation, nor even primarily on the score of favouritism towards the provinces. Their failure was not that they legislated, nor even so much what they legislated, but rather how they legislated."[18] In other words, the JCPC's *modus operandi* was to look at the BNA Act in a formal way and interpret it literally when all along they were making policy.

Like MacGuigan, Cairns suggests the judges assumed a public policy function. Cairns embraces this role in a positive manner, stating that all judges of final appellate courts must rise above the terms of the BNA Act and assume "a candid policy role."[19] Cairns approves of policy-making judges; judges who were not bound by the intention of acts of parliament or by the language of constitutional statutes. He admires the "creative statesmanship" of the Judicial Committee.[20] According to Cairns, the law lords' most basic response to the obligation to exercise discretionary power "was silence, supplemented by

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[17] MacGuigan, "The Privy Council and the Supreme Court," p. 156.

[18] *Ibid.*, p. 157.

[19] Vaughan, "Critics of the Judicial Committee," p. 169.

[20] *Ibid.*, p. 169.

isolated statements of principle dealing with the federal system."[21] The active policy role of the Judicial Committee was required, Cairns insists, because the BNA Act "was not subject to easy formal change by the amending process."[22]

Cairns informs us that despite the jurisprudential restraints under which members of the Judicial Committee laboured, they still were able to obtain results. Conversely, the law lords remained captives of these restraints in the language of their explanations. The Judicial Committee, Cairns explains, "partially escaped from this dilemma by occasionally giving overt recognition to the need for a more flexible, pragmatic approach, and by covertly masking its actual policy choices behind the obfuscating language and precedents of statutory interpretation."[23] Cairns' position is that the Judicial Committee affected the institutional structure of the federation in virtual defiance of the explicit terms of the BNA Act. The JCPC achieved this, Cairns affirms, by taking into account the extraneous evidence provided by the "social realities" of Canada. The main sociological reality was the "federal character" of Canadian society. He subscribed to the proposition that the federalism of 1867 was too centralist for the underlying regionalism of the country.[24]

Reflecting on Peter Russell's general survey of the JCPC, he claims that "the words alone would not yield answers to the constitutional questions that had to be decided." Russell "gives the clear impression that the justices of the early Supreme Court of Canada turned not to legal history but to political history, particularly to their understanding of the

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[21] *Ibid.*, p. 169.

[22] *Ibid.*, p. 169.

[23] *Ibid.*, p. 169.

[24] *Ibid.*, p. 169.

intentions of the Fathers of Confederation."[25] Moreover, he claims that what motivated the law lords was their own view of federalism. "Their commitment to classical federalism," says Russell, "as a fundamental principle of the Canadian constitution underlies most of their opinions and occasionally breaks through their legalistic prose."[26] Russell concerns himself with demonstrating the adequacy of the Judicial Committee's philosophy of law.

In Vaughan's opinion, what is obvious from the transcripts of proceedings before the Judicial Committee in *Russell* and *Local Prohibition* is that "the law lords viewed their function as essentially political, and not as judicial."[27] Vaughan says that "the law lords were required to go beyond the plain words" of the BNA Act,[28] and cautions that we "must not be misled into thinking that the Judicial Committee was adopting a narrow legalistic approach simply because its judgments were expressed in narrow legal terms."[29] According to Vaughan, Lord Watson "went so far at one point in *Local Prohibition* to say that the Judicial Committee did not give judicial opinions. There was a clear disposition on the part of all members of the board to side with the provinces against the claims of the federal Parliament."[30] The written judgments in both *Russell* and *Local Prohibition* "disclosed that almost all the law lords viewed the federal dominance as to be resisted as essentially a threat to viable provinces... What the JCPC attempted to do was to identify

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[25] *Ibid.*, p. 173; Russell et al., *Leading Constitutional Decisions*, p. 16.

[26] *Ibid.*, p. 173.

[27] *Ibid.*, p. 177.

[28] *Ibid.*, p. 172.

[29] *Ibid.*, p. 172.

[30] *Ibid.*, p. 177.

areas of provincial power and place them beyond the easy reach of the federal Parliament."[31] Vaughan states that the JCPC,

> emerge as intent on giving effect to a conception of federalism which was clearly counter to that contained in the BNA Act. This is why they viewed the function of the Judicial Committee as political: their function was to correct the deficiencies of the BNA Act. They viewed their function, therefore, as primarily legislative- to make up for or to correct the mistakes of the legislature. What started as a reasonable judicial proposition- to determine the scope of Dominion and provincial powers- became a political mission.[32]

Having briefly summarized the prevailing explanations as to the course taken by the judiciary, the literature review highlights the manner in which the JCPC and the SCC interpreted the terms of our fundamental constitutional document. There is a consistent disposition throughout the literature on the subject to assume that the Judicial Committee was performing not only a judicial function.[33] It is my contention that the JCPC viewed its role as part of the political or legislative function, in addition to their formal duties.[34]

According to Vaughan, acting as a branch of the legislative process, the Judicial Committee corrected the misunderstandings of the Imperial Parliament and the Canadian framers in 1867. Moreover,

> what the Judicial Committee did was to loosen the terms of the BNA Act so as to accord a greater degree of autonomy to the provinces and thereby to make the Canadian system of government a more authentic federal system. In a certain sense, the Judicial Committee of the Privy Council restored a large measure of the self-government which the provinces had enjoyed before confederation, while at the same time preserving the integrity of the federal

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[31] *Ibid.*, p. 177.

[32] *Ibid.*, p. 177.

[33] *Ibid.*, p. 177.

[34] Cf, pp. 47-48. See MacGuigan's points regarding the role of the JCPC in construing the words of the BNA Act.

> government and Parliament. In so doing the Judicial Committee became in fact the real fathers of Canadian confederation.[35]

In Vaughan's opinion,

> the precise nature of federalism was not a problem for the law lords. They were not attempting to enter into or resolve a theoretical problem over the nature of federalism. The thrust of the discussions before the board and in the judgment of the Judicial Committee was towards finding some measure of exclusive legislative authority for the provinces. They cared little about whether observers called it 'classical federalism' or not. Their chief or dominant concern was to enunciate the basis for provincial legislative authority.[36]

It is here that I disagree with Vaughan. For all his valid points concerning the political role of the judiciary in its vision of the BNA Act, Vaughan inappropriately attacks the JCPC for apparently siding with the provincialists. In my view, the JCPC was not cozying up to the provincial premiers. Rather, it was spelling out the proper boundaries to be used by the dominion government and the provinces within the confines of federalism, an exercise that was nonetheless politically significant.

The Judicial Reasoning of the SCC and the JCPC

Our focus now turns to a direct and detailed legal analysis of the judicial reasoning in the SCC and JCPC. The cases examined centre on the status of the provincial governments in relation to Ottawa with respect to the distribution of executive and legislative powers under the BNA Act, 1867. The judges in the Supreme Court and Judicial Committee were active players for the fights that ensued, charged with authoritatively resolving the difficult issues arising from the Canadian constitution.

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[35] *Ibid.*, p. 181.

[36] Frederick Vaughan, "Reply", in John Saywell and George Vegh, *Making the Law: The Courts and the Constitution* (Toronto: Copp Clark Pitman Ltd., 1991), p. 199.

As we have seen, the points of departure between provincialists and centralists were numerous. Confrontations mainly pivoted around the peace, order and good government clause, the federal trade and commerce power, the provinces' property and civil rights, sections 92(8) and 92(9), and section 92(16)- "Generally all matters of a merely local or private Nature in the Province." One of the first constitutional encounters, in the late 1870s, between Mowat and Macdonald centred around the distribution and regulation of liquor, a highly contentious matter in this period. The cases on this issue will be the focus of the legal analysis in this chapter.

Severn v. The Queen vaulted the Supreme Court of Canada into the constitutional brawl regarding the list of powers in the British North America Act. The Ontario legislature introduced "An Act to amend and consolidate the law for the sale of fermented or spirituous liquors." This law required John Severn, a brewer licensed by the Government of Canada, to obtain a license to sell his manufactured liquor in the province. The Supreme Court held, by a 4-2 decision, that the provincial act was not within Ontario's legislative capacity. Moreover, the province's power to tax and regulate the trade of a brewer, in this case, fell under the regulation of trade and commerce reserved for the dominion government. In the arguments presented by both legal counsel, the question arose as to whether the act imposed upon brewers was a direct or indirect tax. Oliver Mowat, the Attorney-General for Ontario, provided his reasoning in defence of the act. He argued before the Supreme Court that:

> The requirement of the license is neither obnoxious as being an indirect mode of taxation, nor as being repugnant to the jurisdiction of the Dominion in the regulation of trade and commerce. The tax here is direct upon the person, and not upon the commodity...The taxing power is also commensurate with, and

> essential to, the existence of the Government, and this mode of its exercise is not excluded from Provincial jurisdiction.[37]

Adam Crooks supplemented Mowat's legal opinion by neatly summarizing the provincialist concept of federalism within the new Dominion. "By the [BNA] Act," he said, "we are given a constitution similar to the English constitution. In each Province a *plenum imperium* was constituted and not a subordinate authority, or one with only such powers as were specifically conferred. Once jurisdiction is given over a subject matter, the power is absolute."[38] In determining whether the province acted beyond its powers, Crooks asserted that,

> The aim of the Statute...was not to interfere with the general jurisdiction of the Dominion Government. It is not an absolute prohibition for sale generally, but only a charge when sold for consumption within the Province of Ontario...Licenses of any description cannot be limited by any power held by the Dominion Government. There may be here, as in the United States, two powers that may tax the same subject.[39]

A close look at the reasoning provided by the Supreme Court, in *Severn v. The Queen*, will illustrate the tension between judicial formalism and judicial policy-making.

Sir William Buell Richards, the Chief Justice of the Supreme Court, ruled against the Ontario legislation. In his written judgment, Richards briefly summarized the purpose "for federally uniting the Provinces of Canada, Nova Scotia and New Brunswick, and forming the Dominion of Canada."[40] According to the Chief Justice, "by far the larger portion of...ordinary revenue was raised by indirect taxes. [This] seems to indicate that the

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[37] *Severn v. The Queen* [1878] 2 S.C.R. 82.

[38] *Ibid.*, p. 84.

[39] *Ibid.*, p. 86.

[40] *Ibid.*, p. 87.

framers of the British North America Act considered this so important a power that it was not intended to intrust it to the Local Legislatures."[41] Richards also declared that:

> The anomaly of allowing the Local Legislatures to compel a manufacturer to take out a license from the Local Government to sell an article which has already paid a heavy excise duty to the Dominion Government, and after he has paid for and obtained a license from the Dominion Government to do the very same thing, is obvious to every one. It is not doubted that the Dominion Legislature had a right to lay on this excise tax and to grant this license, and the act of the Local Legislature forbids and punishes the brewer for doing that which the Dominion Statute permits and allows. Here surely is *what seems* a direct conflict and interference with the act of the Dominion Legislature, and such a conflict as the framers of the *British North America Act* never contemplated or intended.[42]

Ian Bushnell says that "Richards was well aware of the political nature of the decision making in which he was engaged and the need to rationalize the decisions of the court with the social context."[43]

In fact, the Chief Justice acknowledged implicit judicial law-making. Tension did exist with the proper function of the judiciary in simply applying the law in these circumstances. Richards admitted:

> It may be that I do not take a sufficiently technical view of the matter, that I look too much to the surrounding circumstances and the legislation which I consider applicable to the subject, and that my mind is too much influenced by those circumstances. But I consider the question to be decided is of the very greatest importance to the well working of the system of Government under which we now live. I consider the power now claimed to interfere with the paramount authority of the Dominion Parliament in matters of trade and taxation and indirect taxation, so pregnant with evil, and so contrary to what appears to me to be the manifest intention of the framers of the *British North*

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[41] *Ibid.*, p. 89.

[42] *Ibid.*, p. 94.

[43] Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal & Kingston: McGill-Queen's University Press, 1992), p. 83.

> *America Act*, that I cannot come to the conclusion that it is conferred by the language cited as giving that power.[44]

Nevertheless, in a dissenting opinion, Judge Ritchie felt that the Ontario government had the authority to require brewers to obtain a license under section 92(9) of the BNA Act. Ritchie proclaims that "the power given under sub-section 9 should be construed as intended to furnish the Local Legislature with the means of raising a substantial revenue for provincial purposes from all such licenses...either by provincial or municipal authority."[45]

Ritchie's judicial views promoted the autonomy of the provinces within the structure of federalism. This Ontario act was vital to the collection of revenue and Ritchie was aware of its significance. In his opinion, "so far...as the raising of a revenue for provincial, municipal and local purposes is concerned, the *British North America Act*...gives to the Local Legislatures not an inconsistent but a concurrent power of taxation, and I fail to see any necessary conflict."[46]

Justice Strong, who also dissented, clearly warned his judicial peers that when placing their construction of the BNA Act, "we are to bear in mind 'that it does not belong to Courts of Justice to interpolate constitutional restrictions; their duty being to apply the law, not to make it.'"[47] However, during the course of his written decision, Strong inserts his version of how to read the BNA Act by placing great weight on the province's section 92(9) power.

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[44] *Severn v. The Queen*, p. 95.

[45] *Ibid.*, pp. 99-100.

[46] *Ibid.*, p. 101.

[47] *Ibid.*, p. 103.

It seems that the Supreme Court judges were in a lawmaking position with regard to this matter when assessing the constitutionality of this particular law. The words-"and other licenses"- in section 92(9) were decisive in the determination of whether to grant jurisdiction to the Ontario legislature. Justice Fournier put it this way:

> What subjects would be susceptible of taxation by the mode of licenses, and what subjects would be exempt from such taxation? The line of division is no doubt somewhat difficult to be drawn, in consequence of a vagueness and want of precision in drafting the paragraph in which these expressions are to be found; but the Dominion, no more than the Provinces, can increase its jurisdiction by its own legislation; and we must therefore, notwithstanding the delicacy of the task, have recourse to a judicial interpretation in order to know the limits of both powers.[48]

Fournier conceded that "the power to tax [was] no doubt necessary to the existence of the Local Governments, but it [was] limited and proportioned to the extent of their jurisdiction...This new tax...came certainly in conflict with the power of the Federal Government to regulate trade and commerce, and to impose indirect taxes."[49] Contrary to what Justices Ritchie and Strong mention, Fournier claims that "[w]ith the exception of agriculture and immigration, there is no subject-matter over which there can exist concurrent powers of legislation; and even then, should there be conflict, the authority of the Parliament of *Canada* is supreme."[50]

City of Fredericton v. The Queen[51] is another example of the Supreme Court of Canada plunging into the domain of law-making. Thomas Barker requested to have a

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[48] *Ibid.*, p. 117.

[49] *Ibid.*, pp. 123-124.

[50] *Ibid.*, p. 126.

[51] *City of Fredericton v. The Queen* [1880] 3 S.C.R. 508.

license to sell liquor in his hotel. The city, by virtue of the Canada Temperance Act, rejected his application. After the Supreme Court of New Brunswick held the Canada Temperance Act to be ultra vires of the Parliament of Canada, the mayor of Fredericton appealed to the SCC.

The lawyer for the appellants, Mr. Lash, submitted to the Court that "when the powers specifically conferred upon the Dominion Parliament clash with the powers of the Provincial Legislatures, the latter must give way."[52] He introduces to the Court the reasons why the provinces have no jurisdiction in the regulation of selling liquor despite conceding the fact that the provinces have the power to issue licenses.[53] Moreover, Lash stresses the point that it was the Dominion's intention to curb instances of drunken behaviour. In justifying the validity of the Canada Temperance Act, Lash said:

> In addition to the regulation of trade and commerce, I will also contend that under the 27 sub-section of sec. 91, relating to the criminal law, the Dominion Parliament had power to pass this Act. The power to legislate upon the Criminal Law includes the right to declare Acts...if Parliament thinks that the public good requires it. Drunkenness is a fruitful source of all kinds of crime. In legislating to promote temperance, Parliament is, in an eminent degree, dealing with the criminal law. It is not obliged to wait till liquor has been sold and then drunk till intoxication has ensued and crime has been committed, before dealing with the subject. It has the right to legislate and attack the cause...Drinking liquor was not *per se* a criminal offence, but this law was against the sale, not against the drinking of liquor.[54]

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[52] *Ibid.*, p. 508.

[53] *Ibid.*, pp. 508-509.

[54] *Ibid.*, p. 513.

The arguments in favour of the Canada Temperance Act centred around the notion that whenever there was conflict stemming from the BNA Act, the local interest had to yield to the "concluding words of section 91."[55]

The Supreme Court validated the Canada Temperance Act by a 4-1 majority. Chief Justice Ritchie, in making s. 91(2) paramount, said that "if the Dominion Parliament legislates strictly within the powers conferred in relation to matters over which the British North America Act gives it exclusive legislative control, we have no right to enquire what motive induced Parliament to exercise its powers."[56] Another member of the majority, Gwynne, put forward a constitutional doctrine that favoured a strong Dominion. By presenting a brief account of Confederation and the general objectives of the BNA Act, Gwynne states that the Dominion was to be "a quasi Imperial Sovereign Power," with legislative and executive powers "as absolute sovereign, and plenary as consistently with its being a dependency of the British Crown as it could be, in all matters whatsoever, save only in respect of matters of a purely municipal, local or private character- matters relating...to the family life...of certain subordinate divisions termed provinces."[57]

In *Citizens Insurance Company v. Parsons*, the conflict centred on an 1876 Ontario act concerning fire insurance policies that stipulated a series of standard conditions. Parsons initiated a claim against two fire insurance policies to recover compensation for losses caused by a fire in his hardware store. The core issue was whether or not the Ontario

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[55] *Ibid.*, p. 516.

[56] *Ibid.*, p. 533.

[57] *Ibid.*, p. 561.

statute was within the province's constitutional reach. Although this controversy was a private one, Oliver Mowat and Dalton McCarthy took part in this constitutional debate by putting forth legal arguments for their respective positions.

The Supreme Court of Canada, by a four to two majority, upheld the Ontario legislation. Chief Justice Ritchie, one of the judges in the majority, placed a limitation on the federal government's power to regulate trade and commerce:

> I think the power of the Dominion parliament to regulate trade and commerce ought not to be held to be necessarily inconsistent with those of the local legislatures to regulate property and civil rights in respect to all matters of a merely local and private nature, such as matters connected with the enjoyment and preservation of property in the province, or matters of contract between parties in relation to their property or dealings, although the exercise by the local legislatures of such powers may be said remotely to affect matters connected with trade and commerce... .[58]

Ritchie views the Ontario act in question as dealing with the contract of fire insurance, and not under the scope of s. 91(2).

Ritchie throws light on the type of relationship that is to exist within the framework of Canadian federalism. He "affirms with confidence that the BNA Act recognizes in the Dominion constitution and in the provincial constitutions a legislative sovereignty...as independent and as exclusive in the one as in the other over the matters respectively confided to them." Also, "the power of each must be equally respected by the other, or ultra vires legislation will necessarily be the result."[59] This vision of federalism is the very picture of Mowat's own constitutional portrait regarding the federal-provincial structure. A sharp contrast is evident in Gwynne's dissenting opinion.

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[58] *The Citizens Insurance Co. v. Parsons* [1880] 4 S.C.R. 243.

[59] *Ibid.*, p. 238.

Gwynne confidently asserts that this brand of contracting falls within the domain of trade and commerce. He further declares that in no way can the provinces encroach upon areas that relate to the s. 91(2) power- in this case, the business of fire insurance being deemed a trade. By evoking the memories of the founders of Confederation from the 1860s, Gwynne provides his concept of Canadian federalism:

> Within this Dominion the right of exercise of National Sovereignty is vested solely in Her Majesty, the Supreme Sovereign Head of the State, and in the Parliament of which Her Majesty is an integral part; these powers are, within this Dominion, the sole administrators and guardians of the *Comity of Nations*. To prevent all possibility of the local legislatures creating any difficulties embarrassing to the Dominion Government, by presuming to interfere in any matter affecting trade and commerce, and by so doing violating, it might be, the Comity of Nations, all matters coming within those subjects are placed under the exclusive jurisdiction of the Dominion parliament.
>
> [T]hat the Act in question does usurp the jurisdiction of the Dominion parliament, I must say I entertain no doubt. The logical result of a contrary decision would afford just grounds to despair of the stability of the Dominion. The object of the *B.N.A. Act* was to lay in the Dominion Constitution the foundations of a nation, and not to give to provinces carved out of, and subordinated to, the Dominion, anything of the nature of a national or quasi national existence.[60]

Throughout this period, Gwynne expressed the most sympathy to the federal government and a great understanding of the Macdonaldian constitution.

It is in the Parsons case that the Judicial Committee of the Privy Council makes its foray into Canada's constitutional, legal and political landscape. The JCPC provide a format to determine how the distribution of legislative powers between the federal and provincial governments are to be allocated. After looking at sections 91 and 92, Sir

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[60] *Ibid.*, p. 347.

Montague Smith makes this observation regarding the potential for conflict over legislative authority:

> ...it must have been foreseen that this sharp and definite distinction had not been and could not be attained, and that some of the classes of subjects assigned to the provincial legislatures unavoidably ran into and were embraced by some of the enumerated classes of subjects in sect. 91.
>
> Notwithstanding this endeavour to give pre-eminence to the dominion parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the dominion parliament.[61]

The Judicial Committee suggest that the general power of the Dominion parliament does not in every particular case override the local powers of the provinces whenever it is difficult to distinguish a section 91 or section 92 power.

In trying to avoid possible overlapping of jurisdiction, the Judicial Committee attempt to bring clarity to the messy constitutional situation. In the course of their lordships' judgment, the JCPC seem to acknowledge that their judicial function goes beyond the scope of simply applying constitutional principles to the act in question:

> In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an

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[61] *Citizens Insurance Company v. Parsons* [1881] 7 A.C. 106.

> interpretation of the statute than is necessary for the decision of the particular question in hand.[62]

The JCPC make it clear that it is up to the courts to determine the breadth of the legislative powers bestowed upon the two levels of government. The test that the Judicial Committee formulates seems to give them a wide amount of discretion to ascertain which level of government has the right to enact legislation.

The law lords draw up a blueprint to assess whether an act can be administered by the provincial legislature or the Dominion. The first question is whether the Act falls within any of the classes of subjects enumerated in section 92, and assigned exclusively to the legislatures of the provinces; second, whether, assuming the provincial act relates to one of the headings under section 92, its enactments and provisions come within any of the classes of subjects enumerated in section 91. In answering these questions, the JCPC validated Ontario's fire insurance legislation and limited the extent to which the federal government could argue on behalf of section 91(2). Their lordships state:

> The words "regulation of trade and commerce," in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of parliament, down to minute rules for regulating particular trades. But a consideration of the Act shows that the words were not used in this unlimited sense...Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the dominion parliament...[Its] authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of sect. 92.[63]

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[62] *Ibid.*, p. 107.

[63] *Ibid.*, pp. 110-111.

By virtue of this decision, the JCPC begin to slowly whittle away the strength of the trade and commerce power and elevate the provinces' constitutional rank similar to that of the Dominion. Moreover, having very little precedent available in the area of Canadian federalism, the JCPC take on this full discretionary power to decide on matters of law and policy and bring forward their views of how the federal state should be structured.

In *Russell*, which was regarded as an appeal of *Fredericton*, a private individual brought a case against Russell under the Canada Temperance Act. Russell was a tavern owner who was thought to be selling liquor in violation of the terms set up by the Act. In the Judicial Committee of the Privy Council, Sir Montague Smith said that "what Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety...Upon the same considerations, the Act in question cannot be regarded as legislation in relation to civil rights."[64]

With regard to interpreting the Canada Temperance Act the Judicial Committee characterized the legislation in this way:

> Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada.[65]

The law lords stated the purpose of the 1878 act. According to the JCPC, "the object and scope of the legislation are to promote temperance by means of a uniform law throughout

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[64] *Russell v. The Queen* (1882), 7 A.C. p. 155.

[65] *Ibid.*, pp. 155-156.

the Dominion."[66] Their interpretation of the Act is contrary to the opinion put forward by Chief Justice Allen of the New Brunswick Supreme Court, who defined the act in a more provincialist way in *Barker v. City of Fredericton*

The Judicial Committee found that the Canada Temperance Act did not fall primarily within any of the sub-sections under s. 92 of the BNA Act. It is interesting to note the fact that, under the test set up in Parsons, the JCPC discontinued any further analysis regarding the provisions in section 91. Their unwillingness to look into whether or not the Canada Temperance Act could be placed within one of the sub-sections in s. 91 is curious. They seem to defer to the Supreme Court's decision "who held that the Act, as a general regulation of the traffic in intoxicating liquors throughout the Dominion, fell within the class of subject, 'the regulation of trade and commerce'".[67]

Hodge v. The Queen involved a challenge to Ontario's Crooks Act which transferred the powers over liquor licensing from the municipalities to newly created Boards of License commissioners, appointed and controlled by the provincial government. In addition, the Crooks Act added powers to enable the boards to limit the numbers of licences. Hodge, a tavern-keeper, was charged with permitting billiards to be played in his tavern, contrary to the regulations made by the licence commissioners for Toronto. Hodge challenged the Act on two grounds: first, it conflicted with the Dominion power over trade and commerce; and second, the provincial legislature could not delegate law-making powers to the Boards of Commissioners.

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[66] *Ibid.*, p. 158.

[67] *Ibid.*, p. 159.

The Ontario Court of Appeal dismissed these grounds and the Dominion government appealed arguing that *Russell* gave it extensive control over liquor. Sir Barnes Peacock wrote the judgment for the JCPC. In framing a response to the question of whether the 1877 Liquor License Act was ultra vires the Ontario legislature, the law lords find it expedient to dispell any tension between legal formalism and law-making that might cloud the judiciary. They point out that:

> Their Lordships do not think it necessary in the present case to lay down any general rule or rules for the construction of the British North America Act. They are impressed with the justice of an observation by Hagarty, C.J., "that in all these questions of ultra vires it is the wisest course not to widen the discussion by considerations not necessarily involved in the decision of the point in controversy." They do not forget [what the] previous decision on this same statute (Parsons) their Lordships recommended...[68]

The JCPC seemed to acknowledge that the dilemma they were faced with was the issue of constraining themselves to points of law without entering into a more philosophical, political and policy-oriented debate. The precautions they took from the beginning were imperative to avoid the risk of being tagged as showing favouritism towards one level of government at the expense of another. The Judicial Committee aimed to be free of any perceived bias and thus to portray themselves as a model of judicial impartiality.

The Judicial Committee in *Hodge* did not accept the argument that this particular Ontario legislation infringed upon s. 91(2). They take into consideration the judicial reasoning behind *Russell*:

> It appears to their Lordships that *Russell v. The Queen*, when properly understood, is not an authority in support of the appellant's (Hodge's) contention, and their Lordships do not intend to vary or depart from the reasons expressed for their judgment in that case. The principle which that case and the case of the *Citizens Insurance Company* illustrate is, that subjects

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[68] *Hodge v. The Queen* [1883] 9 A.C. 195.

> which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91.[69]

It was not clear yet as to what direction, if any, the JCPC were taking in deciding Parsons and Russell. Hodge, however, begins to demonstrate a judicial pattern executed by the JCPC which would have the provinces on an equal footing with the Dominion government.

After setting down some rules for interpreting the BNA Act, the law lords view Ontario's Liquor License Act as being of a local nature. They go further and say that:

> ...the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, &c., licensed for the sale of liquors by retail, and such as are calculated to preserve, in the municipality, peace and public decency, and repress drunkenness and disorderly and riotous conduct. As such they cannot be said to interfere with the general regulation of trade and commerce which belongs to the Dominion Parliament, and do not conflict with the provisions of the Canada Temperance Act, which does not appear to have as yet been locally adopted. The subjects of legislation in the Ontario Act of 1877, sects. 4 and 5, seem to come within the heads Nos. 8, 15, and 16 of sect. 92 of British North America Statute, 1867.[70]

The JCPC felt that Ontario was acting within its legislative capacity, that they did not intrude on the powers of the Dominion government.

Another contention was made that Britain did not grant any authority to the provinces to delegate powers to the License Commissioners, and that the provincial government itself had to exercise these powers. In response to this point, the JCPC significantly bolster the status of the provinces within Canadian federalism:

> It appears to their Lordships...that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any

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[69] *Ibid.*, p. 197.

[70] *Ibid.*, p. 198.

> mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.[71]

The penultimate statement with respect to the relationship between the provinces and the Dominion government is judicially crafted in this case. A decade later, in *Liquidators* and the *Local Prohibition Reference*, the JCPC went on to cement the idea that the true principle of federalism involved the provincial governments being equal to the Dominion parliament. What was at the outset a constitution that very much favoured the interests of the Dominion government in the way it was ambiguously worded, became a mission of sorts for the JCPC to attain constitutional balance, by construing the words of the BNA Act so that the provinces could escape their position of relative weakness. The judiciary, undoubtedly, was a major force in shaping dominion-provincial relations.

A review of the early federalism cases demonstrates both the validity of the academic commentary made in this chapter and the argument surrounding the tension between formalism and public policy. Mowat's determined defence of provincial rights was effectively translated into legal arguments. By using the courts in this fashion he forced the

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[71] *Ibid.*, pp. 198-199.

judges to make public policy choices and put them at the heart of his political battles with the Macdonald centralists.

An excerpt from the leading English text on the nature of federalism in the late nineteenth century, A.V. Dicey's *Introduction to the Study of the Law of the Constitution*, highlights the dominant constitutional creed in England and Canada at the time. This is Dicey's comment about federalism and legalism:

> Federalism...means legalism- the predominance of the judiciary in the constitution- the prevalence of a spirit of legality among the people. That in a confederation like the United States the Courts become the pivot on which the constitutional arrangements of the country turn is obvious. Sovereignty is lodged in a body which rarely exerts its authority and has (so to speak) only a potential existence; no legislature throughout the land is more than a subordinate law-making body capable in strictness of enacting nothing but by-laws; the powers of the executive are again limited by the constitution; the interpreters of the constitution are the judges. The Bench therefore can and must determine the limits to the authority both of the government and of the legislature; its decision is without appeal; the consequence follows that the Bench of judges is not only the guardian but also at a given moment the master of the constitution.[72]

In applying the provisions of the various pieces of legislation in dispute to the BNA Act, the JCPC, the highest court in Canada in the nineteenth century, distilled one version of what the constitution meant in the country, and the Supreme Court of Canada produced another version. By distilling the principles and rules from the BNA Act, both the SCC and the JCPC interpreted the constitution such that they did not restrict themselves to the role of simply applying the law. As a number of commentators suggest,[73] the JCPC and SCC were arguably engaged in judicial law-making in attempting to discern the "true meaning"

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[72] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1885), pp. 161-162, in Macklem et al., *Constitutional Law of Canada* (Toronto: Carswell, 1997), pp. 74-75.

[73] Cf., pp. 47-52. The analysis given by MacGuigan, Cairns, Russell, and Vaughan.

of the BNA Act. Were they simply applying standard judicial techniques of interpretation or were they going further? The assertion of the JCPC and SCC dipping into the field of law-making will be demonstrated in the next chapter.

In short, this chapter has looked at the judiciary's interpretation of the BNA Act in relation to the division of powers between the federal and provincial governments. The next chapter, by way of a case study, is as much about policy impact as about law-making. The policy elements of the federalism cases discussed in chapter 3 have dealt with the judiciary's observations concerning the proper jurisdictions of the two levels of government. The policy elements in the 'Rivers and Streams' case are twofold: i) policy consideration with respect to statutory interpretations of provincial laws, and ii) the legal effect the judicial decisions projected on the constitutional functioning of the BNA Act.

Chapter 4

Case Study: The Rivers and Streams Episode

In the thirty years after Confederation, the provincial rights movement became one of the most prominent issues of Canadian federalism. The focus of this chapter will be on a case that was situated at the centre of the provincial rights debate, the Rivers and Streams episode. The case left an identifying mark on the relationship between the Dominion government and the provinces, especially Ontario. The objective of this chapter is to illustrate that although the Ontario Court of Appeal, Supreme Court of Canada and the Judicial Committee of the Privy Council took a formalistic approach to interpreting the British North America Act, 1867, their decision-making in this federalism case was in fact very much entailed with the consideration and making of policy.

It should be acknowledged at the outset that limitations exist in the selection of this case study. The decision which the SCC and JCPC had to make in the Rivers and Streams case was not, strictly speaking, a decision about the constitutional division of powers. Nor was the case an opportunity for the judiciary to validate or invalidate the exercise of the federal disallowance power. Effectively, the courts had to decide if a pre-Confederation statute favoured the interests of a dam owner who supported the federal Conservatives or those of a lumber company with provincial Liberal ties. Nonetheless, the issue the courts had to decide was politically charged, and pitted the federal and provincial governments against each other. While *McLaren v. Caldwell* itself did not directly entail a constitutional issue of legislative authority, the Rivers and Streams bill, presented in the Ontario Legislature, initiated an explosive philosophical debate concerning provincial autonomy in a

federal system of government. The use of the disallowance power to hinder the passage of the provincial law seemed to demonstrate that the relatively new Dominion had quasi-unitary features that were unacceptable to those who believed in a truer form of federalism. As such the Rivers and Streams case was at the centre of federal/provincial tensions which the courts sought to resolve using the classic techniques of legal formalism.

For the purposes of this thesis, policy is not regarded as an either/or affair. There is no bright line between law and policy. Thus a decision-maker is not doing either one thing or the other. Law and policy are best seen as points along a spectrum, raising the question of "more or less", rather than "either/or". The chapter will attempt to identify policy involvement by looking for the apparent impact of policy factors (such as the provincial rights crusade) on the SCC's and JCPC's decisions.[1] Furthermore, instances of consideration of policy by the SCC and JCPC in the course of their decisions will also be examined. This case will illustrate the difficult and politically loaded public policy choices facing the judges. Their decisions on policy made an impact in federal-provincial relations and blurred the line separating the powers of the executive and judiciary.

Further, I will be seeking to demonstrate the judiciary's policy involvement in both negative and positive ways. The negative approach works by implication. For example, I will try to demonstrate this by showing that where the JCPC did not follow the written law, there is a strong suggestion that they implicitly considered and implemented policy. *McLaren v. Caldwell* is a situation where a decision in a non-constitutional legal context had indirect non-legal, but profound, constitutional consequences. Since the initial written arrangement was unclear, policy must have been necessary to supply the gaps. To show

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[1] Cf., pp. 29-31, 37-39.

policy in a positive way, I will point to actual instances of consideration of policy matters in the decisions, and specific ties between Judicial Committee decision-making and some of the economic, social, and political developments of the time. Finally, and perhaps the most important aspect of policy in relation to judicial decision-making of federalism cases, the kind or level of policy I will be seeking to identify is based on general philosophical policy such as that dealing with general theoretical visions of federalism espoused by the Canadian judges and British law lords. The Rivers and Streams case will highlight issues of law and policy, and the role of the judiciary settling, in a covert manner, the irreconcilable views of federalism held by Macdonald and Mowat. In short, the state of affairs surrounding *McLaren v. Caldwell* gave rise to decisions made by the judiciary in a strictly non-constitutional legal context. This took place within a larger, explosive political context and consequently the decisions had indirect constitutional implications for the dynamics of federal/provincial relations.

The controversy over the power of disallowance was a constant theme surrounding the issues of the Rivers and Streams Act. The notion that the Dominion government of the day could render provincial legislation invalid was troublesome to provincialists since they saw this federal power as potentially endangering the constitutional rights enjoyed by the provinces. If the BNA Act was to resemble a constitution containing features of classical federalism, then the presence of the disallowance power posed serious problems in securing that brand of federalism. As the provincial and federal debates regarding the Rivers and Streams Act illustrate, this federal mechanism to strike down provincial measures put to the test the true foundations of Canadian federalism.

The case of Peter McLaren v. Boyd Caldwell and William Caldwell involved conflicting rights; property rights and the right to float timber by anyone for the betterment of the Ontario economy. However, more was at stake than whether McLaren, who owned expansive plots of timber land on both sides of the disputed Mississippi (Ontario) river, had the right to an injunction against Caldwell. At the centre of this issue was a conflict over the essential nature of the British North America (BNA) Act, 1867 and the status of the provinces vis-a-vis the central government. The judiciary helped to clarify and put forward the meaning of the constitution that was to eventually prevail; one which elevated the provinces to a rank similar to that of the Dominion. The political agendas of both levels of government were complemented by the decisions of the Ontario Court of Appeal, the Supreme Court of Canada and the Judicial Committee of the Privy Council. What this says about the judiciary is that they were achieving more than simply interpreting relevant statutes according to set law. The courts were just as involved in the policy platforms and constitutional outlook of Canada as were the respective legislators of the Dominion and provincial governments.

While the Supreme Court remained the guardian of Macdonald's centralist platform, the Judicial Committee solidified Mowat's reputation as the successful defender of provincial rights. The most important matter arising out of the case is how the judges and law lords came to their respective conclusions in relation to the Rivers and Streams Act. If law is "conceived of as consisting of fixed principles that are there to be discovered and applied by judges, with adaptation of the law to the changing circumstances of society to be the task of the legislature," then what we see in this case casts doubt on the idealized

functioning of the courts.[2] The ideal of impartial justice under the Rule of Law, "with a minimum of personal imput by a judge"[3] could not be attained since the judiciary, when presenting their decisions, appeared to make policy choices and by extension were engaged in the creative exercise of law-making. This case, therefore, merits detailed examination because it vividly demonstrates the interaction of law and politics.

Jurisdiction and Public and Private Interests in Riparian Rights

In the second half of nineteenth-century Ontario, a contest for power took place between the judiciary and the executive. As Jamie Benidickson puts it:

> Government involvement in regulating the social and economic life of Ontario expanded dramatically...Legislative intervention and bureaucratic initiatives both at the departmental level and in the form of administrative agencies and commissions were increasingly frequent and varied in nature. The courts experienced severe challenges to their stature as principal institutions for resolving legal conflicts as a consequence of these developments...An apparent diminution in the authority of the courts occurred as primary responsibility for decisionmaking was either removed from the judicial system...or conferred directly on other institutions. In either form, the transition reflected an influential perception that the judicial process was ill suited to the determination of certain important public issues.[4]

This shift in the way of conducting public policy indicated that the judicial process was thought to be ineffective in the resolution of these kinds of issues.[5] The case of McLaren versus Caldwell proves otherwise as the JCPC acted in a manner that ultimately devalued

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[2] Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal & Kingston: McGill-Queen's University Press, 1992), p. 57.

[3] Bushnell, *A Study of the Supreme Court of Canada*, pp. 56-57.

[4] Jamie Benidickson, "Private Rights and Public Purposes in the Lakes, Rivers, and Streams of Ontario, 1870-1930," in, David H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. II (Toronto: University of Toronto Press, 1983), p. 365

[5] Benidickson, "Private Rights and Public Purposes", p. 365.

the proper use of the federal disallowance power and augmented the stature of the Ontario government within the constitutional context of Canada.

Before embarking upon a critical analysis of the political debates surrounding questions of the right to disallow provincial legislation and the dramatic performance of the judiciary in limiting the legislative strength of the Dominion government, it is necessary to briefly outline the legislative and judicial weight given to private rights and public interests in the area of rivers, streams and creeks in 19th century Ontario. According to Jamie Benidickson:

> the competing interests of rival lumbermen set off numerous battles about the use of provincial waterways to the extent that two or more operators often claimed use of the same waterways to transport or to store logs... toll charges for the use of stream improvements were another source of frequent disputes, and competition in the exploitation of water power sites for saw mills and small manufacturing also gave rise to legal clashes. [The] institutions primarily responsible for settling conflicts about the use of water resources in the nineteenth century were the courts through their application of general principles to gradually changing circumstances and conditions.[6]

In Benidickson's view, the judicial response "may be examined in relation to an emerging tension between property and progress", which masked the importance the decisions had with respect to issues of federal-provincial relations.[7] I will look for some explanation relating to the collision between the judicial preference as favoured by the Supreme Court for the established property interests, and the judicial, legislative encouragement of economic development and progress as enunciated by the Ontario Court of Appeal and the Privy Council.[8]

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[6] *Ibid.*, pp. 366-367.

[7] *Ibid.*, p. 367.

Politics of Provincial Rights and the Rivers and Streams Act

The rivers and streams dispute needs to be appreciated in the context of the significance of the forest industry in nineteenth century Ontario. Jamie Benidickson points out that,

> access to waterways was important in the transportation of logs to mills and markets for the purposes of processing and selling. As early as 1847, lumber workers enjoyed the right to use 'all streams in Upper Canada during the Spring, Summer and Autumn Freshets' to float saw logs and timber.[9]

An early decision, *Boale v. Dickson*[10], determined that the right "extends only to such streams as in their natural state will, without improvements, during freshets, permit saw logs, timber, etc. to be floated down them."[11] As a result, the right did not include streams capable of floating timber only by virtue of the enhancements of riparian owners, such as slides. The re-enactment of the legislation in 1877, as part of the Revised Statutes of Ontario, and the lumbering operations of Boyd, Caldwell & Son in 1879-1880 on the Mississippi (Ontario) River instigated a new challenge to the 1863 decision.

The decision in *McLaren v. Caldwell* can be examined in terms of the law's relation to economic development.[12] A functionalist perspective, presented by Carl Stychin, is informed by the analysis of nineteenth century American legal-economic instrumentalism first put forward by Willard Hurst. According to Stychin, "Hurst found that the American experience demonstrated a close relationship between law and economic development":

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[8] *Ibid.*, p. 368.

[9] *Ibid.*, p. 372.

[10] *Boale v. Dickson* (1863), 13 Upper Canada Common Pleas, 337.

[11] Benidickson, "Private Rights and Public Purposes", p. 372.

[12] *Ibid.*, pp. 365-375.

> Not the jealous limitation of the power of the state, but the release of individual creative energy was the dominant value. Where legal regulation or compulsion might promote the greater release of individual or group energies, we had no hesitancy in making affirmative use of the law.[13]

The Canadian situation differed in some important respects from the American, especially in the relationship between the courts and legislatures. One can view the rivers and streams conflict with respect to the "tension between the evident desire of legislators to promote economic development and the reluctance of the judiciary to endorse interference with established property interests."[14]

Jamie Benidickson, in his essay on the subject of the regulation of Ontario rivers and streams, looks at the Ontario government's involvement in the economic growth of the province. He believes that the courts were unwilling to promote an environment conducive to economic development:

> One cannot conclude from *McLaren v Caldwell* alone that the courts either favoured or disapproved productive use of resources when that objective clashed with property interests. The case is at least an indication that the basis for doubt existed and that the legislature could not rely on the judiciary to foster provincial economic progress in clashes with property rights.[15]

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[13] J.W. Hurst, *Law and the Conditions of Freedom in the Nineteenth Century* (Madison: University of Wisconsin Press, 1956) at p. 7, in Carl Stychin, "The Rivers and Streams Dispute," p. 346. Morton Horwitz turned Hurst's thesis around and refined it into an analysis about law as an instrument of capitalism. The American courts both facilitated economic development and performed an ideological function; namely judicial formalism which disguised the economic biases of decisions under technical doctrine. M. Horwitz, *The Transformation of American Law, 1780-1860* (1977).

[14] Benidickson, "Private Rights and Public Purposes," p. 368. Benidickson stresses the "cautious approach of Canadian courts to interference with property rights, [contrasting] with legislative encouragement of resource use." He uses two cases, *Graham v Burr* (1853) and *Dickson v Burnham* (1868), to highlight the judiciary's "respect for established property rights" and their inability to promote development in the lumber industry through judicial declarations. See pages 368-371.

[15] *Ibid.*, p. 374.

The analysis of the rivers and streams issue by Jamie Benidickson and Carl Stychin reflects the influence of R.C.B. Risk who applied Hurst's theories to the study of 19th century Ontario courts and concluded that, unlike Wisconsin, Ontario courts were resistant to innovation (instrumentalism) and overly deferential to British precedents.[16] It can be argued that innovation did indeed occur, but through legislative initiatives rather than common law and that these initiatives tended to facilitate public rather than private enterprise, unlike the situation in the United States, which in turn gave rise to clashes between public and private interests and a more complex relationship between the courts and legislatures. What this literature implies for our focus here is that: 1) Our courts tended to be highly formalistic (an approach which might have implicit political significance such as the ideological functions described by Horwitz); and 2) Legislatures were active in creating jurisdiction over spheres of economic development.

McLaren v. Caldwell is a situation involving the clash between private property rights and the interests of the public. With respect to the role of the judiciary in this case, the Supreme Court of Canada and the Judicial Committee of the Privy Council played a greater role than has been attributed to them.[17] According to the facts of this case:

> one of [the] loggers, Peter McLaren, owned extensive timber lands on both sides of the stream. After making it usable by blasting rocks and constructing dams and slides, he used it to float his own timber downstream. The other, Hugh Caldwell, owned timber lands upstream and attempted to drive his logs down the river through the improvements. After some squabbling, McLaren sought an injunction against Caldwell. Their quarrel had serious implications,

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[16] R.C.B. Risk, "The Last Golden Age: Property and the Allocation of Losses in Ontario in the Nineteenth Century" (1977) 27 U.T.L.J. 199.

[17] Richard Risk and Robert C. Vipond, "Rights Talk in Canada in the Late Nineteenth Century: The Good Sense and Right Feeling of the People," in *Law and History Review* Spring 1996, vol. 14, no. 1, pp. 2-3.

> for timber was a crucial staple in Ontario's economy, and the streams were crucial highways for transporting the logs to mills and markets.[18]

In essence, Caldwell wanted to send his timber down waterways owned by McLaren, "thereby using improvements said to total $250,000."[19] McLaren, "a riparian owner with substantial investments in stream improvements, asserted the absolute and exclusive right to the use of the [improved stream] for the purpose of floating or driving saw logs and timber down the same."[20]

McLaren drafted a claim to the Court of Chancery on 4 May 1880 requesting that Caldwell's industrial practice be halted. An injunction was given on 16 December 1880 by Vice-Chancellor Proudfoot on legal reasoning similar to *Boale v. Dickson*[21]:

> After carefully weighing all the evidence...it seems impossible to escape the conviction, at least I cannot, that without these artificial means neither the Mississippi, nor Louse, nor Buckshot creek, can be considered floatable, even in freshets or high water.[22]

While Proudfoot allowed the injunction to proceed, it is intriguing to note that he provided technical legal reasoning concerning an issue that had broad implications in the area of individual rights and the public good. His "uncreative mechanical approach was appealing since it appeared both safe and easy", and deflected any suspicion one might have regarding the courts taking a keen delight in politics.[23]

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[18] Risk and Vipond, "Rights Talk in Canada in the Late Nineteenth Century," p. 5.

[19] Carl Stychin, "The Rivers and Streams Dispute: A Challenge to the Public/Private Distinction in Nineteenth-Century Canada," (Toronto: *Faculty of Law Review*, vol. 46, No. 2, 1988), p. 343.

[20] Benidickson, "Private Rights and Public Purposes," p. 372.

[21] Stychin, "The Rivers and Streams Dispute," p. 343.

[22] *McLaren v. Caldwell*, (16 December 1880), cited in 1882, 8 *Supreme Court Reports*, p. 450.

[23] Bushnell, *A Study of the Supreme Court of Canada, pp. 477–478.*

During this time, motivated by the quarrel, Mowat's administration examined and approved the Rivers and Streams Act which enabled all loggers to use the waterways, irrespective of whether or not these water routes had been improved by the owner. Besides, Mowat's legislation set up "reasonable tolls" that the riparian owner could collect whenever his improved waterway was put to use by another business interest or individual. The federal disallowance of the Rivers and Streams Act, however, postponed Mowat's initiative and instigated a political controversy.

The debates in the Ontario Legislative Assembly between 1881 and 1885, regarding the Rivers and Streams Act, highlight the pressures to balance traditional riparian rights with the needs of economic development. At the heart of these skirmishes was a profound disagreement over the extent of the provinces' constitutional powers and the legitimacy of the federal disallowance power as stipulated within the BNA Act.

The Ontario Legislature in an Uproar

Ontario Liberal and Crown Lands Commissioner Timothy Pardee first explained the rationale behind the bill "to protect the public interest in streams and rivers" on 22 February 1881. Taking into account the significance of the lumber industry in generating revenue, Mr. Pardee stated that the "proposed legislation was neither new or novel, but simply to explain the law as it stood."[24] The law he was referring to was passed in 1849, providing all persons the right during the spring, summer and autumn freshets of floating sawlogs and timber down all streams. The provincial Liberals had trouble dealing with the 1849 statute since the courts basically decided that the individual was the absolute owner of streams that

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[24] *Globe*, 22 February 1881.

were not navigable. In response to this legal decision put forward in *Boale v. Dickson* , Pardee would not construe the law as "placing one of the largest interests and sources of revenue...at the will and caprice of certain individuals."[25]

Premier Oliver Mowat stated that the "principle involved in the Bill was perfectly plain- that of equal rights to all having business upon the streams."[26] Liberals such as Pardee and Mowat stressed that private rights had to give way to public necessity. Yet the leader of the Ontario Conservative Party, William Meredith, vehemently objected to the bill's proposal "to do away with vested rights." The Conservatives were concerned with the public violation of individual rights with a lack of adequate compensation for those who had made improvements upon streams. They looked at this particular bill as "opposed to sound legislation and establishing a dangerous precedent."[27]

In the speech from the Throne delivered by the Lieutenant-Governor, in January 1882, His Honour lamented the fact that the Dominion government disallowed

> the Act for protecting the public interests in rivers, streams, and creeks. The competency of the Legislature to pass the Act was not questioned, and the Act was disallowed mainly upon the ground that the Minister of Justice did not approve of the mode or extent of the compensation which the Act gave to owners of property affected by the Act.[28]

The reason provided for the disallowance of the Streams Act was that this provincial measure seized private property rights that were deemed to be inviolable. In fact, Mr. Young asserted "that the Streams Act did not come under any of the four clauses

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[25] *Ibid.*

[26] *Ibid.*

[27] *Globe*, 3 March 1881.

[28] Ontario Debates, *The Globe*, 13 January 1882.

enumerated by Sir John Macdonald and its disallowance was, therefore, an unconstitutional use of the veto power."[29] Essentially, the federal government exercised its constitutional power at will threatening to undermine Ontario's legislative freedom, which was granted to it by the BNA Act.

In the address that followed partisanship became stronger and more passionate among the provincial politicians. Meredith's response to the federal government's use of disallowance was supportive. He stated that:

> ...the Dominion Government had the power to veto the Act... that the supreme power of controlling all the legislation of the Provinces was vested in the Parliament of Canada... that the virtue of such a power lay in the fact that the Dominion Government was responsible and accountable to the people of Canada for their course in such matters...[I]f there was any Act which the Federal Government would have been justified in disallowing aside of the question of jurisdiction, the Rivers and Streams Act was such a one. It involved...most dangerous principles interfering with private rights in property without adequate compensation... The Government at Ottawa in disallowing the Act acted...wisely and justly.[30]

The provincial government allotted a fair amount of compensation to the riparian owner for use of his waterways, yet the leader of the opposition was not impressed. Meredith's compliance with the federal government illustrates his status as a provincial spokesperson defending the actions of Macdonald and his cohorts.

Mowat, in reply, sought to clarify the issue by resorting to the legal text. "The B.N.A. Act," according to the Premier, "gave the Provincial Legislatures jurisdiction in all matters such as that now in question. The legal right of the Dominion Government to disallow any Act of the Provincial Legislature no one would deny...Now it seemed that...

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[29] Ontario Debates, *The Globe*, 18 January 1882.

[30] Ontario Debates, *The Globe*, 13 January 1882.

Downing-street interference was less to be feared than interference at Ottawa."[31] The Premier listed the principles he thought the power of disallowance should be exercised: "(1) When the Act is altogether illegal or unconstitutional, (2) when illegal or unconstitutional in part, (3) in cases of concurrent jurisdiction as clashing with the legislation of the General Parliament, (4) when it affects the interests of the Dominion Parliament."[32] Mowat felt that the Rivers and Streams Act did not fall within any of these classes.

The Ontario Liberals were quick to pounce on the federal Conservatives' initiative of rejecting legislation to promote prosperity in the lumber trade. A.S. Hardy was keen to note that "where a Provincial Bill was found to be defective the Local Government should be notified of the fact before disallowance takes place. In this case what notice was given to the Ontario Government of the intention of the Dominion Government to veto the Streams Bill? None at all."[33] Another member of the governing party cleverly pointed out that when the measure was passed, "the Commissioner of Crown Lands stated distinctly that in passing the Bill they were not making a new law, but merely interpreting the law as it stood, adding the clause providing for compensation... [I]f the matter had been intelligently considered by the Minister of Justice he would have discovered that he was recommending the disallowance of an Act which merely set forth clearly the law of the land."[34]

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[31] Ontario Debates, *The Globe*, 16 January 1882.

[32] *Ibid.*

[33] *Ibid.*

[34] Ontario Debates, *The Globe*, 17 January 1882.

A.W. Lauder contended that with the judgment in McLaren v. Caldwell being "reversed by the Court of Appeal since last session [this] proved that the Attorney-General should have left the courts to interpret the law."[35] George W. Ross could not find any grounds warranting the Dominion government to obstruct the Streams Act from becoming law. He quoted Sir A. John Macdonald in a speech given in 1872 regarding Dominion interference of actions espoused by local legislatures. Sir John said:

> The Government of the Dominion could not act, and they would have been guilty of a violent wrench of the Constitution if, because they held a different opinion, they should set up their own judgment against the solemn decision of a Province in a matter entirely within the control of that Province...The Constitution, which had hitherto worked so easily and so well, could not survive the wrench that would be given if the Dominion Government assumed to dictate the policy or question the action of the Legislatures of the different Provinces on subjects reserved by the British North America Act to those Legislatures.[36]

The Dominion government broke with the constitutional principle of not communicating to Ontario their intentions of preventing the province from passing the Streams bill. It was customary that when "a measure [was] considered only partially defective, or where it [was] objectionable as being prejudicial to the general interests of the Dominion, or as clashing with its legislation," that the provinces had the opportunity of taking into account the objections and looking at the proper remedies for legal reparation.[37]

A classic statement on the disallowance issue in context of the Rivers and Streams bill was made by Timothy Pardee, who vehemently justified the rights of Ontario against

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[35] *Ibid.*, 18 January 1882.

[36] *Ibid.*, 19 January 1882.

[37] *Ibid.*, 20 January 1882.

Dominion meddling. He was startled to hear the provincial Conservatives enunciate a constitutional doctrine whereby the federal government had the right under the BNA Act to review and disallow every bill on its merits, even if the subject matter was within the jurisdiction of the provinces. In terms of constitutional usage between the colonies and London, the law and practice of disallowance was very clear. As Pardee said,

> No disallowance had taken place by the Imperial Government of legislation enacted by a colonial legislature having representative and responsible government unless such legislation was contrary to law or interfered with Imperial interests. If it was true...that the Imperial Government could not constitutionally disallow an Act similar to the Streams Act if passed by the Dominion Parliament, then as the section in the [BNA] Act as to disallowance between the Imperial and the Dominion Governments and the Dominion and the Provinces was one and the same section, they were forced to put the same construction of law upon the power of disallowance.[38]

Not unlike the Liberal members who spoke before him, Pardee stipulated the grounds upon which the Dominion could utilize the disallowance power, and if a provincial act was detrimental to the national government, time should be allotted for the province to respond so that an amendment can be made.

Pardee went to the heart of the Confederation project when he talked about the motivation behind disallowance. He said:

> If the people of this country once saw that the exercise of the veto depended upon the amount of party pressure any one who thought themselves aggrieved could bring to bear, then Confederation was not worth ten years' purchase. [I]f upon this question of disallowance everything depended upon party influence brought to bear upon the Ottawa Government, [this] would certainly have the effect at no distant day of shattering, and eventually destroying, our federal system.[39]

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[38] *Ibid.*

[39] *Ibid.*

Pardee made it clear that the right of veto should only be applied in a constitutional manner. In the debates on the Quebec Resolutions, prior to Confederation, "there was no intention of claiming an arbitrary power of disallowance under the veto section. The disallowance [had to] rest upon constitutional rules and practice, and not on mere caprice or because in the judgment of the Minister of Justice the Act was a bad one."[40] The rules of constitutional law seemed to be on the side of the provinces. The local legislatures had "ample and unreserved powers to deliberate and determine absolutely in regard to all matters of local concern."[41] Therefore, it seems that while the Dominion government, under Sir John A. Macdonald, was willing to allow a provincial bill to pass when a "friendly government was in power, the very moment a Government unfriendly to the powers at Ottawa undertook to make use of the provisions of [a] law, then...it was found that the law was unconstitutional."[42] Hence, the Macdonald government used the power of disallowance for political, rather than legal/constitutional, reasons.

Mr. Pardee went on to argue that the necessity for legislation in rivers and streams stemmed from a public and private demand to have the "means of bringing the wealth of their forests to market."[43] The rivers and streams bill "provided the fullest and most ample and complete compensation to the owners" who made improvements of these natural

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[40] *Ibid.*

[41] *Ibid.*

[42] *Ibid.*

[43] *Ibid.*

highways.[44] In terms of what the lumbermen felt and the "drift of public opinion regarding" the rivers and streams bill, Pardee had another interesting point to make. He mentions that,

> The lumbermen of Ontario were an intelligent and shrewd class of men, and yet...the fact that they were appealed to and copies of the Bill were sent them, not a single petition or protest against the passage of the Bill was presented to the House, and unless the protest came from Mr. McLaren, not a member of the House received a complaint against the provisions of the Bill. What more conclusive evidence than that could...prove that the people of this country demanded such an Act?[45]

It was the question of adequately compensating the owners that stirred the Justice Minister into disallowing the act. It is essential to note that Pardee had the backing of the Ontario Court of Appeal when the issue of compensation arose.

Pardee claimed that the Dominion government was swayed into disallowing the Act because of political pressure. McLaren, a wealthy and influential figure, had the resources to control and manipulate the government in Ottawa. Notwithstanding the wishes of the general populace, Ottawa proceeded to invalidate the provincial act since one individual had a powerful affiliation with the federal Conservatives. According to Pardee, the disallowance of the Ontario legislation went against representative and responsible government.

Mowat's speech glossed over the main points introduced by Pardee such as the categories of disallowing provincial measures and the legitimacy of passing retroactive legislation. As far as the issue of compensation was concerned, the reason for the act of disallowance, Mowat declared:

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[44] *Ibid.*

[45] *Ibid.*

> What we have done is to give the owner of the improvements a fair change in the way of compensation for the use of his improvements by those who may wish to use them. We do not take away the improvements from the owner. They still remain his. He has the ownership, but he has not the exclusive right to use them, and he is to receive fair compensation for their use, taking into account the value of the improvements. [46]

On 7 February 1882, during the second reading of the Rivers and Streams bill, Pardee stated that this piece of legislation was not ushered in specifically to satisfy "the interests of McLaren or of Caldwell except to the extent that these gentlemen came within its provisions and scope...The Bill was submitted to meet the public interest and the public necessity."[47] The lumber trade in Canada was crucial in terms of revenue generated simply from exports alone. Pardee was adamant to show that the rivers and streams bill was "required in the public interest, and that so far as any private interests were interfered with or affected by it they were fully protected."[48]

Next to the agricultural sector the lumber trade was the most important to Canada. Yearly provincial revenues from the timber industry were of considerable amount. The significance of the Rivers and Streams bill was explained by Timothy Pardee:

> The agricultural products of the Province were carried to market chiefly over our railways, but in the very nature of things this means of transportation could not be adopted for the products of the woods and forests, which could only be floated down the rivers and streams, their natural highways. Hence the necessity which devolved upon the Legislature of seeing that these rivers and streams were secured to the public use, and that no one, by making small improvements upon them, should be allowed their entire control to the exclusion of the public.[49]

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[46] Ontario Debates, *The Globe*, 27 January 1882.

[47] *Ibid.*, 7 February 1882.

[48] *Ibid.*

[49] *Ibid.*

Pardee further states that the securing of rivers and streams for public use was legislated in 1849. The act in question, under "the Revised Statutes of Ontario, provided that 'All persons may float saw-logs and other timber, rafts and crafts, down all streams during the spring, summer, and autumn freshets , and no person shall, by felling trees, etc., prevent the same."[50] In the case of Boale v. Dickson, the Court took a different view from that contended by Pardee. He would point to the decision rendered by the Ontario Court of Appeal, which had declared that rivers and streams "were for the use of all parties, and that no man, in virtue of making any improvement on any part of a stream, had a right to its absolute control."[51] The intention of the Ontario legislature was to "convey a mere right, viz., to allow logs, timber, and lumber to be rafted down all streams, large and small, in Upper Canada...whether improvements were or were not required, whether or not the streams were floatable at such times, and whether the lands over which they ran were held in fee simple (unlimited) or not."[52]

Mr. Mowat, during the second reading, "looked upon the disallowance as being so monstruous that he did not believe the Government at Ottawa would disallow the Bill again."[53] The act reflected the reality of the lumber business in the province. Owners of improvements allowed others to make use of the waterways under certain regulations that were agreed upon by all involved. He found McLaren to be quite striking in his selfishness and pointed out that "while there were so many streams to which the Bill would apply, so

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[50] *Ibid.*

[51] *Ibid.*

[52] *Ibid.*

[53] *Ibid.*

many streams on which owners had made improvements, not one of them had made any objection to it, with the exception of Mr. McLaren."[54]

In the speech from the Throne of 24 January 1884, the Lieutenant-Governor referred to the recent decisions of the JCPC ruling in Ontario's favour.[55] He said that in disposing of these constitutional cases, the judgments "had a reassuring effect on the public mind, by showing that the federal principle embodied in the [BNA] Act, and the autonomy it was intended to secure for the individual Provinces, are likely to be safe in the hands of the Court of final resort in constitutional questions."[56]

The speech from the Throne in January 1885 witnessed the Lieutenant-Governor congratulating the Ontario administration since "Her Majesty's Privy Council [had] pronounced a judgment in regard to the legal rights of the public in the rivers and streams of the Province, affirming the views so strenuously maintained by the Provincial Legislature."[57] The debate on the address featured Mr. Awrey in the spotlight. The judicial decision delivered by the JCPC in the case of McLaren v. Caldwell was viewed in this manner:

> The taunts thrown upon the Liberal party and the opinions expressed by men who profess to pride themselves upon their great knowledge of constitutional law have been numerous, and now surely they are ridiculous. The results of the decision upon the principle of the [Rivers and Streams] bill- for it is upon the

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[54] *Ibid.*

[55] The cases referred to were: *Hodge v. The Queen* whereby provinces had the constitutional right to regulate the traffic in intoxicating drinks; the insurance case, *Parsons*; and the decision that lands reverted to the Crown for lack of heirs are the property of the provincial legislatures.

[56] Ontario Debates, *The Globe*, 24 January 1884.

[57] *Ibid.*, 29 January 1885.

> principle of the bill that the Privy Council has given a decision- are such as to cause unbounded satisfaction to the friends of the Province.[58]

It was announced that one of the greatest Canadian constitutional lawyers was seated "in the Legislature of the Province of Ontario," when referring to Premier Oliver Mowat.[59] Meredith's reply on the Rivers and Streams Bill was that "there never was a point of constitutional law involved in the case. That bill was an interpretation of the statute."[60]

Mowat's final words with regard to the Rivers and Streams bill were linked to the favourable judgment pronounced by the JCPC. This, it is hoped, should put to rest any doubt as to the importance of the rivers and streams episode to the notion of Canadian federalism and the constitutional make-up of the BNA Act. After four years of bitter debating, it came down to Mowat stating:

> My hon. friend may forget that the Act, of which he complains, and which was passed frequently in this House, was one which did provide for compensation. It is to be remembered that the statute was a very old one. It is not one of ours. It was passed in 1849. When this matter came before the Privy Council one of the arguments was that the Rivers and Streams Bill was fixing upon the statute a construction which was unjust; that if that construction contended for was correct, then the Legislature was giving to the public a benefit of streams and improvements they had no right to. The Privy Council did not think that was so unreasonable as hon. gentlemen opposite thought, and did not attach any importance to that argument.[61]

The debate on the address illustrated the differing conceptions of federalism espoused by the two political parties. In addition to the discussion of disallowance, reference to the decisions made by the JCPC served to enhance the theory that provincial powers were not

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[58] *Ibid.*

[59] *Ibid.*

[60] *Ibid.*

[61] *Ibid.*

diminished since the time of Confederation. Positions were taken as to how desirable it was for Canada to be a centralized nation. In the end, Meredith claimed that the Rivers and Streams bill was a dangerous one fraught with evil. Mowat believed the bill to be just and equitable, promoting economic prosperity in Ontario.

It can be argued that the judiciary was far removed from the strife of politics, as well as being entirely uninfluenced by political considerations. Nevertheless, the issue before the courts (a statutory one in the direct sense, and a constitutional one indirectly) had political overtones. While the judiciary provided a formally legalistic account in their written judgments, underneath this surface of judicial formalism was an inclination on the part of the judges and law lords to either: a) support the private interests of property owners, or b) to encourage the growth of the lumber industry through, not so much the application of the law but, policy-making: the art of the legislative and executive branches of government.

To appreciate the context in which the Ontario Court of Appeal, the SCC, and the JCPC were rendering their respective decisions, it is also important to look at what federal politicians of the day were saying regarding the rivers and streams controversy. A Parliamentary debate about the disallowance of the Rivers and Streams Act ensued in April 1882, exposing fundamental beliefs about federalism, especially the power of disallowance and the concept of provincial autonomy.

Dominion Politics of Disallowance and the Judiciary

The Dominion's decision to disallow, three times, an Ontario Act for Protecting the Public Interests in Rivers, Streams and Creeks[62] represented a great effort on the part of Sir John A. Macdonald's Conservative government to place Ontario in a more constitutionally inferior position in relation to the federal government. The Rivers and Streams controversy became the focal point, in the 1880s, of a greater debate "about the general principles regulating the use by the Government of the power of disallowing Provincial legislation,"[63] in pursuing a policy of denying the political, social and economic program of Premier Oliver Mowat's Ontario. Macdonald, even though he acknowledged that the act was jurisdictionally sound from a legal and constitutional point of view, gave these reasons for disallowing the Rivers and Streams Act, an act that was approved in part "to resolve a private dispute between two lumbermen":

> We were protecting a man from great wrong, from a great loss and injury, from a course which, if pursued, would destroy the confidence of the whole world in the law of the land. What property would be safe? What man would make an investment in this country? Would capitalists come to Canada if the rights of property were taken away, as was attempted under this Bill? This was one of the grounds on which in that paper of mine, of 1867 [sic], I declared that, in my opinion, all Bills should be disallowed if they affected general interests. Sir, we are not half a dozen Provinces. We are one great Dominion. If we commit an offence against the laws of property, or any other atrocity in legislation, it will be widely known...[64]

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[62] Robert C. Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: State University of New York Press, 1991), pp. 76-77.

[63] Vipond, *Canadian Federalism and the Failure of the Constitution*, p. 77.

[64] Robert C. Vipond, "Constitutional Politics and the Legacy of the Provincial Rights Movement in Canada," in *Canadian Journal of Political Science* XVIII:2 (June 1985), p. 284. Canada, Parliament, *House of Commons Debates* (April 14, 1882), p. 924.

Mowat's complete refusal to recognize the use of disallowance as a tool to weaken provincial autonomy had serious consequences concerning the intentions of the framers of the 1867 constitution, and served to illustrate that the BNA Act resembled not so much a federal state, but a unitary, centralist regime under the dictates of Prime Minister Macdonald. The JCPC's decision in the Rivers and Streams case, which had the effect of watering down Macdonald's use of disallowance, show this judicial tribunal's view of federalism as being antithetical to the wishes of those who wanted to build a stronger Canada within the structural framework of a legislative union.

The unfavourable impact on Canadian federalism caused by Macdonald's excessive use of disallowing provincial legislation makes the Rivers and Streams case deserving of a closer look. Nevertheless, there is another reason for studying this case. The role of the judiciary, in particular the Supreme Court of Canada and the Judicial Committee of the Privy Council, had a tremendous impact in determining the final outcome of issues dealing with federal-provincial relations. It is very telling that the Dominion government's creation, the Supreme Court, would decide in favour of Macdonald's colleague, and that the Judicial Committee would side with the Caldwell company which enjoyed strong partisan ties to the Mowat Liberals.

House of Commons in Disarray

The leading address for the Conservatives on the topic of disallowance was made by the fiery advocate Dalton McCarthy. This eccentric political associate was also one of the lawyers representing Peter McLaren. Risk and Vipond summarize the main points from the debates in the House of Commons. According to their account, from a legalistic

standpoint, "McLaren had a common-law property right" with respect to ownership of his rivers and streams, yet "the Ontario legislature had absolute power to modify or terminate it" under section 92(13) of the BNA Act.[65] McCarthy made a distinction between the property and civil rights power and the notion of a strong Dominion government. According to McCarthy, "a fervent believer" of a central Canada, "[t]he legislature was obliged to exercise its power according to principles found in the 'spirit of the constitution,' and one of these principles was that rights should be respected: property should be expropriated only with compensation and for public purpose."[66] Thus, "the primary object of all government is the protection, not merely of life and liberty, but of property."[67] The Rivers and Streams Act, "violated this principle in three ways: it expropriated property without reasonable compensation, for a private purpose, and *ex post facto* it extinguished rights declared by the courts."[68]

McCarthy saw the power of disallowance as a means of removing provincial legislation that "despoil[ed] a man of his property." John A. Macdonald, in a similar vein, emphasized private property rights and the national interest. As Macdonald succinctly put it, "we are not half a dozen Provinces. We are one great Dominion."[69]

Disallowance was necessary to enforce these fundamental laws, to prevent an egregious error and protect the national interest in the eyes of the centralists. "If this 'great

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[65] Risk and Vipond, "Rights Talk in Canada in the late Nineteenth Century," p. 6.

[66] *Ibid.*, p. 6.

[67] *Ibid.*, p. 6.

[68] *Ibid.*, p. 6.

[69] *Ibid.*, p. 6.

wrong' were permitted, [w]hat property would be safe? What man would make an investment in this country?"[70] It is fascinating to see one "watertight" interpretation of what the concept of property meant and how the power of disallowance was given preferential treatment by the federal Conservatives. Juxtapose this with the Ontario Liberals' version of property and disallowance, and what we have is a constitutional conundrum that had not been solved during the formative years of Confederation, thus sadly leaving the BNA Act in its ambiguous, *tabula rasa* form.

Edward Blake, for the most part, was the spokesman for the federal Liberals. Blake criticized the notion of disallowance espoused by the federal Conservatives. He felt that deference towards "Ontario's liberty to make the determination about limiting McLaren's rights" was essential for the smooth running of federalism.[71] He said that "the liberty of the British people to determine their affairs free from despotic monarchs was transformed into the liberty of the people of Ontario to determine their affairs free from a despotic Dominion."[72]

Blake "agreed that McLaren had a common-law property right, but the choice whether to limit the right, [and] whether to enact the Rivers and Streams Act, was a choice for Ontario to make, free from arbitrary interference from the Dominion."[73] At the end of his argument, Blake eloquently recited his position regarding property rights:

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[70] *Ibid.*, p. 6.

[71] *Ibid.*, p. 7.

[72] *Ibid.*, p. 7.

[73] Canada, House of Commons, *Debates*, 14 April 1882, pp. 912-913, 915, in Risk and Vipond, "Rights Talk in Canada", p. 7.

> I am a friend to the preservation of the rights of property...but I believe in the subordination of those rights to the public good...I deny that the people of my Province are insensible to or careless about the true principles of legislation. I believe they are thoroughly alive to them, and I am content that my rights of property, humble though they are, and those of my children, shall belong to the Legislature of my country to be disposed of subject to the good sense and right feeling of the people of that Province.[74]

Other Liberals supported Blake, speaking in very similar tones. Most emphasized provincial autonomy rather than McLaren's rights. Wilfrid Laurier, for instance, said "the Provinces are supreme in their sphere, and...their judgment should not be superseded by the judgment of another power."[75] The Rivers and Streams Act appeared to look innocuous when reading its provisions. Parliamentary debate, however, illustrated how difficult it was to draw the line as to when McLaren's riparian rights ended and the interests of the province took precedence.

A.V. Dicey postulated that Parliament had "the right to make or unmake any law whatever, and further ...no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."[76] As we shall see, the rivers and streams issue was very much a jurisdictional one. Both the judges of the Supreme Court of Canada and the law lords of the JCPC constructively fashioned the Ontario legislation in question to their own liking. They did so using, to good effect, exceedingly technical and doctrinal terms in a case that involved not only property rights and public interests, but- indirectly- the proper exercise of the power of disallowance. It is vital to differentiate the

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[74] Canada, House of Commons, *Debates*, 14 April 1882, p. 915, in Risk and Vipond, "Rights Talk in Canada", p. 1.

[75] *Ibid.*, p. 907.

[76] A.V. Dicey, *An Introduction to the Law of the Constitution* (London: Macmillan, 1885), pp. 167.

issues immediately before the JCPC from the disallowance spectacle. Disallowance was not an issue in the case of *McLaren v. Caldwell*, but the case did, indirectly, affect the legitimacy of the disallowance power. This distinction is crucial to make. The SCC and the JCPC were deciding on matters of a strictly statutory nature in the Ontario case. Nevertheless, it would be difficult to conclude that the judicial enterprise in this case was unaware of the larger issue of disallowance.

McCarthy looked to some external institution for the supervision of McLaren's rights- either the Dominion through disallowance, or the courts. For Blake, the provincial legislature itself was solely responsible; the provincial community assembled in the legislature should determine its own needs.[77] However, as will be demonstrated later in this chapter, it is the judiciary that played the decisive role in deciding on McLaren's rights, and indirectly shaping and defining the genuine meaning of federalism as spelled out in the BNA Act.

Blake's analysis of common-law rights and the emphasis of Ontario's autonomy in Confederation was reflected by his colleague David Mills, one of the most significant and underestimated constitutional figures in late nineteenth century Canada. According to Mills, "federalism meant the division of legislative responsibility between mutually exclusive spheres. Each government was supreme in its sphere and powerless beyond. Disallowance of legislation made by a province within its sphere was fundamentally opposed to these basic principles."[78] In the Rivers and Streams debate, he believed that the Ontario Act was

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[77] Risk and Vipond, "Rights Talk in Canada," p. 9.

[78] *Ibid.*, pp. 10-11.

perfectly acceptable on its merits. Like Blake, Mills made the institutional questions paramount:

> It is not simply a matter of rivers and streams. It is not, as the Conservatives would fondly have the people believe, a matter of private rights or the compensation to be given therefor. It is something above and beyond both. It is the right of the province to enjoy the inestimable privilege of local self-government.[79]

Through Mills' eyes, the issues at stake could be viewed from two lenses: common-law rights and, more importantly, the whole issue of federalism in Canada.

From the perspective of federalism, for McCarthy, Macdonald and the Conservatives, the provinces were subordinate and to be supervised and regulated by the Dominion. For Blake, Mills and most of the Liberals, the provinces were autonomous and coordinate governments. The dissonance revealed between the two sides concerning the precise interpretation of the provinces' and Dominion's status vis-a-vis the constitution encapsulated the struggle regarding 'provincial rights'.[80] It is through the accumulation of decisions by the JCPC that Blake's vision emerged triumphant in the House of Commons, and Mowat's ambitious economic program remained afloat. From the standpoint of rights, McCarthy claimed that legislatures could not be trusted with the final word. Disallowance "was a legitimate means of supervising the provincial legislatures and protecting individual rights, and imperial disallowance played the same supervisory role for the Dominion legislature."[81] Similarly, the courts might perform the same function of refraining provincial

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[79] *Ibid.*, p. 10.

[80] Refer to chapter 2.

[81] Risk and Vipond, "Rights Talk in Canada," p. 10.

governments from passing certain legislation that was inconsistent with the Conservatives' centralist agenda of building Canada into a prosperous nation.

The Triggering of Political Conflict

With the passage in 1881 of an Ontario measure to protect the public interest in rivers and streams another phase in the dominion-provincial encounter commenced. The Rivers and Streams "[A]ct provided retroactively that anyone who rendered a river floatable which had not been so before did not thereby acquire control of the waterway."[82] The province of Ontario had an economic motivation for action. The value of timber permits, from which the Mowat administration received ample revenue, would be greatly diminished if any individual were granted an exclusive right to a stream by simply making a dam or slide. It was only natural that the premier would safeguard the interests of lumbermen. The legislation was consistent "with the commercial outlook" at that time and "with other Liberal legislation for the use of provincial resources for the public good."[83] It appeared "to deal with the dilemma in a fair and practicable way: the tolls were to be set by the lieutenant-governor-in-council, and the owner of the improvements was given a lien on the timber to the amount of the tolls owing him."[84]

The background to the dispute suggests that the rivers and streams controversy was politically loaded. Morrison stated that the "real origin of the dispute, and of the bitterness thereby created, lay in the political affiliations of the chief contestants. McLaren was a

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[82] A. Margaret Evans, *Sir Oliver Mowat* (Toronto: University of Toronto Press, 1992), p. 156.

[83] Evans, *Sir Oliver Mowat*, pp. 156-157.

[84] *Ibid.*, p. 157.

staunch Conservative; Caldwell had a nephew sitting in the Ontario Legislature as a supporter of the Liberal government."[85] The political innuendos spilled into the debate of disallowance, with both sides making accusations that the other side was acting out of political motivation. In the House Commons, for example, Edward Blake stated that "an exceptional course ought not to be pursued...when the alleged defect concerns only the private rights of one individual. Is it because that private right of one individual is the right of a man who is called Peter McLaren, who is a supporter of hon. gentlemen opposite, and who is a friend of the hon. member for Lanark?"[86]

Speaking for the government, one MP, Haggart, responded with accusations of political motivation by the Ontario government:

> This government disallowed this Act, and the Ontario government have repeated it- and why? For the purpose of enabling Mr. Caldwell, a political friend of theirs, who exercises considerable influence...to take his timber through the improvements of my friend, who happens to be a supporter of the Dominion government. I venture to say that if Mr. Caldwell had been a supporter of the Dominion Government they would never have passed that Act.[87]

The fact that issues of federalism were usually politically loaded, the debate of whether the Dominion or provinces had a valid constitutional claim to a particular power or right could be stifled by an overriding veto. The feature of a disallowance clause within the BNA Act gave the constitution a more unitary outlook, rather than a federal one.

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[85] Morrison, "Oliver Mowat and the Development of Provincial Rights in Ontario," p. 215.

[86] Canada, House of Commons, *Debates*, 14 April 1882, p. 914.

[87] *Ibid.*, p. 899.

McLaren petitioned the governor general-in-council and the Rivers and Streams Act was disallowed on 21 May 1881, for the reason that it violated "private rights and natural justice."[88] Crooks, as acting attorney general in Mowat's absence during the summer, responded for the province. The harmony necessary to the smooth operation of the federal system, he affirmed, "could be preserved only by limiting the exercise of disallowance to acts that were unconstitutional or opposed to the general interest of the dominion."[89] Disallowance of the Rivers and Streams Act, which was within provincial jurisdiction, was a "wrongful interference with the constitutional rights of self-government possessed by each Province."[90] Crooks advised that the Ontario government continue to assert its "sovereign authority" in framing laws relating to property and civil rights and the other subjects exclusively assigned to the provinces in 1867.

It is of some interest as well that the alignments of Mowat and Macdonald on the issue were consistent with the positions they had taken in 1859 on private property rights versus the social good.[91] Accordingly, more was involved than pure partisan politics. The philosophical and constitutional visions of Canada, propounded by these two political warriors, were to be won or lost. And the courts acted as the referees in this grudge match. As we will see, the judiciary found it difficult to provide an impartial assessment regarding

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[88] W.E. Hodgins, ed., *Correspondence, Reports of the Ministers of Justice, and Orders in Council upon the Subject of Dominion and Provincial Legislation, 1867-1895* (Ottawa, 1896) at 178, in Stychin, "Rivers and Streams Dispute", p. 355. Also, Robert Vipond's article "The Provincial Rights Movement: Tensions Between Liberty and Community in Legal Liberalism", in Janet Ajzenstat & Peter J. Smith, eds., *Canada's Origins: Liberal, Tory, or Republican?* (Ottawa: Carleton University Press, 1995) at 234 sets out an explanation given by John A. Macdonald regarding the reasons for the disallowance.

[89] Evans, *Sir Oliver Mowat*, p. 157.

[90] *Ibid.*, pp. 157-158.

[91] Benidickson, "Private Rights and Public Purposes," p. 369.

the province's power to enact the statute through a rigorous application of the law, and so the Supreme Court and the Judicial Committee used their discretion to make policy choices as they saw fit within the political, legal and social context of 19th century Canada. Thus, as a result of this legal vacuum surrounding jurisdiction in rivers and streams, the judges and law lords permitted for themselves the "absolute and unlimited ability to choose" which competing interest they favoured.[92] It is appropriate, at this time, to consider what the judiciary were achieving when rendering their decisions in McLaren versus Caldwell.

The Participation of the Courts in the Rivers and Streams Debate

The work of the courts, and the successful outcome of the crusade for provincial rights demonstrated that there was an aura of uncertainty and confusion surrounding the law and legal rules in 19th century Canada. In particular, the vague wording of the BNA Act reflected this general state of uncertainty. The constitution's lack of clarity opened the way for judges and law lords to exercise wide discretion to legislate, taking into consideration the perceived needs of society, even though this was not the proper domain of the judiciary. In the Rivers and Streams dispute, vague wording in statutes invited similar judicial discretion, with results that extended to the constitution itself.

The general principle of disallowance equipped the federal government to invalidate provincial measures only if the law enacted exceeded the jurisdictional boundaries of a province. In the 1880s, Macdonald began to use the power of disallowance more extensively, precipitating a furious storm within Liberal ranks. The thrust of this thesis -the political role of the judiciary- is tied to the events that took place in the context of the

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[92] Bushnell, *A Study of the Supreme Court of Canada*, pp. 477-478.

Rivers and Streams dispute. Although the issues the courts were specifically asked to decide in *McLaren v. Caldwell* did not deal with the shortcomings and confusion of the BNA Act, it is difficult to deny that the decisions of the Supreme Court and the JCPC in this case affected the constitutional landscape between Ottawa and the provinces.

Having portrayed the philosophical, constitutional, and economic ideas of the centralists and provincialists in relation to the Rivers and Streams episode, we can usefully examine what the courts said about the quarrel between the two loggers. At the same time, one must remember that a major constitutional subject -the validity of using the disallowance power- was hanging in the balance. In *McLaren v. Caldwell* the issue was in fact one of statutory interpretation and not of the BNA Act. An Ontario statute enacted in 1849 provided that loggers could use "all streams...during the spring, summer, and autumn freshets." The question was, did "all streams" include streams that had been made usable by riparian owners? In 1863, the Court of Appeal had held that it did not, and Vice-Chancellor William Proudfoot relied on this holding in granting McLaren's claim for an injunction.(The Vice-Chancellor did not deliver a written judgment when he granted the judicial restraint)[93]

Caldwell appealed the Vice-Chancellor's decision, and in July 1882, a few months after the debate in Parliament and in the Ontario Legislature, *McLaren v. Caldwell* moved along to the Ontario Court of Appeal, which overturned the injunction and the decision in *Boale v. Dickson*. The Court stressed the intention of the legislature to "encourage the lumber trade of the province" and that any adversity suffered by McLaren was "a matter for his own consideration when he makes the improvements."[94] In reversing the earlier verdict

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[93] Benidickson, "Private Rights and Public Purposes," p. 372.

by a 3-1 decision, a divided Ontario Court of Appeal freed itself from the legal shackles of previous judicial decisions. Rather than restricting themselves to the prevailing statutory interpretations of the past, the OCA's juridical behaviour was more free-wheeling.

The majority in the Court of Appeal, which included Chief Justice John Godfrey Spragge and Justices Christopher S. Patterson and Joseph C. Morrison, called on a policy of encouraging the logging industry, which they saw expressed in the early nineteenth-century statutes. In *McLaren v. Caldwell*, Chief Justice Spragge "explicitly stated what he believed the legislative preference to be: 'It is obvious...that it was the policy of the legislature to encourage the lumber trade of the province.'"[95] [Spragge] "acknowledged that criticism might be made of the legislature for giving too much consideration to the interests of the lumbermen at the expense of riparian proprietors but that it was not appropriate for the courts to dispute the social balancing of the legislature."[96] He stated the role of the Court in this way: "Our province is to construe the Act, and not to fail to give due effect to it under the idea that its provisions press over hardly upon one class of persons for the benefit of another class."[97]

Justice Patterson expounded an attitude close to Spragge's concerning the "burden of an improver whose efforts and investment rendered a stream fit for the use of lumbermen...[Moreover, he] regarded his task as interpreting the statute in light of the

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[94] *McLaren v. Caldwell*, (1881), *Ontario Appeal Reports*, p. 469, 487.

[95] Benidickson, "Private Rights and Public Purposes," p. 372.

[96] *Ibid.*, p. 372. *McLaren v Caldwell* (1881), 6 *Ontario Appeal Reports*, p. 469

[97] *Ibid.*, p. 372, p. 469.

legislative intention of the Ontario government."[98] This is how Patterson explained the conflict:

> It may be in appearance, and perhaps in reality, rather hard on the man at whose expense what was a highway only in legal contemplation becomes one fit for profitable use, to have to allow others to share in the advantage without contributing to the cost. That is, however, a matter for his own consideration when he makes the improvements...All these statutes proceed upon the assumption that the attribute of a highway, for at least one branch of commerce [lumbering], attaches to streams of all degrees of size and volume.[99]

Justice Burton, who dissented, argued that a statute should not be interpreted so that it impaired McLaren's private property unless its language was clear.[100] It is quite evident that the reasoning offered for both interpretations of the Act fall under the categories as pronounced by the Liberals and Conservatives. One has to wonder if these four judges masked their personal, philosophical views behind the pretence of legal formalism. The members of the Ontario Court of Appeal maintained that they were making a statutory decision.

It is during this time (1881-1882) that the Ontario legislature intervened, reacting to McLaren's success at trial, with *An Act for Protecting the Public Interests in Rivers, Streams and Creeks*, which expressly accepted the rights of users to waterways not usable but for riparian improvements. Nonetheless, the statute did provide that the rights of lumber companies were subject to the payment to the person who had made such constructions and improvements, of reasonable tolls.[101]

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[98] *Ibid.*, p. 373.

[99] *Ibid.*, pp. 372-73. *McLaren v Caldwell* (1881), 6 *Ontario Appeal Reports*, p. 487.

[100] Benidickson, "Private Rights and Public Purposes," pp. 372-373; Risk and Vipond, "Rights Talk in Canada," pp. 10-11.

The federal government responded to a petition from McLaren and disallowed the Act immediately in 1881, without any consultation with the Ontario government of Oliver Mowat. In a remarkable series of events, the legislation was reintroduced and disallowed in 1882 and 1883 and was finally passed without disallowance in 1884. In 1882, the case was appealed to the Supreme Court of Canada and judgment was delivered by the Court, reversing the decision of the Ontario Court of Appeal and upholding the judgments of the Court of Common Pleas and the Court of Chancery. The Supreme Court maintained that McLaren's proprietary rights were to remain sacrosanct. They had no difficulty admitting that the public enjoyed the right to use waterways in their natural state, but they were more concerned with the public's right to accessibility of streams, deemed non-floatable, when the riparian owner improved them at his cost and having no recourse to compensation. The justices of the Supreme Court resorted to previous decisions made by other jurisdictions prior to Confederation to justify negating Caldwell's opportunity to use streams that were enhanced by the private owner. Chief Justice William Johnstone Ritchie affirmed that:

> statutes which encroach on the rights of the subject, whether as regards person or property, should receive a strict construction, and if a reasonable doubt remains...the subject is entitled to the benefit of the doubt...unless the intention of the Legislature is clearly and unequivocally indicated.[102]

From this perspective, he reached the conclusion that:

> the object of the Legislature was, ...in the interest of the timber business, not to interfere with or take away any private right, but to settle by statutory declaration any doubt that might exist as to streams incapable of being navigated by boats, but capable of floating property such as saw logs and timber...the action of the Legislature was not intended to interfere with private

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[101] Garth Stevenson, *Ex Uno Plures: Federal-Provincial Relations in Canada, 1867-1896* (Montreal & Kingston: McGill-Queen's University Press, 1993), p. 73.

[102] *McLaren v. Caldwell* [1882] 8 S.C.R. 440.

> property and private rights in streams not by nature floatable at any season of the year.[103]

The Chief Justice also pointed out that if private rights were to give way to public necessity it should be "through the instrumentality of expropriation, with suitable and full compensation under and by virtue of the right of eminent domain."[104] Ritchie C.J.'s judicial opinion was very similar to Sir John A. Macdonald's view regarding private rights. Ritchie C.J. took a narrow view of the law and overlooked Ontario's primary intention in introducing the Act. He constrains himself to a discussion on the floatability of rivers.

In essence, the SCC ruled that McLaren had a legal right to prevent Caldwell from driving timber down private property. These streams were not regarded as part of the public highway. The judges rely on past canons of construction when reaching their decisions. Strong, J. neatly summarized the main issues at hand:

> ...in the case of a stream made navigable by artificial construction, the imposition of a public right of user would be to appropriate private property to public uses without compensation; an encroachment on proprietary rights, which the law not only never sanctions, but seeks in every way to avoid, in the case of positive written laws, by adopting strict and exceptional rules of construction.[105]

McLaren had an exclusive right to the use of streams that were classified as non-navigable. The Court found no evidence at common law or by statute, with the exception of the OCA's ruling, to interfere with McLaren's sole title to his land.

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[103] *Ibid.*, p. 441.

[104] *Ibid.*, p. 444.

[105] *Ibid.*, pp. 455-456.

Next, the role of the Judicial Committee of the Privy Council in the Rivers and Streams saga will be examined. Although the Judicial Committee took a formalistic approach to interpreting the Canadian Act in question, their decision-making in Caldwell et al. v. McLaren was tinged with aspects of policy. This being the main concern of the thesis, it is necessary to look closely at what the JCPC did say in this case.

On appeal from the Supreme Court of Canada, the legal issue in front of the Judicial Committee was the right to float timber down the streams of Ontario. Legal counsel for the appellant, Mr. Caldwell, "contended that on a true construction of the statutes in force in the province of Ontario the respondent [Mr. McLaren] had no right to prevent the appellants from floating timber and logs down the streams in question."[106] The lawyers argued that the statutes broadened common law rights and served the public interest by conferring "the right on every one to float timber and logs down every stream in the province."[107] They go on to assert that the "Vice-Chancellor was wrong in holding that Boale v. Dickson decided that if improvements were necessary to render rivers and streams floatable then the owner...could exercise his common law right of preventing all intrusion upon his property."[108] In summary, Caldwell's legal team put it clearly: "The right given by the statute applies to all streams and all parts of them, whether floatability is the result of improvements or not."[109]

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[106] *McLaren v Caldwell* (1884) 9 A.C. 392-93.

[107] *Ibid.*, p. 393.

[108] *Ibid.*, p. 393.

[109] *Ibid.*, p. 393.

The Solicitor-General (Sir F. Herschell) and Dalton McCarthy presented the case for the respondent, Peter McLaren. They maintained "that the streams in question, not being navigable in their natural state, were the private property of [McLaren] wherever they flowed through the lands of the respondent, and were not subject to any easement."[110] Basing themselves on a rule of property law in favour of McLaren, the lawyers contended that these streams with improvements were the domain of McLaren, "and did not by virtue of the statute or otherwise become available for the appellants."[111] Reference to Boale v. Dickson was made whereby the courts decided "that [the relevant statute] did not apply to streams which had been rendered floatable by private expenditure."[112] According to McLaren's lawyers, the particular statute at hand had to be strictly construed, preferring private rights over the general interests of the public.

The five members present in the Judicial Committee were: Lord Blackburn, Sir Barnes Peacock, Sir Robert P. Collier, Sir Richard Couch, and Sir Arthur Hobhouse. The judgment of their Lordships was delivered by Lord Blackburn. In the course of his judgment Blackburn recounts the bill of complaint introduced by McLaren alleging that he has the exclusive, uninterrupted rights to streams that have been improved by whatever means. Moreover, McLaren is appalled with the fact that Caldwell uses the streams without paying any compensation and so he pleads to the court that some sort of remedy be given to him for the use of these streams.

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[110] *Ibid.*, p. 393.

[111] *Ibid.*, p. 393.

[112] *Ibid.*, p. 393.

In reply, the Caldwells, who needed access to the Mississippi river in order to bring timber and saw logs to their saw mill, stated that they "have...been always ready and willing to pay [McLaren] any proper sum for the use of any of [the] said improvements"[113] - a position which Lord Blackburn described as "fair and just". In addition to this, the Caldwells felt that they were entitled to utilize all the streams within the meaning of the statutes. It seems that the JCPC realized that this issue regarding the use of streams to float timber was a murky one in relation to law. Yet they all agreed that the question for them to determine was "purely one of law."[114]

In setting out the legal problem, Lord Blackburn said:

> ...it is not pretended that the statutes provide in terms that if [the defendant-Caldwell] uses...improvements he shall pay for them. Had either of [the statutes of Upper Canada] done so, the intention of the legislature to authorize him to pass over the obstacle by means of the improvements would have been quite clear. The absence of any such provision is strongly relied on as shewing (sic) that the legislature did not so intend.[115]

After reading carefully a smorgasbord of judicial opinion over this matter, the JCPC finds the decision of the Ontario Court of Appeal to be the correct one. They agree with their assessment on placing limits on the rights of owners of streams in relation to the interests of the public.

The Judicial Committee refer to policy considerations when they talk about the fact that legal uncertainty arose as to whether or not a right existed for all concerned to the use of streams "not navigable for general purposes, to float down timber."[116] No case of

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[113] *Ibid.*, p. 401.

[114] *Ibid.*, p. 402.

[115] *Ibid.*, p. 404.

similar fact in the law occurred in England and so the Privy Council was entering into a new area. There was, also, uncertainty regarding the scope of the owner's rights opposite to those of the public:

> It is obvious that it was very desirable that, for the purposes of encouraging the development of the country, these doubts should, as soon as possible, be solved. And as the legislature of Upper Canada had full power to enact what should be the law in that country, the real question is what did they enact? The statutes of Upper Canada have been consolidated and afterwards revised; but the Acts under which this is done are *merely* consolidation and revision Acts, and do not alter the effect of those statutes which bear on this question.[117] (my emphasis added)

By referring solely to the Upper Canada statutes, the JCPC meticulously avoid dealing with the Ontario government legislation put forward by Oliver Mowat. Perhaps sensing that their decision would be viewed more as a political expression rather than a legal edict, they appear to side-step the thorny issues surrounding the debate between the province of Ontario and the Dominion parliament.

In their jurisprudence regarding *McLaren v. Caldwell*, the JCPC first examined the 1828 Act. They look at the preamble and state unequivocally what the intentions of the legislature seemed to be. That is:

> ...the legislature, for the purpose of affording facility to those engaged in the lumber trade in conveying their rafts to market, impose a duty on the mill owner to add to his mill an apron so as to let the rafts pass over it. This did, to some extent impose on the owner of the dam...the burden without any compensation of building an apron; but it is clear that the legislature did intend for the good of the trade to impose that burden on them.[118]

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[116] *Ibid.*, p. 405.

[117] *Ibid.*, p. 405.

[118] *Ibid.*, p. 406.

After declaring what purpose the 1828 act served in relation to furthering the goals of timber users, the JCPC inquired into the nature of the 1849 act.

The preamble to this particular act stipulated an even greater burden to owners to maintain the sufficient flow of saw logs down the waterways of Ontario. In the views of their Lordships, the case hinged on the fifth section of the act in determining whether McLaren had exclusive rights to the use of the stream or whether the right bestowed upon "all persons to float saw logs and other timber rafts and craft down all streams in Upper Canada, during the spring, summer, and autumn freshets."[119]

Lord Blackburn then discussed the judicial decisions leading up to the final appeal. He cites the Vice-Chancellor's account of Boale v. Dickson. The Vice-Chancellor stated:

> ...in response to improvements upon rivers and their floatability...if any improvements are necessary to render streams floatable, the statute does not apply, that it does not alter the character of the private streams, and that the owner of the land over which the stream flows has the right to prevent intrusion upon it.[120]

Furthermore, Lord Blackburn went on to say that the judges of the Ontario Court of Appeal "all agreed that Vice-Chancellor Proudfoot had correctly apprehended the construction put upon the statute by the Court [of Common Pleas of Upper Canada] in Boale v. Dickson, and that he could not properly disregard the decision of a Court of co-ordinate jurisdiction, but all four thought that construction wrong."[121] Nonetheless, on further appeal, the judges in the Supreme Court of Canada felt that "the construction put

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[119] *Ibid.*, p. 407.

[120] *Ibid.*, p. 408.

[121] *Ibid.*, p. 408.

upon the statute in Boale v. Dickson was right, and the Chief Justice, Sir W. Ritchie, thought that, even if wrong, it ought to be maintained" on some conveyancing ground.[122]

The JCPC sided with the Ontario Court of Appeal "in thinking that there is nothing to justify any Court in construing the words 'all streams' as meaning such streams only as are at all places floatable."[123] According to the JCPC, the purpose of the law in this case, and thus the legislature's intent can be summed up in the following passage delivered by Lord Blackburn:

> It is quite true that it is not to be presumed that the legislature interfere with any man's private property without compensation. But if the whole stream is floatable during the freshets it cannot be doubted that the legislature did mean, with the object of affording facility to lumberers to carry their timber to market, to say that they should have the right to float down the stream at these seasons without obstruction by the owners of the bed of the river without paying them anything.[124]

By way of conclusion the JCPC said:

> It does not seem to their Lordships that the private right which the owner of this spot claims to monopolise all passage there is one which the legislature were likely to regard with favour, and in the earlier legislation they had, without scruple, cast on the owners of dams 'legally erected' the obligation, at their own expense, to make such dams passable for lumber.[125]

Finally, and this is crucial to making the link between what was taking place within the political context in Canada in relation to the Rivers and Streams Act and its disallowance, and the judicial decision formulated by the JCPC, Blackburn made some interesting observations:

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[122] *Ibid.*, pp. 408-409.

[123] *Ibid.*, p. 409.

[124] *Ibid.*, p. 410.

[125] *Ibid.*, pp. 411-412.

> if the law was...that reasonable compensation should be payable for the use and occupation of works maintained for the purpose of rendering the portion of the stream practically useful for floating purposes, there would be no hardship at all; if the legislature had inserted a provision that such should be the law, there could have been no doubt of their intention. They have not inserted such a provision; but, though that makes the case somewhat difficult, their Lordships do not think it enough to justify what seems to them a somewhat violent departure from the plain meaning of the words.[125]

The JCPC blur the line separating law from politics when discussing the issue of compensation. While looking at the finer points with respect to the Ontario debate over the Rivers and Streams Act and tying it in with the JCPC's decision, it is plain to see that by ruling in Caldwell's favour they gave some consideration to policy.

Pardee, in the course of the provincial debates, explicitly stated that the purpose of creating the Rivers and Streams Act was to clarify and amend the 1828 and 1849 statutes. Specifically, the provincial Liberals inserted into their Act a provision allowing for adequate compensation to owners who permitted the use of their property to other timber companies. Since the Ontario government and the Dominion government were at loggerheads over the constitutionality of the 1881 Act as a result of Macdonald's disallowing the Provincial legislation, technically speaking Mowat's 1881 statute was not law. Consequently, the JCPC had no other choice but to interpret the Upper Canadian statutes only. By reading into these pieces of legislation the notion that the government of the day truly intended each and every logging company to make use of the rivers, creeks and streams, whether through improvements or not, the JCPC virtually endorsed Mowat's legislative initiative. The old statutes would have been even more unchallengeable if they had provided expressly for reasonable compensation. The Rivers and Streams Act was

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[125] *Ibid.*, p. 412.

precisely contemplated by the provincial Liberals in order to ameliorate the law in the way of providing compensation to those owners who made improvements on the stream for the passage of lumber.

The JCPC cleverly restricted themselves to interpreting what the old Upper Canadian statutes had to say with regard to the issue of navigable rivers. By rendering a judicially sound and novel interpretation within a legal formalistic framework, the Judicial Committee insulated itself from the hotly contested political and constitutional controversy taking place in Canada. It is hard to imagine that these five British lawyers did not understand, in the non-legal context, what the implications were and what was at stake as far as Mowat's and Macdonald's economic, political and constitutional agendas entailed. Nonetheless, it is conceivable that with the considerable distance from Canada and the very different economic issues in England at the time, the JCPC did not apprehend how closely some colonial politicians were linking the fate of the 1849 Act and that of the disallowances of the 1881 Act. In the end, the members of the Judicial Committee had a role to play in this odyssey for, in essence, they acted as a kind of spark-plug to crystallize the issues surrounding the Rivers and Streams Act. Although they cloaked themselves under the pretence of legal formalism and exhibited the traits of judicial impartiality, their decision had a constitutional effect in the sense that the federal government discontinued the practice of disallowing the Rivers and Streams Act designed by the Ontario government.

Finally, the ruling by the Supreme Court was reversed by the Judicial Committee of the Privy Council in 1884 on the basis that the term "all" in the Act comprised all usable

streams, no matter how the waterway was made usable.[126] In the judgment of the law lords:

> the right to float timber and logs down streams...is not limited to such streams as in their natural state, without improvements, during freshets...but extends to the user without compensations of all improvement upon such streams, even when such streams have been rendered floatable thereby.[127]

The sub-text of the Rivers and Streams case involved a dramatic combination of events- Conservatives v. Liberals, individual rights v. the good of the public, Macdonald's unitary plan of a strong and prosperous Canada v. Mowat's platform for a dominant Ontario within the Canadian confederation. The JCPC handled these critical issues by deciphering mainly whether one word, "all", included streams in their natural state or streams in both their natural and improved condition as suitable for moving timber. Also, there was some consideration given in their decision to the conflicting needs of water users and property owners; different circumstances in England and colonial Canada; and the users' willingness to provide compensation.

To summarize, a unanimous Supreme Court of Canada allowed an appeal by McLaren, primarily on the ground that Burton, J., had used in the Court of Appeal- the presumption in favour of private rights. Not to be outdone by the likes of Justices Samuel Henry Strong and John Wellington Gwynne, the Judicial Committee of the Privy Council, under the guidance of Lord Blackburn, reversed the Supreme Court's decision with reasoning that was little more than a forthright statement about the plain meaning of the words. The case involving McLaren and Caldwell saw a final decision change no less than

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[126] *McLaren v. Caldwell* [1884], 9 A.C. 392.

[127] *Ibid.*, p. 392.

three times, but the courts gave the appearance of acting in an impartial and independent way. Whether it is a remarkable occurrence of events without any apparent causal connection or a strict construction of interpreting the statute, one cannot be surprised by the Supreme Court siding with the Dominion, and the Judicial Committee rendering its decision to Ontario's delight. As Ian Bushnell points out,

> the establishment of such a mystique about the reading, understanding, and applying of rules found in a statute must be attributable to an attempt to avoid any appearance of making choices of values. The more rules that can be summoned forth give the appearance that the rules are determining the ultimate solution, not the mind of the arbitrator.[128]

Both the SCC and the JCPC finessed their decisions by determining the meaning of the language of the Upper Canadian statutes within narrow parameters. Moreover, they were not required to assess the purpose of the Rivers and Streams Act, thus avoiding the potential dilemma of encroaching upon the duties of the legislative and executive branches of government. Indeed, inquiring about Mowat's legislation and its purpose was beyond the judiciary's function here. Nevertheless, it was quite legitimate for them to look at the purpose of the earlier acts.

It is important to ask why this Ontario law (Rivers and Streams Act) was enacted? What was the intention of the creators of the law? In this case, what was the motivation behind Ontario Premier Mowat's enactment of the Rivers and Streams bill? And what was the policy behind the law? Keeping in mind that it was not the function of the judiciary to examine these questions in relation to this Act, by refusing to look at these issues directly in their opinions regarding the case of *McLaren v. Caldwell*, the courts, nonetheless,

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[128] Bushnell, *A Study of the Supreme Court of Canada*, p. 59.

projected their particular viewpoint of Canadian federalism under the external appearance of legal formalistic decisions.

The choices expressed in the judicial statements can be looked at in terms of the public interest in logging and private rights. The choice for the private right was a declaration that only the legislature should make a decision that impaired a private right. Chief Justice William Ritchie said,

> If the development of the public domain, the exigencies of the public, or the business of the country, is of such importance in comparison with individual loss or inconvenience as to require that private rights should give way to the public necessity, the remedy must be sought at the hands of the legislature through the instrumentality of expropriation, with suitable and full compensation under and by virtue of the right of eminent domain.[129]

Intergovernmental squabbling and the unwillingness for political compromise prompted the judiciary to the role of umpire of the federal system, with the judges as policy makers who made decisions under the pretence of legal formalism. The primary role of the courts in instances of constitutional conflict was to clarify the main issues, to determine which side should initiate the political process via constitutional measures, and to limit the possibilities of political deception and debate. With the general uncertainty concerning powers allocated to the two levels of government within the BNA Act, and the dissension among politicians arising out of the debate related to the ranking of the Dominion government and the provinces, federal-provincial bargaining was replaced by judicial review for delineating the respective jurisdictions of the two orders of government. This judicial review took the form of judges and law lords pretending to give only a strict, constructionist interpretation of

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[129] *McLaren v. Caldwell* [1882] 8 S.C.R. 444.

statutes and laws, when in reality the courts were also involved in the process of "constitution-making".[131]

The incessant utilization of the federal power of disallowance to defend McLaren's private rights presented insuperable obstacles to the functioning of a federal state.[132] In essence, the rivers and streams dispute consisted of a disagreement over the workings of Canadian federalism. According to Carl Stychin, "the rivers and streams case contributed to the triumph of one vision of Canadian constitutionalism- one in which federal disallowance was incompatible with provincial" interests and the theory of coordinate sovereignty as outlined by classical federalism.[133] Despite the centralist leanings of the Supreme Court of Canada, the provincialists were able to effectively showcase their independent vision in arguments before the JCPC.[134]

While the Ontario government and Ottawa had competing claims regarding rivers, streams and creeks, the judiciary was forced to find a resolution depending on balance, accommodation, and a choice between conflicting interests. It is this semblance of choice that eroded the illusion of an apolitical judiciary, which is a major element of the rule of law.[135] The judgments of the Supreme Court of Canada and the Privy Council in this case

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[131] Edward McWhinney, *Supreme Courts and Judicial Law-Making: Constitutional Tribunals and Constitutional Review* (Boston: Martinus Nijhoff Publishers, 1986), p. xii.

[132] W.R. Lederman, *Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada* (Toronto: Butterworths, 1981), p. 75.

[133] Carl Stychin, "The Rivers and Streams Dispute," p. 345.

[134] See cases regarding *The Liquidators*, and *Hodge* in Peter Russell et al., *Federalism and the Charter: Leading Constitutional Decisions* (Ottawa: Carleton University Press, 1993). See, also, the case *St. Catharines Milling and Lumber Company v. The Queen* in James G. Snell and Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press, 1985).

were an effort to uphold the appearance of judicial neutrality. Nonetheless, the decisions made by the Supreme Court and the Judicial Committee had to resort to non-legal criteria.

The Rivers and Streams Act was inoffensive from a purely jurisdictional standpoint. However, Sir John A. Macdonald regarded this provincial law as trespassing on the private rights of riparian owners:

> I think the power of the local legislatures to take away the rights of one man and vest them in another as is done by this Act is exceedingly doubtful, but assuming the right does, in strictness, exist, I think it devolves upon this government to see that such power is not exercised in flagrant violation of private rights and natural justice.[136]

Vipond states that "according to Macdonald,...the Rivers and Streams Act 'violated distinctly the most important' of the conditions set out in the 1868 Report on disallowance; that is, it affected the 'general interests' of the Dominion."[137] As a result, "disallowance [became] an additional weapon in the arsenal of the" centralists in the name of legal liberalism so as to obscure the fact that it was the Macdonaldian version of the BNA Act the Dominion government was attempting to defend.[138]

The desire of the federal government to vindicate its exercise of the disallowance power in jurisdictional terms rather than solely on the basis of the protection of property rights serves to illustrate that a conception of Confederation was at play. In practice, the federal government, in order to acquire more power, masked its true intentions through formal legal manouvres. That the Rivers and Streams Act was "unconstitutional" in the

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[135] Carl Stychin, "The Rivers and Streams Dispute: A Challenge to the Public/Private Distinction in Nineteenth-Century Canada," in *Toronto, Faculty of Law Review* vol. 46, no. 2 (1988), p. 351.

[136] Vipond, *Canadian Federalism and the Failure of the Constitution*, pp. 126-127.

[137] Vipond, "Constitutional Politics", p. 283.

[138] Stychin, "Rivers and Streams Dispute," p. 355.

large and somewhat vague British sense, to the extent that it interfered with vested interests without adequate compensation, was the dubious issue on which the battle was joined.[139]

As a result of the Privy Council's decision, legislation similar to the Rivers and Streams Act could restrict property rights. Furthermore, disallowance was not only inconsistent with the rule of law, it was also incompatible with the political conception of Canadian federalism.[140] It took the JCPC, in a technical, doctrinal account of the rivers and streams episode, to begin to clarify the ambiguities clogging the BNA Act.

By making it difficult for Macdonald to continue to use the power of disallowance in this particular kind of case, and nurturing the province's power to pass legislation under "property and civil rights", the Privy Council ventured into the arena of politics when presenting their decision on the Rivers and Streams Act. The JCPC, in effect amended or clarified the relationship between the Dominion and the provinces whereby an equilibrium had been achieved within the framework of Canadian federalism. Thus, a legalistic and objective approach to cases dealing with issues of federal-provincial boundaries was translated into an exercise of policy-making by the judiciary whereby the judges and law lords directed courses of action to be taken by the two levels of government in Canada.

In terms of the legal historical work on law and economic development, what this suggests is that there was an ongoing tension between the courts and legislatures over economic development and property rights throughout the 19th century in Ontario. While Hurst's perspective and Horwitz's instrumentalism/legitimation hypothesis apply to the

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[139] Morrison, "Oliver Mowat and the Development of Provincial Rights in Ontario," p. 215.

[140] Stychin, "Rivers and Streams Dispute," p. 359. Robert C. Vipond, "The Provincial Rights Movement: Tensions Between Liberty and Community in Legal Liberalism," pp. 233-256.

American situation, the particular legal dynamics noted here do suggest that while legislatures attempted to facilitate economic use, the courts tended to disguise policy preferences under legal formalism. In the case at hand the formalism operated in favour of the provincial government.

The importance of the rivers and streams episode lies in the active engagement of the judiciary in what was otherwise a personal, philosophical and partisan conflict between two political parties and two levels of government: the Conservatives versus the Liberals, and the Dominion pitted against the province of Ontario, respectively. The decisions enunciated by all levels of the judicial machinery give credence to the thought that the constitution of Canada and the framework of Canadian federalism were shaped and moulded, to a certain extent, by the judiciary. In addition to the statutory clarification needed regarding the validity of the Upper Canadian acts, the case of *McLaren v. Caldwell* involved a political and constitutional choice to be made by the judges and law lords. The definition of Canadian federalism was unclear from the inception of the BNA Act, and this dispute could not be solved effectively in the political domain. From the political theatre to the judicial ring, law descended into politics, the inevitable became a choice,[141] and internal, grammatical reasoning gave way to external factors. The formalism of the rule of law stood on shaky ground. Legal liberalism revealed a policy-making and judicial law-making impulse that settled comfortably within the domain of the Supreme Court of Canada and the Judicial Committee of the Privy Council.

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[141] Stychin, "Rivers and Streams Dispute," p. 361.

Chapter 5

Conclusion

> There are many schools of thought on the interpretation of written constitutions. There are those who consider that the "contractual" nature of the Federal instrument prevail; there are those who would import some form of undefined "sociological" doctrine or who, at any rate, consider that political considerations should enter into judgments; there are the "progressives", who think that the Constitution should be interpreted in such a manner as to take into account...new subject-matters which the Founders of the Constitution might have included if their minds had been addressed to the question- closely allied is the "historical school", which would endeavour to discover, by recourse to past events, notably those preceding the adoption of the Constitution, what the Framers intended. There is, no doubt, from the political scientist's point of view, merit in these various modes of approach, but none of them can be satisfactory to the lawyer, nor, in the last resort, to society. For the need of some objectivity is basic if there is to be a coherent system applicable to all alike. The "compact" theory, which seemed attractive to the members of the first High Court, defeated itself in the end because, as with "sociological" and "progressive" theories, it lacked logic and the standards to be applied in particular cases varied with the view of the individual as to the object of this or that piece of legislation and if it be said that lawyers, too, are prone to disagreement, the answer is that all human activities suffer from this defect, but that legal and logical reasoning supplies some objectivity. Many of the difficulties which have arisen in Canada are traceable in the last resort to the tendency to consider the *British North America Act* on the "compact" basis to be interpreted with due regard to the preservation of Provincial autonomy, a process greatly aided by the presence of the double enumeration of powers which has made an investigation into "trenching" a necessary element in any discussion of powers and the "pith and substance" doctrine an inevitable consequence.[1]

This statement is a classic defence of judicial formalism, one which nonetheless acknowledges the judicial difficulties that were faced under the BNA Act. The Australian and United States constitutions differed from the Canadian project in that defined powers were given to the federal government with the residue going to the states, while in Canada

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[1] W.A. Wynes, *Legislative, Executive and Judicial Powers in Australia* 3rd ed. (Sydney: Law Book, 1962), pp. vi-vii.

each level of government was given "exclusive" powers with residual powers going to the Federal level. The question of interpreting the constitution is whether this was purely a technical problem as Wynes suggests or due to judicial politics. This study favours the latter, but the former counter-argument cannot be ignored.

According to Ian Bushnell, the "Rule of Law demands that a decision made within the legal system contains a maximum of the law and a minimum of the individual decision-maker. Impartiality, meaning an absence of personal prejudice and biases, is a must, but this should not blind anyone" to the difficult practical realities of the judicial decision-making process.[2] Subjective discretion within the judgments rendered by the courts is not entirely incompatible with a legal system that stresses the need to dispense with impartial justice. Yet it is argued that something more, an actively creative decision-making process, was evident by the Supreme Court and Judicial Committee. The judges and law lords handled each constitutional case by making choices that were guided by the political, legal and social contexts within the Dominion of Canada. This element of choice made it difficult to achieve an unbiased decision. Choice, in itself, raised the notion of discretion. Bushnell points out that, "unfortunately there are two uses of the word discretion: one simply means a choice that is limited by the language, legal, and social contexts, while the other use signifies an absolute and unlimited ability to choose as one sees fit, and thus there is an absence of law."[3]

The judiciary was expected to display a quasi-scientific application of legal rules,

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[2] Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal & Kingston: McGill-Queen's University Press, 1992), p. 484.

[3] Bushnell, *Captive Court*, p. 478.

thus emphasizing a dispassionate approach to law. Fairness in constitutional decision-making "was to be upheld by confining judicial thought to technical" considerations of the law or act in question.[4] Thus, legal deliberation was to be mechanical, rather than inventive.

The first period after Canadian confederation, 1867-1899, saw the Supreme Court of Canada and Judicial Committee of the Privy Council appraise the constitutionality of laws and legal regulations created by the Dominion and provincial governments. The judiciary's initial duty was "to determine which parts of community activity [fell] within Ottawa's jurisdiction and which [aspects were] the responsibility of the provinces."[5] The Canadian justices and British law lords perused the text of the British North America Act and decided whether the objectives and the public interest of the law presented to them were "within one of the powers assigned to the government that enacted it."[6]

In a formal legalistic fashion, the Supreme Court and Judicial Committee were obliged to catalogue "the list of powers enumerated in sections 91 and 92" outlining the government's justifications regarding "the exercise of [its] law-making powers."[7] In terms of outward appearances, both the SCC and JCPC appeared to define the property and civil rights clause, the federal power over trade and commerce and peace, order and good government by a structural, deductive method of interpretation.[8]

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[4] *Ibid.*, p. 478.

[5] David Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995), p. 29.

[6] Beatty, *Constitutional Law in Theory and Practice*, p. 29.

[7] *Ibid.*, p. 29.

However, underlying the formal legal reasoning, these judicial tribunals worked on a premise that was inherently political; that the status of the central and provincial governments was either coordinate and equal, or one level of government was more superior than another. When one looks at the anti-Confederation arguments presented by political officials within every province in the 1860s, if the law lords read literally the all-inclusive grants of power offered to the Dominion government, the federal structure in Canada could easily have been threatened. This reflected the tension between the legal and political considerations of interpreting the BNA Act. Jonathan Robinson puts it this way, "it seems to many people that the decisions of the Judicial Committee of the Privy Council on the British North America Act are to be received and believed, but not understood. That is, it seems clear that the judgments cannot be understood within a purely legal framework."[9]

Commentators on the JCPC stated that there remained a mystery surrounding the criteria employed by the law lords to deliver their decisions as determinative, and objective, distinguishing laws that were in conformity with the BNA Act from those that were not.[10] Using even narrow legal criteria, the JCPC's decisions were inconsistent and unclear.[11] Most commentators concede that indeterminacy and indefiniteness plague most federal

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[8] *Ibid.*, p. 31.

[9] Jonathan Robinson, "Lord Haldane and the British North America Act," 20 *University of Toronto Law Journal* (1970), p. 55.

[10] See Alan C. Cairns, "The Judicial Committee and Its Critics," in Garth Stevenson, ed., *Federalism in Canada: Selected Readings* (Toronto: McClelland & Stewart Inc., 1989).

[11] See Paul Weiler, "The Supreme Court and the Law of Canadian Federalism", *UTLJ* 23 (1973) 307; Patrick Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism", *UTLJ* 34 (1984) 34; Peter Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992), 15.5(c).

grants of power, although those such as Wynes argue that such tendencies are minimized when defined powers are given to one level of government and the residual powers to another (as opposed to dual enumeration and residual powers in the BNA Act). Nonetheless, it is due to this indeterminacy in the Canadian constitution that under the veneer of formal legality the law lords were accorded the opportunity to decide each case on their view of what was good for the country, rather than on the basis of some fixed or settled rule of law.[12]

While the indeterminacy of the wording of the BNA Act invited judicial discretion in most federalism cases, in others- such as the Rivers and Streams case, the JCPC ended up "making" policy by interpreting non-constitutional wording in a politically and constitutionally charged setting. From this perspective, the fact that the JCPC could rule in favour of the federal government in 1882 and then rule against it a decade later on a similar law illustrates how adaptable their jurisprudence was in the late nineteenth century. Judicial decisions plagued by ambiguity are an anathema to stare decisis and formal claims of the rule of law. This made the Judicial Committee susceptible to the charge that they were indulging in politics and their own self-interest when deciphering the reach of the powers of the Dominion and provincial governments. The extent to which this is true cannot be determined with certainty due to the methodological limitations to historical research on judicial decision-making as noted in chapter one. Certainly the effect of their decisions was promotion of Mowat's view of federalism at the expense of Macdonald's. Arguably, even if the JCPC's decisions were more consistent, questions about the law lords' policy

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[12] Gordon Bale, "Law, Politics and the Manitoba School Question: Supreme Court and Privy Council," vol. 63 *Canadian Bar Review* (1985), p. 461.

assumptions would not be closed. Rather, they would be harder to raise. No matter how closely the criteria of legal formalism were adhered to, the JCPC was faced with policy choices with enormous political implications when evaluating the status of the Dominion and the provinces within 19th century Canada.

The legal indeterminacy which gave the SCC and the JCPC interpretive discretion in this case study was statutory and common law. In cases dealing with federal-provincial relations, the central issues that the courts had to contend with revolved around balancing the constitutional powers of the Dominion government to that of the provinces. Some of the legal and constitutional questions directed towards the courts were:

> ...which level of government [was] entitled to regulate and set the standards in different areas of social policy? Should the rules governing [a licensing system for the sale of beer, wine, and spirits] be fixed nationally or provincially? Which of these activities of everyday life should be settled uniformly, across the country as a whole, and which should allow for local variation? In every case, the essential question [was]: which community or group of people- national or regional- [was] entitled to rule? which majority should prevail?[13]

The fundamental challenge for the SCC and JCPC when confronted with these federalism questions was an interpretive one. The problem was that the wording of the BNA Act did not facilitate a clear response. In the 1867 Constitution,

> long lists of potentially limitless powers [were] distributed to both levels of government... In dividing the legal powers of the state between national and regional levels of government, the Canadian constitution failed to provide much guidance to the courts... [Did] the federal government's power over trade and commerce embrace activities such as [liquor licensing]... or [were] these issues really about property and civil rights in the province, and more matters of a merely local or private nature?... Read literally and according to their common meaning, each of the more sweeping allocations of power enumerated in sections 91 and 92 could [have been] read as justifying either federal or provincial control.[14]

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[13] Beatty, *Constitutional Law in Theory and Practice*, pp. 20-21.

Thus, the JCPC wielded a great amount of discretion when deciding conflicting cases of constitutional law, and the spectre of non-legal reasoning was unavoidable.

In the Rivers and Streams case, although the uncertainty regarding disallowance came from the BNA Act, the discretion regarding the 1849 Act derived from the wording of an ordinary statute, combined with presumptions of common law. The judicial decision in *McLaren v. Caldwell* helped reduce this constitutional uncertainty coming from the BNA Act.

It is plain to see that the "federal principle was the central pillar of constitutional law" in late nineteenth century Canada.[15] According to David Beatty, "the federal principle [had]...instructed the judges that in deciding what any of the categories or grants of power should be taken to mean, they should never adopt an interpretation or definition that would threaten the autonomy of the other level of government."[16]

The transcripts from *Parsons*[17] to *Local Prohibition*[18] overwhelmingly demonstrate that the law lords were pre-occupied with a conception of federalism that was antithetical to the centralist intentions of Sir John A. Macdonald. In praise of Lord Watson's work with the Judicial Committee, Viscount Haldane complimented this Scot for rendering:

> an enormous service to the Empire and to the Dominion of Canada by

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[14] *Ibid.*, pp. 21-22.

[15] *Ibid.*, p. 25. Peter Hogg, *Constitutional Law of Canada*, 3rd edition (Toronto: Carswell, 1992), pp. 1288-1290.

[16] *Ibid.*, p. 26.

[17] *Citizens Insurance Co. v. Parsons* [1881] 7 A.C. 96.

[18] *Attorney General of Ontario v. Attorney General of Canada* [1896] A.C. 348.

> developing the Dominion constitution. At one time, after the B.N.A. Act of 1867 was passed, the conception took hold of the Canadian Courts and what was intended was to make the Dominion the centre of government in Canada, so that its statutes and its position should be superior to the statutes and position of the Provincial Legislatures. That went so far that there arose a great fight, and as the result of a long series of decisions Lord Watson put clothing upon the bones of the Constitution, and so covered them over with living flesh that the constitution of Canada took a new form. The provinces were recognized as of equal authority and co-ordinate with the Dominion, and a long series of decisions were given by him which solved many problems and produced a new contentment in Canada with the constitution they had got in 1867.[19]

One merely has to look at the statistics to see the pattern: the JCPC "overruled no less than fifty per cent of appeals from the Supreme Court while only overruling twenty-five per cent of appeals from other Canadian courts."[20]

The members of the Judicial Committee in the early years of Confederation were judicial statesmen providing a jurisprudence that was enmeshed in the making of public policy. Their decisions transformed the nature of Canada's constitution. The JCPC seemed to lend credence to the argument that the purpose of Confederation was to protect and promote the general concerns of a new nation. The course of action taken by the Judicial Committee was to oppose the Macdonaldian version of federalism by striking down the centralist interpretations espoused by the Supreme Court in the early period. The centrifugal effect of the JCPC's judgments preserved the autonomy of the provinces and forced the centralists to acknowledge that the BNA Act was to be treated as a federal document, and not as a means of furthering the unitary goals of the Dominion at the

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[19] Frederick Vaughan, "Critics of the Judicial Committee: The New Orthodoxy and an Alternative Explanation," in John Saywell and George Vegh, eds., *Making the Law: The Courts and the Constitution* (Toronto: Copp Clark Pitman Ltd., 1991), p. 178.

[20] Vaughan, "Critics of the Judicial Committee," p. 178.

expense of the provinces.

The political debates surrounding the constitutional legitimacy of the Rivers and Streams Act and the *McLaren v. Caldwell* case are a microcosm of issues relating to Canadian federalism, the separation of powers and the independence of the judiciary. *McLaren v. Caldwell* is a situation where judicial decisions made in a strictly non-constitutional legal context take place within a larger, explosive political context and consequently the decisions have indirect constitutional implications on the dynamics of federal-provincial relations. Although the judiciary were not asked to offer an interpretation of a particular section or sections of the BNA Act, they were caught in the middle of a battle revolving around the nature of the legislative powers of the provincial and federal governments.

The Judicial Committee of the Privy Council, upon delivering their decision, provided very brief consideration to the policy issue of the respective concerns of timber users and property owners, and arguably this and their verdict in *McLaren* did have some indirect impact on the controversy over disallowance. Although the Province of Canada legislation that was the subject of the court case was quite distinct from the provincial Act that was disallowed, their terms were similar. Moreover, both the geographical application of the earlier legislation and the validity of the disallowance involved some weighing of timber interests against property rights. Because of these points of overlap, Mowat argued that the JCPC's apparent tilt in the direction of timber interests was a verdict against the merits of the disallowance. Hence, even though the JCPC were not addressing and were not asked to address the British North America Act, 1867 their decision in a non-

constitutional legal context was perceived as having constitutional significance.

By not deferring to previous case law regarding provincial waterways, and showing a concern for the interests of the provincial economy, the JCPC and the Ontario Court of Appeal appeared to implicitly consider and implement policy. Reference to government intentions and not a pure, literal interpretation of the acts in question positioned these two judicial bodies in a way that had them not only applying the law but become involved in the role of the legislative and executive branches of government. The same can be said with respect to the Supreme Court of Canada in that this court seemed to identify with Macdonald's political philosophy, even though the justices, including Gwynne, took a grammatical and technical approach in *McLaren*.

The analysis of the judicial approaches to the rivers and streams episode confirms many of the points made by the critics of the JCPC surveyed in chapter three. The necessary first step in examining issues about the politics and public policy influences of the judiciary is a careful analysis of the judgements themselves and whether technical legal rules and doctrines do in fact guide the decisions. Broader questions of judicial politics remain but lie beyond the scope of this thesis. While there are formidable methodological obstacles as outlined in chapter one, further research on the backgrounds, partisan connections and social values of the judges involved in these decisions remains to be done. Directions for further research in this area regarding the politics of the judiciary should also include looking at the prior occupations of the judges, commercial connections they preserved, and ideological influences that affected their judicial decision-making. As an example, the fact that Sir Richard Couch was an expert in railway law and that Lord Blackburn had a

thriving business in trade law in Liverpool could go a long way in assessing how the judges in the rivers and streams appeal used their commercial interests and connections to determine the final outcome of the McLaren v. Caldwell case. Additional empirical research needs to be done (for another project) with respect to uncovering judicial formalism in nineteenth-century Canada.

In short, I conclude with a statement made by Justice Rosalie Abella to the Canadian Bar Association with respect to judicial neutrality. She says:

> Judges have always been involved with public policy. They have also been involved in the development of the law, whether in interpreting statutes or selectively applying precedents. After examining the traditional functions of judges in this light...the Charter has not changed anything in this regard.[21]

The SCC and the JCPC were not confined to merely formal analyses of legal problems. Within jurisdictional boundaries there was freedom to mould the law.

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[21] Rosalie Silberman Abella, "Public Policy and the Judicial Role", in *McGill Law Journal* 34 (1989) 1021.

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