Learning Federalism:
The Experience of New Brunswick's 19th Century Judges

by

William Lahey

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Graduate Department of Law, University of Toronto

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William Lahey
Department of Law
University of Toronto

Abstract

This is a study of how New Brunswick judges interpreted the BNA Act in the first decades of Confederation. Particular attention is paid to *The Queen v. Chandler* (1869), to *City of Fredericton v. The Queen* (1979), and to the opinions of William Johnstone Ritchie in early constitutional cases of the Supreme Court of Canada. It concludes that constitutional adjudication in New Brunswick: opened deep fault lines in the province's legal culture on the relationship between legislatures and courts and the definition of constitutional law; produced a clash of constitutional visions based on different understandings of how confederation made federalism and the English constitution consistent; revealed the influence of a provincial rights understanding of confederation that linked federalism and constitutional interpretation to the protection of individual rights; produced indigenous understandings of the BNA Act that anticipated the achievements of provincial rights in Privy Council cases.

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Chapter 1

Introduction

The history of the early years of the judicial interpretation of the British North America Act[1] has been largely told as the history of the decisions of the Judicial Committee of the Privy Council. There has been some attention paid to the early constitutional rulings of the Supreme Court of Canada, but most often, the treatment is either cursory (frequently, only the outcomes are stated) or ancillary to a focus either on the institution or on the career of particular judges.[2] Relatively little attention has been paid to the constitutional rulings of the superior courts of the provinces.[3]

The reasons for this are probably obvious. Legal scholars have played a large role in writing the history of Canadian constitutional law and they have undoubtedly been guided by the lawyer's tendency to measure the importance of a case by it's continuing doctrinal relevance to contemporary law. Clearly, from that perspective, the constitutional rulings of Canadian courts in the first decades of Confederation have been overtaken by the rulings of the Privy Council or, since 1949, by the rulings of the Supreme Court of Canada.

Historians may have been influenced by the same consideration but also by the sense that, beyond their doctrinal significance, court decisions have no or modest usefulness as

historical records precisely because they focus on legal doctrine and technicality. For historians of Confederation, this impression would understandably be reinforced by the experience of reading the constitutional decisions of the Privy Council. For the most part, these were written in the language of legal formalism or positivism. With the exception of a few paragraphs frequently taken to give a glimpse of an underlying (and mistaken) theory of Confederation, the Privy Council's rulings detached constitutional interpretation from political, economic and social context as well as from the history of Confederation.[4] They instead portrayed doctrinal outcomes as coming from the "true" meaning of the words and structure of the constitutional text, derived by disinterested and technical reading of that text.

It is possible as well that all scholars in the field have been influenced by a sense that Canadian judges of the post-Confederation period were not capable of producing judicial writing of lasting significance and interest, and especially so in the constitutional sphere. Ironically, the frequency with which the Privy Council overruled the Supreme Court of Canada has probably contributed to this sense, notwithstanding that criticism of the Privy Council itself has been a mainstay in the literature for 60 years. Low expectations of Canadian judges may also have flowed naturally enough from the patterns of political preferment that were the dominant route to the bench,[5] as well as by the low assessment of the originality and creativity of Confederation-era judges in other areas of law.[6] Low expectations might also seem an obvious corollary of the belief that the generation of public men who made Confederation, and that also produced the judges who decided Canada's first constitutional cases, was not activated by grand political or constitutional philosophies but by immediate and pragmatic necessities or ambitions, be it the resolution of the deadlock between Canada East and Canada West, the fear of American aggression or the mutual desire of all provinces for broader markets.

Whatever the influences, it is arguable that historians have, with some exceptions, overlooked the potential usefulness of constitutional adjudication in the Canadian courts in the early years of Confederation as a source for constitutional legal history. For approximately the first two decades of Confederation, provincial courts and the Supreme Court of Canada decided constitutional cases when there was either little or no guidance as to how they should do it from either the Privy Council or from constitutional scholarship. Throughout these decades, fundamental questions about the basic structure and key features of the constitution remained outstanding, even as the body of decisions from higher courts and the number and quality of books on the constitution increased.[7] There is the possibility therefore, that

Canadian constitutional cases from these early years of Confederation can enlighten as to how and what Canadian lawyers and judges who had lived through Confederation thought about the constitution before being told how and what to think about it by higher authorities.

This study explores this potential through reconstruction of the experience of the judges of New Brunswick in constitutional adjudication during the first two decades of Confederation. It aims to know what this reconstruction of adjudicative experience can tell us about constitutional thought in New Brunswick, about New Brunswick attitudes to Confederation, about patterns of legal thinking in New Brunswick and beyond, and about the broader development of Canadian constitutional law. It asks how the interpretation of the constitution by the judges of New Brunswick reflect the arguments for and against Confederation made in the years 1864-1867. It asks what constitutional interpretation in New Brunswick reveals about how New Brunswick thinking on the constitution and Confederation was alike or different from thinking on the same subjects in other provinces. Throughout, the emphasis is on reconstruction and exposition. The quality of the constitutional doctrine produced is of less interest than what the doctrine, such as it was, tells us about the understanding of Confederation, of constitutional law and of judging that these New Brunswick judges brought to the BNA Act.

Much of the analysis is dedicated to constitutional cases decided in the New Brunswick Supreme Court, including those decided when William Johnstone Ritchie was Chief Justice of that Court, but the frame of reference is not limited to New Brunswick cases. It also encompasses the broader experience in constitutional litigation of Ritchie, the most prominent and eminent New Brunswick jurist of the period, on the Supreme Court of Canada after his appointment to that Court in 1875. With one exception, the focus is on cases decided before 1883, the year of the Privy Council's decision in *Hodge v. The Queen*.[8] The reason is not only that the more interesting parts of the New Brunswick experience happen before 1883, but also because I want to hear the voice of New Brunswick judges before it became significantly mixed with doctrine from the Privy Council. From Hodge forward, it can be assumed that Privy Council doctrine became steadily more influential.

In broad outline, what emerges are judges who took constitutional adjudication seriously and who grappled earnestly to understand and to explain the meaning of the BNA Act, a legal instrument unlike any other they had been asked to interpret. They entered into the world of constitutional adjudication professing confidence that it would be easy and straightforward but quickly found themselves sharply disagreeing over what the BNA Act meant and over how that

meaning was to be derived and from what sources. They started with consensus built on the BNA Act as a statute that imposed subordinate federalism, moved through deep and bitter disagreement about surprisingly fundamental issues and insights, and ended again with consensus that the BNA Act was a constitution that enshrined the desire of the confederating provinces for coordinate federalism. Through this transition, the judges of New Brunswick were forced to learn federalism by being challenged to apply the broad and general framework of the BNA Act to the type of questions that only arise from specific cases.

Along the way, the judges translated arguments previously used to defend or attack Confederation in the political sphere into legal arguments for competing interpretations of the BNA Act, particularly for broad or narrow legislative mandates for either the federal Parliament or provincial legislatures. In consequence, we see some of the underlying constitutional premises of the provincial rights movement emerging in the cases, particularly the continuity of provincial autonomy with the pre-Confederation achievement of provincial responsible self-government. We see, in reaction, a competing understanding of Confederation and of judicial review, based on ideas and values from nineteenth century Canadian toryism. Significantly, we see Ritchie at the Supreme Court of Canada and the judges back in New Brunswick anticipating the general thrust and, in some respects, the specific detail, of later Privy Council rulings by evolving to an understanding of the BNA Act that was increasingly favourable to the provinces. And notwithstanding the limits of experience and of ability under which they laboured, the New Brunswick judges gave or at least suggested explanations for these outcomes that perhaps made them more understandable than the explanations later given by the Privy Council.

From these perspectives, the very assumptions about the quality of Canadian judges that have perhaps inhibited much scholarly attention to early Canadian constitutional adjudication, especially in the provinces, are partly what makes the New Brunswick decisions of historical interest. The constitutional jurisprudence of the New Brunswick judges is worthy of investigation precisely because of their background in the politics of the Confederation era and precisely because they were, by professional background and interest, as much politicians as lawyers. Indeed, some of them probably thought of themselves in these terms even after being appointed to the bench.

Accordingly, the New Brunswick judicial experience contributes to our understanding of the relationship between law and politics and between courts and legislatures in the late nineteenth century. Confederation has obviously long been understood as a change in the

political order of massive proportions, but perhaps there has still been insufficient assessment of the impact of Confederation within the world of lawyers and legal institutions, at least in a Maritime context. Particularly in comparison to the American constitutional experience, there has been a tendency to see division of powers law as rather technical and limited in it's broader implications for the central questions of constitutional law, such as the relationship between the individual and the state, the nature of federalism and the role of the courts. Again, the positivism of the Privy Council has perhaps nourished these tendencies. What has been missed (with some exceptions) is the reality that however limited the scope of constitutional law under the BNA Act, Confederation meant that constitutional law ceased to be only for political institutions, as it had been in British North America until Confederation. It meant a power of judicial review over the conduct of legislatures that, although limited relative to American or later Canadian experience, was novel and significant, especially on the accommodation of federalism and the British constitutional model. Little if any of this shows up in the reports of Privy Council decisions. It does in the law reports of post-Confederation New Brunswick.

The balance of this chapter presents an overview of the constitutional cases that arose in New Brunswick, a more detailed introduction to the themes that appear in later chapters and a summary of the organization of those later chapters. Before proceeding however, it may be helpful to briefly set out the principle conclusions of this study. First, the New Brunswick judicial experience strengthens the thesis that the provincial rights movement drew upon constitutional ideas that had deep roots in New Brunswick as well as Ontario and other provinces. In particular, it shows that New Brunswick judges linked federalism to individual rights through provincial jurisdiction and provincial self-government. Second, the New Brunswick judges cared deeply about the tension at the centre of the BNA Act between federalism and consistency with the constitution of the United Kingdom. Their deep disagreements about the scope and relative importance of federal and provincial legislative powers was, in an important way, connected to disagreement about how to accommodate federalism within the British constitutional model. The third conclusion is that the experience of the New Brunswick judges strongly suggests that their evolution from subordinate to coordinate federalism was one that emerged, to a significant degree, from within their adjudicative experience of deciding cases and the deeper knowledge of the BNA Act that this experience produced. In other words, it came in part from their engagement with the complexity of the BNA Act and what they learned from that engagement.

The ongoing debates over the motivation lying behind the frequently alleged preference of the Privy Council is the broader context for these conclusions. New Brunswick constitutional

adjudication, conducted by judges who lived through and participated in the Confederation process, shows judges moving from subordinate to coordinate federalism. In the process, they applied ideas and values that were important elements of the provincial rights understanding of Confederation. Their experience may suggest that comparing Privy Council interpretations of the BNA Act in the 1880's and 1890's to the political or draft-persons understanding of the Act in 1867 misses the potentially dynamic and intervening impact of the adjudicative experience as a source of a more nuanced understanding of the complexity and ambiguity of the written text of the constitution that 1867 produced.

II

Between 1867 and 1895 the Supreme Court of New Brunswick decided 26 constitutional cases.[9] Twenty-three of these cases concerned the division of powers created by sections 91 and 92 of the BNA Act.[10] One of the remaining cases involved the Court's rejection of the claim of New Brunswick Catholics to constitutionally protected educational rights,[11] another the Court's ruling that the province could create and appoint parish courts,[12] and the last the Court's ruling that the office of the Lieutenant-Governor had retained its pre-Confederation status as a direct representative of the Crown, therefore endowed with prerogative rights.[13] In the cases on education rights and the Lieutenant-Governor's relationship to the Crown, appeals made their way to the Privy Council and the New Brunswick Court was upheld in both.

Among the division of power cases, 16 concerned the constitutionality of provincial legislation covering a range of matters, including the release of debtors from prison,[14] the construction of railways across provincial boundaries,[15] the prohibition and licensing of liquor sales,[16] the licensing of commercial travellers,[17] the taxing of officers and employees of the federal government,[18] and the erecting of piers and booms on navigable inland waterways.[19] In total, seven pieces of provincial legislation were ruled *ultra vires* and unconstitutional. Only the decision on navigable waterways resulted in an appeal to the Supreme Court of Canada, where the Court's decision in favour of the province was overturned. None of these rulings went on appeal beyond New Brunswick.

Of the seven cases concerned with federal legislation, two concerned the constitutionality of the authority of the federal government, claimed through the Fisheries Act, to issue licenses for inland fisheries,[20] and two concerned the constitutionality of the Canada Temperance Act, or Scott Act, as it was commonly called.[21] On both subjects, the Court was

required to decide the same case twice when it's first decision was simply ignored. It used the opportunity to reverse itself on the fishing licence issue by striking the federal legislation down, whereas on the temperance issue, the Court reiterated its earlier finding of constitutional invalidity. Both matters went on appeal to the Supreme Court, with the New Brunswick Court being upheld on the Fisheries Act but overturned on the Scott Act, the latter result confirmed on further appeal of *Fredericton* to the Privy Council in *Russell v. The Queen*. The three remaining federal legislation cases concerned the authority of Parliament to confer summary conviction jurisdictions on county courts,[22] to place limitation periods on rights of action against interprovincial railways,[23] and to collect custom duties on goods subsequent to their importation.[24]

From all of these cases, three stand apart.[25] One is *R. v. Chandler*, decided in 1869. It was the very first case to be decided under the BNA Act by the New Brunswick Court, or any other superior court.[26] The immediate issue was the relatively narrow one of whether a provincial law for the release of debtors was *ultra vires*, because within the federal bankruptcy and insolvency power. But the larger issue was the challenge made, inside and outside Court, to the Court's authority to apply the constitution. Chief Justice Ritchie defended judicial review by declaring that the BNA Act had totally changed the constitutional status of all Canadian legislatures. Whereas before Confederation they had exercised "plenary powers", after Confederation, provincial and federal governments both exercised only delegated statutory powers. He declared the division of powers established by sections 91 and 92 to be clear and straightforward, so much so that it was difficult to conceive how the Imperial Parliament could have stated it any more clearly. The BNA Act established a rule of construction under which all possible uncertainty was avoided by making federal all matters capable of being claimed by both levels of government.

The significance of *Chandler* is that it shows that the legitimacy of judicial review was contested in New Brunswick over the question of its consistency with pre-Confederation constitutional experience and identity. Ritchie's denial of plenary status to the New Brunswick legislature came as a revelation that provoked a powerful reaction in the legislature and beyond that says a great deal about what had and had not been understood to be the legal and political consequences of Confederation, particularly as regards the constitutional status of the province. The issues raised in the judicial review argument became a sub-text to subsequent judicial disagreements over the extent and nature of federal and provincial powers and over the role of the courts in constitutional cases. Ritchie had tried to address these issues by denying their

existence and by embracing subordinate federalism with a vengeance. An important part of the story of constitutional adjudication in New Brunswick is how the New Brunswick Court, and Ritchie himself at the Supreme Court of Canada, came through the adjudicative process to later appreciate the deeper complexity of the BNA Act and to understand the need for more fundamental responses to that complexity.

The second case was decided in 1888, close to the other end of the Court's nineteenth century constitutional experience. It was *Liquidators of the Maritime Bank v. New Brunswick*, one of two New Brunswick cases from this era that would make their way into modern constitutional law as decisions of the Privy Council. In many ways, it is properly seen as the culmination of the process of evolution that took the New Brunswick judges from the vision of *Chandler* to a constitution of "co-ordinate federalism" that is recognizable to modern eyes. The question of both commercial and constitutional law was whether the province had priority over other creditors due to its ability to claim crown prerogative. This depended on whether lieutenant-governors were direct representatives of the Crown or only officers of the federal government. In the context of a "constitution similar in principle to that of the United Kingdom", the answer would determine whether provincial governments were sovereign or subordinate governments. It would also either support or undermine the broad reading of provincial heads of legislative power that by 1888 was otherwise well advanced. In New Brunswick, the Court held for New Brunswick and continuing provincial sovereignty and in doing, rejected the understanding of Confederation that had informed *Chandler*. To do so, the Court relied on Ritchie's post-*Chandler* opinions in Supreme Court of Canada cases, where Ritchie himself implicitly repudiated *Chandler*. In the broader Canadian context, *Maritime Bank* stands as a seminal victory for the provincial rights movement of Ontario. In a New Brunswick frame of reference, it can be seen as a much delayed victory for the political and legal critics of *Chandler*.

The third case stands out most dramatically. It is the second Scott Act case of *The Queen on the Prosecution of Thomas Barker v. The Mayor & c. of Fredericton*,[27] better known today by its eventual name in the Privy Council as *Russell v. The Queen*.[28] Decided in 1879 in New Brunswick and in 1882 in London, it forms the link between *Chandler* and *Maritime Bank* and captures the dramatic transformation of the New Brunswick Court's constitutional vision over the 20 intervening years.

The case looks very different from the rest even on a very quick review. Five of the six judges who sat on the case gave separate opinions, even though the case was decided against

federal jurisdiction by a five to one majority. In contrast, in more than half of the constitutional cases decided before 1895, the Court spoke through a single judgment. There is only one other case in which as many as four separate opinions were delivered.[29] In terms of length alone, *Fredericton* stands out, filling almost 50 pages in the law reports. This also contrasted sharply with the norm. The Court's earlier constitutional decisions averaged 11 pages, a length exceeded by two of the opinions delivered in *Fredericton*.

More important was the complexity, richness and breadth of constitutional thought that the opinions contained. Whereas the Court more usually focussed on the specific jurisdictional question in the case before it, several of the opinions in *Fredericton* can be fairly described as attempts to articulate a general theory of the division of powers as a whole that connected sections 91 and 92 to the objects of Confederation and, just as importantly, to the distinctive essentials of British constitutionalism. This resulted in starkly divergent accounts of Confederation and of the BNA Act as a constitution "similar in principle to that of the United Kingdom", and these in turn generated sharp disagreement on the scope of constitutional adjudication and the role of the courts relative to parliamentary institutions.

Along the way, the judges canvassed many of the issues that would bedevil judges, lawyers and scholars well into the twentieth century. One judge (Wetmore) anticipated the Privy Council by almost 20 years in seeing the rationale, and perhaps the need, for limiting the peace, order and good government power. Another (Allen) anticipated the Privy Council in linking a limited reading of "trade and commerce" to the enumeration of more specific powers of economic regulation in section 91. The lone dissent (by Palmer) is interesting not only for linking a broad reading of all federal powers to British ideas of the balanced constitution, but also because it contained a discussion of the scope of the criminal law power such as would not reappear in the jurisprudence for another 50 years.[30] Each of the judges in the majority (and especially Fisher) anticipated the Privy Council in seeing the relationship between federal and provincial powers as one of interpretive co-determinacy and in understanding this was, in turn, required by the co-equal sovereignty of the provinces.

Most intriguingly, in each of the opinions the conclusion on constitutionality reflected underlying conceptions of the relationship between community and the individual and of the intersection of this relationship with the objects of Confederation and the structure of the division of powers. In the case of the judges in the majority, this manifested itself, to varying degrees, in a struggle to connect particular heads of federal power to "Canada as an economy" and particular heads of provincial powers to "everyday community contact", to the "life of the

neighbourhood", and to "Canadians as members of society".[31] In this way, *Fredericton* reads as a neglected but impressive judicial articulation and validation of what Professor Abel in 1969 called, "The neglected logic of 91 and 92".

These three cases were obviously unrelated in doctrinal terms. But they are connected by what they say about how the thinking of New Brunswick judges on the constitution evolved in the first two decades of Confederation. Together with Ritchie's separate movement beyond *Chandler* in the Supreme Court of Canada in cases such as *Severn v. The Queen*[32], *Citizens Insurance v. Parsons*[33] and *Mercer v. Attorney General for Ontario*,[34] they tell the story of the experience of New Brunswick judges in learning federalism.

III

Because *Fredericton* is the most interesting and revealing of these cases, it will receive the most attention and detailed analysis. Large claims will be made for what it suggests about the shape of constitutional thought in New Brunswick and to some extent, in Canada. It is important therefore, that the judges who decided *Fredericton* are not put forward as legal giants who influenced the course of Canadian constitutional law and left lasting legacies as interpreters of the BNA Act. Several were not regarded as particularly able lawyers or even as qualified for the bench by their fellow lawyers.[35] In the case of some, there were serious questions of integrity and character. Undoubtedly, all of this contributed to the defiance that greeted the Court's first ruling on the Scott Act, as well as that which had earlier greeted the Court's first pronouncement on the Fisheries Act.

In addition, several of the opinions in *Fredericton* read as attempts to pronounce in the grand style of judicial statesmanship, associated now and probably then with the great American judges. If so, the gap between ambition and ability was apparent. The reasoning left too many unanswered questions, relied too heavily on mere assertion and contained too many inconsistencies. The writing was rough, sometimes muddled and highly, even wildly, rhetorical. Without doubt, this was partly caused by the fact that the judges were writing at a time when no general framework for division of powers analysis had been established. They clearly had difficulty producing one of their own. Some of it may also have reflected the apparent animosity to legislated temperance and the difficulty the judges had in explaining their attempt to write that animosity into constitutional law.

But notwithstanding the apparent bias against legislated temperance and the

deficiencies of style and reasoning, *Fredericton* also shows that the judges of New Brunswick took the interpretation of Canada's new constitution very seriously. Their judgments lacked smoothness of style and sophistication of thought, but they openly grappled with the full complexity of sections 91 and 92. Their motivation for working as hard as they did to justify the perhaps desired outcome in division of powers terms is perhaps less important than the seriousness of the effort. Thus the disagreement over which level of government owned temperance became a disagreement between Charles Fisher, who wrote the most interesting majority opinion, and Acalus Palmer, the lone dissenter, about the relationship of the fundamental principles of the British constitution to the federalism that the BNA Act established. In the process, they expressed competing visions of British constitutionalism, both of which harkened back to different traditions within pre-Confederation New Brunswick politics and both of which resonated with patterns of nineteenth century constitutional thought that extended well beyond New Brunswick. They talked expansively about the history of Great Britain and its constitutional legacy to Canada and the world, and they talked openly about the political and economic aspirations that Confederation was designed to satisfy.

In consequence, the *Fredericton* case is surprisingly revealing of what some members of the New Brunswick elite thought about Confederation and Canadian constitutional law. And the insight it provides is perhaps all the more valuable because of the background of the judges, including the more highly regarded Chief Justice Allen. Some of their contemporaries may not have regarded them as great jurists, but they were men who had been deeply involved in the complex mix of New Brunswick law and politics, including the battle for responsible government, the debates over Confederation and the pre-Confederation battles over legislated temperance that were all at play in *Fredericton*.

This was most strongly the case with Fisher, who had been a principal leader of the movement for responsible government in New Brunswick, and attorney general and premier from 1854 to 1861. His government's indulgence of Tilley's demand for action on intemperance had earned it the name "the Smashers" and defeat in the wild temperance election of 1855. Fisher also represented New Brunswick at both the Quebec and London Conferences, where he was said with Henry of Nova Scotia to have drafted the first version of the BNA Act.[36] His election in a York County by-election in 1866 had marked the beginning of the end for Albert J. Smith's anti-Confederation coalition government.[37]

Allen also had a background marked by the mix of temperance and politics, as he had entered politics in the 1855 election as an opponent of the government's temperance legislation

and of reform politics generally.[38] Later, in Smith's anti-Confederation coalition government, he served as attorney-general and represented the branch of anti-Confederation opinion that opposed the Quebec scheme of Confederation because it did not abolish the provinces in a full legislative union.

Wetmore's career in politics only started in 1865, but it put him in the centre of the debate on Confederation. He was elected for Saint John as an anti-confederate.[39] Reflecting the swing in the public mood that would soon see Tilley and the confederates back in power and Confederation realized, Wetmore defected to the confederate position and briefly served as the province's first post-Confederation premier.

Palmer, a former president of the New Brunswick Barristers' Society, had been an unsuccessful candidate on behalf of Confederation (in Westmorland against Smith) in the general elections of 1865 and 1866.[40] He subsequently earned his place on the bench by representing Saint John as an "independent liberal" in Parliament, where he would speak most often, and apparently with some credibility, on the constitution and where he would confess his continuing preference for a legislative union.

Given these backgrounds, the debates in *Fredericton* on British constitutionalism and its connections to Confederation read as continuations of the debates about Confederation that dominated New Brunswick in the years 1864-1867. More particularly, they allow the historian to better understand the ideas, values and aspirations that shaped those debates. Fisher's fundamental concern was to defend a broad interpretation of the provincial power over property and civil rights to ensure that all matters relating to private life, and most especially to the rights of property, remained within provincial jurisdiction. For Fisher, this was necessary not only to fulfil the intentions of the founding fathers and the "compact of union," but to guarantee legislative respect for property and individual liberty. His premise was that provincial legislatures, closer and more directly accountable to the voters, would be less likely to encroach on the prerogatives of the individual. This faith in local democracy reflected the arguments of New Brunswick leaders who had reacted either for or against Confederation primarily from a concern for preservation of provincial political independence.[41] It was a theme also sounded by Wetmore, who painted a dark picture of a distant federal government able and willing to direct a man on the most mundane and minute affairs of his household, including the feeding of his horses. Like Fisher, he also invoked the spirit of the "compact of union," confident that it controlled and coloured the language of the BNA Act. In all these respects, both articulated core elements of "provincial rights" thinking.

In response, Palmer lectured his colleagues, but Fisher especially, on the limited role of the judiciary in protecting individual rights under a constitutional system, "similar in Principle to that of the United Kingdom." If protection against what Fisher described as "sumptuary legislation" was wanted, it was to be achieved by looking to Parliament and its embodiment of the Canadian version of the three estates of the British realm. In Canada as in Great Britain, the "balanced constitution" ensured stability, the great blessing of British government. The people, said Palmer, were "restrained from passing laws from sudden popular impulse, and ... from any being passed to affect them without the consent of their representatives." This approach was premised on a belief in a constitution that protected the people from themselves as much as from arbitrary and unaccountable rulers. It was consistent with the preference for a complete legislative union that New Brunswick Tories expressed at the time of Confederation, a preference that, like the opposite orientation, cut across pro- and anti-Confederation camps.[42]

Just as Fisher echoed the pre-Confederation experience of provincial responsible self-government, Palmer echoed the views of Confederation that came largely from nineteenth century adherence to eighteenth century toryism.[43] Seen in this light, *Fredericton* invites further reconsideration of the long-held view that New Brunswick's Confederation debate was merely a sad reflection of the inertia and small-mindedness of politics in a small province that had been bypassed by the emerging "spirit of the age."[44] It suggests that the New Brunswick debate was, at least partially, activated and informed by genuine commitment to ideas about the nature and purpose of constitutional government.[45]

In a post-Confederation context, the judgments of Fisher and Palmer resonate with the constitutional thought of public men in other parts of Canada as well as with prevailing themes in British and American constitutional thought of the nineteenth century. In protean form, Fisher articulated the provincial rights vision that we now associate with David Mills, Oliver Mowat and Edward Blake. That he did so in constitutional adjudication reinforces the conclusion of recent scholarship that our understanding of provincial rights, and of the development of constitutional law, is impoverished by their separate consideration.[46] Fisher lends support, however modestly, to the argument that the provincial rights movement rested on what were understood to be legal foundations as much as on jurisdictional ambition or the inter-provincial dynamics of party politics. Finally, Fisher challenges the virtually universal assumption that the provincial rights movement, was, as an understanding of Canada, exclusively, or even largely, an Ontario perspective.[47]

On the other hand, Palmer's *Fredericton* opinion echoes the constitutional thinking

usually associated with John A. Macdonald, most obviously in the confidence placed in federal powers and the federal government. Palmer's federalism was "political federalism" of Macdonald, for he came close in *Fredericton* to saying that matters that Parliament legislated upon for the peace, order and good government of Canada, were those on which Parliament had the authority to enact.[48] The rationale for this understanding of parliamentary sovereignty and of federalism lay partly in judicial enthusiasm for Confederation as the creation of a new nationality unhindered by the centrifugal weaknesses apparent in the constitution of the United States but ultimately, it lay in the importance of stability as a central constitutional value and the belief that a British constitution must have an absolute sovereign at its centre.[49]

None of these ideas were original to Palmer or Fisher or to the other judges in *Fredericton*, who to varying degrees demonstrated the same influences as Fisher. But what may have been different, and therefore intriguing, is that the New Brunswick judges were prepared to have these debates, at least in *Fredericton*, within constitutional adjudication. This did not make them great constitutional jurists, but it showed they were not men solely motivated by political expediency, immune to the impulse of principle or the influence of ideas.[50] This says something about elite legal and political culture in New Brunswick. It makes *Fredericton* rich in potential for our understanding of the New Brunswick response to Confederation and the subsequent campaign, in and beyond New Brunswick, for provincial rights, as well as for our understanding of that campaign's success. It also makes it clear that the debate among the New Brunswick judges was not only a debate about the constitution but also a debate about law.

IV

Almost apart from its interest in constitutional terms, *Fredericton* can be viewed as a revealing window on late nineteenth century legal culture. The sources that some of the judges felt entitled to invoke, especially Fisher and Palmer, were not limited to the words of the BNA Act and the handful of constitutional cases that had been decided by 1879. Their sources included the whole history and theory of the British constitution. The sources also included the constitution and nation-making aspirations of the founding fathers. Fisher's included his own recollection and personal interpretation of what had transpired at the Quebec Conference in 1864, as well as a detailed description of all household activities – making perfume, baking "luxuries" and cleaning clothes and furniture – made more difficult or impossible by virtue of the

Scott Act.

In contrast, Chief Justice Allen, though agreeing with Fisher on the invalidity of the Canada Temperance Act, tried to confine himself and his reasoning to the four corners of the BNA Act. Like Fisher, Allen believed that if the Scott Act was valid, it had to be within Parliament's jurisdiction over trade and commerce. However, Fisher narrowed the scope of this power by referring extensively to the limited purpose that the Fathers of Confederation had hoped to achieve by giving it the national government. Allen, on the other hand, relied only on his observation that Parliament had also been given the power to regulate such matters as weights and measures, bills and notes of exchange, and bankruptcy and insolvency and his conclusion that these specific enumerations would have been unnecessary if the trade and commerce authority applied to trade and commerce in all it dimensions.

Allen's strict reliance on the words of sections 91 and 92 followed the adjudicative style of his predecessor, Chief Justice Ritchie. The obvious difference between this approach and that of Fisher, in particular, had several subtle dimensions. The first was the dramatic difference in the way each sought to ascribe meaning to the words of the BNA Act. For example, Fisher sought to put the words in context, relating them to the nation-building ambitions they were meant to serve. Ritchie, in contrast, tried to decide constitutional cases on the premise that words like "bankruptcy and insolvency" and "trade and commerce" had a firm and objective meaning that was more or less unchanging from one context to another and that could be determined through reading the text with the standard techniques of statutory interpretation. If external guidance was necessary, it could be obtained from British or American case law even if the cases were commercial cases without constitutional implications. Words had a meaning that did not change from one area of law to the other, including constitutional law.

This was a difference in understanding of the judicial role and of judicial responsibilities. To Fisher, it was his role and responsibility as a judge to articulate and give effect to the nation-building aspirations embedded in the BNA Act. Each question of jurisdiction therefore required an explanation of the purpose of the founding fathers in assigning the relevant power to one level of government rather than the other. Legislation only came within a head of jurisdiction if it was both consistent with the purpose of that head of jurisdiction and compatible with the ability of the other level of government to achieve the purposes over which it had authority and responsibility. To Fisher, this was the approach that would deliver the good government that the division of powers had wisely been designed to achieve.

Essentially, judging constitutional cases was a continuation of the constitution- making role he had discharged as a Father of Confederation. Fisher's constitutional jurisprudence was therefore highly political. It was committed to a particular conception of federalism – one that depended on prior notions as to the aspirations that Confederation was intended to achieve and the values and traditions that it was intended to preserve. It was neutral and objective only in the sense that Fisher believed that his understanding of the Confederation bargain was embodied in the language of the BNA Act. But it was neither if neutrality and objectivity meant judicial disinterest in the political or economic consequences that would flow from deciding a case in one direction rather than another. For Fisher, these consequences were the very essence of constitutional law.

Such judicial statesmanship was the antithesis of Ritchie's approach. He professed a sharp distinction between the law of interpreting a constitution and the politics of making a constitution. The latter were not his concern. It was the language of the BNA Act, and not the political or economic purposes that lay behind the language that determined the outcome in particular cases. Ritchie would make this clear when *Fredericton* was appealed to the Supreme Court of Canada, and was overruled.[51] Presiding as Chief Justice, he would dismiss the notion that the Canada Temperance Act was unconstitutional because it was for a purpose (moral reform) outside the power to regulate trade and commerce. Section 91(2) gave Parliament jurisdiction over the regulation of trade and commerce, Ritchie pointed out, and since the Canada Temperance Act operated by regulating the trade in liquors, the purpose for which that regulation was undertaken was not the Court's concern. The message was clear: the purpose for which Parliament decided to use its powers of legislation was a political judgment for Parliament, and Parliament alone, to make.[52]

The difference in style between Fisher and Ritchie may confirm Ritchie's greater ability and skill, as judicial skill and ability were defined in late nineteenth-century Canada. It may, however, also illustrate New Brunswick's (and Canada's) transformation from one legal culture or consciousness to another.[53] Fisher's judgment, and that of Palmer, can be seen as an expression of what American historians refer to as the "grand style" – an approach to adjudication in which the judge decides cases by referring to broad considerations of "principle" or "policy".[54] They therefore represented a "pre-classical legal consciousness."[55] On the other hand, Ritchie accepted many of the assumptions on the distinction between law and politics that we today identify with the legal positivism, or formalism, of the late nineteenth century.[56] At the same time however, Ritchie does not appear to have been totally of that new world. He insisted

on separating the words of the constitutional text from the larger constitutional context but he does not appear to have been influenced by the understanding that the role of law, including statutory interpretation, was to carve out and enforce spheres of autonomy between legal actors. This was the underlying philosophy of the understanding of the rule of law that was to radiate out from Oxford and Harvard in the late nineteenth century. There is no trace of it in Ritchie's rule of construction under which federal power routinely overlapped and overwhelmed provincial power.

On this view, the experience of New Brunswick judges in trying to understand federalism within British North America's older constitutional context will be viewed as a window on the development of New Brunswick and Canadian legal culture. On the one hand, it indicates that the formalism characteristic of the constitutional jurisprudence of the Privy Council had indigenous New Brunswick antecedents. This may help to explain why Canadian judges and lawyers (or at least those of New Brunswick) were so ready to adopt the formalism and positivistic technique of the Privy Council and of English (and American) textbook writers.[57] Ritchie's indigenous formalism, at least in constitutional cases, looks very much like his response to opposition from within New Brunswick's legal and political community to the very idea of judicial review.[58] This opposition formed the backdrop to Ritchie's decision in *Chandler*, and it may have been still in the air ten years later when the Supreme Court of New Brunswick was called on to decide *Fredericton* even though it had already declared the Scott Act unconstitutional in an earlier decision.

Whether or not that was so, Fisher and Palmer can be seen as trying to ground judicial review in the unique quality of the BNA Act as a constitution, an instrument of government. They both substituted different versions of the objects of Confederation and different understandings of Britain's constitutional legacy, for the tenacity of Ritchie's reliance on the bare constitutional text and his theory of Confederation as an act of Imperial will. Indeed, if Ritchie represents New Brunswick receptivity towards a greater and more rigorous formalism that came from beyond Canada, Fisher in particular may be taken to represent the New Brunswick resistance to these external influences. If so, it was a resistance that may have been propelled by awareness, and seemingly growing awareness, of the inherently political nature of constitutional law that came through the experience of deciding constitutional cases. Here, it is worth noting that Ritchie's formalism would relax sufficiently after *Chandler* to allow him to recognize a constitutional commitment to provincial autonomy that would be difficult to derive solely from what was written in the constitution. Confederation is therefore seen to have

brought the line between law and politics into sharp focus for New Brunswick judges, just as the same distinction was becoming fundamental to legal thought throughout the common law world. This is relevant to our understanding of the interplay between three processes: the development of Canadian constitutional law, the transformation of Canadian legal culture and the historical understanding of both. One aspect of this is possibly indicated by putting *Chandler* and *Fredericton* in the context of later Privy Council decisions, the subject of chapter 2. What we see is significant vindication for Fisher on the major division of powers questions but the vindication of Ritchie on questions of judicial methodology. In this way the conclusions that the Privy Council reached in particular cases became separated from the type of rich and probing debate about Confederation and of Canada's broader constitutional character that is displayed in *Fredericton* and that may have rendered those conclusions more intelligible, if not more compelling. The result has been an undue preoccupation in Canadian constitutional historiography with the search for the motive that lays behind what is almost universally admitted to be the Privy Council's "provincial bias". The result, in short, is a poorer understanding of the early years of Canada's constitutional history.

V

Chapter 2 will set the stage for the deeper exploration of these themes. It reviews the principal nineteenth century constitutional decisions of the Privy Council and the leading explanations that have been offered for the victory, through those cases, of the provincial rights vision of Confederation. This serves several functions. It provides a framework of analysis within which we can better understand what the New Brunswick judges were trying to say about Confederation and the BNA Act. It permits connections to be made later between their experience and the broader tapestry of constitutional evolution during the same two decades. It establishes a foundation for the later argument that the New Brunswick judges, overturned on the appeal from *Fredericton*, nevertheless anticipated some of the key elements of the Privy Council's interpretation of the BNA Act. Particularly through the discussion of the scholarship of Paul Romney, Robert Vipond and Richard Risk, chapter 2 more specifically establishes the foundation for linking Fisher with provincial rights thinking.

Chapter 3 takes the story back to the chronological beginning of constitutional adjudication in both New Brunswick and in Canada, to the opinion of Ritchie in *The Queen v. Chandler*. It discusses the New Brunswick opposition to judicial review that gathered

momentum after *Chandler* and then follows the evolution of Ritchie's later constitutional thinking as a justice of the Supreme Court of Canada. The objectives of the chapter include establishing *Chandler* as a jurisprudential benchmark that allows the extent and nature of the subsequent evolution both of the Court and of Ritchie to be appreciated and understood. Another is to establish the environment within which the New Brunswick judges experienced constitutional adjudication and particularly, to show that it was an environment in which the legitimacy of judicial review was not readily accepted for reasons that had continuing implications for other questions about the meaning of the BNA Act. These questions included the constitutional status of provincial governments and legislatures and the relationship of provincial self-government to federalism.

In chapters 4 and 5, the study moves to its main concern, the decision in *Fredericton* and more specifically, the competing explanations of Confederation and of the BNA Act offered by Fisher and Palmer in defence of their differing views on Parliament's competency over temperance legislation. Chapter 4 makes the argument that Fisher articulated the key elements of provincial rights thinking in nascent form, particularly in his association of individual liberty with provincial jurisdiction through the mechanism of provincial responsible self-government. Chapter 4 also emphasizes the importance of Fisher's rejection of the textualism of *Chandler* to his ability to relate constitutional adjudication to his broader understanding of Confederation and of the division of powers.

Chapter 5 turns to Palmer and places his opinion in *Fredericton* in the context of his parliamentary speeches, where as MP for Saint John, he consistently opposed the constitutional ideas of David Mills and tried to articulate an understanding of the BNA Act that aligned it with the conservative and nationalist vision of John A. Macdonald. This helps to show that the understanding of the constitution and of Confederation manifested in Palmer's judgment in *Fredericton* put constitutional stability ahead of liberty, political discretion and executive power ahead of judicial review and Canadian nationality ahead of provincial autonomy.

Chapter 6 offers some concluding thoughts on the separate evolutions of Ritchie and of the New Brunswick Court from coordinate to subordinate federalism. *Maritime Bank* is briefly discussed to show these two distinct processes of evolution converging and culminating with each other and then together intersecting with the Privy Council's definitive articulation of the vision of coordinate federalism, now so familiar to us. It is used as the embodiment of the leading themes of this study, including the identification of elite New Brunswick lawyers with a

provincial rights understanding of Confederation and the relationship of the resulting interpretive outcomes with the understanding of Confederation and of the BNA Act that was eventually endorsed by the Privy Council, including in *Maritime Bank*. More broadly, by framing *Maritime Bank* as the fulfilment of indigenous processes of intellectual evolution, it is used to exemplify the argument that lies beneath the rest of the study, that the evolution of New Brunswick judges did not come solely on command from above or beyond New Brunswick but also significantly from within their own experience of learning federalism.

Endnotes

1. Hereinafter referenced as the "BNA Act" throughout.

2. See James G. Snell and Frederick Vaughan, The Supreme Court of Canada: History of the Institution (Toronto, University of Toronto Press, 1985), and Gordon Bale, Chief Justice William Johnstone Ritchie: Responsible Government and Judicial Review (Ottawa, Carleton University Press, 1991), as examples of an institutional and biographical focus.

3. One of the exceptions is R.C.B. Risk, "Canadian Courts Under the Influence", (1990) 40 University of Toronto Law Journal 687.

4. The passage most often cited is the statement of Lord Watson in *Liquidators of the Maritime Bank of Canada v. The Receiver-General of New Brunswick* [1892] A.C. 437, in favour of the autonomy of the provinces. The statement included the observation that, "The object of the [B.N.A.] Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy", and the declaration that, "... in so far as regards those matters which, by sect. 92, are especially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act."

5. See Phillip Girard, "The Maritime Provinces, 1850-1939: Lawyers and Legal Institutions", (1996) 23 Manitoba Law Journal 379, at p. 382; and David G. Bell, Legal Education in New Brunswick (Fredericton, University of New Brunswick, 1992), at pp. 51-56.

6. An example of the generally low opinion of the quality of Canadian jurisprudence in the late nineteenth century is found in James G. Snell and Frederick Vaughan, The Supreme Court of Canada: History of the Institution, supra, where the authors quote R.C.B. Risk, '"This Nuisance of Litigation": The Origins of Workers' Compensation in Ontario', in D.H. Flaherty, Essays in the History of Canadian Law, vol. 2 (Toronto, University of Toronto Press and the Osgoode Society, 1983) in the following passage:

> What work the justices did perform was not done impressively. Their early judgments manifest a diffuseness and prolixity that are disturbing for their apparent commentary on the justices' intellectual discipline. At the same time, however, the judgments are generally reflective of the quality and character

of decisions then being written in the lower courts of Canada. R.C.B. Risk's description of the Ontario courts of the time aptly depicts the Supreme Court of Canada:

> In Ontario the courts seemed to assume that the common law was composed of rules firmly settled by authority, primarily English authority. It was almost never expressly justified, beyond the justification implicit in it's mere existence and the internal authority of the courts in a hierarchy ... The process of making decisions seemed usually to be simply finding facts and applying rules. If the law was obscure or uncertain, the court simply had to look harder to find it. This process of finding almost never included any reasoning, even to deduce implications from the rules. The judgments contain virtually no discussions of the functions of courts, especially their responsibility for the common law or interpreting statutes, but a basic and pervasive article of faith was apparent: their function was only to apply the law in an impartial way.

7. See R.C.B. Risk, "Constitutional Scholarship in the Late Nineteenth Century: Making Federalism Work", (1996), 46 University of Toronto Law Journal 427, for the emergence and evolution of legal writing on federalism, starting with the earliest books around 1880, and in which a recognizable version of a modern understanding of Canadian federalism, particularly as regards the autonomy and independence of the provinces, is shown to appear as settled doctrine after 1890; see at pp. 434-435 and pp. 439-440.

8. *Hodge* v. The Queen (1883) 9 A.C. 117 (PC).

9. This figure includes 25 cases that were published in the New Brunswick Law Reports, and one that was privately published in pamphlet form. There is no way of knowing for certain whether all of the Court's other constitutional decisions were published in the official reports, but it can be said that none of the located decisions includes citation or mention of any unpublished case (other than the one already mentioned) and that the reports were presented as inclusive of all the cases decided by the Court.

10. 30 & 31 Vic., c.3, hereinafter referred to as the BNA Act.

11. *Ex parte Renaud* (1873), 14 N.B.R. 273.

12. *Ganong v. Bayley* (1877), 17 N.B.R., 324.

13. *The Provincial Government of the Province of New Brunswick and the Liquidators of the Maritime Bank of the Dominion of Canada* (1888), 27 N.B.R., 379.

14. *The Queen v. Chandler. In re Hazelton* (1867-69), 12 N.B.R. 556.

15. *The Queen v. Dow* (1873), 14 N.B.R. 300.

16. *Regina v. McMillan* (1873) 15 N.B.R. 110; *Regina v. The Justices of the Peace of the County of Kings. ex parte McManus* (1773-75), 15 N.B.R. 535; *Ex parte Mansfield* (1878), 18 N.B.R. 56; *Ex parte Driscoll* (1888), 27 N.B.R. 216; *Ex parte Danaher* (1888), 27 N.B.R. 554; *Ex parte Foley* (1889), 29 N.B.R. 113.

17. *Ex parte Fairbairn* (1877), 18 N.B.R. 4.

18. *Ex parte Owen* (1881), 20 N.B.R. 487, and *Ackman v. Town of Moncton; Landry v. The Same* (1884) 24 N.B.R. 103.

19. *Quiddy River Boom Co. v. Davidson* (1886), 25 N.B.R. 580.

20. *Robertson v. Steadman et al.* (1876), 16 N.B.R. 621; and *Steadman v. Robertson et al.; Hanson v. Robertson et al.* (1878-79) 18 N.B.R. 580.

21. *Canada Temperance Act 1878; Judgment of the Supreme Court of New Brunswick, Trinity Term, 1879; Ex parte Grieves,* August 12, 1879(hereinafter called *Ex parte Grieves* or *Grieves*); and *The Queen on the Prosecution of Thomas Barker v. The Mayor & Commonality of Fredericton* (hereinafter called *City of Fredericton* or *Fredericton*) (1879-80), 16 N.B.R. 139.

22. *Ward v. Reed* (1882), 22 N.B.R. 279.

23. *Levesque v. New Brunswick Railway Co.* (1889), 29 N.B.R. 588.

24. *Attorney-General of Canada v. Foster et al.* (1892), 31 N.B.R. 153.

25. The decision of the Court in *Ex parte Renaud,* supra, was obviously a major one. I have focussed on other cases primarily because they are most closely related to the general structure of the division of powers and of the relationships between the federal and provincial governments.

26. Bale, supra, at pp. 97-132.

27. *Fredericton,* supra.

28. *Russell v. The Queen* (1882) 7 App. Cas. 829. The citation for the Canada Temperance Act is S.C. 1878, 41 Vic., c. 1i

29. The case was *Ganong v. Bailey* (1877-78)17 N.B.R., which concerned the authority of the province to establish and appoint parish courts for the recovery of small debts.

30. See *Re: Board of Commerce* (1922) 1 A.C. 191; *Toronto Elec. Commrs. V. Snider* (1925) A.C. 396; and *Proprietary Articles Trade Assoc. v. A.-G. Canada* (1931) 310.

31. Albert S. Abel, "The Neglected Logic of 91 and 92", (1969) 19 University of Toronto Law Journal 487, at 499 ff.

32. *Severn v. The Queen* (1878) 2 S.C.R. 70.

33. *Citizen's Insurance Company v. Parsons* (1880) 4 S.C.R. 215.

34. *Mercer v. A.G. Ontario* (1881) 5 S.C.R. 538.

35. See, for example, the views of Jeremiah Travis, discussed in David Bell, "Judicial Crisis in Post-Confederation New Brunswick", (1991) 20 Manitoba Law Journal 181, and J.W. Lawrence, The Judges of New Brunswick and Their Times (Fredericton, Acadiensis Press, 1983 Reprint), which although generally complimentary and even celebratory, could only say of Judge John Wesley Weldon that he turned out to be a better judge than many expected and which suggested that his main contribution to the New Brunswick judiciary was to be the first judge to wear a mustache.

36. A brief summary of Fisher's career can be found in C.M. Wallace, "Fisher, Charles", Dictionary Of Canadian Biography, X, 284-290. The history of Fisher's government is recounted in more detail in W.S. MacNutt, New Brunswick: A History: 1784-1867 (Toronto: MacMillan of Canada, 1963) at 353-388.

37. MacNutt, supra, pp. 437-438.

38. Lawrence, supra, at pp. 511-514.

39. T.W. Acheson, "Andrew Rainsford Wetmore", Dictionary of Canadian Biography, XII, 1096-1098.

40. James C. Graves and Horace B. Graves, Grave's Judges: New Brunswick Political Biography, Manuscript, Public Archives of N.B.

41. The classic accounts of the New Brunswick reaction to the Quebec Resolutions can be found in P.B. Waite, The Life and Times of Confederation: 1864-1867 (Toronto, University of Toronto Press, 1962), at pp. 229-262, and W.S. MacNutt, supra, pp. 414-461. A thought provoking reappraisal, one that has strongly influenced my interpretation of the opinions of Fisher, Wetmore and Palmer, is found in Phillip A. Buckner, "The Maritimes and Confederation: A Reassessment", in Ged Martin ed., The Causes of Canadian Confederation (Fredericton, Acadiensis Press, 1990), 86. On the division of those concerned with continuing provincial independence, see Buckner at pp. 106-113. See also, Christopher Moore, 1867: How the Fathers Made a Deal (Toronto, McClelland & Stewart, 1997), at pp. 164-198.

42. See Waite and MacNutt, supra.

43. Peter J. Smith, "The Dream of Political Union: Loyalism, Toryism and the Federal Idea in Pre-Confederation Canada", in Martin, supra, 148; see also Buckner, supra, at pp. 107-113, and esp. p. 110.

44. The literature to this effect is reviewed and critiqued in Buckner, supra.

45. See Buckner, supra, generally.

46. See Paul Romney, Mr. Attorney: The Attorney General for Ontario in Court, Cabinet and Legislature, 1791 - 1899 (Toronto, University of Toronto Press, 1986); Robert C. Vipond, Liberty and Community: Canadian

Federalism and the Failure of the Constitution (Albany, State University of New York, 1991); and R.C.B. Risk, "Constitutional Scholarship in the Late Nineteenth Century: Making Federalism Work" (1996) 46 University of Toronto Law Journal 427.

47. The need for such a reappraisal is hinted at by Buckner, supra, at 112.

48. Macdonald's "political federalism" is described in Bruce W. Hodgins "Disagreement at the Commencement: Divergent Views of Federalism, 1867-1871", in Donald Swainson, ed., Oliver Mowat's Ontario (Toronto, Macmillan, 1972) 52.

49. See Risk, "Canadian Courts Under the Influence" supra, at pp. 702-703, and p. 704.

50. The prevalence of the view is made clear by Buckner, supra.

51. *The Mayor, Alderman, and Commonality of the City of Fredericton v. The Queen on the Prosecution of Thomas Barker* (1880) 3 S.C.R. 505

52. A fundamental aspect of the difference between the two styles was that Fisher believed that the makers of the constitution were the Fathers of Confederation; it was their intentions, representing the desires of the confederating peoples, that governed judicial interpretation of the BNA Act. The "compact of union" was therefore frequently invoked as a fundamental point of reference. In contrast, Ritchie's point of reference was the intentions of the Imperial Parliament. It was the BNA Act as enacted by the Imperial Parliament, and not the compact it embodied, that constituted law. This, too, was consistent with and even necessary to Ritchie's portrayal of the BNA Act as an ordinary statute within the scope of the ordinary and uncontroversial canons of statutory interpretation.

53. The use of the concept of "legal consciousness" follows that of Duncan Kennedy, who uses the concept to refer to the "body of ideas through which lawyers experience legal issues" and those "premises about the salient aspects of the legal order that are so basic that actors rarely if ever bring them consciously to mind"; see Duncan Kennedy, "Towards an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940", (1980) 3 Research in Law and Sociology 3.

54. Karl Llewellyn, The Common Law Tradition (Boston, Little, Brown, 1960), esp. at pp. 36-41 and 62-72; Martin J. Horowitz, The Transformation of American Law, 1780-1860 (New York, Oxford University Press, 1992 edition), at pp. 1-30; Elizabeth Mensch, "The History of Mainstream Legal Thought", in David Kairys, ed., The Politics of Law: A Progressive Critique (New York, Pantheon Books, 1982) 18, at pp. 19-23.

55. Mensch, supra, pp. 19-23.

56. The structure of late nineteenth century legal formalism or "classical legal consciousness" is explored in Kennedy, supra and in Mensch, supra; See also: Robert W. Gordon, "Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920" in L. Stone and G. Geison, eds., Professions and Professional Ideologies in America, 1730-

1940 (Chapel Hill, University of North Carolina Press, 1983); Thomas C. Grey, "Langdell's Orthodoxy", (1983) 45 University of Pittsburgh Law Review 1; David Sugarman, "Legal Theory, the Common Law Mind and the Making of the Textbook Tradition", in William Twining, ed., Legal Theory and the Common Law (Oxford, Basil Blackwell, 1986), and "The Legal Boundaries of Liberty: Dicey, Liberalism, and Legal Science" (1983) 46 Modern Law Review 102.

57. G. Blaine Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire", (1985) 8 Law and History Review 219.

58. The views of those New Brunswick politicians and lawyers who protested against judicial review are throughly documented in Bale, supra, at pp. 97-132.

Chapter 2

The Privy Council and the British North America Act: The Search for an Explanation

In 1971, in one of the classic articles on the subject, the political scientist Alan Cairns described the debate over the Privy Council's interpretation of the British North America Act as, "... the most significant, continuing constitutional controversy in Canadian history."[1] The assessment continues to be an accurate one.

At one level, the debate has been whether the Privy Council gave to Canada a more decentralized federalism than was contemplated by the language of the Act or by the intentions of the founding fathers. At another level, the debate has revolved around the search for the explanation for the Privy Council's failure to follow the centralist intentions, usually assumed to be manifest on the face of the Act. The assumptions that have, for many years, informed this second level of debate are obvious from the language scholars have used to describe their subject. For example, in 1951, law professor Vincent MacDonald wrote of the Privy Council's "obsession" with provincial autonomy and in 1971, Cairns wrote of the Privy Council's "provincialist bias" as an accepted fact.[2] Such language is consistent with the view that the outcomes were so obviously at odds with the Act that they could not be explained as

coming from an objective, judicial interpretation of it. In consequence, the scholarship has significantly been concerned with the search for the explanation either of the Privy's Council's inability to understand, or, more typically, deliberate decision not to be guided by, the Act.

Over the last two decades, new voices and perspectives have revitalized these debates by challenging this standard view of Privy Council jurisprudence and some of the assumptions on which it rests. Historians are questioning the clarity of the BNA Act's centralism over elements of the Act that pointed toward a more balanced federalism.[3] They have more fundamentally questioned the view, long orthodoxy, that an unequivocally centralist constitution was equally understood to have been the outcome of the Quebec and London conferences, even by those who were there. Most significantly perhaps, the Privy Council cases have been reappraised in the context of revived interest in the provincial rights movement that was largely successful through the cases. These studies, particularly those of Paul Romney, Robert Vipond and Richard Risk, have challenged the consensus that provincial rights was driven strictly by political, economic or social factors and objectives, rather than constitutional and legal ideas and values.[4] In doing so, they have suggested that Canadian advocates for the provinces and Privy Council interpreters of the constitution had common ground in the constitutional and legal ideas and values of the late nineteenth century empire and in late nineteenth century patterns of legal thought.

In leading this revisionism, Romney aptly described the BNA Act as, "the legislative equivalent of an optical illusion: look at the [A]ct one way and it seemed to say one thing; look at it in another and it seemed to say the opposite".[5] This captures the inherent complexity and the indeterminancy of the language and structure of the BNA Act. After all, the Act, and the Resolutions on which the Act was based, were accepted precisely because they had sufficient elasticity of meaning to satisfy the diversity of interests, objectives and opinions that characterized Confederation from its beginning.

In significant measure, the revisionist position is that this indeterminancy meant that the BNA Act did in fact contain the elements of the decentralized constitution that emerged in the decades after Confederation, particularly through the decisions of the Privy Council. The further suggestion has been that the Privy Council was guided, if not pushed, to give effect to these elements by the understanding of the underlying complexity of the BNA Act that came from applying its broad and sweeping language to specific questions of jurisdictional competence, by the quality of the arguments presented by the provinces (especially by Mowat in his personal representation of Ontario), and by the resonance of these provincial arguments

with the broader web of legal and constitutional ideas and values that influenced both Canadian advocates of provincial rights and English judges.

One of the principal arguments of this study is that constitutional adjudication in late nineteenth century New Brunswick supports this revisionist understanding of the Privy Council and the provincial rights movement on several levels. At the same time, the revisionist explanations, especially of the provincial rights movement, are key to a full understanding and appreciation of the New Brunswick cases. This chapter lays the groundwork for the subsequent focus on the New Brunswick adjudicative experience of the BNA Act by presenting an outline primarily of Privy Council cases up to the seminal *Local Prohibition Reference* of 1896 and an overview and evaluation of the leading theories of how the Council came to interpret the BNA Act so strongly in favour of the provinces. To put the Privy Council cases in some context, brief discussions of some of the early Supreme Court of Canada decisions are also included.

II

The early cases on the BNA Act raised two separate issues. The first was the constitutional status of the provinces; the second was the division of powers between Ottawa and the provinces. The scholarship of the last two decades suggests earlier explanations of Privy Council jurisprudence have not always given enough consideration to the implications of the cases on status for the division of powers cases.[6]

The status question had two components. The first related to the provincial legislatures and raised the question of whether they were true parliaments in the British sense or instead, subordinate statutory bodies. The second concerned the question of whether the lieutenant governors were direct representatives of Her Majesty or instead, the representatives of the governor general and the federal government. This question arose because the lieutenant governors, unlike the governor general, were not directly appointed by Her Majesty, but were instead appointed by Ottawa. It also arose because the BNA Act referred to the Queen in the description of the federal executive, and instead provided for, "an officer, styled the Lieutenant-Governor", in the description of the executive branch of the provincial governments. Finally, it arose for some from the assignment to the federal government of powers of control over the provincial government, such as the power of disallowance, that were thought to make the provinces a subordinate level of government which therefore could not have the sovereign and

independent status that would come from direct involvement of the Crown in provincial government.[7]

The implications for the provinces, and for Canadian federalism, were serious. If the provincial legislatures were not true parliaments, the claim of the provinces to exclusive jurisdictional rights would be compromised. If the lieutenant governors were not direct representatives of the Crown in their own right, the executive of provincial governments would be without the prerogative powers of the Crown and would be limited to those powers expressly assigned them by the BNA Act. More important, provincial governments would be of inferior status, depending for their jurisdiction on the sufferance of the superior delegating authority rather than on an independent status as sovereign governments. This implied accountability to the federal government, rather than to the provincial legislature. In short, it meant the end of provincial self-government.

The importance of the status issue extended beyond defensive considerations. If the provincial governments maintained their sovereignty, they could argue that Confederation was an enduring contractual arrangement between the provinces as independent and sovereign governments.[8] This put the provinces in control of constitutional amendment. It supported their continuing possession of all the powers and rights they brought with them into Confederation, subject only to express limitation in the BNA Act. In contrast, if the provinces were the creations of the BNA Act, they more likely only had such powers and rights as that Act bestowed on them. At stake was the interpretive context for constitutional adjudication. The implications could be seen in the textual arguments for and against the representation of Her Majesty by the lieutenant governors. On one view of provincial status, the Act's failure to expressly provide for such representation clearly meant it did not exist. On the other view, the Act's silence was simply a function of the understanding that the lieutenant governors were of course to keep their status as direct personifications of Her Majesty.[9]

Battle was joined over the seemingly innocuous issue of provincial power to appoint Queen's Counsel. These appointments were prerogative appointments and therefore either could not be made by the provinces because the relevant prerogative power was not expressly authorized by the BNA Act or could be made because nothing in the BNA Act expressly stripped the provinces of the relevant authority.[10] In 1879, the Supreme Court of Canada accepted the former position in the Nova Scotia case of *Lenoir v. Ritchie*.[11] Justice Gwynne held that the lieutenant governors were not representatives of the Queen because they were appointed by the federal government and not by the Crown directly. As the prerogative powers

depended on the person of royalty, provincial governments were, in his view, totally devoid of prerogative powers. Justice Taschereau admitted that provincial governments had an indirect link with the crown via the Queen's consent to the passage of section 92, but this meant the provinces had prerogative powers only with respect to the legislative matters expressly assigned to them in section 92.

The Supreme Court reached a similar conclusion in *Mercier v. AG for Ontario*,[12] a case concerning the power of escheat. Unlike *Lenoir v. Ritchie*, this was a direct confrontation between Ottawa and not only Ontario, but Quebec, which intervened. Quebec argued that Confederation was a treaty between the empire and the four founding provinces. The federal government argued that Confederation was an act of imperial will which annihilated all previous political entities. By a majority, the Court sided with the Dominion, partly because the Crown was not generally represented in the provinces but also because escheats were included within "duties and revenues" transferred from the provinces to the Dominion by section 102. Interestingly, Ritchie of New Brunswick dissented and gave a statement in favour of the continuity of lieutenant governor status that was stronger and more significant than has been appreciated. This is part of the story of the New Brunswick experience to which we return. On further appeal to London, the Privy Council vindicated Ontario but without ruling on the broader status question. Instead, it based it's decision on the express right of the provinces to "royalties" under section 109.

In 1883, the battle shifted to the status of the provincial legislatures. In *Hodge v. The Queen*, Ontario's liquor licensing legislation, which provided for delegation of powers to licensing boards, was challenged on the premise that the rule against sub-delegation, which only applied to subordinate statutory bodies, applied to Ontario. Upholding Ontario's Court of Appeal, the Privy Council rejected this argument in one of the handful of paragraphs from the whole body of Privy Council jurisprudence that is regularly quoted as evidence of the Committee's underlying understanding, or misunderstanding to many, of Confederation. Lord Watson said the delegation argument was:

> 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 mandate from the Imperial Parliament.
>
> . . .
>
> [section 92] 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 section 92 as the Imperial Parliament in the plenitude of its powers possessed and could bestow. *Within these limits of*

subjects and area the local legislature is supreme ...[13] [emphasis added]

In contrast to *Lenoir v. Ritchie*, this obviously strongly suggested that the provinces had within their legislative spheres a status equal to that enjoyed by the Dominion within the ambit of section 91.

In 1892, the Privy Council drove the point home in the case of *The Liquidators of the Maritime Bank of Canada v. The Receiver-General of New Brunswick.*[14] The case arose from the collapse of Saint John's Maritime Bank and concerned the assertion by New Brunswick of crown priority over other creditors. From a New Brunswick perspective, the importance of the case was indicated by the personal involvement of Andrew Blair, the Liberal premier, who argued the case before the New Brunswick Supreme Court and the Supreme Court of Canada, where he was successful, and briefed English counsel in London before the Privy Council. In agreeing with New Brunswick's arguments, Lord Watson declared the object of the BNA Act had been,

> . . . neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy.[15]

This definitively established that the federalism of the BNA Act was coordinate or autonomous federalism built on two levels of government with equal constitutional status. It meant an end to MacDonald's sub-ordinate federalism, in jeopardy since *Hodge v. The Queen* and based significantly on elements of the BNA Act that were outside sections 91 and 92, such as the power of disallowance and the federal appointment of lieutenant governors. The implications for rival claims over fields of legislative jurisdiction would become clear in the Privy Council's decision in the *Local Prohibition Reference*, discussed below.

On the division of powers, the BNA Act was generally understood, the compact theory notwithstanding, to have given the provinces jurisdiction over specific matters by way of section 92 and jurisdiction over everything else to the Dominion through section 91 and Parliament's general grant of authority to make laws for the "peace, order and good government of Canada". One of the difficulties that this structure presented to the courts is that the federal sphere could only be defined by defining the scope of provincial powers, because Parliament's general authority excluded matters within provincial powers, all of which were described as "exclusive" and some of which were of a broad and uncertain nature,

especially property and civil rights [92(13)] and the authority over "local matters" [92(16)].[16] The general authority was itself enumerated in 29 federal heads of power, also described as "exclusive". They were also said by the opening paragraph of section 91 to apply, "notwithstanding anything in this Act", which presumably included the provincial powers set out in section 92. The result seemed to be a general power that, standing alone, was subject to specific heads of provincial jurisdiction but which, when connected to the enumerated powers that illustrated its scope, was superior to the same heads of provincial power.

Further complications came from the deeming clause at the bottom of section 91. It said that "matters" coming within the enumerated federal powers were deemed not to come within, "the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces". This was rife with ambiguity. Did it apply to all of the enumerated provincial powers or did it only apply to subsection 92(16), which spoke specifically of provincial jurisdiction over matters, "of a merely local or private Nature in the Province"? And what was its effect? Did it reinforce the notwithstanding clause or supplement it by giving federal enumerated powers an additional capacity to incidentally affect provincial matters in some cases? Or, did it mean that the effect of the notwithstanding was also to give incidental rather than general priority over provincial powers? The language and structure of sections 91 and 92 did not give unequivocal answers.

Consistent with its approach to the sovereignty issue, when the Supreme Court started to hear division of powers cases, it generally reached conclusions favourable to the federal government. In 1877 in *Severn v. The Queen*,[17] a majority of the Court ruled that an Ontario law for the licensing of breweries was *ultra vires* provincial competency as an interference with Parliament's exclusive jurisdiction over trade and commerce. This gave short shrift to subsection 92(9), under which the provinces had jurisdiction over "Shop, Saloon, Tavern Auctioneer, and other Licences in order to the raising of revenue for Provincial, Local or Municipal Purposes".[18] It placed intra-provincial as well as inter-provincial trade, as well as specific branches of trade and the general regulation of all trade, within the federal power. It also implied that the existence of federal jurisdiction precluded provincial legislation on a matter that might be said to have a provincial aspect even where the competing federal jurisdiction had not been exercised. It implied, in other words, an absolutist application of federal paramountcy connected with a broad reading of federal jurisdiction.

The same was true of the Supreme Court's decision in *City of Fredericton v. The Queen*,[19] where the Court upheld the Canada Temperance Act. Obviously, this is a case that

will be discussed at great length in subsequent chapters. For now, it is enough to say that several of the judges upheld the legislation under trade and commerce on the premise that if legislation regulated commercial activity, the trade and commerce power applied.[20] The Court held that constitutional character of the Act was not affected by its temperance purposes; the relevant factor was that it pursued this purpose through the regulation of trade in liquor.[21] Ritchie took the lead in this, although he had dissented in *Severn.* Gwynne, always the most committed defender of the constitution's centralism, wrote long reasons that relied primarily on the general jurisdiction of Parliament over Canada's peace order and good government. He applied it partly on the basis of his conclusion that local option temperance was not a matter within any provincial head of jurisdiction and partly on his view that the constitution was designed to make Parliament the arbiter of what was necessary for the peace, order and good government of Canada. Essentially, if Parliament decided that the peace, order and good government of Canada was at stake, the general authority supplied the necessary jurisdiction. What Gwynne and the rest of the majority had in common was rejection of the broad reading that had been given to 92(13) and 92(16) by the judges of the New Brunswick Supreme Court.

The early Supreme Court of Canada was not, however, uniformly centralist. In *Citizen's Insurance Co. v. Parsons*,[22] decided in the same year as *Fredericton,* a majority found Ontario legislation on fire insurance contracts to be valid either under property and civil rights or as legislation on a local matter.[23] The rationale for the apparent distinction between the regulation of the liquor trade and the regulation of the fire insurance business was not easy to see, as Gwynne noted in his dissent. For Ritchie, it was partly the hard to understand observation that some purchasers of fire insurance would have nothing to do with commerce and partly the view that the possibility of federal legislation on the same matter in the future did not preclude provincial legislation in the meantime.[24] Regardless, the majority opinions, including that of Ritchie, indicated an awareness that the jurisdiction over "property and civil rights" and the jurisdiction over "local matters" would hardly exist if the jurisdiction over "trade and commerce" included all legislation that touched upon economic activity, whether local or national, general or specific.

Citizen's Insurance was appealed and the Privy Council upheld the Supreme Court in a decision that gave early warning to centralists that it shared these concerns.[25] Although the law obviously affected commercial transactions, this by itself was held not to settle the question of constitutionality. This put the correctness of *Fredericton* in the Supreme Court of Canada in doubt. More significantly, the Privy Council elevated the jurisdictional dispute over

fire insurance into one of its first elaborations of the general framework of the division of powers. The first step, it said, was to consider whether Ontario's legislation fitted within any of the heads of power set out in section 92. If it did, it could nevertheless still be a matter of federal jurisdiction if it also fit within section 91. This led to the conclusion that the Ontario law did fall within property and civil rights because these words extended beyond "such rights as flowed from the law", encompassed "rights arising from contract" and were used in the BNA Act in "their largest sense".[26] Fire insurance was held not to fall within federal jurisdiction because of a narrow reading to the trade and commerce power, in which the interpretation of the general authority over trade and commerce was heavily influenced by section 91's enumeration of more specific powers of economic regulation.

The year after *Citizen's Insurance*, the Privy Council ruled in *Russell v. The Queen*[27], essentially the appeal from *Fredericton*, that the Canada Temperance Act was valid under peace, order and good government. It appeared to do so, contrary to *Citizen Insurance v. Parsons*, by taking a narrower view of property and civil rights. *Citizen's Insurance* appeared to say that the regulation of a branch of trade within a province was property and civil rights, and implied a broad reading of 92(13) relative to trade and commerce. *Russell v. The Queen* seemed to suggest that the scope of the property and civil rights jurisdiction changed when the competing head of federal power was peace, order and good government, rather than trade and commerce, for the Canada Temperance Act was, despite its national scope, the regulation of a particular business at the local level. Of course, the Canada Temperance Act had a purpose, the "promotion of public order, safety or morals", quite different from the purpose of the legislation in *Parsons*. By making the purpose rather than the means of the Act determinative of characterization, the Privy Council launched the now familiar "pith and substance" doctrine. Purposiveness did not however, extend to the interpretation of the competing heads of power. Instead, the Canada Temperance Act was essentially put under peace, order and good government by matching its object of public order with the word "order" in peace, order and good government. No consideration was given to how the words of section 91 and 92 reflected any kind of overall understanding of the type of matters that the Dominion and the provinces were respectively, generally to have jurisdiction over.

In 1883 the Privy Council ruled in *Hodge v. The Queen*[28] that an Ontario law directed at the regulation of the retail sale of liquor was valid under provincial jurisdiction over municipal institutions. This endorsed a provincial jurisdiction over public order that had been given short shrift in *Russell v. The Queen*. In addition, *Hodge* established the aspect doctrine by

distinguishing *Russell* by saying that, "subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91". The meaning of this for the relationship between *Hodge* and *Russell* was not made clear, though one possibility was the difference between the prohibition and regulation and another the difference between retail and wholesale. Shortly afterwards, the Privy Council struck down a federal licensing law that was virtually identical to the Ontario law upheld in *Hodge*, in what was known as the *McCarthy Reference*.[29] Although no reasons were given, the result almost certainly followed from a narrow reading of the federal trade and commerce power, through the association of the regulation of the liquor trade with the provincial authority over public order, whether under 92(8) [municipal institutions] or 92(16) [local matters].

Russell v. The Queen now seemed to stand as an anomaly. Taken together, *Hodge* and *Russell* meant that the federal government could not regulate but could prohibit, even if the prohibition applied to some counties but not to others. Why was the liquor trade a Dominion matter for one purpose but not the other? Similarly, the provinces could use one means (licensing) to regulate the liquor trade, but not another (prohibition). Meanwhile, *Citizen's Insurance* cut across these distinctions by suggesting that the regulation of a particular branch of trade was a provincial and not a federal matter. But did *Russell*, or for that matter *Fredericton*, mean that Parliament could change that, either by legislating nationally or by applying an overriding power to prohibit?

In 1890 the Ontario Legislature passed a local-option prohibition law virtually identical to the Canada Temperance Act.[30] In what became known as the *Local Prohibition Reference*,[31] Lord Watson and the Privy Council held, four years after *Maritime Bank*, that Ontario's legislation was constitutional, *Russell v. The Queen* notwithstanding. The Ontario legislation was on local matters and, but for the authority of *Russell*, on property and civil rights as well. There was no inherent conflict with the Canada Temperance Act because both depended on local adoption. Along the way, Watson pronounced that Parliament's general power over peace, order and good government to be a grant of legislative authority distinct from the enumerated powers; that the deeming clause at the end of section 91 applied to all of section 92, even though it "applies in its grammatical construction only to No. 16 of s. 92"; that the effect of the deeming clause was to permit incidental encroachment on normally provincial matters; and finally, that the power over peace, order and good government, unlike the rest of section 91, had no application to matters within section 92 unless the matter, "attain[ed] such dimensions as to affect the body politic of the Dominion".

No decision of the Privy Council has been more criticized and more frequently cited as demonstrative of the Privy Council's anti-Dominion bias. The first reason was the separation of Parliament's general power from the powers later enumerated in section 91. On Lord Watson' model, this made both the notwithstanding clause and the deeming clause inapplicable to the general power and this, in turn, meant that the relationship of the general power to provincial powers was determined by the statement at the beginning of section 91 that it (the general power) did not apply to provincial matters. The result was a grand general authority over the country's peace, order and good government that was subordinate to the power of the provinces over (for example), shop saloon and tavern licences. The second reason for the criticism was the extension of the deeming clause to all of section 92, joined with Watson's explanation of the effect of that clause. As noted earlier, the notwithstanding clause at the beginning of section 91 seemed to clearly provide that any and all matters capable of coming within section 91 were excluded generally or absolutely from all of section 92. The deeming clause could be interpreted as reinforcing that effect [either in relation to 92(16) only or to all of 92] or it could be interpreted as providing for an additional federal encroachment quality in respect of matters normally within section 92 but which valid federal legislation needed to address in a particular case. By joining the broader application to the "incidental effect" interpretation, Watson virtually nullified the more general override potential of the notwithstanding clause, not only in relation to 92(16), but in relation to all of 92. And he did it without even mentioning the notwithstanding clause.

The criticism of Watson's failure has been intensified by the absence of much or any reasoning for the conclusions, most of which were *obiter dicta*, given the conclusion that enumerated federal power was not applicable to the case. The conclusions were for the most part simply stated as self-evident propositions. The one very important exception was Watson's observation that any other construction of the general power would, "not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces". For the critics, this simply confirmed the operation of a bias in favour of the provinces. But as the following discussion of Privy Council scholarship will suggest, the better interpretation of this slight lifting of the positivist veil is that it connects the status cases to the division of powers cases and shows the influence within the Privy Council of the same fundamental understanding of law and of legal reasoning that shaped and justified provincial rights interpretations of the BNA Act in the late nineteenth century.

A general difference between the early Privy Council decisions and the early decisions

of Canadian courts needs to be noted. It is that the Privy Council consistently had equal or more interest in the general structure of the relationship between all of section 91 and all of section 92 than it had in the boundaries among the heads of jurisdiction that collided in particular cases. In contrast, the Canadian courts of this period applied either a relatively simplistic understanding of the overall relationship or they simply ignored that level of inquiry and concentrated on the boundaries between the powers that potentially applied to each particular jurisdictional dispute. It will be seen that *Chandler* exemplifies the former approach and *Fredericton*, the latter, at least to some extent. The reasons for this difference in approach were undoubtedly multiple. One might simply be the Privy Council's greater interest and detachment from the subject matter of the cases. Another was almost certainly the more advanced prevalence in England of an understanding of the rule of law under which the role of law was the construction and protection of spheres of autonomy for each legal actor.[32] This almost certainly drove the Privy Council to position what in Canada were specific jurisdictional disputes (for example, between licensing and regulation of trade) as disputes about the boundary between section 91 and section 92 at the more general level. The result was "pith and substance", the "aspect" and the "necessarily incidental" doctrine. The result in other words, was doctrine, not just outcomes to the cases. The result was abstraction.

This characteristic of the legal reasoning of the Privy Council will be discussed further below. For now, the point is that this difference between the Privy Council and Canadian courts creates a doctrinal divide between ourselves and those early Canadian decisions, including those of the New Brunswick judges. There is a danger that this will interfere with our ability to understand the early Canadian decisions on their own terms because they do not speak to us in the cadences of the Privy Council doctrine that is more than just familiar to us; it is how we think about division of powers questions. More specifically, there is danger that we measure the relationship between the early Canadian decisions and the early Privy Council decisions based on how closely the former come to the right doctrine, rather than on the basis of similarity or difference on substantive outcomes. In other words, there is a danger that we think too much like lawyers and not enough like historians.

III

Russell v. The Queen had indicated the potential for a strongly centralist interpretation of the BNA Act that was quickly overtaken by interpretations that favoured the provinces.

Professor Macdonald's castigation of the Privy Council's "obsession" with provincial autonomy, and Professor Cairns' search for the source of the Privy Council's "provincial bias", illustrate the view, long prevalent in the literature, that the Privy Council's decisions are not explicable as legal interpretations of a constitutional document, but must instead reflect either the Privy Council's failure to understand the constitutional document or a deliberate decision to re-write, rather than to interpret, that document. The prevalence of this view comes through clearly in a chronological review of the most significant scholarly explanations of Privy Council decisions.

Writing in 1971, Cairns identified two stream of criticism, each represented by many of the same authors.[33] One stream of criticism he called "fundamentalism". The basic point was that the Fathers of Confederation had clearly intended a strongly centralized political system and had made this intention manifestly clear in the writing of the BNA Act.[34] First, the federal government had been given, in John A. Macdonald's phrase, "all the great heads of power".[35] It had, in addition, been given the power to appoint lieutenant governors and to reserve and disallow provincial legislation. It had also been given the discretion to assume control of public works. Finally it had, in contrast to the federal government in the United States, been given the residual powers, whereas the provinces were limited to expressly enumerated powers. Given such clear evidence for centralist intent, said the fundamentalists, the Privy Council's interpretation of the BNA Act could only be understood as a mistake. The law lords had interpreted the Act in a strongly federal fashion simply because they had failed to understand it. One explanation for this failure was the influence of the rule against extrinsic evidence, which had prevented the Privy Council from considering the historical record, such as the Confederation Debates, which made the centralist intentions of the founding fathers abundantly clear. More generally, the argument of the fundamentalists was simply that the members of the Privy Council were too removed from Confederation and Canadian affairs to understand how strongly centralist the BNA Act was intended to be.

The basic charge of the fundamentalist critique was that judicial incompetence explained the Privy's Council's decentralizing jurisprudence. This looks unconvincing from a contemporary perspective. The exhaustive and detailed argument against the Privy Council found in the famous O'Connor Report has long been answered by Professor Brown's lengthy argument that Privy Council interpretations were not only defensible but the only interpretations available to it.[36] More substantively, it is simply difficult to maintain that the issues which came before the Privy Council in the late nineteenth century were straightforward or that Privy Council treatment of them was obviously unreasonable. For example, in the case of the lieutenant

governor's status, the Dominion's position rested significantly on the omission from the BNA Act of any express provision for Her Majesty's participation in provincial government. By itself, this was fairly ambiguous evidence in favour of the existence of a founding intent to end provincial sovereignty. It was even more doubtful when put beside section 88, by which the constitutions of Nova Scotia and New Brunswick were to continue as they existed at the time of union. With the text providing so little support to either side, or rather, so much support to both sides, the most reasonable conclusion is either that the Fathers of Confederation never really turned their minds to the matter or instead, that they simply assumed that it was obvious that the provinces would continue to have their pre-Confederation constitutional status. Either way, the Act could as easily be interpreted as providing for continuity as for radical change on this critical point.

Even the Privy Council's reading down of the Dominion's general power in the *Local Prohibition Reference* cannot be said to be without support in the text of the BNA Act. For example, Hogg argues that the dichotomy created by Watson reflected the reality that the enumerated powers covered matters that would not have been within the federal jurisdiction but for their enumeration.[37] This supports the Privy Council's understanding that the general power and the specific powers were distinct grants of power, even though the introductory paragraph of section 91 could be interpreted as saying that the latter were but illustrations of the former. In addition, as we have seen, the same paragraph said specifically that matters within provincial heads of power were exempted from the general power. Under the theory that the enumerated powers were but illustrations of the general power, logically this would mean matters within provincial heads were also excluded from the enumerated federal powers. And yet, the notwithstanding clause at the beginning and the deeming clause at the end of section 91 both indicated that matters within both provincial and enumerated federal powers (however that was to be determined) were to be federal matters. It is not obvious that the Privy Council was wrong in concluding that this established a different relationship between provincial heads of power and the general power than existed between the provincial powers and enumerated federal powers. Finally, there was the breadth and vagueness of "peace, order and good government". The words were capable of encompassing virtually every subject of legislation and more important, of encompassing every subject of legislation that Parliament decided was for the "peace, order and good government of Canada". One way or the other, the general power had to be defined and limited if the grant of "exclusive" legislative authority to the provinces was to have much continuing meaning. As to what this definition and limitation

should be, the text of the BNA Act was, as on so many other matters of detail, silent.

Nor would resort to the historical record have salvaged the clarity of the BNA Act's centralist meaning; it may have provided some evidence to reinforce Privy Council interpretations. For example, Professor Silver has written that in Quebec, "Confederationist propaganda ... underlined the Quebec-centeredness of French Canada's approach to Confederation, and the degree to which French Quebec's separateness and autonomy were central to French Canadian acceptance of the new regime."[38] No less a Father of Confederation than Cartier saw the strength of the provinces as the central feature of the Confederation scheme and in the Confederation Debates, Hector Langevin gave an even stronger defense of the autonomy and significant powers that would belong to Quebec under the new Confederation.[39] In New Brunswick, Tilley marketed Confederation by saying that only responsibility for the post office would require relocation to Ottawa.[40] Like the BNA Act itself, therefore, the historical evidence would have given the Privy Council, at best, conflicting signals, even if the use of such evidence by the Privy Council could be imagined.

In general, the BNA Act did strike a centralist tone and there is little if any room for real doubt that a strong central government was desired by all involved in the Act's construction. But when it came to precise questions as to what this required from judicial interpretation, particularly as regards the constitutional status and jurisdiction of the provinces, the Act was, as Romney says, "the legislative equivalent of an optical illusion."[41] Professor Vaughan's more recent attempt to raise the fundamentalist banner anew foundered on the same unjustified optimism as to the clarity of the Act.[42] His criticism of the Privy Council for taking a "political" approach depended on the assumption that a properly "judicial" approach would necessarily have produced different outcomes because limited to a virtually mechanical enforcement of the BNA Act's clear intent in favour of the federal government on virtually all questions. In reality, the Act was a skeletal framework for a federal system that depended on judicial in-filling that was unavoidably "political", if by that is meant adjudication that attached meaning to the clauses of the BNA Act by putting them into the context of claims about the objectives of Confederation, the reasons for federalism, or the nature of Canadian society. As argued below, understanding the Privy Council requires us to accept that the application of such ideas to the interpretation of the BNA Act was virtually unavoidable, whether or not it was acknowledged and whether or not the result favoured the Dominion or the provinces. The challenge, given the positivism of the Privy Council and the elliptic style of judicial exposition that this positivism produced, is to reconstruct the context of ideas that took the Privy Council in one direction rather than another.

The second stream of mid-century criticism of the Privy Council was labeled "constitutionalism" by Cairns.[43] This view, perhaps best represented by the writings of F.R. Scott, was as much concerned with the adverse social and economic consequences of Privy Council decisions, and the Privy Council's support for or indifference to those consequences, as with the fidelity of the Privy Council to the constitutional text. For Scott and others, including the historians Frank Underhill and Arthur Lower, the Privy Council had, by limiting the powers of the federal government, reduced Canada's ability to adopt "progressive" economic and social policies, such as those contained in Bennett's New Deal of the 1930's.[44] Such policies could only be effectively implemented by the federal government, due to its relatively greater fiscal capacity and the national scope of federal legislative authority.

As an explanation of why the Privy Council understood the BNA Act to have created a decentralized federation, the argument of the constitutionalists obviously moved from consequence to cause; because the decentralization of the constitution at the hands of the Privy Council prevented progressive social and economic policies, the Privy Council must have been motivated by opposition to those policies and by a desire to protect laissez-faire capitalism. Even without direct evidence of such pure instrumentalism, the argument had, and continues to have, plausibility as applied to the Privy Council's failure in the early twentieth century to alter course in favour of broader national powers as social and economic conditions pointed increasingly both to the need and the desire for national action.[45] Instead, under the leadership of Lord Watson's successor, Lord Haldane, the Privy Council continued through these decades to accentuate the provincialist thrust of Canadian federalism, frequently in cases that pitted commercial interests against federal legislation that was, in the view of the constitutionalists, progressive. Putting it crudely, it does seem plausible that the Privy Council sided with the provinces during these years to insulate private enterprise from the costs of the welfare state. It is therefore understandable to find Underhill in 1934 attacking the cry for provincial rights as, "largely camouflage put up by our industrial and financial magnates" and making the charge that, "None of these worthy gentlemen wants a national government with sufficient constitutional power to be able to interfere effectively with their own pursuit of profits."[46]

The lack of evidence for this argument becomes a more serious deficiency in the attempt to explain the jurisprudence of the late nineteenth century.[47] While it would be easy to gather evidence of the commitment of Privy Council members of the era to the protection of private property and to free enterprise, or even to safely assume the existence of such

commitments, it is simply impossible to extract nineteenth century motivation from twentieth century consequences. The constitutional cases that went to London in the nineteenth century simply did not clearly align progressive and capitalists interests with one level of government or the other. Indeed, to the extent that socially or economically interventionist legislation was produced in late nineteenth century Canada, it tended to come from the provinces rather than from the federal government.[48] In addition, the interests of Canada's business elite in the first decades of Confederation, and of their financial backers in England, were fairly clearly aligned with the federal, rather than the provincial, governments. As Professor Greenwood writes, during the 1880's, this business elite wanted, "a strong credit-worthy central government, with a near-monopoly of revenue, unchallenged authority to regulate trade, and power to curb provincial experiments detrimental to their interests". In consequence, they, "applauded the repeated disallowance of Manitoba railway charters which threatened the C.P.R., expressed outrage when Macdonald refused to veto a Quebec tax on corporations, and prophesied doom if Mowat's conception of co-ordinate federalism should be implemented".[49]

The constitutionalist critique was heavily influenced by legal realism, as well as by their progressivism. Importantly, it marked a step away from the debate over what the words of the BNA Act really meant and a large step toward recognition that constitutional adjudication unavoidably requires judicial statesmanship. The same can be said for the Cairns theory that the Privy Council's decentralizing decisions are explicable as examples of "sociological jurisprudence".[50] This explanation for the Privy Council's "provincial bias" is that by the 1880's and 1890's Canada had become a "de facto" federal society and that the Privy Council simply recognized this by allowing for greater decentralization in the country's political institutions. Cairns' view was that with the completion of the great national projects such as the C.P.R. and the cessation of the perceived military threat posed by the United States, some of the rationale for the strong central government envisaged by the BNA Act had disappeared. With that came a resurgence of regionalist sentiment, exacerbated by federal-provincial irritants such as the Riel execution, Manitoba's battle against the monopolistic C.P.R., Nova Scotia's election of a secessionist government and the provinces' collective declaration of constitutional war on Ottawa at the Quebec conference of 1887. Taking account of all of this, the Privy Council wisely relaxed a constitutional structure which had become "too centralist for the diversity it had to contain".[51]

Cairns' account of the changing balance between centralist and decentralist sentiment within Canada during the 1880's and 1890's is supported by historians.[52] Yet as an explanation

of Privy Council jurisprudence during the 1880's and 1890's, the argument suffers from the lack of evidence of Privy Council awareness either of the 1867 consensus around centralization (nuanced as it was), or its subsequent disintegration. Such evidence as Cairns did canvass not surprisingly suggested limited awareness or interest. [53] The problem, in short, is that the Cairns theory does not explain the mechanism by which the movement from centralist to decentralist sentiment in Canada influenced constitutional adjudication in London. In this respect, it has the rather dissatisfying quality of suggesting the Privy Council got it right and perhaps saved the country, but perhaps by accident. Yet, more recent historical scholarship does suggest that the trend in Privy Council jurisprudence can be understood as the unwillingness of its members to impose the centralist consensus of the provincial representatives of 1867 on their unwilling successors of 30 years later.[54] Some support comes from Vaughan, who unlike Cairns, rejected the legitimacy of judicial statesmanship but nevertheless made much of the evidence that prominent members of the Judicial Committee self-defined their role to be that of Imperial statesmen rather than solely that of judges deciding cases between litigants.[55] Assuming Privy Council members did have knowledge, however general, of the changing political realities of Canada, it is not implausible that they saw it as their duty to interpret the constitution in accordance with those realities.

Another approach from the 1970's and 1980's was to explain the course of Privy Council jurisprudence by reference to the influence of the key members of the Council. One example of this approach is the argument that Hegelian philosophy explains the desire of Lord Haldane, first as counsel in the late nineteenth and early twentieth centuries and then as the Privy Council's dominant member from 1912 through to 1928, to give Canadians a constitution that expressed what he understood to be their strong sense of regional identity.[56] Recently, David Schneiderman has revived this approach and the interest in Lord Haldane by arguing that his Hegelian idealism was significantly augmented by the associational pluralism of Harold Laski.[57]

Another more relevant example of the same general approach focused on the nineteenth century is an article from 1974 by Murray Greenwood, who focused on the role of Lord Watson, the judge who spoke for the Privy Council in the two critical cases of *Maritime Bank* and *Local Prohibition*. Greenwood's thesis was that the main motivation influencing Watson was the desire to preserve the appellate jurisdiction of the Privy Council and with that jurisdiction, continuing colonial support for imperial ties.[58] This Watson did, according to Greenwood, by becoming the champion of the provinces against not only the Dominion, but more important, against the centralism of the Supreme Court of Canada. The objective was

to ensure provincial opposition to abolition of appeals to the Privy Council.

The most direct evidence presented for this thesis is Watson's relationship to Haldane and the comments of Haldane, after Watson's death, that Watson's contribution as a member of the Privy Council was that of a great "statesman" who had corrected the "alarming" centralism of the Supreme Court of Canada and thereby put to rest the thoughts of abolishing the appeal to the Privy Council. From this evaluation of the *effect* of Watson's jurisprudence, Greenwood derived Watson's *motive* by pointing out that the possibility of abolition continued to be raised throughout the 1880's and 1890's, with the result that Watson and his colleagues would have been consistently reminded of their institutional vulnerability and the need for a strong Canadian constituency for the continuing value of the Privy Council to Canada.[59] He went on to suggest that Watson and his colleagues, encouraged by the tendency of provincial politicians, unlike their federal counterparts, to personally participate in Privy Council proceedings, set out to claim the provinces as that constituency.[60]

According to Greenwood, the Privy Council did this by emphasizing constitutional equality between Ottawa and the provinces, not because the constitution called for it, but to profile the impartiality of the Privy Council relative to the centralism of the Supreme Court, a court that was, after all, appointed by one of the two competing levels of government.[61] More basically, Greenwood demonstrated that Watson and his colleagues overruled the Supreme Court of Canada significantly more often than they did other colonial courts, including the courts of Canadian provinces. This supports the argument that the Privy Council had a general policy of undermining confidence in the Canadian alternative to itself.[62] The particularly consistent rejection of Supreme Court interpretations of the BNA Act is taken by Greenwood to make the operation of this policy manifestly clear.[63]

Greenwood's argument had a New Brunswick connection that is worth some discussion given later focus on constitutional adjudication in New Brunswick. He credited Jeremiah Travis, an obscure Saint John lawyer, both with inspiring Watson's strategy of institutional self-interest and with giving Watson the constitutional arguments he needed to twist the BNA Act to implement that strategy. In 1884, Travis wrote one of the early books on Canadian constitutional law.[64] It was a disorganized tirade that amply reflected the egoism of the author and his poor view of just about every other lawyer, including the judges of every level of Court up to and including the Privy Council, save Ritchie. It started with praise for *Russell v. The Queen*, but changed in mid-course to denounce the centralism of that decision as being so intolerable as to justify the abolition of Privy Council appeals in constitutional cases.

Greenwood suggests that this caught Lord Watson's attention when Travis (according to Travis) sent Watson a copy.[65] He also concluded that Travis must have given Watson his "revolutionary analysis of section 91", since buried within the book's dense and convoluted prose were the kernels of Watson's ruling in *Local Prohibition*. On the view that, "[a]lone among legal scholars, Travis divided section 91 into two parts with different encroachment potentials, which was precisely the conception adopted by Lord Watson", Greenwood posited Travis as Watson's key influence.[66] Noting that Travis also anticipated *Local Prohibition* by recognizing that all heads of provincial power, not only the 16th, were on "local and private matters" and by arguing that this made the deeming clause at the bottom of section 91 applicable to all of section 92, not to clause 92(16) only, Greenwood concluded that, "in all material particulars, it appears that Lord Watson's novel interpretation of section 91 was derived from Travis' book". Indeed, he concluded that the influence of Travis on Watson seems, "almost beyond question".

Greenwood's argument was creative and original but it suffered from the partiality of his interpretation of the empirical evidence on which it rested. For instance, he did not consider the possibility that the rate of reversals of the Supreme Court of Canada by the Privy Council reflected, at least to some extent, the reality that it was not a very strong, cohesive, hard working or properly funded court during its first years.[67] More seriously, the entire argument, like that of earlier critics of the Privy Council, depended once again on the premise that the Privy Council could not have ended up where it did by interpreting the BNA Act and by finding the arguments for provincial positions, often presented by the provinces, stronger than the arguments for competing federal claims, usually presented, not by the federal government, but by third parties. The importance of this premise to Greenwood's argument is best indicated by the influence accorded to Travis, something that is surprising to anybody who has tried to read Travis' book. But for Greenwood, Travis' obvious limitations seem actually to prove his influence on Watson because of the assumption that practically no lawyer of intelligence could have interpreted section 91 in the way Travis did in his book. The work of Paul Romney has, however, shown that Oliver Mowat developed the same argument as Travis in a memorandum he wrote in 1881, either before Travis had begun or had finished his book. While Greenwood and other critics of provincial rights and the Privy Council would rightly question Mowat's objectivity, it is harder to dismiss his legal ability. The mere fact that Mowat and Travis independently constructed the interpretation of section 91 that eventually became the law through *Local Prohibition* questions the assumption that it was an interpretation that section 91 could not reasonably bare.

All of which is not to say that institutional self-interest could not have played some and even an important role in Privy Council jurisprudence. It is, instead, only to say that an agenda of institutional self-interest and genuine agreement with the arguments put forward by the provinces cannot be assumed to have been mutually exclusive influences on Watson and his colleagues. The two influences were certainly compatible at a conceptual level and were capable of being mutually reinforcing. The key question is whether the likely attractiveness of the arguments for the provinces to the members of the Privy Council can be evaluated. This brings us to the scholarship that has focused on how Canadian lawyers, and especially lawyers in Ontario, thought about constitutional law in the first two decades of Confederation, particularly as regards the provincial rights movement and what Risk calls the "model of autonomous federalism".

One of the leading contributors to this scholarship has been Paul Romney. In his 1986 book on Ontario's attorney general, Romney attributes the triumph of the provincialist position to the role played by Oliver Mowat, premier and attorney general of Ontario from 1872 to 1896. He refers to the provincial rights movements as, "Mowat's struggle for provincial rights".[68] The Privy Council's gradual adoption of a provincialist view of the BNA Act is explained by saying: "Mowat's success was partly a victory of forensic reasoning, but is was also very much a triumph of forensic strategy and tactics". Much weight is attributed to the memo that Mowat wrote in 1881 and which argued for the interpretation of the general power which was eventually adopted in *Local Prohibition*. Without ever being explicit on the point, Romney suggests that the Privy Council reached the conclusion it did in *Local Prohibition* because of the influence of Mowat's memo.[69]

A decisive role for Mowat seems particularly difficult on the provincial sovereignty issue. *Maritime Bank* originated in New Brunswick and New Brunswick's Premier Andrew Blair successfully argued the case in the New Brunswick and Canadian Supreme Courts, and was present for the hearing of the appeal in the Privy Council. But Romney asserts that *Maritime Bank* just beat Mowat to the punch as he had, in 1888, taken steps to deliver the "coup de grace" to an outmaneuvered John A. Macdonald by adopting a law declaring Ontario's right to exercise the prerogative powers of commutation and remission in respect of provincial offences.[70] Little consideration is given to another interesting possibility, that *Maritime Bank* indicates that Mowat was as successful as he was, not only because of his brilliance in articulating the provincial case and leading the forensic campaign, but also because his arguments were not only the arguments of Ontario but the reflection of a broader

understanding of Confederation that was pan-Canadian and trans-Atlantic in scope.

The changes wrought by the Privy Council decisions were far too fundamental to be the work of one man. Romney's portrayal of the Privy Council as the passive reflector of Mowat's brilliance is therefore not fully convincing. At the same time however, Romney made an important contribution in linking the result in *Maritime Bank*, and Mowat's success in other cases, with the maintenance of responsible government in the provinces after Confederation. The right of the provinces to self-government was clearly at stake in *Maritime Bank* and it is hard to understand the case without accepting that Watson understood this. This starts to suggest that the Privy Council's approach to the BNA Act may have been shaped by the constitutional ideas and values of its members, and the convergence of those ideas and values with those of provincial rights advocacy, rather than solely by extra-legal factors. In short, it suggests that the concerns that shaped advocacy for the provinces, not only but very significantly by Mowat, were the same concerns that facilitated receptive listening in the Privy Council.

Romney's insight on the connection of constitutional adjudication to the earlier accomplishment of responsible government has been developed and greatly enriched by Robert Vipond's study of the intellectual foundations of the provincial rights movement, and by Richard Risk's exploration of the influence of the same ideas among Canadian lawyers. Vipond begins his analysis by explaining that interpretations of the provincial rights movement, like explanations of the Privy Council's jurisprudence, typically emphasize economic, social and political factors, and forget that the movement (in its legal aspect) was fought in the name of a legal goal: a constitution consistent with the principles and values of those within the movement, including responsible self-government at both provincial and federal levels.[71] Responsible self-government was important for many and varied reasons. Most were wrapped up in the mantra of local control over local affairs that had made Confederation, on the basis of federalism, inviting to the Ontario Reform Party. It was only if the principles of responsible government were in place that the people in Ontario would have this control, because only then would accountability for the disposition of these local affairs be solely and exclusively to Ontario electors. In turn, responsible self-government at the provincial level demanded the legal autonomy, independence or sovereignty of the provincial government and legislature. Otherwise, accountability to the electors would be compromised by the distinct and competing accountability to the federal government and Parliament. Otherwise, local control over local affairs would always be at risk because of the potential for withdrawal of what would be only

delegated legislative powers.

The merits that could be claimed for this model operated on many levels. Local control over local matters meant consistency with British constitutional practice and principles not only at one but at both levels of government. This was important symbolically as well as practically. It meant constitutional validation of the continuing importance of provincial identity and of the intrinsic importance of local affairs, those in which people were most immediately interested. It meant continuity in the connection to the Crown and thus, the preservation of an important symbol of Britishness, or at least of the British inheritance. This two-way symbolism was important to identity in Ontario, and in other provinces.[72] Thus local control over local matters was a slogan, but one that represented important elements of identity and of the constitutional importance of that identity through the right to local self-government. In Ontario, advocates of provincial autonomy bridled at the suggestion that this locally based political identity was inferior to its Dominion counterpart, and therefore not worthy of the Crown's direct attention.

On the more practical level of governance, local control over local affairs meant better and more just government at both the national and the provincial level. Issues that might produce either division and strife, or indifference, at the national level, either because they highlighted the differences in opinion and interests across different parts of the country or because they were only of interest to the people in one part of the country, were assigned to the local legislatures. At that level, both consensus and responsiveness, as required, were more likely. Here the critically important concern was fear that the division and strife between groups that was more likely in the broader legislative forum would lead to legislative oppression of one group by others. The critically important faith was that local legislatures, because they were closer to the people, were more likely to be sensitive to the interests and to the rights of both individuals and groups. They were, in short, more likely to use legislative authority in accordance with the "opinion and good sense of the people".[73] All this was in jeopardy if the local executive was subject to taking contrary direction from outside the local legislature or if legislative powers were subject to being withdrawn or reduced from outside. Such functional arguments for provincial autonomy could be and were supported by their consistency with the operating principles of the organization of the British Imperial system of the late-nineteenth century, as Vipond shows.[74]

Each of these symbolic and pragmatic considerations helped to establish the vital importance of provincial self-government and of the provincial autonomy, independence or sovereignty that made it possible within Canadian federalism. But the deepest insights

provided by Vipond relate to his exploration of the relationship between provincial rights, and especially the quest for provincial autonomy, with the central concerns, the language and the concepts of late nineteenth-century legal liberalism.[75] A brief summary cannot hope to do these insights justice. The key point is that legal liberalism defined the purpose of all law to be the setting and policing of boundaries between the subjects of the law within which each subject, be it natural or corporate person or the state, was free to will without interference from others. Essentially, all law was jurisdictional law and its irreducible aim became the maximization of liberty by keeping each actor within appropriate and assigned limits. Jurisdictional overlap was to be squeezed out of legal relations because of the implication it carried of the interference with the autonomy of one legal actor by another. This understanding of law came to be exemplified by the legal science of Harvard and Oxford scholars, including A.V. Dicey, who embodied it in his classic treatise, *The Law of the Constitution*, published in 1885.[76] It argued for American federalism, and for the role of the American courts in American federalism, as the epitome of the rule of law. Richard Risk succinctly sketches the outlines of the legal reasoning that Dicey's claim represented and of which legal liberalism was a large part:

> In England, a general mode of thinking emerged during the second half of the nineteenth century, which has been given different names, among them the rule of law, the black letter tradition, and classical legal thought. Whatever its name, its basic elements were the equality and autonomy of individuals (or more abstractly, legal entities, including the state), a division between the public and the private realms, and a pervasive perception of legal relations as spheres of powers separated by sharp, bright lines. In this thinking, the courts and the common law were paramount, and the work of the courts in deciding individual cases was objective and apolitical - determining facts and applying general principles of the common law or the words of a statute.[77]

Within this philosophical context, Vipond argues that the claim to provincial autonomy became more than an appeal for the preservation of responsible self-government. It became an appeal to the transcending value of autonomy, the essence of the prevailing understanding of rule of law throughout the common law world. On this broad foundation, the object of federalism was to preserve the "freedom", the "autonomy", the "independence" and the "rights" of the subjects of that law, namely, the provinces. This did nothing less than make the law of the Canadian constitution consistent with a proper understanding of the constitution of society. The defense of provincial autonomy was not merely to safeguard provincial parliamentary self-government but to make the supreme law of Canada consistent with the rule of law. Implicitly and sometimes explicitly, the specific right of the provinces to autonomy or liberty was

compared to the right of the individual to autonomy or liberty. Even if the analogy was not explicit, the moral claim for provincial autonomy came to rest on the same basis as the moral claim for individual autonomy. Indeed, the connection with responsible self-government went full circle, as the advocates for provincial rights, "argued consistently that their defense of [provincial] community was a means to protect [individual] liberty".[78] We will return to this particular aspect of the relationship between provincial rights and liberalism in the later discussion of Charles Fisher.

The composite picture of the intellectual foundations of the provincial rights movement that emerges from Romney, Vipond and Risk might be summarized as follows. First, the claim to autonomy rested on continuity with an older Anglo-Canadian tradition of British and of colonial constitutionalism that emphasized the particular claims of Ontario, and of every province, to political separateness, as well as symbols of identity such as the preservation of direct connection with the Crown and consistency with British and Imperial constitutional models. Second, these influences were powerfully justified and reinforced by the consistency of the core claim for autonomy with mainstream ideas and values of late nineteenth century Anglo-American legal thought. In the scholarship of both Romney and Vipond, the evidence for all of these connections is from political rather than legal forums, and indeed, the legal and judicial methodology of legal liberalism would have prevented the provinces from defending autonomy in constitutional litigation on the basis of such broad and diffuse foundations. Further, legal liberalism was not a discrete legal doctrine to be invoked as authority for specific adjudicative outcomes. It was a way of thinking about law and a set of legal values that was pervasive and embedded within all law, not because lawyers and judges consciously chose it over competing philosophies, but rather because increasingly, law and legal liberalism were synonymous.

The key point is that, in making the claim to autonomy, the provinces did not have to spell out the importance and significance of provincial autonomy within the broader context, because, as Risk states it, "the arguments [of the provinces] appealed to deep and pervasive strands in lawyers' thinking".[79] Accordingly, the moral equivalency between provincial and individual autonomy is not something that the judges of the Privy Council needed pointed out to them. Thus, Risk states, "When the provinces made their arguments in *Hodge*, *Maritime Bank*, and the *Local Prohibition Reference*, they appealed to an understanding of federalism that was already in the judges' minds"[80]

Such convergence between the ideas and values behind the arguments for provincial

autonomy and the ideas and values of the judges who accepted the arguments, was probably not limited to the separate influence on each of legal liberalism. For example, the judges of the Privy Council, judicial tribunal of the empire, would not have needed legal liberalism to see and understand the consistency of autonomous federalism with the organizational principle of the empire. By the late nineteenth century, the core of the Empire was the principle of local self-government. England's colonies were self-governing colonies in which local assemblies, organized in accordance with the principles of responsible government, had been given virtually free reign over internal affairs. And yet the empire was alive and well, indeed, precisely because of the commitment to local control over local affairs. From this perspective, provincial claims to a sovereign and independent status probably seemed reasonable, even obvious. Their satisfaction required no more than fidelity to the same principles and policies that prevailed throughout the empire, and which underlay the creation of the Dominion of Canada itself. It probably helped that the provinces asked for, or could credibly say they were asking for, no more than the continuation of their pre-Confederation status within their newly limited spheres of jurisdictional competence. No argument appeals to an English lawyer like one founded on continuity!

Similarly, the importance of the local personification of the Crown as a symbol of provincial identity and as a badge of continuing membership in the British community would have resonated with the judges of the Empire without explicit reference. As members of an *Imperial* Judicial Committee, charged with the responsibility of building the legal framework of England's Empire, a predisposition in these judges to interpretations of the BNA Act that maintained points of contact between citizens of the Empire and the Crown seems plausible. In the *Maritime Bank* case, Lord Watson said that the notion that the Imperial Parliament had cut the provinces adrift from the Crown by passing the BNA Act, an Act intended to strengthen the colonists' tie to Britain, was beyond belief.[81] It is not hard to believe he meant it.

In sum, advocates for the provinces had a case on the sovereignty issue which would have appealed to the legal and institutional consciousness of the Privy Council. And as Romney almost certainly suggests, a resolution of the sovereignty issue in a manner favourable to the provinces probably influenced treatment of the division of powers issue. Having recognized the provinces to be, within their legislated sphere, the constitutional equal of the Dominion government, it is probable that the Privy Council would have been wary of nullifying this recognition by interpreting section 91 and section 92 in such a way as to give the provinces sovereign jurisdiction over few legislative matters or alternatively, in such as way as to make

provincial jurisdiction a shifting one, dependent on federal legislative priorities. In the *Local Prohibition Reference*, Lord Watson said as much in the course of reading down the peace, order and good government power. The same concern about local self-government would encourage an expansive interpretation of section 92 powers.

Finally, if in addition to the implications of the abiding importance of responsible government and the reinforcing influence of legal liberalism, the members of the Privy Council had the means to take cognizance of the de facto "sociological federalism" described by Cairns, it is possible to see how the case for co-determinant and balanced federalism may have become unavoidable. At a minimum, it was strong enough to justify the pursuit of the strategy of institutional self-interest described by Greenwood. But put within this broader context, sociological jurisprudence and institutional self-interest look more plausible as contributing and reinforcing factors than as self-standing explanation.

IV

Although the early jurisprudence of the Privy Council has long been a subject of scholarly debate in Canada, most of the explanations of why it took such a strongly provincial approach to the BNA Act are unsatisfying. The fundamentalist explanation is unconvincing because of the simplistic model of adjudication on which it is based. The explanation of the constitutionalists fails because it explains a trend which started in the nineteenth century primarily by reference to mid-twentieth century dynamics. Cairns fails to provide convincing evidence that Privy Council members were as aware of Canadian society as his theory assumes. Greenwood's thesis of "institutional self-interest", also assumes what it seeks to prove, in his case, that institutional self-interest was the sole and dominant motivation behind legal rulings that cannot be supported as legal rulings. Romney's analysis of the importance of Mowat claims too much of the success of a movement with deep and broad social and intellectual roots for one, admittedly important, individual.

A problem common to many of the explanations is that they pay insufficient attention to the possible relationship between decisions in the division of powers cases and the decisions in status cases. This is related to a second difficulty. Until recently, insufficient attention has been paid to how members of the Privy Council perceived and understood the constitutional issues and arguments brought before them, and more specifically, by the ways in which their concerns as lawyers and judges may have connected with the arguments they largely

accepted. In other words, there has been insufficient attention to the question of what made provincialist legal arguments convincing as legal argument. In the very different work of Romney and of Vipond, with increasing support from other historians,[82] convincing arguments are made that the provincial rights movement out of which the nineteenth century litigation arose was motivated by a desire of provincial communities to maintain distinct connections with the Crown and by a determination to preserve and expand local control over local affairs through the system of responsible self-government won in the provinces in the 1830's and 1840's. Both desires would have resonated with the judges of an empire increasingly dedicated to "home rule". Vipond and Risk add detailed explanations of the reinforcing influence of the same legal liberalism that was shaping legal doctrine throughout the common law world, in and from England. Together, the work of Romney, Vipond and Risk, makes a convincing case that the provinces won before the Privy Council because their interpretive arguments did not depend solely on textual foundations or on congruity, serendipitous or otherwise, with ulterior Privy Council motives. Instead, the provinces may have won in significant measure because their textually based arguments manifested and connected with deeper ideas and values that also shaped or influenced Privy Council understanding of those textual arguments. This suggests not only that legal ideas mattered to the outcomes, but that the judges who sat in the Judicial Committee of the Privy Council were to some extent propelled from the one-sided federalism of *Russell v. The Queen* to the autonomous federalism of *Maritime Bank* and *Local Prohibition Reference*, by their own ideas about law, and about the law of federalism in particular.

This study takes the story of the victory of provincial rights through the Privy Council back to where *Russell v. The Queen* began, to the decision of the New Brunswick Supreme Court in *City of Fredericton v. The Queen.* In doing so, it shows that the judges of New Brunswick, though overruled in *Russell v. The Queen*, anticipated many of the outcomes that would eventually be vindicated in *Maritime Bank*, *Local Prohibition Reference* and other Privy Council decisions. To some extent, their reasons for these outcomes also anticipated those eventually given in the Privy Council. But more interestingly, they gave reasons that seemed to connect the interpretation of federal and provincial powers to an understanding of the role of provincial legislatures and of responsible self-government within federalism, to the protection of individual liberty, and to a growing and indigenous understanding of the connection between provincial status and provincial jurisdiction. In doing so, they provide further evidence for seeing Privy Council interpretations of the BNA Act not as the imposition upon Canada of the constitution preferred by English judges for their own reasons, but as the vindication of a Canadian

understanding of the BNA Act that was rooted in Canada's own pre-Confederation constitutional experience and that resonated with trans-Atlantic patterns of legal reasoning and constitutional thought.

But to understand *Fredericton* it is necessary to go back still further to the New Brunswick Court's first attempt to explain and apply the BNA Act, and in particular, to the early constitutional jurisprudence of William Johnstone Ritchie, New Brunswick's Chief Justice at Confederation and future Chief Justice of Canada.

Endnotes

1. Alan Cairns, "The Judicial Committee and its Critics", (1971) 4 Canadian Journal of Political Science 301.

2. Vincent MacDonald, "The Privy Council and the Canadian Constitution", (1951) 29 Canadian Bar Review 1021 at 1035, and Cairns, supra, at p. 320.

3. Paul Romney, Mr. Attorney: The Attorney General for Ontario in Court, Cabinet and Legislature, 1791-1899, (Toronto, University of Toronto Press, 1986), at pp. 245-248, and Christopher Moore, 1867: How the Fathers Made a Deal, (Toronto, McClelland & Stewart, 1997), at pp. 115-132.

4. Robert Vipond, Liberty and Community: Canadian Federalism and the Failure of the Constitution, (Albany, State University of New York Press, 1991). Romney's analysis is found in Romney, supra, at pp. 240-281.

5. Romney, supra, at p. 241.

6. Romney, supra, p. 247-248, and R.C.B. Risk, "Constitutional Scholarship in the Late Nineteenth Century: Making Federalism Work", (1996) 46 University of Toronto Law Journal 427.

7. There does not appear in the literature to have been any scrutiny given to the possibility that the extent of attention paid to enabling the Dominion's intervention into provincial affairs, be it through appointment of the Lieutenant-governors or the power of disallowance, actually confirmed the operation of a presumption that the provinces were to have a status of independence that the Dominion needed to be able to override in specific cases. In other words, the possibility that the centrifugal dangers inherent in their autonomy dictated a capacity in the Dominion for intervention.

8. Romney, supra, at p. 247.

9. The implications are illustrated by the views expressed by John A. Macdonald in 1864 that:

> ... we have avoided exciting local prejudice against the scheme by protecting local interests, and, at the same time have raised a strong Central Government ... if the Confederation goes on you, if spared the ordinary age of man, will see both Local Parliaments and Governments

> absorbed in the General Power. This is as plain to me as if I saw it accomplished now (—) of course it does not do to adopt that point of view ... in Lower Canada.

Quoted in Peter B. Waite, The Life and Times of Confederation, 1864-1867, (Toronto, University of Toronto Press, 1962), at p. 123.

10. Romney, supra, at pp. 245-247.

11. *Lenoir v. Ritchie* (1879) 3 S.C.R. 575.

12. *Mercer v. Attorney General for Ontario* (1881) 5 S.C.R. 538.

13. *Hodge v. The Queen* (1883) AC 117, at pp. 132-133.

14. *The Liquidators of the Maritime Bank v. The Receiver-General for New Brunswick* (1892) A.C. 437.

15. Ibid, at p. 442.

16. Peter Hogg, Constitutional Law of Canada (Toronto, Carswell, 1997), at p. 444.

17. *Severn v. The Queen* (1878) 2 S.C.R. 70.

18. In his dissent, Ritchie thought "other licences" should be interpreted to include brewery licences and pointed out that liquor wholesalers had required licences in New Brunswick prior to Confederation. This was in reaction to Chief Justice Richard's view that 92(9) should not be interpreted as encompassing brewery licences because Ontario law did not provide for such licences at Confederation. Ritchie clearly bristled at the reading of the BNA Act "by the light of an Ontario candle alone, that is, by the state of the law at the time of Confederation in that Province"; Ibid, at pp. 99, 102, and Gordon Bale, Chief Justice William Johnstone Ritchie: Responsible Government and Judicial Review (Ottawa, Carleton University press, 1991), at pp. 201-202.

19. *The Mayor, Aldermen and the Commonality of the City of Fredericton v. The Queen on the Prosecution of Thomas Barker* (hereinafter *City of Fredericton* or *Fredericton*) (1880) 3 S.C.R. 505.

20. These judges included Ritchie of New Brunswick; see Bale, supra, at p. 202.

21. *City of Fredericton*, supra, at pp. 534-535 (per Ritchie).

22. *Citizen's Insurance Company v. Parsons* (1880) 4 S.C.R. 215.

23. *Citizen's Insurance v. Parsons* was actually argued while decision in *Fredericton* was pending: see R.C.B. Risk, "Canadian Courts Under the Influence" (1990) 40 University of Toronto Law Journal 709.

24. Bale, supra, at p. 203.

25. *Citizen's Insurance Company v. Parsons* (1881) 7 App. Cas. 96.

26. Ibid, at pp. 109-111.

27. *Russell v. The Queen* (1882) 7 App. Cas. 829.

28. *Hodge v. The Queen*, supra.

29. See Romney, supra, n.3, p. 263; a full and detailed discussion of this case, unreported, is found in R.C.B. Risk, "Canadian Courts Under the Influence", supra, at pp. 715-722.

30. Romney, supra, at p. 263.

31. *Attorney-General for Ontario v. Attorney-General for Canada* (the Local Prohibition Reference) (1896) A.C. 348.

32. Risk, "Canadian Courts Under the Influence", and Risk, "Constitutional Scholarship in the Nineteenth Century: Making Federalism Work", supra.

33. For example, Cairns included legal scholars such as W.P.M. Kennedy, V.C. MacDonald, Bora Laskin and F.R. Scott and historians such as Arthur Lower and Frank Underhill in both streams of criticism, but put the 1939 O'Connor Report, so-called, in what he described as the "Fundamentalist" camp only; Compare V.C. MacDonald, "Judicial Interpretation of the Canadian Constitution" (1935-36) University of Toronto Law Journal, 1, and MacDonald, supra; W.P.M. Kennedy, "The Interpretation of the British North America Act", (1942-1944) 8 Cambridge Law Journal 146; Bora Laskin, "Peace, Order and Good Government Re-examined", (1947) 25 Canadian Bar Review, 1054; and F.R. Scott, "Centralization and Decentralization in Canadian Federalism", (1951) 29 Canadian Bar Review, 1095, and Report Pursuant to Resolution of the Senate to the Honourable the Speaker by the Parliamentary Counsel Relating to the Enactment of the British North America Act, 1867, and lack of consonance between its terms and judicial contruction of them and cognate matters, the O'Connor Report, (Ottawa, 1939). See also R.C.B. Risk, "The Scholars and the Constitution: P.O.G.G. and the Privy Council", (1996) 23 Manitoba Law Journal 496.

34. As an example, see W.P.M. Kennedy, supra.

35. Quoted often, including in F.R. Scott, "Centralization and Decentralization in Canadian Federalism", supra, at p. 1108.

36. O'Connor Report, supra, and G.P. Browne, The Judicial Committee and the British North America Act (Toronto, University of Toronto Press, 1967).

37. Hogg, supra, at p. 445-446.

38. A.I. Silver, The French-Canadian Idea of Confederation, 1864-1900 (Toronto, University of Toronto Press, 1982), at p. 50.

39. Christopher Moore, 1867: How the Fathers Made a Deal, pp. 143-146, pp. 149-153.

40. W.S. MacNutt, New Brunswick: A History: 1784-1867 (Toronto, MacMillan of Canada, 1963), at pp. 422-423.

41. Romney, supra, at p. 241.

42. Frederick Vaughan, "Critics of the Judicial Committee of the Privy Council: The New Orthodoxy and an Alternative Explanation", (1986) 19 Canadian Journal of Political Science, 495, at pp. 512-519.

43. Cairns, supra, at p. 302.

44. F.R. Scott, supra.

45. See F. Murray Greenwood, "Lord Watson, Institutional Self-Interest, and the Decentralization of Canadian Federalism in the 1890's" (1974) 9 University of British Columbia Law Review 244, at p. 250.

46. Ibid, 314.

47. David Schneiderman, "Harold Laski, Viscount Haldane, and the Law of the Canadian Constitution", (1998) 48 University of Toronto Law Journal 521. This is a fascinating article that argues that Viscount Haldane's constitutional jurisprudence was influenced by Laski's associational pluralism which emphasized the importance of group life and associational autonomy throughout society, (in trade unions, churches, towns, universities, corporations). The role of the state was defined as being a residual one representative of the general will in respect of a relatively short list of national activities. Key components of this ideology included the concept of "group will" that defined groups across society and distinguished them from the general will represented by the state. Contrary to the classic Austinian position, group sovereignty was posited as being an independent variable, not derivative from a single all embracing state sovereignty, and the role of the law was to protect this group sovereignty from state (i.e. central) encroachment. "Heterogeneity of sovereignty" is a phrase capturing the essence of the model. Decentralization of power and decision-making, not just between national and local places but across society along functional lines, was thought essential to healthy society. Independently of Laski's intellectual influence, one of the points that Schneiderman reminds us of is that Haldane was very much a progressive in British politics and indeed became publicly supportive of Labour party policies during the 1920's; See pp. 522-523.

48. Greenwood, supra, at pp. 250-251.

49. Ibid, pp. 250-251.

50. Cairns, supra.

51. Ibid, p. 321.

52. P.B. Waite, Canada, 1874-1896: Arduous Destiny, (Toronto/Montreal, McClelland and Stewart, 1971), at p. 329.

53. Cairns quotes Ivor Jennings to the following effect:

> (The Law Lord's) information about the controversies of the Dominion is obtained from the summary cables of the London Press, which is far more interested in problems nearer home. If Mr. Dooley came to London he could not

> say that the Judicial Committee followed the Canadian election returns ... they are probably as uncertain of the politics of the governments in power as is the average Englishman. The controversies which appear to them to be merely legal disputes ... often have a background of party strife and nice political compromises. The judges may know enough to realize that politics are involved, but not enough to appreciate exactly why and how.

See Cairns, supra, p. 329.

54. Romney, supra, pp. 279-280.

55. Vaughan, supra, pp. 513-519.

56. See Jonathan Robinson, "Lord Haldane and the British North America Act", (1970) 20 University of Toronto Law Journal 130, and S. Wexler, "The Urge to Idealize: Viscount Haldane and the Constitution of Canada", (1984) 29 McGill Law Journal 608, both of which are reviewed in Schneiderman, supra, at pp. 525-529.

57. Schneiderman, supra.

58. Greenwood, supra, at p. 261.

59. Ibid, at pp. 262-265.

60. Ibid, at pp. 274-275.

61. Ibid, at p. 274.

62. Ibid, at p. 264-267.

63. Ibid, at pp. 265-273.

64. Jeremiah Travis, A Law Treatise on the Constitutional Powers of Parliament and of the Local Legislatures Under the British North America Act, 1867, (Saint John, Sun Publishing Company, 1884). The Travis book is one of four discussed in Risk, "Constitutional Scholarship in the Late Nineteenth Century: Making Federalism Work", supra, where it is described as "endlessly repetitive, poorly organized, and distorted by a tendency to make extreme, if not far-fetched, interpretations of the cases and his opponents writing"; at p. 446.

65. Greenwood, supra., at pp. 276-277.

66. Greenwood, supra, at pp. 276-277.

67. James G. Snell and Frederick Vaughan, The Supreme Court of Canada: History of the Institution (Toronto, University of Toronto Press - The Osgoode Society, 1985), at pp. 19-27 and pp. 28-51.

68. Romney, supra, at p. 274; see also, by the same author, "From Constitutionalism to Legalism: Trial by Jury, Responsible Government, and the Rule of Law in the Canadian Political Culture", (1989) 7 Law

and History Review 121, as well as, Getting It Wrong: How Canadians Forgot Their Past and Imperilled Confederation, (Toronto, University of Toronto Press, 1999), especially chapter 1, at pp. 21-32, and Part 2, at pp. 75-143.

69. Romney, Mr. Attorney, supra, at pp. 266-267, p. 272 and p. 277.

70. Ibid, at p. 258.

71. Vipond, supra, at pp. 6-11; The role of party politics is emphasized in Ramsey Cook, Provincial Autonomy, Minority Rights and the Compact Theory, 1867-1921 (Toronto, Queen's Printer, 1969), at p. 1 and p. 10; in P.B. Waite, supra, at p. 175, and in J.T. Saywell, The Office of the Lieutenant Governor (Toronto, University of Toronto Press, 1957), at p. 260. The interaction of the institutions of parliamentary government and federalism is emphasized in Richard Simeon, Federal Provincial Diplomacy (Toronto, University of Toronto Press, 1972), chapter 1, and in Christopher Armstrong, The Politics of Federalism (Toronto, University of Toronto Press, 1981), at p. 3, p. 8 and p. 31. A sociological explanation is given by Cairns, supra. Cook, supra, also notes the role of economic conditions (see p. 20), but this theme is stressed by Christopher Armstrong, "The Mowat Heritage in Federal-Provincial Relations", in Donald Swainson, ed., Oliver Mowat's Ontario (Toronto, Macmillan, 1972), at pp. 93-117, at pp. and at 94-102 and p. 107.

72. In the late nineteenth century, much of English Canadian political identify was rooted in the notion of citizenship in the British Empire. Before Confederation, colonial governors who served as representatives of the Queen had been the symbol of this citizenship. The Dominion Government's assertion that only the Governor-General was the representative of the crown was objectionable not only because it seemed to make the distance between citizen and crown greater and more indirect, but because it implied that the individual's relationship to the crown was through Dominion citizenship only. For example, in Nova Scotia, where provincial identify was synonymous with Britishness, this was equally unacceptable. The entire basis of Nova Scotian political identity before Confederation had been Nova Scotia's status as an independent province within the British Empire. It is difficult to believe that Nova Scotians, or many Canadians in other provinces, ever understood Confederation to involve a surrendering of this status; See, for example, G. A. Rawlyk, ed., The Atlantic Provinces and the Problems of Confederation (St. Johns, Breakwater Press, 1976), chapter 1, and John G. Reid, Six Crucial Decades: Times of Change in the History of the Maritimes (Halifax, Nimbus Publishing, 1987), chapter 4. See also Gregory Marquis, "In Defence of Liberty: 17th Century England and 19th Century Maritime Political Culture", (1993) 42 University of New Brunswick Law Journal 69, esp. at p. 91.

73. Richard Risk and Robert Vipond, "Rights Talk in Canada in the Late Nineteenth Century: `The Good Sense and Right Feeling of the People'", (1996) 14 Law and History Review 1, at pp. 19-20, quoting Edward Blake.

74. Vipond, supra, at pp. 83-112.

75. Vipond notes that in his description of legal liberalism, he draws heavily on the work of American scholar Robert Gordon, who used the phrase "liberal legalism". Vipond inverts the label to emphasize the

political roots of the phenomenon; see Vipond, supra, pp. 133-134 and p. 230, and Robert Gordon, "Legal Thought and Legal practice in the Age of American Enterprise" in Gerald L. Greison, ed., Professions and Professional Ideologies in America, 1730-1940, (Chapel Hill, University of North Carolina Press, 1983), 69.

76. A.V. Dicey, An Introduction to the Study of the Law of the Constitution [London, MacMillan Press, 1959 (10th ed.)]; See also Frederick Pollock, Essays in Jurisprudence and Ethics, (London, MacMillan and Co., 1882), esp. Chapter IX, "The Science of Case Law".

77. Risk, "Constitutional Scholarship in the Late Nineteenth Century: Making Federalism Work", at p. 450; see also his, "Canadian Courts Under the Influence", supra, at pp. 713-714.

78. Quoted in G. Blaine Baker, "The Province of Post-Confederation Rights", (1995) 45 University of Toronto Law Journal 77, at p. 84; see also Risk and Vipond, supra, at p. 16 and p. 20.

79. Risk, "Constitutional Scholarship in the Late Nineteenth Century: Making Federalism Work", supra, at p. 442.

80. Ibid, at p. 441.

81. *Liquidators of the Maritime Bank*, supra, at pp. 441 and 442-443.

82. Moore, supra, at pp. 114-129 and pp. 150-159.

Chapter 3

From Subordinate to Coordinate Federalism: The Evolving Constitution of William Johnstone Ritchie

Of the judges who sat on the New Brunswick Supreme Court in the three decades after Confederation, only William Johnstone Ritchie earned a lasting place in the broader history of Canadian law. This was due largely to his appointment to the original Supreme Court of Canada in 1875 and to his tenure, from 1879 through to 1892, as Canada's second and longest serving Chief Justice. In his day, his legal abilities were greatly admired both within the New Brunswick and the broader Canadian community of practicing lawyers. But the simple fact that he held the office of Chief Justice of the Supreme Court of Canada, rather than his accomplishments in the office, is what accounts for his continuing place in Canadian legal history. Indeed, in their book on the history of the Supreme Court, Professors Snell and Vaughan hold Ritchie significantly to blame for the low credibility and slow development of the Supreme Court across the first two decades of its institutional existence.[1] In their view, he did little or nothing as Chief Justice to combat such problems as the Court's slowness in publishing decisions, its inability to function on the basis of even minimal internal consensus, and the low

quality of decisions. Instead, on this assessment, Ritchie contributed to the Court's poor reputation by his sometimes boorish and arrogant courtroom demeanor and by issuing some of the opinions that best illustrate the Court's lack of imagination and vision.[2]

In this thesis, the interest in Ritchie is limited to his experience as a constitutional jurist. The focus is on his personal development and evolution as a jurist and on his representation of an important dimension of the New Brunswick adjudicative experience with the BNA Act in the first two decades of Confederation. From the perspective of the New Brunswick judicial and legal community, the scope and diversity of Ritchie's experience of the BNA Act in these critically important years of Canada's constitutional development was unique. He was on the bench deciding constitutional cases and interpreting and applying developing constitutional doctrine for the first 25 years of Confederation, first as new Brunswick's Chief Justice and then, after 1875, as Justice and then Chief Justice of the Supreme Court of Canada.

Approaching Ritchie's experience of constitutional jurisprudence from this perspective, four themes emerge. The first is the historical significance of the *Chandler* case once it is placed within a New Brunswick frame of reference rather than a general doctrinal context. The arguments against judicial review made in *Chandler* and the reaction generated in New Brunswick to Ritchie's rejection of those arguments, show that in New Brunswick, the question of judicial authority under the BNA Act was not a technical lawyer's issue. Rather, the issue at stake was the broadly political question of the implications of judicial review and therefore of Confederation, for the continuing supremacy within New Brunswick of New Brunswick's legislative assembly. This makes *Chandler* and the debate it engendered a revealing window on the understandings of Confederation that existed within New Brunswick's legal and political community in the years immediately following 1867. What is revealed is a struggle to reconcile federalism with earlier constitutional ideas, particularly responsible self-government, that formed the spine of New Brunswick's political and legal identity. In this way, *Chandler* illustrates the operation within New Brunswick from the beginning of Confederation of the ideas and values that would, in the 1870's and 1880's, lead the provinces into successful reaction against subordinate federalism. From this viewpoint, the debates within and about *Chandler* were not primarily about judicial review. They were about the legal foundations and implications of Confederation. They raised the issues that would cut across all of the major questions of constitutional development of the next 20 years.

The second theme, closely connected to the first, is the extent of Ritchie's early centralism while at the helm of the New Brunswick Supreme Court. The cornerstones of this

centralism were the breadth he assigned to Dominion powers and the interpretive paramountcy that he derived from the opening and closing paragraphs of section 91. Like others in the early years of Confederation, he took the objective of both paragraphs to be the creation of a unitary and general "rule of construction" by which federal powers were interpreted as encompassing all matters that might be capable of falling within both a federal and a provincial head of legislative authority. Paramountcy was not, on this view, limited to resolving conflicts between federal and provincial legislation where both levels of government legislated on different aspects of a matter of shared competency. Instead, it operated to prevent the existence of shared matters of responsibility, always in favour of the federal government. It was the superior level of government.

The third theme is the evolution of Ritchie's understanding of the BNA Act after *Chandler*. One aspect of this is a change in how the BNA Act is conceptualized: it goes from being a statute to being a constitution. Another related aspect is that the initial position of undiluted centralism is abandoned for one that paralleled, but also anticipated, the more general evolution of Canadian constitutional law between the late 1870's and the mid-1890's toward consistently greater recognition of the equal sovereignty and jurisdictional importance of the provinces. This convergence between Ritchie's constitutional thinking and the parallel trend in the general direction of the law may seem predictable and unremarkable given the disposition of the Privy Council toward the provinces and its ultimate control of doctrinal development during these decades. Here, a key point will be that Ritchie's own personal evolution does not, on examination, depend on obedience to Privy Council direction. It happened before much Privy Council direction was available. Like the more dramatic evolution of the New Brunswick Supreme Court away from the centralism of *Chandler*, Ritchie's evolution to more qualified, complex and balanced positions, seems to have been driven significantly by other factors, including the learning and appreciation of the BNA Act that came from interpreting it in the context of specific cases. Ritchie anticipated the Privy Council as much as he followed it.

The fourth theme, intertwined with the other three, is what Gordon Bale calls Ritchie's positivism. Here, one point is that Ritchie's positivism does not appear to have been indicative of the way of thinking that Risk and others call the "rule of law" model of the late nineteenth century. Another point is that Ritchie's positivism was most strongly apparent in the early New Brunswick cases, where the very legitimacy of the judicial function was under attack. It is possible that the centralism of these early decisions on the constitution was a function of a

limiting positivism that prevented Ritchie from grasping and articulating the complexity of the federalism embodied within the BNA Act. It seems equally possible however, that Ritchie applied or at least exaggerated the techniques of judicial positivism to counter the claim that judicial review meant judicial interference in politics. This is an important dimension of the broader significance that is claimed for *Chandler*. It is supported by the extent to which Ritchie's positivism relaxed in constitutional cases in the Supreme Court of Canada, when a challenge to legitimacy was no longer present. Here, another dimension is suggested by coincidence between a change in judicial style with greater willingness to endorse outcomes and apply reasoning favourable to the provinces. At the same time, positivism continued to be Ritchie's basic judicial approach and perhaps placed limits on his ability to give satisfactory explanations for his constitutional evolution.

To develop these themes, Part II will place Ritchie's constitutional jurisprudence, and particularly the early cases from his days on the New Brunswick Supreme Court, within the context of his earlier legal and political career. Part III then focuses on Ritchie's opinions in the early constitutional cases of the New Brunswick Supreme Court, and the reaction that was generated by *Chandler*, particularly in the New Brunswick legislature and through a public lecture and pamphlet by James Steadman, a county court judge whose reach as constitutional scholar exceeded his grasp but whose attack on *Chandler* nevertheless captures and reveals the importance of the ideas and values that shaped New Brunswick thinking about Confederation and the BNA Act. Here the emphasis is on highlighting Ritchie's positivism, his centralism and his view that the foundations of Confederation and therefore of judicial review rested solely in the legal framework of the Empire and Canada's subordinate colonial status. In Part IV, Ritchie's opinions in Supreme Court of Canada cases are reviewed, revealing his personal evolution toward a more balanced federalism and a greater recognition of the significance of the BNA Act's constitutional character. Some of the possible explanations for this evolution are discussed. Finally, in Part V, some concluding comments are offered on the significance of Ritchie's experience and evolution to our understanding of the New Brunswick judicial experience with the BNA Act and of the early years of Canada's constitutional law.

II

The question of whether or not to join Confederation caused intense and divisive debate in New Brunswick.[3] The elections of 1865 and 1866 were principally fought on that

issue and caused significant realignments in political loyalties and alliances. In both, the pro- and anti-confederates were led by leading members of what had been loosely called the liberal party throughout the 1850's and 60's. On the side of the confederates, political antagonisms and rivalries of the most personal kind were set aside in the name of the great nation-building cause. On the side of the anti-confederates, men who opposed Confederation for exactly opposite reasons, nevertheless managed to cobble together a coalition and a government. Rumours of impending Fenian raids, the purchase of votes with Canadian dollars and charges of Imperial interference with backroom inter-meddling by the lieutenant governor, created a charged political atmosphere.

Throughout this storm, William Johnstone Ritchie remained aloof on the province's Supreme Court, to which he was appointed in 1855.[4] He nevertheless was widely known to be against Confederation, although the reasons remain unknown.[5] It may have stemmed from his long association with the commercial interests of Saint John, and more particularly, with the various schemes for linking that city by rail with the city of Portland, Maine and the commerce of the north eastern United States. Confederation clearly assumed a different thrust for the province's economic development: the long discussed inter-colonial railway that threatened to bypass Saint John and absorb all the capital that the province could possibly hope to secure for the construction of railways.

Regardless of the motives for the opposition, it was believed to have caused Ritchie's elevation to Chief Justice in 1865.[6] The more obvious candidate would have been Lemeul Allen Wilmot, the senior judge and an immensely popular public figure. Wilmot had, however, insisted on using the circuit bench as a platform for extolling the virtues of the Confederation scheme, and this could not have endeared him to the members of Albert J. Smith's anti-Confederation government.[7] The Saint John *Morning Freeman*, owned by Timothy Warren Anglin, minister without portfolio in Smith's government, frankly explained Ritchie's appointment in terms of the government's inability to overlook, "Judge Wilmot's conduct during the agitation of the Confederation question, when he converted the Bench of Justice into a political platform, from which he delivered harangues that elicited cheers and hisses from the audience and shocked the sense of propriety of the whole people".[8]

There was, on the other hand, little question of Ritchie's claim based on merit. Newspapers that found amusement in the political rationale for his appointment nevertheless acknowledged that, "there can be no doubt that he will perform the duties of his office with dignity and ability" and that, "His record as a Puisne Judge is a sufficient guarantee of that".[9]

This assessment of Ritchie the judge matched the stature he had held as a member of the practising bar. He was said to have, "built up the most extensive and lucrative practice, probably, that any one has enjoyed in the City of Saint John",[10] and was judged to be probably "the ablest lawyer this province has ever known", being virtually invincible at the bar.[11] He was, said another, "as a lawyer one of a thousand". The same writer said his capacity, "especially in cases of commercial law, has never been doubted".[12]

Ritchie had a reputation for integrity in politics as well as in law. Among the reform-minded politicians who came to prominence in the 1850's and who described themselves as liberals, only Leonard Tilley could be said to have had a better personal reputation than Ritchie. Elected to the legislature in 1846 as an advocate of responsible government, he is said to have "violently resented" Wilmot and Charles Fisher, the acknowledged reform leaders, when they agreed in 1848 to join the "family compact" government of Robert Leonard Hazen and Edward Barren Chandler.[13] Together with Tilley, he put his political purity into action in 1851 when the liberal cause suffered two further defections. In that year, Robert Duncan Wilmot and John Hamilton Gray, both liberals from Saint John, joined the Tory government. As Wilmot was appointed surveyor-general, he had to stand for re-election. Both Ritchie and Tilley, together with Charles Simonds and William Needham, vowed that if Wilmot were returned they would resign and all except Needham honoured the pledge.[14]

These instances of party loyalty have led historians to describe Ritchie as a "Liberal purist".[15] Bale perhaps goes further in suggesting that Ritchie's more principled advocacy and his personal example of integrity in politics deserve a greater share of the practical credit for the triumph of responsible government in New Brunswick than they have been given, especially relative to the contribution of Wilmot and Fisher. This is because he was, "a clearer and more consistent advocate of the principle that the government be responsive to the will of the people, speaking through their elected representatives, than others, particularly Lemeul A. Wilmot, who received disproportionate credit for the advent of responsible government".[16] Such an assessment has plausibility, for there is no doubt that Ritchie understood that responsible government required more than an executive individually accountable to the legislative assembly. By entering the government of Hazen and Chandler, liberals such as Wilmot and Fisher did dilute the party discipline that could alone end irresponsible executive government. No government would be secure so long as lieutenant governors could reach beyond it to the assembly and find members who were capable of fashioning a coalition that could carry the house with a policy more to the liking of the Crown's representative.

At the same time, Ritchie's purity perhaps had a tendency to self-righteousness that perhaps carried through into his judicial career.[17] The government that Wilmot and Fisher entered in 1848 was formed after the legislative assembly had, by resolution, approved the principles of responsible government.[18] It was true that appropriations continued to be handled through the system of independent legislative committees that had been in operation ever since the province gained control of the Crown lands in 1837, and that this meant that the government could still not be held responsible for the finances of the province or the development and implementation of a province-wide scheme of development. Nevertheless, in the view of the leading historian of the subject, nobody could deny that the government formed by Hazen and Chandler, "was responsible to the house of assembly or that it was just as popular as could be obtained at the time".[19] It was certainly a government that was fully representational if not fully responsible. It was more so for eschewing adherence to strict party lines, as most of the members of the legislature would have been hard pressed to describe themselves as either Tory or Liberal. They were for the country, the people or the constitution but few could have said what this meant in terms of abstract political theories.

In this context, Ritchie's opposition to the participation of Wilmot and Fisher seems a little self-serving and, in the case of Wilmot, a trifle unfair. Wilmot had been a voice in the wilderness for the cause of reform long before Ritchie appeared on the scene and he quite reasonably regarded the assembly's endorsement of the principles of responsible self-government as personal vindication. Participation in the first government formed in accordance with the principles if not the details of responsible government was a tangible manifestation of that vindication. Moreover, the explanation that Fisher offered Joseph Howe, that New Brunswick did not have enough men of quality to replicate the Westminister party system, was one that many New Brunswick politicians would have accepted, even if it was somewhat self-serving coming from Fisher.[20]

It is also important that the difference between Ritchie on the one hand and Wilmot and Fisher on the other was essentially a difference over tactics. Wilmot and Fisher's conduct was self-serving but it arguably was also pragmatic given New Brunswick's state of political development. Fisher certainly understood the connection between the theory of responsible government and the practical importance of both party discipline and ministerial control in the area of finances. He put both in place during his leadership of the "Liberal" government of the late 1850's and it therefore seems unlikely that the earlier disagreement with Ritchie was caused by Ritchie having a better understanding of the institutional requirements for

responsible government than Fisher and Wilmot.[21] But by the 1850's, reform held a definite legislative majority and the circumstances were therefore more propitious for radical change.

Overall, the picture of Ritchie's political career as one of uncompromising principle against petty politicians is altogether simplistic. His time in the legislature was not taken up only with constitutional matters. His other legislative preoccupations were the removal of the seat of government to Saint John and public financing for the construction of the European and North American Railway that was to connect Saint John with Portland and the American railway network.[22] Both cut close not only to Saint John's aspirations but to Ritchie's self-interest, as he was counsel to the European and North American and generally, one of the leading commercial lawyers of Saint John. In fact, Ritchie's "bitter rivalry" with Fisher and Wilmot,[23] may have had more to do with constituency loyalty and material self-interest than with any disagreement over the principles of responsible self-government. As representatives of the County of York, Fisher and Wilmot were bound to resist the demotion of Fredericton in the political sphere, just as they were bound to promote its economic development by ensuring that the benefits of the new age of steam and rail did not unduly benefit Saint John. In this they were no more but no less principled than was Ritchie. In both directions, disagreement over constitutional tactics overlapped with disagreements over more mundane matters and therefore, animosity in one might easily have reflected animosity from the other. At the same time however, there is no doubt that Ritchie was a dedicated reformer and advocate for responsible self-government.

A direct correlation between Ritchie's political career and his approach to constitutional adjudication is not possible. It is interesting nevertheless to note the history of animosity, within the context of shared constitutional and progressive allegiances, between Ritchie and Fisher. More specifically, it is worth noting that both came to the bench and to constitutional adjudication with constitutional ideas shaped in the constitutional precursor to Confederation, the struggle for colonial responsible self-government. In the end, both may have drawn on this shared history in seeing in the written constitution the intent to protect the autonomy and importance of provincial governments and legislatures within the new federal order. But the extent to which their jurisprudence acknowledged this constitutional continuity differed markedly. In Fisher, it was manifest and pervasive, at least after Ritchie's tight leadership of the New Brunswick court ended. In Ritchie in contrast, the connection of provincial self-government to constitutional adjudication appeared only elliptically in his judgments. One reason for the difference may have been their very different understandings of the boundary

between law and politics. For Ritchie, the constitutional principles which supported responsible government in New Brunswick were a matter of politics, while the interpretation of the words of the BNA Act was a question of law. For Fisher, in contrast, responsible self-government was the all pervasive context for the interpretation of the new written component of the constitution of Canada and of New Brunswick. In a sense, it might be said that where Ritchie had been the lawyer in politics, Fisher ended up being the politician on the bench and that in both spheres, the differences of approach masked significant agreement on substance.

III

Ritchie and Fisher both participated in *The Queen v. Chandler; In re Hazelton*, which as stated above, was the first superior court decision on the BNA Act.[24] It forced the court to directly confront what proved to be a strongly held opinion of the New Brunswick political and legal elite: that judicial review of legislation under the BNA Act was contrary to the principles of British constitutionalism and the right of the people of the province to responsible self-government. In rejecting this argument, the Court set off a furor in the legislative assembly that resulted in something quite extraordinary: passage and implementation of legislation that was indistinguishable from the legislation struck down in *Chandler*. In sum, *Chandler* was a hard case fraught with political overtones and it would appear that Fisher, along with John Campbell Allen and John Wesley Weldon, were more than happy to defer to Ritchie, their senior on the bench and the presiding Chief Justice.

On the surface, the case must have seemed straightforward enough and, from a modern perspective, relatively unimportant.[25] New Brunswick had in 1868 passed legislation authorizing the release from gaol of debtors who, on examination by a county court judge, were shown to have no property, "except such as was by law excepted from levy under execution", and who were in addition shown not to have, "directly or indirectly transferred any property, real or personal, intending to defraud the person at whose suit he is confined". In 1869, an application was made to James Chandler, county court judge for Saint John, on behalf of Captain Horace Hazelton, a Bostonian who had come to New Brunswick in 1866 as the secretary-treasurer of a mining company and who had been placed in gaol at the suit of the administrator (Valentine) of an estate that Hazelton had partly used, as trustee, to finance his mining ventures.[26] The debt in question was a fairly large one of $25,000, and Valentine's counsel applied to the Supreme Court for a writ of prohibition directing Judge Chandler to

neither examine nor release Hazelton. The argument in support sought to rely on the constitutional invalidity of the 1868 legislation, insolvency being a matter assigned to the exclusive legislative authority of Parliament by subsection 91(21).[27] This, said Valentine's counsel, was "too clear for argument".

On this view, the question raised was the very narrow one of the scope of Parliament's jurisdiction over insolvency. By itself, this could hardly have been a question of great political controversy, even in an age in which the legitimacy of imprisonment for debt was increasingly being doubted and debated. It was, however, more than Hazelton's sympathetic circumstances that made the *Chandler* case potentially controversial and, from the point of view of the Supreme Court's standing, treacherous. Hazelton's counsel was Isaac Allen Jack, a young lawyer with literary pretensions, a burning opposition to Confederation and a large resentment toward New Brunswick's loss of the independence it had enjoyed before 1867.[28] His argument for Hazelton dutifully included a submission that the legislation was valid under provincial jurisdiction over civil proceedings in provincial courts.[29] But the core of Jack's submission consisted of the assertion that once an enactment of the legislative assembly received the assent of the lieutenant governor, only the governor general could prevent it from taking effect by exercising his power of disallowance.[30] That power not having been exercised, the Supreme Court had no choice but to apply the law of the land and order Hazelton's release. There was, in other words, no power in the court to determine the question of constitutionality.

As was appropriate to a young romantic who bemoaned New Brunswick's loss of independence and the associated loss of stature of the legislative assembly sitting at Fredericton, Jack began his argument by invoking history. He built his argument on *Regina v. Kerr*, decided by the Supreme Court in 1838.[31] Kerr had been convicted under a statute that prescribed, in the interests of fire prevention, the permissible height of buildings for Saint John. On appeal from that conviction, he had argued that the statute was an unconstitutional violation of his rights of private property.[32] He had relied on the Royal Instructions under which the lieutenant governor was, "not to pass, or give your assent to any bill or bills of an unusual and extraordinary nature and importance wherein our prerogative and the property of our subjects may be prejudiced, or the trade and shipping of the kingdom any way affected". From Kerr argued that, "The difference was great between Acts of the Imperial Parliament, and those of the subordinate colonial legislatures", and that, "The Acts of the colonial legislatures had not the force of laws, unless they were passed in conformity to the delegated authority

vested in them by the royal instructions".

In rejecting this argument, Chief Justice Chipman found it contradicted by the very article of the Royal Instructions relied on by Kerr. The article commenced by referring to the "great mischief" that could arise from the passage of "bills of an unusual and extraordinary nature and importance in our plantations", but then immediately provided that such "bills shall remain in force there from the time of enacting until our pleasure be signified to the contrary". As Chief Justice Chipman noted, this showed that the article was, contrary to Kerr's submissions, founded on the assumption that Acts of the colonial legislature took effect immediately on receiving the assent of the lieutenant governor.[33] The legislation challenged by Kerr was legislation that had received the assent of the lieutenant governor, and this concluded any question of its validity in so far as the court was concerned.

But Chipman went further. What made his reasons so appropriate for Jack's purpose in *Chandler* was his rejection of the notion that New Brunswick's legislative assembly was a subordinate and inferior body and the assumption that the courts therefore had the authority to enforce the limitations that defined its jurisdiction. He had begun his judgement by declaring that, "The Lieutenant-Governor, Legislative Council and Assembly form the legislative body in this province, subordinate, indeed, to the parliament of the mother country, and subject to its control, but with this restriction - they have the same power to make laws binding within the province that the Imperial Parliament has in the United Kingdom".[34] As to laws abridging the rights of private property, it was, "a thing unheard of, under British institutions, for a judicial tribunal to question the validity and binding force of any such law when duly enacted". While a law was on the statute books, the "Courts are absolutely bound to give effect to it".

Jack invoked this declaration of basic constitutional principle by telling Ritchie and his colleagues that it was, "the duty of the Court to give effect to the Acts of the Legislature where they do not stultify themselves".[35] His argument that legislative validity was a matter for the governor general and the power of disallowance, was also based on *Regina v. Kerr*. There, Chipman had acknowledged that there was indeed one "peculiarity in colonial legislation", that it was subject to disallowance at the hands of the Crown even when approved by the Crown's colonial representative. This meant that the Crown kept in, "its own hands a legislative power distinct and separate from that of the colonial legislative body", and it was this power of the Crown that "affords a remedy for any improper colonial legislation". By implication this suggested that judicial intervention was not only unauthorised but unnecessary. Jack tried to make the same claim for the post-Confederation period by analogizing the federal power of

disallowance to the Imperial precursor. The "Act of Confederation" having expressly made it the duty of the federal Minister of Justice, "to advise upon the proceedings and the Acts of the Legislatures of the Provinces", silence as to any comparable role on the part of the courts showed, in Jack's view, that the courts had no such role. Hence the duty of the Supreme Court of New Brunswick to give effect to the Acts of the Legislature, "especially in this case where the Government of Canada have put a construction upon the British North America Act and regarded our Provincial Act as not conflicting with it".[36] To do otherwise would countenance the unseemly prospect of a conflict between Her Majesty's representative, acting in accordance with the legal advice of the people's Ministers, and Her Majesty's courts of law.

In all of this, Jack was almost certainly influenced by the views of James Steadman, the County Court Judge for York who had, in 1868, refused to apply the BNA Act in a case virtually identical to that of Hazelton, on the ground that courts had no authority to question the validity of duly enacted laws. Steadman regarded the question as being of such importance that, in the same year, he gave a public address to argue that Confederation had not given Canadian courts a power to determine the constitutionality of laws. As seen below, Steadman's arguments were very similar to those made by Jack , although he may have been more explicit than Jack in arguing that judicial review would encroach on New Brunswick's responsible self-government. As his address was given prior to *Chandler*, it seems likely that Ritchie and the other judges were at least aware of it as they listened to Jack. They knew Jack was arguing a position that had potential wider support. Together with the sympathetic character of Captain Hazelton's predicament, it was this aspect of *Chandler* that made it a case of some delicacy. As events would show, Jack's views (and those of Steadman) were or came to be those of the New Brunswick legislature.

Writing for the Court, Ritchie began with what he obviously took to be solid ground; New Brunswick's Insolvent Confined Debtor's Act was clearly legislation in respect of insolvency, a matter exclusively assigned to the Parliament of Canada. This followed inescapably from two simple facts; Hazelton was an insolvent debtor and he was in gaol by virtue of that insolvency. Insolvency was "a term in mercantile law applied to designate the condition of all persons unable to pay their debts according to the ordinary usage of trade".[37] The result was that the Court was "at a loss to understand how it could be argued" that the Act was not a law on "a matter coming within that class of subjects, *viz:* Bankruptcy and Insolvency, enumerated in the British North America Act as assigned exclusively to the Parliament of Canada".[38] The New Brunswick law was therefore clearly without legislative

authority and Captain Hazelton equally clearly had no right to release.

On the larger question of the court's authority to consider the case, Ritchie sought to hoist Jack on his own petard. He observed that *Regina v. Kerr* was, "doubtless good law at the time and under the circumstances under which it was delivered", but argued that, "as it is applicable at the present day to the case before us, so far from supporting defendant's contention it is directly against it".[39] This was because *Kerr* expressly excluded New Brunswick legislation that was, "objectionable on account of its repugnancy to an Act of [the Imperial] Parliament relating to the colonies". Obviously, the BNA Act was an Act of the Imperial Parliament "relating to the colonies". What was more, Ritchie had already shown that New Brunswick's Insolvent Confined Debtor's Act was in conflict with or repugnant to this Imperial statute. It followed that *Regina v. Kerr* was authority for, not against, judicial intervention.

Ritchie had responded to Jack by redefining the question. For Jack, the question was whether the courts or the legislative assembly, (subject to the governor general's power of disallowance), were to have the power to say what was the law in New Brunswick. It was, in other words, whether the relationship between the judges and the legislative assembly was to remain as it had been before Confederation. As the reaction of *Chandler* would make clear, this was a question that raised serious concerns as to the status of the province and its political institutions and, more specifically, as to the extent to which New Brunswick could still be said to enjoy responsible self-government under a constitution that accorded with British principle. In apparent anticipation of these concerns, Ritchie sought to diffuse them by portraying judicial review under the BNA Act as merely an application of the recognized principle that colonial laws were invalid to the extent that they were repugnant to Imperial statutes that applied to the colonies. This principle had been enshrined in section 2 of the Colonial Laws Invalidity Act in 1864, and Ritchie almost certainly had it in mind in *Chandler* because he mentioned it expressly in the court's next constitutional case.[40] Thus the choice was not between the authority of the courts and legislature of New Brunswick, but between that of the legislative assembly and the Imperial Parliament. So framed, there was in Ritchie's mind no doubt as to what the court was bound to do: it had, in accordance with, not defiance of, *Regina v. Kerr*, to give "full force and effect to the statute of the Supreme Legislature, and ignore the Act of the subordinate, when, as in the present case, they are repugnant and in conflict".[41]

This allowed Ritchie to claim consistency with parliamentary sovereignty; it was just that the parliament's whose sovereignty was being respected sat in London, not Fredericton. In

essence, Ritchie's explanation of judicial review was that Confederation had created Parliament and the provincial legislatures as statutory bodies exercising delegated powers. As such, they had no authority to make laws in respect of any matter except those expressly delegated to them. As Judge Steadman was to later charge in his pamphlet, this implied that New Brunswick's legislative assembly, and even the grandly designated Parliament of the Dominion, were little more than glorified municipal councils.[42] But for Ritchie, the political implications were secondary to his immediate objective of making the BNA Act fit with established understandings of judicial power. The degree to which Ritchie seemed to embrace the new order may have been surprising given his prior political opposition to the scheme. There was a hint either of grim satisfaction or perhaps of bitterness in the lecture that he delivered to Jack and those who clung to the old order represented by Chipman's deference to the provincial legislature. "The British North America Act entirely changed the legislative constitution of the Province", he told Jack, because it had, "taken from the subordinate legislative body of this Province the plenary power to make law which it formerly possessed".[43] It had done this, "by depriving [the legislature] of the right to legislate in all matters coming within certain enumerated classes of subjects", those assigned to the Dominion Parliament by section 91. The independent and supreme legislative assembly that had been compared by Chipman to the Parliament at Westminster and in which Ritchie himself had served, simply no longer existed; it had been abolished by the Imperial Parliament and substituted in its place was the anaemic post-Confederation assembly that was powerless even to secure an old man's release from debtor's prison. The "sooner the respective legislative bodies of the Dominion realize the full effect of the change" said Ritchie, "and the fact of their limited powers of legislation", the less likely would it be that judicial tribunals would "be called upon to ignore laws passed in an apparently legitimate way".[44] Resignation and legislative adjustment, not Jack's resistance to the new reality, was the course to be adopted if the legislative assembly was to retain something of the public estimation and the independence from judicial interference it once enjoyed.

This explanation of the judicial responsibility under the BNA Act made the Act the equivalent of the statutes that created and conferred a limited jurisdiction on parish councils or inferior courts, statutes that the Courts were routinely required to interpret and enforce. Judicial review under the new constitution was therefore straightforward and uncontroversial, as it only required the Court to apply standard rules of statutory construction for the standard purpose of keeping subordinate bodies within their limited spheres of authority. Thus, Ritchie

began his discussion of the Dominion's jurisdiction over insolvency by observing that, "In construing an Act of Parliament, *as in construing a deed or contract*, we must read the words in their ordinary sense, and not depart from it unless it is perfectly clear from the context that a different sense ought to be put on them".[45] (emphasis added) Significantly, the "context" that Ritchie referred to was not the nation-building or constitutional expectations and intentions that had informed the writing of the BNA Act. Instead, the context was solely the words of sections 91 and 92. On this basis, Ritchie could conclude that, "There is certainly nothing in the British North America Act to shew that the word insolvency is used in any other than the ordinary sense".[46]

The "ordinary sense" of the word insolvency was taken from the Imperial Dictionary and from English mercantile law. No consideration was given to the possibility that the word should be given a special meaning in the context of the BNA Act in order to reconcile Parliament's jurisdiction over insolvency with that of the provinces over property and civil rights or civil procedure, the head of power relied on by Jack. In large part, this reflected Ritchie's understanding of the closing paragraph of section 91. It provided that, "any matter coming within any of the Classes of Subjects enumerated in the Section shall not be deemed to come within the Class of Matters of a local or private Nature". To Ritchie, this was a reiteration of the principle of interpretation found in the first paragraph of section 91, that "it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated". Both paragraphs were, in Ritchie's mind, to the same effect; matters that came within the "ordinary sense" of the words used to enumerate Dominion powers were by definition excluded from provincial jurisdiction. This was so even if the matter in question also came within the "ordinary sense" of any of the words used to enumerate provincial powers because any matter coming within the classes of subjects enumerated in section 91 were not to be deemed to come within section 92. This was the basis for Ritchie's confident declaration that it was, "difficult to conceive how the Imperial Parliament, in the distribution of legislative power, could have more clearly or more strongly secured, to the respective legislative bodies, the legislative powers they were respectively exclusively to exercise".[47]

But the opening and closing paragraphs of section 91 do not fully account for Ritchie's brisk and sparse disposal of the case before him in *Chandler*. The belief that the words used by the Imperial Parliament in enumerating federal powers did indeed have an "ordinary sense" that could be determinatively known and applied by standard methodologies was equally

influential. Judicial review under the BNA Act was legitimate and trustworthy not only because the BNA Act was a statute of a Parliament with authority but also because the courts could be counted upon to discover the correct meaning of the words of sections 91 and 92 and thus give effect to the intentions of the Imperial Parliament. Words such as "insolvency" and "bankruptcy" had a particular and definite meaning in the law and it was judges, conversant as they were with the relevant jurisprudence, who were best equipped to give effect to that meaning.

In this, Ritchie's style was fundamentally that of judicial positivism.[48] Words had a definite and knowable meaning that judges knew how to reveal by applying dictionaries, grammatical analysis and the interpretations applied to the same words in other cases. The meaning was more or less unchanging from one legal context to another.[49] This confidence in the determinacy of words was key to the attempt of the legal profession of the mid- and late-nineteenth century to portray judicial decision-making as neutral and apolitical, an attempt that was crucial to the profession's continued legitimacy (and power) in an age of rising democratic fervour.[50] Judges did not decide cases according to their own will, but in accordance with the will of the legislature as expressed in the words of the relevant statute, or, in the case of private law, the will of the parties as expressed in the disputed deed or contract. Thus, the views of English judges as to the meaning of insolvency in commercial cases where there was no question of a division of legislative power, were virtually determinative in *Chandler.* Thus also Ritchie's seemingly exaggerated confidence in the clarity with which the Imperial Parliament had demarcated the boundary between federal and provincial matters. This might have been an effort to diffuse the concern that judicial review meant judges meddling in political matters. This was the attitude animating Jack's reliance on *Regina v. Kerr* and as will be seen, it was an attitude that would resonate in the New Brunswick legislature. Ritchie may have recognized this and if so, the strength of his expressed confidence in the clarity of the words of sections 91 and 92 and their amenability to the conventional and limited role of judicial interpretation may have been a deliberate response.

The core of Jack's argument had been that judicial pronouncement on the constitutionality of legislation would be contrary to the principle of legislative supremacy. Such inconsistency with a cornerstone of the British constitution was not only unthinkable in the abstract but precluded by the preamble of the BNA Act, wherein the "Provinces of Canada, Nova Scotia and New Brunswick", expressed their desire to be "federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, *with a*

Constitution similar in Principle to that of the United Kingdom". (emphasis added) Ritchie's response was that the court respected the ultimate supremacy of the imperial legislature in ruling the Confined Insolvent Debtor's Act constitutionally invalid. In doing so, the court only decided an ordinary question of statutory interpretation by applying familiar techniques and principles of interpretation to the clear intent expressed through the words of the BNA Act, which included a clear "rule of construction" that would make the outcomes so predictable that legislatures could avoid judicial intervention just by submitting to obvious limits of their competency.

This explanation did not sit easily with the province's legislators. From their vantage, the question was not supremacy as between Fredericton and Westminster, but supremacy between the judges and the legislature within New Brunswick. The events and legislative debates that followed *Chandler* have been well covered by Gordon Bale in his biography of Ritchie.[51] The attorney general, George Edwin King, future premier and Supreme Court of Canada Justice, introduced a bill limiting imprisonment for debt to 12 months. It would have secured Hazelton's release immediately but was not really distinguishable from the law invalidated in *Chandler*. It was therefore a challenge to the supremacy that the Court had claimed over the legislature. Ritchie's colleague, Judge Weldon, then complicated things by giving Valentine an injunction instructing sheriffs and gaolers not to release Hazelton under any legislation, including legislation that might be passed. This "extraordinary aggression" launched a fierce legislative debate. The technical arguments were that the Court was subordinate to the legislature because the BNA Act recognized the power of the legislature to put an end to the Court's existence, that there was nothing in the BNA Act giving the Court the kind of authority that the American constitution gave to the Supreme Court of the United States, and that the power of disallowance was provided for in the BNA Act and was therefore the only constitutional means for review of provincial legislation. Underlying each of these were the larger themes that judicial consideration of the legality of legislation was a thing unheard of in a British country and the characterization of *Chandler*, and especially of Weldon's injunction, as an aggression against "the rights of the people" and responsible self-government. At stake was the question of who was going to be "the head of the country", the legislature or the courts. King argued that judicial review would be acceptable if it was by a "General Court of Appeal for Canada" established under section 101 of the constitution, confirming that the relative status of the two New Brunswick institutions was his main concern. In the end, two bills passed, King's reassertion of the legislature's right to deal with

imprisonment for insolvency and another that provided indemnification to those who acted on the new law and not Weldon's injunction.[52] The result was Hazelton's release, in defiance of Weldon's injunction and *Chandler*. The constitutionality of the new law was never brought before Ritchie's Court but in a later case, he appears to have declared a truce of sorts. In *obiter dicta* he acknowledged that "there may be many cases where the abolition or regulation of imprisonment for debt is in no way mixed up with or depending on insolvency".[53]

Judicial review was never challenged again in the New Brunswick Court, but the legislative outcome makes it hard to conclude that Ritchie's *Chandler* decision had ruled the day and ended opposition to judicial review. The fact that Ritchie went out of his way to raise the issue himself in the Court's next constitutional case so that he could give another explanation of the Court's authority, this time citing the Colonial Laws Validity Act, suggests otherwise.[54] If he was hoping to avoid a further reaction from the legislature, he was not successful. Even though the Court upheld New Brunswick's Common Schools Act of 1871, the Court's further involvement in judicial review brought a further response from the legislature.[55] It ordered the printing of Steadman's address from 1868 in pamphlet form. As the finished product made clear, Steadman had not been idle since *Chandler*, for the pamphlet contained extensive rejoinders to the arguments that Ritchie had marshalled in support of judicial review in deciding that case.

Many of the arguments that Steadman tried to make had serious technical difficulties. For example, he asserted that before *Chandler*, the Colonial Laws Validity Act had never been understood as rendering offending colonial laws invalid within the colony of enactment. Instead, said Steadman, the Act only had the limited effect of displacing the general rule of "Comity of Nations ... as between the Courts of the United Kingdom and colonial legislation", making the offending colonial law, "void in England" alone.[56] It therefore followed for Steadman that the Act had never been understood until *Chandler* to confer any jurisdiction on colonial legal tribunals to disregard the validly enacted legislation of colonial legislatures.

Such a restrictive view of the repugnancy principle seemed to be inconsistent with *Regina v. Kerr*, the case Steadman, Jack and the legislature put so much stock in. Chief Justice Chipman had expressly excluded from the Court's duty to apply a law, "passed in proper form by the provincial legislature", any law that was "objectionable on account of its repugnancy to an Act of Parliament relating to the colonies". Justice Parker had been even more explicit, stating that, "cases may occur in which the Court would be bound to pronounce its opinion upon the validity of an Act of the Assembly ... when it conflicts with an Act of the

Imperial Parliament". Moreover, Steadman's understanding of the repugnancy principle was inconsistent with section 2 of the Colonial Laws Validity Act, which spoke of repugnancy between colonial laws and Acts of Parliament "extending to the Colony". This made it clear that the purpose of the principle was to retain for the Imperial Parliament a power to in certain circumstances legislate for the Colonies.

Steadman was also mistaken in suggesting that a conflict between a law of the Canadian Parliament or provincial legislature and the BNA Act caused the amendment of the latter, not invalidation of the former.[57] He thought this followed from the three principles, first that the Crown was indivisible, second that no law could be enacted without the Crown and third, the fundamental rule of statutory construction, that between two conflicting statutes enacted by the same law-maker, the later prevailed. Taken together, concluded Steadman, these principles meant that whenever the governor general or lieutenant governor gave assent in the Queen's name to a statute that was inconsistent with sections 91 and 92, the crown gave its assent to the amendment of those sections. But this seemingly incredible conclusion - that the legislation of colonial legislatures could operate by way of amendment of a statute of the British Parliament and a constitutional statute at that - was surely precluded by the very principle that Steadman relied on most heavily in criticizing Ritchie, that of colonial self-government. For the corollary of Steadman's view was that royal assent to any law passed at Westminster that was inconsistent with laws enacted in the colonies would necessarily have the effect of superseding such colonial laws. This would have been contrary not only to the principle enunciated in section 2 of the Colonial Laws Validity Act, but also to the much larger principle of colonial self-government.

But if Steadman's general theory of the imperial legislative framework was questionable, it at least raised questions for which there were no obvious answers. Also, his views as to the nature and rationale of the BNA Act could not be dismissed out of hand, at least not in 1868 or in 1873. In the course of explaining why the BNA Act was not a "supreme law, in the sense that the constitution of the United States is the supreme law in that Republic", Steadman asserted that Confederation could have been accomplished by the passage of the terms of union in each of the legislatures of the confederating provinces. Once royal assent had been given to each of these separate "acts of union", the Dominion of Canada would have come into being with as firm a legal base as it now had in the BNA Act. It could not, said Steadman, "be argued that the Provincial Legislatures did not possess the right and authority with the assent of the Sovereign to organize of themselves the confederacy as now

established, or in other words that the Crown [acting on the advice of the provinces] had not power to establish the Parliament and Government of Canada".[58] It was after all, "not from want of power in the Provinces that application was made to Parliament to pass the British North America Act, it was because of the great difficulty of bringing so many minds to agree upon the details of so important a subject".[59]

The foundations for this view of provincial competency were quite simple; all of the matters dealt with in the BNA Act were matters that fell within the scope of pre-Confederation colonial self-government. In other words, they were matters that, from the point of view of the Empire, were of strictly local concern. Thus sections 91 and 92 were not to be taken as new grants of legislative powers, nor as imposing strict restrictions on the exercise of the powers they enumerated.[60] This was because the powers enumerated in sections 91 and 92 belonged to the governments and people of British North America independently of the BNA Act. They could therefore be exercised as those governments and people saw fit, subject to the Crown's power of disallowance. To put it somewhat differently, the division of powers between Ottawa and the provinces was a matter of local, not imperial concern, and it would therefore have been contrary to the principle of colonial self-government, "the most vital principle of the British colonial system", to regard the BNA Act as a binding and strict delimitation of the legislative powers of Canada's two levels of government.[61] Sections 91 and 92 had instead to be interpreted "as declaratory only in pointing out for the purpose of *greater convenience*, the particular subjects upon which the people, through each legislative body, are to exercise the legislative authority" that they derived, not from the BNA Act, but from their right of self-government. [62]

On this basis Steadman challenged Ritchie's characterization of legislative departures from sections 91 and 92 as a conflict between the will of a subordinate colonial legislature and the legislative will of the Imperial Parliament. As the division of powers was a strictly Canadian concern, the conflict that arose when either Canada's Parliament or a provincial legislature exceeded their respective jurisdictions was likewise a strictly Canadian conflict, one that could be of no concern to the Imperial Parliament.[63] In the face of such a challenge, Ritchie's reliance on the principle of repugnancy and section 2 of the Colonial Laws Validity Act, implicit in *Chandler* but explicit in the New Brunswick school case decided in 1873,[64] must have seemed heavily formalistic and technical. Ritchie was right, of course. The BNA Act was an Act of the Imperial Parliament "extending to the Colony" in which a repugnant law had been allegedly enacted. But when the BNA Act was seen, as by Steadman, as the culmination of

Canadian efforts to create a Confederation, it was far from clear that it was the type of imperial statute section 2 had been intended to catch. The purpose of the Colonial Laws Validity Act was to protect, not curtail, colonial self-government, for it made it clear that repugnancy to the laws of the United Kingdom was not in all cases to have the effect of invalidating colonial laws. It was only to do so where the Imperial Parliament expressly legislated for the colony in which the repugnant law was enacted. The convention, if not the strict rule of law, was that Parliament only expressed such an intention when adopting legislation that related to matters of imperial interests, matters that were not of local concern to any particular colony and thereby subject to the principle of colonial self-government.

In passing the BNA Act, Parliament had passed a statute of a totally different character, one that related almost exclusively to matters that were of direct concern to particular colonies rather than to the Empire as a whole. To bring such a statute within the scope of the Colonial Laws Validity Act had at least the appearance of contradiction. It meant that imperial legislation that was generally understood as having the purpose of widening the scope of colonial self-government in British North America, instead had the effect of bringing virtually the whole field of Canadian legislation within the formerly narrow power of Westminster to legislate directly for the colonies. This was inconsistent with colonial self-government as abstract principle. It seemed also to be inconsistent with section 5 of the Colonial Laws Validity Act, which provided that, "every Representative Legislature shall, in respect to the colony under its jurisdiction have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers and procedure of such Legislature". This supported Steadman's view that the provinces could have themselves collectively enacted the BNA Act. It also ran counter to the implication that flowed from Ritchie's use of the repugnancy principle, that the question of whether Ottawa or the provinces could enact a certain piece of legislation was an imperial matter, rather than strictly Canadian concern.[65]

Steadman's analysis of the relationship between the BNA Act and the Colonial Laws Validity Act made it clear that Ritchie's reliance on the latter was a good deal more problematic than he appreciated or acknowledged in *Chandler*. He had not of course, had Steadman's pamphlet at hand when he wrote *Chandler,* but he probably was aware of the gist of Steadman's arguments from the address Steadman gave in 1868 as well as from Jack's submissions in court on Hazelton's behalf. Nevertheless, he obviously saw little need for a detailed response. There was, throughout his judgment, a sense that judicial enforcement of the BNA Act was simply necessary, or perhaps inherent in the very nature of federalism.

When Jack suggested in argument that the final decision as to the constitutionality of provincial laws rested with the governor general, Ritchie interrupted to say that Jack "surely [did] not contend that the assent of the governor general would make an Act law, where there was no right to legislate".[66] This made it clear that he thought the courts alone capable of correctly answering the question of legality, the question of "the right to legislate".

In his pamphlet, Steadman spent much energy trying to discredit the view that judicial review was legitimate because it was necessary. He asserted that it was simply wrong to assume that the power of disallowance, what he called the Crown's "negative legislative jurisdiction", had the effect of extending or limiting the legislative jurisdiction of the provinces.[67] If the "office and purpose" of the power of disallowance was in fact to determine the question of constitutionality, the proposition posed by Ritchie was that the governor general had no authority to extend the legislative jurisdiction of the provinces, was simply judicial arrogance. In deciding not to exercise the power of disallowance, the governor general did not extend the legislative jurisdiction of the provinces, any more than would a court in refusing to strike a law down on constitutional grounds. Instead, the governor general simply gave effect to his determination, or rather, to the determination of his constitutional advisers, that the bill in question was within provincial jurisdiction. Pointing out that the BNA Act did not expressly confer any jurisdiction to invalidate laws on the courts, Steadman questioned what purpose could be served by raising the question of constitutionality in the Courts once it had been, "determined by the jurisdiction specifically named for that purpose".[68] Only confusion and uncertainty would result from such judicial second-guessing of the constitutional determinations of the governor general and his advisors.

There were, besides, practical advantages to be derived from exclusive reliance on the power of disallowance. It could only be exercised to invalidate a statute within two years of its enactment, while there would be no time limit on the exercise of judicial review. Strict reliance on the "negative legislative power" would therefore contribute to the certainty of all statute law.[69] But ultimately, the argument for disallowance as the sole mechanism of constitutional enforcement rested on Steadman's view that, at least as it applied to the legislation of the provinces, it could be reconciled with the principle of responsible self-government. "In these days of constitutional government", said Steadman, "the prerogative is only exercised in the best interests of the people".[70] Exclusive reliance on the power of disallowance would mean that decisions as to the constitutionality of provincial legislation would be made on the advice of ministers who were accountable to the elector's of the provinces through Parliament. In

contrast, the courts were totally unaccountable to the people, even though it was the will of the people that they frustrated in finding duly enacted laws to be unconstitutional.[71] Thus, reliance on disallowance would mean that the provinces would be adequately protected from Dominion encroachment by the fact that their "representatives constitute the Parliament of Canada", and the resulting political reality that, "the safety and permanency of the central power depends, constituted as it is, upon the protection afforded to the rights and powers secured to each of the several Provincial governments".[72] The fact that by the same logic the reliance on the power of disallowance meant that the constitutionality of Dominion legislation would be made in the distant and unaccountable Colonial Office was explained away with the observation that the Sovereign's power to negate colonial legislation, "has ever been exerted to protect the weak and maintain the right".[73] The colonial office, in short, was more worthy of trust than were Canadian courts of law.

Reliance on periodic imperial intervention into Canadian affairs was at any rate a small price to pay to avoid the alternative of judicial review along American lines. That would have entailed the conclusion that neither Parliament nor the legislatures were supreme in the sense in which the latter had been prior to Confederation, and it was difficult for Steadman to believe that such a fundamental change, "so entirely adverse to the theory of all British institutions", would have been effected without express enactment.[74] But instead, the BNA Act did not contain a supremacy clause, nor did it expressly confer any power of judicial review on the courts. Fidelity to the principles of British constitutionalism therefore required that it be regarded as a statute binding on Parliament and the legislatures only in the sense that it guided those bodies in their legislative deliberations, and only to the extent that it was enforced by either the Queen directly or by the governor general on her behalf, exercising the power of disallowance. It could not be legally binding in the sense suggested by *Chandler*, for that involved, "a theory altogether foreign to the spirit of the British Constitution, by virtue of which the Sovereign [not the Courts] declares the will of the people".[75]

But most fundamentally, Steadman questioned Ritchie's premise, that questions of constitutionality were primarily, or even largely, questions to be determined by legal rights. He acknowledged that, "None would deny that it is most desirable for each legislative body to confine its legislation to the subjects assigned to it by the British North America Act, so far as it is possible to do so". But then he asserted, "it would be very unwise in the commencement of our confederate system of government to surround the constitution with a legal band rendering it unable to yield to any public necessity or public pressure".[76] Here the basic

concern was the relative inflexibility of judicial review. Once the courts had determined that legislation of a particular character was within the legislative jurisdiction of Parliament or the legislatures, they would be required by the doctrine of legal precedent to stand by that determination even if circumstances suggested the need for the opposite conclusion in a particular case. The governor general and his advisors would be free, by virtue of the political nature of the power of disallowance, of any such constraint. The interpretation and application of the BNA Act was for Steadman, "a question of a political nature, growing out of a conflict between legislative authorities, and therefore not within the sphere of ordinary judicial inquiry or judicial control".[77] In effect, he denied Ritchie's claim that judicial impartiality could be assured through application of the ordinary meaning of words and the principles of statutory interpretation. Referring to jurisdictional questions, he wrote, "Legislators like judges and all other men are fallible and the question must be determined by mere opinion not by facts, and different minds may arrive at different conclusions".[78] Bluntly, this rejected Ritchie's claim that judicial technique would produce objective answers.

Steadman's presentation cannot be said to show that Ritchie decided *Chandler* wrongly. To begin with, he didn't resolve or even recognize the tension if not contradiction between characterizing judicial review but not disallowance as a violation of self-government. In addition, his arguments on the legal framework of the Empire were problematic to say the least. And further, the view of modern scholars and of most lawyers of the day that judicial review was necessary and inherent in federalism was probably inevitable. It is therefore possible to see the entire episode as an interesting but modest divergence from the general Canadian pattern of ready acceptance of judicial review. But this perhaps sees *Chandler* and the local reaction to it, especially in the legislature and in Steadman, too much from a relatively narrow doctrinal perspective. Seeing it instead as primarily a revealing episode in New Brunswick's adjustment to Confederation and to the implementation of the BNA Act casts a different light. It shows prevalent and deep concerns about the implications of Confederation for the status of the New Brunswick legislature, virtually from the beginning of Confederation. It shows that part of that concern was the protection of responsible self-government. The fact that these concerns were articulated in reaction to judicial review rather than in a federal-provincial context, may be less important than that they were articulated. The episode also indicates the importance that was attached to constitutional continuity, both in relation to the status of the province but also more generally, in regard to continuing compliance with the British constitutional model. This is hardly surprising, but the confirmation

is important nevertheless. It helps us to understand the context within which the rest of the BNA Act experience of New Brunswick judges would unfold. The *Chandler* episode makes it very clear that part of that context was a debate about where the line ran between law and politics and judicial and legislative roles. It is possible to see Steadman's assertion that jurisdictional questions were political ones as a rejection of Ritchie's positivism but equally, it is possible to see the positivism, or at least the extent of it, as Ritchie's response to the realism that Steadman expressed and seems to have shared with many. Here it is worth noting that there was a general and increasing concern about the politicization of the judiciary in late nineteenth century New Brunswick, and that Steadman's opinion was part of it. The other parts included the emergence with Confederation of patronage as the principal route to the bench and the involvement of judges in controverted elections.[79]

The last case decided by Ritchie on the New Brunswick court was *Justices of Kings County, ex parte McManus*, one of the first of the many cases on the regulation of liquor that would shape the law of federalism in the first three decades of Confederation. [80] It showed that he was not about to broaden his adjudicative approach because of the criticism of a county court judge. Or perhaps it showed the opposite, that the criticism had convinced him that he could not. In any event, even though the case involved the inherently more ambiguous power of Parliament over trade and commerce, Ritchie decided the case as he had decided *Chandler*, by emphasizing the clarity of the division of powers created by sections 91 and 92 and the highly centralized nature of that division.

The case arose from the refusal of the Justices of Kings to renew the liquor licence under which McManus kept a tavern. In response to an application for a mandamus, the Justices relied on "An Act to amend and consolidate the Laws to regulate the sale of Spirituous Liquors", passed by the New Brunswick legislature in 1873.[81] It empowered "the General Sessions of the Peace for the several Counties ... to grant wholesale and tavern licenses to such and so many persons of good character as they in their discretion shall think proper". Although there was no express authority to deny all licences, the argument for the Justices was that the power to issue licences to, "such and so many persons ... as they in their discretion shall think proper" implied the power to issue no licences whatsoever. In response, the argument for McManus was that the Act, so applied, contravened the exclusive power of Parliament to regulate trade and commerce. This was because wherever there was doubt as to jurisdiction, "the subject shall be held to come within the jurisdiction of the Federal Parliament".[82] This was an understanding of the overall structure of the division of powers that

accorded perfectly with that which Ritchie had expressed in *Chandler*.

Eschewing an obvious and short answer to the case - that the Justices had simply misconstrued the scope of their delegated statutory powers - Ritchie went straight to the constitutional point. He began with the bold declaration that, "the regulation of trade and commerce must involve full power over the matter to be regulated, and must necessarily exclude the interference of all other bodies that would intermeddle with the same thing".[83] He then observed that the word "commerce" included "traffic in articles of merchandise, not only in connection with foreign countries, but also that which is internal between different Provinces of the Dominion, as well as that which is carried on within the limits of an individual Province". This was because subsection 91(2) did not contain any express qualification, geographic or otherwise, of the words "trade and commerce". With the exception of a brief and cursory dismissal of the case law on the American commerce clause, this was all that Ritchie regarded as necessary to dismiss the main argument for the Justices, that the federal power did not extend to trade or commerce within a province.

At this point, after two and a half pages, Ritchie's decision was virtually complete. Parliament having an unqualified jurisdiction to regulate trade and commerce in all merchandise, and liquor being self-evidently an article of merchandise, the Court was "clearly of [the] opinion" that when the "Legislature undertakes directly or indirectly to prohibit the manufacture or sale, or limit the use of any article of trade or commerce, whether it be spirituous liquor, flours or other articles of merchandise ... they assume to exercise a legislative power which pertains exclusively to the Parliament of Canada".[84] The breadth and self-confidence of this conclusion seems almost unbelievable, even when full allowance is made for the benefit that hindsight accords the historian fully apprised of the subsequent and tortured history of the trade and commerce power.[85] As in *Chandler*, it was simply accepted as too clear for debate that the constitutional provision in dispute had a clear and obvious scope. However appropriate as applied to bankruptcy and insolvency, this approach was considerably less tenable applied to the broad if not vague power over trade and commerce. Again, there was a complete failure to take competing heads of provincial power into account in defining the scope of the competing federal jurisdiction. Where this was perhaps understandable in the context of *Chandler*, though even there, later developments made it plain Ritchie gave far too little scope to provincial jurisdiction over the administration of justice, it was a particularly glaring omission in the context of trade and commerce questions. In *Justices of Kings County*, it meant the easy assimilation without discussion of spirituous liquors into the category of

generic "articles of merchandise", such as flour. As Ritchie's personal experience in politics demonstrated, liquor possessed a political and legal resonance that made it a very unique "article of merchandise" in late nineteenth century Canada.[86] It had social and moral dimensions that were simply not present as regards merchandise generally and that very arguably implicated provincial powers over property and civil rights, public order and other "local matters". The avoidance of these dimensions when defining the federal government's trade and commerce power undoubtedly made it much easier for Ritchie to believe in the simplicity of constitutional adjudication and the existence of "right answers" and it accordingly also helped to insulate constitutional adjudication from charges that it was political.

In sum, *Justices of Kings County* shows the extent of Ritchie's early confidence in the simplicity of constitutional adjudication. Notwithstanding that the trade and commerce power was inherently more imprecise and ambiguous than the insolvency power encountered in *Chandler*, Ritchie again confidently disposed of the jurisdictional question on the premise that the jurisdictional boundaries were so perfectly clear and absolute as to be beyond any credible controversy or doubt once the standard rules of judicial construction had been brought to bare, assisted by the rule of federal paramountcy established in the closing paragraph of section 91. Intended or not, this responded to Steadman in the same way Ritchie had responded to Jack in *Chandler*, by portraying judicial review on constitutional grounds as both judicially and politically unexceptional and therefore unobjectionable. Even more so than in *Chandler*, the consequence was a division of powers that was, to say the least, very favourable to the federal government.

The argument made here is that the immediate context for what I have called Ritchie's positivism was the resistance to judicial review. Part of the larger context may well have been a general allegation of politicization of the judiciary, an obvious concern for a Chief Justice. But judges do not so easily adopt a judicial philosophy for a handful of cases that is different from the philosophy applied in all others; at most these influences would have accentuated elements of the understanding of judging that Ritchie had been applying since 1855. But what do the constitutional cases say about that broader understanding? They suggest a positivism based more on the traditional respect for parliamentary sovereignty than on the application of the elements of rule of law thinking of the later nineteenth century. This interpretation is consistent with the reliance on parliamentary sovereignty, through the Imperial Parliament, as the solution to the legitimacy challenge of *Chandler*. More strongly, it is consistent with the way in which Ritchie interpreted the BNA Act. Although *Chandler* and *Justices of Kings*

County are only two cases, they are two cases in which Ritchie was clearly trying to set out a framework for interpretation and application of sections 91 and 92 that would apply in later cases. What seems apparent is that he was relying primarily on the language of 91 and 92 to build that framework, and not on any general philosophical disposition in favour of a particular kind of relationship between the two levels of government as "legal actors". In particular, there is not a trace of any influence from a general philosophy of equality or autonomy in legal relations. Thus his understanding of section 91 and 92 was that federal paramountcy applied in the definition of federal and provincial powers, not only to resolve or avoid either conflicts or overlaps once the scope of the two spheres of power had been determined. This made for a shifting and highly derivate jurisdictional sphere for the provinces, not consistent with late nineteenth century rule of law reasoning. It came instead from Ritchie's reading of the language and the point is that there was nothing in his general understanding of law that led him to reconsider or modify that reading.

This interpretation, unavoidably impressionistic, is more consistent with Ritchie's background as a lawyer educated in Halifax in the 1830's.[87] Two points can be made here. First, this interpretation suggests that the disagreement between Ritchie and Fisher as to judicial method that becomes apparent as we move to chapter 4 was probably not a disagreement across the cultural and intellectual divide that separated the rule of law model and legal liberalism from earlier understandings of law. Second, as we move on to consider Ritchie's evolution in the Supreme Court of Canada to a more balanced federalism, it seems unlikely that the influence of the newer understanding of the rule of law can account for that evolution.

In any event, on Ritchie's elevation to the Supreme Court of Canada, soon after *Justices of Kings County*, the Canada Law Journal noted that while he was at "one time strongly opposed to Confederation, his court has probably gone further than any of the provincial courts in limiting the jurisdiction of the local legislatures".[88] What the Canada Law Journal could not have appreciated is that the reasons for this included the strictness with which Ritchie had applied positivist techniques, probably encouraged by the experience that his New Brunswick Court alone faced, of fashioning a defence of the very idea of upholding the constitution through the courts. In short, the opposition to judicial review that Ritchie and his Court confronted perhaps made Ritchie in the New Brunswick phase of his career a constitutional positivist with a vengeance.

IV

After Ritchie's appointment to the Supreme Court of Canada, his thinking on federalism underwent a transformation. Bale points out that his voting record from his appointment in 1875 until his death in 1892 was a perfect balance between federal and provincial government wins. Significantly, this is almost as true for the period prior to 1883 and the decision of the Privy Council in *Hodge v. The Queen*, when the influence of the Privy Council in favour of the provinces started to became a significant factor in Supreme Court decision-making, as it is for the period after 1883. By itself, this balance in voting, especially for the period prior to meaningful Privy Council influence, is very hard to square with the reasoning or the outcomes in *Chandler* and *Justices of Kings County*, and indicates a substantial shift in Ritchie's thinking.

This impression is confirmed by a more detailed look at Ritchie's opinions in Supreme Court cases decided before 1883 that can be said to have raised issues that were fundamental to the overall balance of power between the federal and the provincial governments. What is revealed is that the overall balance in Ritchie's voting record significantly understates the extent to which he held for the provinces in the cases that mattered the most between his appointment to the Supreme Court and the decision of the Privy Council in *Hodge*. In this period, he was generally holding for the federal government in cases that addressed specific and relatively narrow points but for the provinces in the cases that had broader significance.

This pattern began almost immediately after Ritchie's appointment to the new court. In 1878, the Court was asked to rule on the constitutionality of Ontario legislation that required brewers to be licensed provincially in *Severn v. The Queen*, the Court's first significant application of the BNA Act.[89] In dissent with Ontario's Justice Strong, Ritchie voted to uphold the provincial law. Unlike the majority, he was prepared to do so under the provincial licensing power even though the brewing licence was a form of indirect taxation that could also fall within the jurisdiction of the federal Parliament over "The raising of money by any Mode or System of Taxation". For the judges in the majority, it was clear that such "concurrency" was contrary to the principle of two distinct and mutually exclusive spheres of competency that never overlapped because every matter that was capable of being federal was federal by virtue of the closing paragraph of section 91, the position essentially, of Ritchie, in *Chandler* and in *Justices of Kings County*. To this and the practical concern of the majority that business might be discouraged or consumers treated unequally across the country by overlapping taxing authority, Ritchie had a somewhat surprising solution: the federal government could intervene

using the power of disallowance.[90] In addition, Ritchie was firm in rejecting the view of Chief Justice Richard that the power to raise revenues through licences could only be used to raise the revenue needed for the relatively minor and inexpensive functions of municipal government. Relying on his knowledge of the revenue raised at the local and provincial level through licensing in pre-Confederation New Brunswick, Ritchie concluded that the licensing power, "should be construed as intended to furnish the Local Legislatures with the means of raising a substantial revenue for provincial purposes".[91]

As the next chapter will discuss in greater detail, this question of the scope of the licensing power was important to nineteenth century Canadian lawyers on both sides of the competition between the federal and provincial governments in ways that are now easy to overlook. In addition to the obvious implications for patronage possibilities, the scope of the licensing power would, in the context of the financial options available to governments of the day, say much about the independent revenue generation capacity of the provinces and therefore, the relative importance of the provinces as an order of government within the federal system. Ritchie's dissent in *Severn* therefore suggested dissent not only to the majority's interpretation of the licensing power but growing dissent also to the view of Confederation the interpretation implied, that provincial governments were subordinate and virtually municipal governments, doing relatively unimportant things.

In 1879, Ritchie joined the rest of the Court in *Valin v. Langlois* in upholding federal legislation that conferred jurisdiction over federal controverted election cases to the superior courts of the provinces.[92] The case is of interest because it seems to catch Ritchie's thinking in the midst of transition. He declared the powers of Parliament to be plenary powers, "in no way limited or circumscribed, and as large, and of the same nature and extent, as those of the Parliament of Great Britain".[93] At least for the federal government, this departed from the vision of the constitution articulated in *Chandler*, under which the BNA Act was said to have rendered all Canadian legislative assemblies, including Parliament, into derivative and subordinate bodies. In this sense, *Valin* shows Ritchie starting to think of the BNA Act as more than a statute of the Imperial Parliament but also as the constitution of Canada. At the same time, it implied that the provinces did not enjoy plenary or sovereign status within their spheres. Indeed, Ritchie said that because the Imperial Parliament had made the Canadian Parliament, "an independent and supreme Parliament ... any power given to the Local Legislatures must be subordinate thereto".[94] To this extent, Ritchie seemed to be holding to *Chandler*, which he may have had in mind in writing for *Valin*. At the same time, Ritchie commented briefly in *Valin*

that federal powers should be interpreted as superseding provincial ones only to the extent necessary for general and effective legislation on federal matters. This further suggested a re-thinking of the earlier categorical centralism and a more protective attitude to the provinces. Finally, *Valin* is also of interest because Ritchie used it, somewhat out of context, to quote from the Privy Council's decision in The *Queen v. Burah*, on the judicial review question.[95] Speaking of the Indian Parliament, the Privy Council referred to the duty of the "established Courts of Justice" to answer questions of legislative authority where the authority was created and limited by an Act of the Imperial Parliament.[96] This may have been yet a further backward looking riposte to Steadman and company.

Ritchie's judgment in *The Queen v. City of Fredericton*, decided in 1880, was much more strongly centralist.[97] The case concerned the constitutionality of the *Canada Temperance Act* and therefore asked which level of government had jurisdiction over local-option temperance. As the next two chapters will detail, the decision of the New Brunswick Supreme Court in the case, and particularly the judgment of Charles Fisher, was a complete repudiation of the direction taken by that Court under Ritchie in *Justices of Kings County*. Key elements of that repudiation were the rejection of the idea that a law that affected trade was necessarily a law on trade, greater acceptance of the distinction between the regulation of trade in general and of particular branches of trade, an emphasis on the importance of licensing revenue to the ability of the provinces to perform the functions assigned them by the Confederation "compact", and the view that such moral reform legislation, especially if implemented at the local level, fitted within provincial authority over property and civil rights or matters of local concern. Writing in the majority, Ritchie rejected or ignored each of these challenges to *Justices of Kings County* and, in doing so, seemed to once again make "trade and commerce" synonymous or nearly synonymous with all legislation that affected trade or commercial activity.[98] In this, he agreed with the opinion of the Court's most pronounced centralist, Ontario's Justice Gwynne. Ritchie also showed less regard for the protection of provincial revenues than *Severn* perhaps had suggested.[99]

In the same year as *City of Fredericton*, the agreement of Ritchie and Gwynne on the scope of the trade and commerce power and its relationship to property and civil rights came to an abrupt and final end. The case was the well known one of *Citizen's Insurance Company v. Parsons*.[100] It involved the authority of Ontario to pass a law stipulating the conditions for contracts of fire insurance. Gwynne voted to decide the case against Ontario on the theory that "trade and commerce" included specific branches of trade and "everything relating to

every trade".[101] Together these propositions meant that the buying and selling of fire insurance was a branch of trade within federal jurisdiction and that every element of each transaction by which such insurance was sold and acquired, including the rights and obligations as between the parties whether under statute or common law, was also a federal matter. Key to this was Gwynne's view that the provincial jurisdiction over property and civil rights was not an absolute but only a qualified jurisdiction. It encompassed only the "residue" of property and civil rights once the property and civil rights encompassed within federal powers had been "subtracted".[102]

In the bare majority, Ritchie's disagreement with Gwynne started here at the roots of Gwynne's theory of the BNA Act, that provincial powers were qualified and of lesser weight. Significantly, Ritchie distinguished for the first time between conflicts between federal and provincial powers and conflicts between federal and provincial legislation, and acknowledged that in the latter case, local legislation had to yield. As to the conflict of powers, he built on his openness to concurrency from *Severn* by affirming, "with confidence that the BNA Act recognizes in the Dominion Parliament *and in provincial constitutions* a legislative sovereignty, if that is the proper expression to use, as independent and as exclusive in the one as in the other over the matters respectively confided to them, and the power of each must be respected by the other, or *ultra vires* legislation will necessarily be the result". [103] In the context, this was more of a warning to the federal government than to the provinces; its powers, said Ritchie, should take priority over provincial only to the extent necessary "for the purpose of legislating generally and effectively ... [on] matters confided to the Parliament of Canada".[104] This heralded the modern paramountcy doctrine, in place of the overweening version of Gwynne and of the earlier Ritchie. It also meant that the analogy made implicitly in *Chandler* between Canadian legislatures, federal and provincial, and municipal councils, abandoned for Parliament in *Valin*, was now also abandoned for the provinces. In its place, Ritchie had articulated the cornerstone of a coordinate federalism comprising equally sovereign legislatures operating within separate but overlapping jurisdictional realms.

Within this framework, Ritchie now accepted the distinction between the regulation of trade generally and legislation on particular trades or on the local aspects of trade that Gwynne denigrated and that he had himself rejected in *City of Fredericton*. His attempt to capture the distinction is worth quoting at length:

> 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 of all matters of a purely 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 legislature of such powers may be said remotely to affect matters connected with trade and commerce, unless, indeed, *the laws of the provincial legislatures should conflict with those of the Dominion Parliament passed for the general regulation of trade and commerce.* I do not think the local legislatures are to be deprived of all power to deal with property and civil rights, because Parliament in the plenary exercise of its power to regulate trade and commerce, *may possibly pass laws* inconsistent with the exercise by the local legislatures of their powers - the exercise of the powers of the local legislatures being is such a case subject to such regulations as the Dominion may lawfully pass.[105] [emphasis added]

This made the Ontario law acceptable because it governed contracts (which were "matters of civil rights") between private persons in relation to property within Ontario. Together, all of this made it legislation dealing with civil rights in respect of matters "of a merely local and private nature in the province". [106]

As Ritchie himself was "humbly" but accurately to observe in *The Queen v. Robertson*, this fairly closely anticipated the Privy Council's rationale for finding for Ontario when *Citizen's Insurance v. Parsons* was appealed there. The same would be true of Ritchie's dissenting opinion in 1881 in *Mercer v. The Attorney General for Ontario*,[107] not in relation to the Privy Council's later ruling in *Mercer* itself, but rather, in relation to the ultimate vindication of the provinces on the sovereignty issue in the Privy Council in *Maritime Bank*, 11 years after *Mercer*. As discussed earlier, the question in *Mercer* was whether property escheated to the federal or the provincial governments. The outcome was fundamental to provincial expectations of being treated as sovereign governments. But it was also possible to view *Mercer* as depending on the sections of the BNA Act that allocated public property between the federal and provincial governments and as not raising the more fundamental status question, which had, in any event, been decided adversely to the provinces by the Court in 1879 in *Lenoir v. Ritchie*.[108]

Writing in dissent in *Mercer*, Ritchie alone dealt with the status question, possibly because he had not participated in *Lenoir v. Ritchie*. He did so by concluding that the various sections of the BNA Act that concerned the constitutions of provinces, "clearly show that the provincial executive power and authority was to be *precisely the same* after Confederation as before Confederation".[109](emphasis added) Of course, there had been a change in the range of matters over which lieutenant governors enjoyed this status. But on the matters that continued to be provincial, the lieutenant governors continued to represent the Queen and the

provinces continued to be sovereign to the same extent and in the same degree as before Confederation.

In light of *Valin* and more particularly *Parsons*, Ritchie's *Mercer* opinion is not surprising. But in the broader context of this thesis, particularly in tracing the changes in the thinking of New Brunswick judges as they learned the constitution through the adjudicative process, Ritchie's dissent in *Mercer* is important. First, it shows that, contrary to the assumption in much of the literature, there were Canadian precedents for the what the Privy Council did in *Maritime Bank*. In particular, it is not the case that Canadian courts and judges at most ruled that the lieutenant governors were not representatives of the Crown or were only representatives of the Crown to the limited extent expressly authorized by the BNA Act.[110] Ritchie's *Mercer* opinion says otherwise, as does the New Brunswick Court's ruling in *Maritime Bank*, which as will be seen in chapter 6, built extensively on Ritchie's *Mercer* opinion. It is true that Ritchie acknowledged that lieutenant governors now perhaps represented the Queen in a "modified manner", but this clearly related to the issue of the functional scope of representation in light of the divisions of powers, rather than to the legal quality of the representation.

Second, *Mercer* makes it apparent that Ritchie understood that the significance of the status of the lieutenant governors was not only or primarily linked to the distribution of prerogative powers between Ottawa and provincial capitals. He understood the broader legal and political significance. He said, for example, that a review of the BNA Act confirmed that, "Special pains appear to me to have been taken to preserve the autonomy of the provinces, so far as it could be consistently with a federal union".[111] Likewise, he said that within their respective and exclusive spheres, "the Dominion and provinces respectively ... are separate and independent, neither having any right to interfere with or intrude on those of the other".[112] Oliver Mowat, who appeared before Ritchie and the Court in *Severn*, could have no better articulated the core principle and the main objective, through the process of constitutional adjudication, of the provincial rights movement.

This acceptance of equal provincial sovereignty, and its relationship to jurisdictional questions, was fundamental to the greatly and even radically different understanding of the BNA Act that Ritchie had developed by 1882. In that year, he put all of the pieces of his revised vision together in *The Queen v. Robertson*, a case originating in New Brunswick and coming to the Court on appeal from Gwynne sitting in the Exchequer Court.[113] The dispute was over the right of the federal government under "Sea Coast and Inland Fisheries" to issue

licences to fish in waters above the "ebb and flow of the tide" and already granted by a provincial government. In holding with the rest of the Court for the provinces, Ritchie applied to the federal jurisdiction over the fishery the same reasoning he had applied to the trade and commerce power in *Citizen's Insurance v. Parsons*: the federal jurisdiction over the fishery was not a jurisdiction over the rights and obligations of private individuals in relation to the ownership and the buying or selling of fish, but was instead a jurisdiction to legislate on the fishery as an industry and for the general benefit of the public at large. It therefore encompassed matters such as conservation and the general improvement and development of the fishery. But this aspect of the case is of less interest than the fact that, on the one hand, Gwynne used it as a platform to once again summarize his highly centralist vision of the constitution and that, on the other, Ritchie responded with an equally complete summary of his competing vision. For Gwynne, this meant a uniform "rule of construction", by which:

> All subjects of legislation of every description whatever are within the jurisdiction and control of the Dominion Parliament ... except such as are placed by the [BNA Act] under the exclusive control of the Local Legislatures and nothing is placed under the exclusive control of the Local Legislatures unless it comes within some or one of the subjects specifically enumerated in the 92nd section, *and is not at the same time outside of the several items in the 91st section, that is to say, does not involve any interference with any of those items.* The effect of the closing paragraph of the 91st section ... clearly is to exclude from the jurisdiction of the Local Legislatures the several subjects enumerated in the 92nd section, in so far as they relate to or affect any of the matters enumerated in the 91st section.[114] [emphasis added]

This was *Justices of Kings County* in a nutshell. For good measure, Gwynne again emphasized that provincial jurisdiction in all areas, including property and civil rights, was qualified or limited, whereas the jurisdiction of Parliament was, "as absolute and supreme as the jurisdiction of the Imperial Parliament over the like subject would in the United Kingdom be".[115] The reason for the difference was not only to ensure central over local authority. It was to ensure that parliamentary supremacy in the undivided British sense was part of the constitution so that Canada would have a constitution, "similar in principle to that of the United Kingdom".

When Ritchie's turn came on the appeal, he clearly set out to make his disagreement with Gwynne's whole approach clear. Contrary to what he had said in *Chandler* and in *Justices of Kings County*, there was now "no hard and fast canon or rule of construction" that could be "laid down and adapted" to all cases. Instead,

> The nearest approach to a rule of general application that has occurred to me ... is

> what I suggested in the cases of *Valin v. Langlois* and *The Citizens Insurance Co. v. Parsons*, ... that, as there are many matters involving property and civil rights expressly reserved to the Dominion, Parliament, the power of the local legislature must, to a certain extent, be subject to the general and special legislative powers of the Dominion Parliament. But while the legislative rights of the Local Legislatures are in this sense subordinate to the rights of the Dominion Parliament, I think the latter rights must be exercised so far as may be consistently with the rights of the Local Legislatures, and therefore the Dominion would only have the right to interfere with property and civil rights *in so far as such interference may be necessary* for the purpose of legislating generally and effectively in relation to matters confided to the Parliament of Canada.[116] [emphasis added]

Here, Ritchie quoted the Privy Council in *Citizen's Insurance v. Parsons* as having endorsed his own judgment from the same case, by confirming that federal and provincial powers, "must be read together, and that of one interpreted, and, where necessary, modified by that of the other", with the understanding that the words "property and civil rights" were used in the constitution "in their largest sense".

In all of these Ritchie opinions, this was the only really significant or lengthy reliance on a Privy Council ruling under the BNA Act, and in this case, the purpose was to rub Gwynne's nose in Ritchie's vindication in *Parsons*. This leads to the only really firm conclusion that can be reached on what accounts for the transformation in Ritchie's thinking, that it was not a function of being required to follow a Privy Council "provincial bias". Indeed, it seems more likely that Ritchie, through cases such as *Parsons* and *Mercer*, may have been one of the influences operating in the other direction.

It is more difficult to know what factors did account for the transformation of Ritchie's thinking and the best that can be offered is speculation. One possibility is simply the movement of Ritchie to a more complex and stimulating environment. Despite the poor reputation of the early Supreme Court for scholarship, the move to the Supreme Court must have been an intellectual renaissance for Ritchie. In New Brunswick, the court had tended to speak through a single judgment in constitutional cases, and most were only a few pages in length. The conventions of the Court, as well as Ritchie's recognized preeminence in legal ability and work habits, seemed to discourage disagreement in constitutional cases. In contrast, at the Supreme Court, multiple lengthy judgements in every constitutional case were the norm. In many cases, all five justices wrote their own reasons. Split decisions based on strong and fundamental disagreements between the judges were almost invariable. More importantly perhaps, the disagreements were now with colleagues of the caliber of Gwynne. And in addition to these internal court dynamics, Ritchie was now hearing arguments from

counsel such as Oliver Mowat (*Severn*, *Parsons*), Dalton McCarthy (*Parsons*) and Zebulon Lash (*Mercer*, *The Queen v. Robertson*) Finally, Ritchie received a broader exposure to the BNA Act as a Supreme Court Judge. The cases raised provisions of the BNA Act that had not been raised in the New Brunswick cases or they cast a different light on provisions that had been in issue in the New Brunswick cases. One of the exceptions from Ritchie's perspective was *Fredericton*, which raised the same issue as *Justices of Kings County*, and that was probably significant in his decision in that case. But otherwise, it is easy to see how the new breadth of experience could have pushed Ritchie to deeper thinking and to a fundamental rethinking of what had, as of *Chandler*, appeared easy and straightforward.

Another contributing factor may have been Maritime pride and the desire to resist the Court's adoption of what Ritchie now saw as an Ontario version of Confederation. This may seem puzzling, since Ritchie went from being a strong protector of sweeping federal authority to being a relatively staunch protector of the provinces and the latter naturally links with Ontario's constitutional position through the provincial rights movement. But within the Supreme Court, judges from Ontario were among the strongest proponents of centralist interpretations and they clearly drew Ritchie's ire by interpreting the BNA Act on the basis of Ontario experience and an Ontario view of Canadian aspirations. In *Severn*, Chief Justice Richard ruled that the licensing power did not authorize licences for raising revenues for the provinces (as opposed to revenues for municipal functions) because licences in pre-Confederation Canada had been only for revenue for municipal functions and this indicated the intent of the framers in giving the provinces the power to issue "other licences", in addition to those specifically named. From Ritchie, this drew a curt observation that the BNA Act was not to be, "read by the light of an Ontario candle alone", as well as a detailed description of the more complex licensing situation in pre-Confederation New Brunswick. Three years later, Gwynne wrote in *Mercer* that "the legislature of [old] Canada was the chief of the parties to the framing of the BNA Act and to the petition to the Imperial Parliament to pass it". He then used Ontario legislation to bolster his argument that the reversionary interest in lands owned by the provinces was, by section 109 of the BNA Act, transferred to the new Dominion. Without mentioning Gwynne by name, Ritchie was scathing in saying he could make no sense of Gwynne's argument. It is difficult not to hear his indignation at Gwynne's version of history coming through his disagreement on a highly technical question. The indignation may have been reinforced by apparent personal animosity.[117]

With Richard and with Gwynne, Ritchie may have been encountering or may have

believed he was encountering in the judicial sphere what Maritimers encountered in the political sphere immediately after Confederation: the sense that Confederation had not created a new Canada after all but had simply expanded the old one.[118] If so, disillusionment with the centralism that he had himself espoused does not seem unlikely. As an old reformer and "Liberal purist", Ritchie may also have been encouraged in this shift by Ontario's increasingly concerted campaign for "provincial rights" under the leadership of that province's Reform Party. The references to provincial "autonomy" and "independence" in *Mercer* and to equal provincial "legislative sovereignty" in *Citizen's Insurance v. Parsons*, could be evidence of Ritchie's growing openness to such "political" influences. They were, after all, part and parcel of the arguments Ritchie heard from the bench. In *Severn*, for example, Mowat was reported as having started his argument by declaring that, "I claim for the Provinces the largest power they can be given: it is the spirit of the *B.N.A. Act*, and it is the spirit under which Confederation was agreed to". Romney, Vipond and others argue that such arguments had appeal to members of the Privy Council because they aligned with the organization of the Empire or a general legal philosophy that prioritized autonomy above other interests. It may be easier to believe that a version of the same kind of convergence took place with a Canadian judge such as Ritchie, who shared Mowat's background in the battle for responsible government and the qualified "provincial independence" it represented. In addition, by the late 1870's, New Brunswick's fiscal challenges under Confederation were becoming apparent, perhaps as reflected in Ritchie's solicitude for provincial revenue sources in *Severn*. More broadly, there was a general loss of provincial self-confidence and a general attitude of disillusionment with Confederation in New Brunswick through the 1870's and 1880's.[119] Perhaps also this created good conditions for reconsideration of the earlier resignation to a highly centralized federation.

What can be said with more certainty about Ritchie's evolution as constitutional jurist is that significant cracks started to appear in his positivist armor. In *Severn*, the provincial jurisdiction over shop, saloon, tavern, auctioneer and "other licences" was to be defined "not only in accordance with the literal interpretation of the language, but ... consistent with the policy and purview of the [entire] statute".[120] In the same case he showed himself willing to go beyond the constitutional text to delve into the details of licensing law and public finances in pre-Confederation New Brunswick as an aid to the discovery of legislative intent. Further, when recognizing in *Mercer* the intent of the framers to protect provincial autonomy, when assigning a common limitation of regulatory generality in *Citizen's Insurance Co. v. Parsons* and in *Robertson* to the trade and commerce and the fisheries power respectively, and when limiting

federal paramountcy in *Valin*, *Parsons* and *Robertson* to situations of actual legislative conflict, Ritchie reached conclusions for which the obvious, ordinary or clear meaning of the words of this and that provision of the BNA Act did not provide a self-sufficient explanation. Instead, these were conclusions that required placing words of the text into a broader understanding of the objects of Confederation and the nature of federalism.

The same could, of course, be said for the heavily centralist interpretations presented in *Chandler* and *Justices of Kings County*, for, as argued earlier in chapter 2, these and similar interpretations also did not follow inexorably from the "ordinary meaning" of the words of the text. In particular, the meaning of the "deeming" paragraph of section 91 was fraught with ambiguity. In significant measure, the difference between the earlier and the later Ritchie is that he moved from one side of that ambiguity to the other. Thus, the real change in Ritchie's reasoning is that he ceased to claim that applying the constitution was straightforward or that the reasons for his rulings consisted only of first putting together the dictionary meaning of all of the relevant words and phrases of the text and then applying those meanings to the facts of the case before the Court. Instead, he became increasingly more comfortable in stating the premises on which his interpretation of the words and phrases depended and in relating particular questions (the status of the lieutenant governors, the scope of the fishery power, the meaning of paramountcy) to an overall explanation of the division of powers. The coincidence of this transition in methodology with the transition from subordinate to coordinate federalism could easily be said to validate the view that those, such as Mowat and the Privy Council and now Ritchie, who took the provincial side on the fundamental questions could only do so by abandoning the text and its obvious centralism and by imposing a pro-provinces bias. However, this simply ignores the centralist position's own dependence on interpretive premises not stated neatly in the constitutional text. This is obvious from Gwynne's eloquent defences of the position in his disagreements with Ritchie.

As suggested in part I, the change in Ritchie's judicial technique could mean that the extent of the positivism of the New Brunswick cases was a deliberate and, in the case of *Chandler*, preemptive attempt to undermine opposition to judicial review. The threat having passed by 1875, Ritchie may have become comfortable with a more expansive and a more statesmanly and a less technical approach to constitutional adjudication. In other words, constitutional interpretation replaced mere statutory interpretation. The broadening of the adjudicative frame of reference could also have been a function of Ritchie's efforts to come to terms with a greater appreciation, gained through experience and exposure to more and better

presented arguments, of the complexity of the BNA Act. On this view, he possibly came to better understand that the standard techniques of statutory interpretation, at least as he understood them prior to significant experience with the BNA Act, were not sufficient to the task of interpreting a statute that was the framework, but only the framework, for the creation and organization of a new country based on a new kind of federalism that was "consistent in principle with the constitution of the United Kingdom". The possibility therefore, is that cause and effect in the relationship between Ritchie's understanding of the judicial role and his understanding of federalism reversed over time: in *Chandler*, the understanding of the judicial function determined (and constrained) the understanding of federalism, but in later cases the growing understanding of federalism determined the changing understanding of judging itself.

Here, it is worth noting that the extent of Ritchie's departure from positivism is comparable to the Privy Council's occasional departures from the techniques of the same interpretive methodologies. As noted in chapter 2, the Privy Council's "bias" against the provinces has been said to be revealed in a few elliptical paragraphs in *Hodge* and in *Maritime Bank* wherein "provincial autonomy" and the general intentions behind Confederation and the BNA Act were openly discussed. The same can be said for Ritchie, particularly in reference to the paragraphs in *Parsons* and *Mercer*, very similar to those in *Hodge* and *Maritime Bank*, in which he spoke of autonomy, independence and legislative sovereignty. Again, this similarity might be taken to only confirm that there was little in law to be said for "provincial rights", either in the Privy Council or the Supreme Court of Canada. But alternatively, if Ritchie's evolution reveals that he was pushed beyond the limits of positivism by the complexity of constitutional adjudication, the similarity between his cautiousness in moving beyond those limits and the comparable cautiousness of the Privy Council may instead suggest that the Privy Council was likewise pushed by the challenges of Canada's constitution to expand on their normal judicial approach. As judges who, like Ritchie, believed strongly in finding legislative intent in what was said concretely in legislative language, it would not be surprising if they did so carefully and measuredly.

The constraining influence of positivism might explain why neither Ritchie or the Privy Council explained why the BNA Act was defined to protect provincial autonomy, why it used the words property and civil rights "in the largest sense", or why, in Ritchie's case, the powers given to the federal government had been given with the intent that they be used for general regulation, not for the regulation of the details of transactions between individuals. This failure to answer the question "why?" meant that a full rationale for constitutional outcomes was not fully

articulated or perhaps even appreciated by either Ritchie or by the Privy Council. One consequence was outcomes for which the sources are, to this day, matters for speculation. Another and more immediate consequence perhaps, was that a full foundation for determining the scope of the rules and principles of constitution law and for determining the implications of the ruling in one case for later cases, was not laid down, whether by Ritchie or the Privy Council.[121] The best example of this is probably the fate of the explanation of the trade and commerce power given by Ritchie and by the Privy Council in *Parsons*. Both said "property and civil rights" was a broad and important authority and both said the federal authority over trade and commerce was for general regulation of the economy. But neither gave an explanation of why these two points were at the heart of Canadian federalism. If they had done so, and particularly if Ritchie had done so, it is possible that the functional distinction between general and specific regulation would not have been confused, as it subsequently was, with the geographic distinction between inter and intra-provincial trade.

As will be seen in the next chapter, one of the main differences between the constitution according to Ritchie and the constitution of Charles Fisher is that Fisher not only emphasized the importance of property and civil rights and the distinction between general and specific regulation, but was also prepared to give an explanation of why the BNA Act was so designed.

V

The main point of this chapter is that Ritchie's personal journey as a constitutional jurist parallelled the journey of the New Brunswick Supreme Court from centralized subordinate federalism to decentralized coordinate federalism. Both journeys started in Ritchie's decisions in *Chandler* and *Justices of Kings County*. Even though Ritchie was on the Supreme Court until his death in 1892, his journey culminated with his opinions in cases such as *Parsons*, *Mercer* and *Robertson*. For the New Brunswick Supreme Court meanwhile, the journey would culminate with its decision in *Maritime Bank* in 1888, building significantly on Ritchie's opinion in *Mercer* and, it will be argued, the debate about federalism that featured in the Court's decision in *Fredericton*.

Ritchie's experience, like that of the New Brunswick Supreme Court, contributes to some of the principal contentions of this thesis. In particular, Privy Council interpretations of the BNA Act were not bereft of important Canadian judicial precedent. Also, that the success of the provincial rights movement in constitutional adjudication may have been due, in part at least, to

the consistency of the movement's arguments with the ideas, values and experiences of the judges who heard the cases, in Ritchie's case, the experience of responsible self-government. And finally, that an initial tendency toward centralism may have been reversed through the greater awareness and understanding of the deeper complexities of the BNA Act that came through continuing participation in the ongoing process of constitutional adjudication. Judges learned the constitution, in other words, by working with it and having learned it, they came to see and understand it differently.

What remains to be explored is the parallel journey of the New Brunswick Supreme Court after Ritchie's departure in 1875. Just as it seems likely that Ritchie's elevation opened intellectual horizons for him, so it seems likely that Ritchie's departure broadened possibilities for his former colleagues. Ritchie had dominated the New Brunswick Court and a consensus, his consensus, prevailed. With his departure, this consensus broke down or at least loosened and while the Court may have accordingly slipped in status among New Brunswick lawyers of the day, it became accordingly more interesting historically. In place of a tendency to consensus on narrow technical grounds that said little about what the judges thought about federalism in general or Confederation in particular, came open and serious debate on these and other questions, including the proper role of the courts under a constitution both federal and "similar in principle to that of the United Kingdom".

This debate took place in *Fredericton* between Charles Fisher, the focus of the next chapter, and Acalus Palmer, the focus of chapter 5. The continuity of their debate with the Court's early experience in constitutional adjudication is pointed out by observing that both drew on the ideas, principles and values that informed Judge Steadman's attack on *Chandler*. For Fisher, the common ground with Steadman was the continuing importance of responsible self-government in New Brunswick and the other provinces. For Palmer, arguing against Fisher, the common ground lay behind Steadman's argument that division of powers questions were political questions best left to the political machinery provided in the constitution.

Endnotes

1. James G. Snell and Frederick Vaughan, The Supreme Court of Canada: History of the Institution (Toronto, University of Toronto Press, 1985) at p. 40.

2. Ibid, at pp.43-44.

3. The story of New Brunswick's turbulent entry into Confederation is told in W.S. MacNutt, New Brunswick - A History: 1784-1867 (Toronto, MacMillan, 1963) at pp. 414-461, and in P.B. Waite, The Life and Times of Confederation: 1864-1867 (Toronto, University of Toronto Press, 1962) at pp. 229-262 and pp. 263-281. See also Christopher Moore, 1867: How the Fathers Made A Deal (Toronto, McClelland & Stewart, 1997) at pp. 164-198.

4. Gordon Bale and E. Bruce Mellet, "Sir William Johnstone Ritchie", Dictionary of Canadian Biography, XII, 895-900, at p. 897.

5. On Ritchie's appointment to the Supreme Court of Canada, it was observed that Ritchie had at one time been "strongly opposed to Confederation"; see (1875) 11 Canada Law Journal 266. When he made Ritchie Chief Justice of Canada, John A. MacDonald acknowledged in a letter to Judge Acalus Palmer, "Ritchie was an anti-confederate and a strong one"; see John A. MacDonald to Acalus Palmer, 30 January, 1879, Sir John A. MacDonald Papers, No. 21-232, National Archives of Canada. Cited in Gordon Bale, Chief Justice William Johnstone Ritchie: Responsible Government and Judicial Review (Ottawa, Carleton University Press, 1991), at p. 176 and p. 197.

6. [Saint John] Morning News, 1 December, 1865. Cited in Bale, supra, at p. 92.

7. Wilmot's "harangues" from the bench in favour of Confederation are noted in MacNutt, supra, at p. 428.

8. [Saint John] Morning Freeman, 2 December 1865, quoted in Bale, supra, at p. 92.

9. [Saint John] Morning News (6 December, 1865), and in Bale, supra, at p. 94.

10. J. W. Lawrence, The Judges of New Brunswick and Their Times, (Fredericton, Acadiensis Press, 1983 Reissue), at p. 484.

11. This was the view of George Fenety, Saint John newspaper editor and political historian, who was quoted by Lawrence, supra, at p. 486.

12. "The Supreme Court as it was Constituted in 1866 - Chief Justice Ritchie and Judge L.A. Wilmot", [Saint John] Daily Telegraph 24 December, 1892. This series was probably written by James Hannay, lawyer, political historian and biographer of Leonard Tilley.

13. Bale and Mellet, supra, at p. 896

14. These events are described in Bale and Mellet, supra, at p. 897, and in MacNutt, supra, at pp. 344-345.

15. MacNutt, supra, at p. 356, and Bale, supra, at p. 41.

16. Bale, supra, at p. 293.

17. According to some, Ritchie on the Supreme Court of Canada had a "temper quick and ardent" and "proverbial rudeness amount[ing] at times to rudeness"; See James G. Snell, "Relations Between the Supreme Court of Canada and the Maritimes: The Pattern of the Early Years", in Peter Waite, et al., eds., Law in a Colonial Society: The Nova Scotia Experience (Toronto, Carswell, 1984) 143, at p. 151. On the other hand, one of these commentators was Jeremiah Travis who had, by 1885, turned against Ritchie, his former hero, along with everybody else; see Bale, supra, at p. 207.

18. MacNutt, supra, at p. 294, and Bale and Mellet, supra, at p. 896.

19. MacNutt, supra, p. 320.

20. C.M. Wallace, "Charles Fisher", Dictionary of Canadian Biography, XI, pp. 284-290, at p. 285.

21. MacNutt, supra, at pp. 364-365 and pp. 384-385.

22. Ibid, at p. 293, p. 328-329, p. 356-357 and p. 379; Bale and Mellet, supra, at pp.896-897.

23. MacNutt, supra, at p. 386.

24. *The Queen v. Chandler; In re Hazelton* (1867-1869) 12 N.B.R. 556.

25. The chronology of the case and its factual background are well reviewed in Gordon Bale, "The New Brunswick Origin of Canadian Judicial Review",(1990-91) 39-40 University of New Brunswick Law Journal 101, and in Bale, Chief Justice William Johnstone Ritchie, supra. For a broader history of judicial review in Canada, see Jennifer Smith, "The Origins of Judicial Review in Canada", (1983) 16 Canadian Journal of Political Science 115.

26. Bale, Chief Justice William Johnstone Ritchie, supra, p. 108.

27. *Chandler*, supra, at p. 558.

28. In 1880, Jack would write Memoirs of A Canadian Secretary: A Posthumous Paper, which purported to be the memoirs, written in 1927, of an Englishman who had served as secretary to Tilley. The pamphlet was an outrageous attack on the Conservative Government of John A. Macdonald and his New Brunswick lieutenant, Leonard Tilley. Jack's main concerns were the National Policy, the MacDonald government's dismissal of Luc Letellier de St. Just from the position of Lieutenant Governor for the Province of Quebec in 1879 and, more generally, the dependency of MacDonald and his colleagues on the voters of french Quebec. He had his fictitious secretary describe the Saint John of 1927 as a decaying and cowered city in which the harbour went undredged and unused, and the commercial buildings of better days either lay empty, or occupied by Roman Catholic (and french) religious orders. The establishment of Roman Catholicism as the religion of all of Canada east of Ontario was imaginatively recalled, a development that Jack suggested would be the ultimate consequence of MacDonald's dependency on the Quebec vote and, more importantly, the Quebec hierarchy. In the same regard, Jack's secretary noted the demise and abolition of the Liberal Party and popular self-government. He depicted a Canada in which the connection to the Crown had been severed, and in which MacDonald and his colleagues governed from a House of Lords as a hereditary and self-proclaimed aristocracy. The Letellier affair was recalled as the beginning of the transformation of the office of Lieutenant Governor into that of the "Intendant", the officer who by 1927 ruled each province with a council of four in accordance with the wishes of Ottawa, and who had overseen the abolition of the then superfluous "Provincial Parliaments". All of this led Jack's secretary to ruefully contemplate the "serious difficulties" that had lay in the way of the "complete success" of the Confederation scheme. He noted the "physical configuration" of the country (the separation of the Maritimes from Quebec and Ontario by the northern part of the State of Maine) and the "presence of a large French population, with a different religion from the majority of their English compatriots, speaking their own language, governed by their own laws, and having peculiar customs with reference to the tenure, transmission and division of land". The location of this population in the middle of the country meant that the "English colonists of Ontario were entirely divided from those of the Maritime Provinces", the result being that the two "rarely seemed to understand each other". This, together with the duplicity of Tilley (proclaimed the "Marquis of Gagetown" for services rendered to MacDonald and the Conservatives) and Tupper (the "Duke of Parrsborough"), explained the disastrous National Policy. Sensationally, the memoir ended with the secretary's recollection of the final ill-fated rebellion of the English people of Saint John, and the assassination of Tilley, the "Marquis of Gagetown".

29. *Chandler*, supra, at p. 558.

30. Ibid, at pp. 557-558.

31. *Regina v. Kerr* (1835-1839) 2 N.B.R. 367.

32. *Chandler*, supra, at p. 556.

33. Ibid, at p. 557.

34. Ibid.

35. Ibid, at p. 557.

36. Ibid, at p. 557.

37. Ibid, at p. 560.

38. Ibid, at p. 565.

39. Ibid, at pp. 565-566.

40. 28 & 29 Vic., (U.K.), c. 63; Compare Bale, Chief Justice William Johnstone Ritchie, supra, at p. 116, to *Ex parte Renaud,* (1872-1873) 14 N.B.R. 273.

41. *Chandler,* supra, at p. 566.

42. James Steadman, Opinion of Judge Steadman of the York County Court, Delivered in 1868, Upon the Power of the Judiciary to Determine the Constitutionality of a Law Enacted by the Parliament of Canada or a Provincial Legislature, with his reasons therefore. Also, observations upon two cases involving the same question since determined by the Supreme Court of N.B., (Fredericton, 1873) at p. 12.

43. *Chandler,* supra, at p. 566.

44. Ibid, at p. 567.

45. Ibid, at p. 560.

46. Ibid.

47. Ibid.

48. Bale characterizes Ritchie as a prototypical nineteenth century positivist who accordingly believed his judicial role was to apply rather than to develop the law. He attributes the narrowness and rigidity of his jurisprudence to the limitations inherent in that understanding of the judicial role, rather than to Ritchie's personal limitations. At the same time, he argues that Ritchie deserves credit for pushing beyond these limiting intellectual boundaries as often as he did by drawing attention to the cases in which Ritchie gave innovative judgements that tried to develop either the common or statutory law in accordance with broad considerations of justice or of sound public policy. The examples include a modest extension to the New Brunswick law on the property rights of married women, a broad reading of an ambiguous municipal taxing ordinance that made it applicable to the income of New Brunswick's Lieutenant Governor, and the determination that the man who lost his wife and the children who lost their mother in a railway accident both suffered a pecuniary and not just a sentimental loss for liability purposes. An interesting characteristic of these and other examples is that they come primarily from Ritchie's early years on the bench, prior to his elevation to Chief Justice of New Brunswick and to his subsequent appointment to the Supreme Court. This may suggest nothing more than the impact of advancing years or of higher office but it may also say something about the evolution in legal and adjudicative culture, and the mechanisms of that evolution between 1855, the year of Ritchie's appointment to the

bench, and 1892, the year of his death. It may suggest, in other words, that Ritchie's positivism was not a static but an evolving element in his approach to judicial responsibility. An interesting difference between Bale's analysis and the one presented here is that here, the suggestion is that Ritchie became lees positivist on the Constitution in later cases. This is not necessarily inconsistent with Bale's interpretation because here, the argument is that Ritchie was more positivist in *Chandler* because of the threat to judicial authority he faced there, a factor obviously unique to the constitutional context: see Bale, Chief Justice William Johnstone Ritchie, supra, at pp. 65-74 and pp. 248-255..

49. This view of Ritchie's constitutional jurisprudence also accords with that of R.C.B. Risk, who writes of the Supreme Court of Canada's decision in the case of Severn v The Queen (1878) 2 SCR 70, that Ritchie (together with Justice Strong of Ontario) was inclined "to claim that the words [of subsections 92(9) and 91(2)] were clear, and more inclined to reason without apparent regard for the context and understandings of Confederation or the implications of their decisions". He also says that Ritchie, "tended to believe that the words themselves (and the judicial decisions about them) contained the interpretations"; see R.C.B. Risk, "Canadian Courts Under the Influence", (1990) 40 University of Toronto Law Journal 687, at p. 698 and p. 699. A similar assessment of Ritchie's approach to adjudication is found in Carl Stychin's study of the Supreme Court of Canada's decision in McLaren v Caldwell (1882), 8 S.C.R. 435; see Carl Stychin, "The Rivers and Streams Dispute: A Challenge to the Public/Private Distinction in Nineteenth Century Canada", (1988) 46 University of Toronto Faculty of Law Review 341 at pp. 348-354. The tendency to assume that legal words and concepts had an abstract yet determinate meaning which did not depend on doctrinal or factual context was one of the hall marks of the legal formalism that came to dominate the Anglo-American, and Canadian, legal world in mid and late nineteenth century; see Elizabeth Mensch "The History of Mainstream Legal Thought in David Kairys, ed., The Politics of Law: A Progressive Critique (Pantheon Books, New York, 1982) 18, at pp. 24-25, and Duncan Kennedy, "Toward an Historical Understanding of Legal Thought in America, 1850-1940" (1980), 3 Research in Law and Sociology 3, at pp. 4-5, pp 9-14 and pp. 14-17.

50. Martin J. Horwitz, "The Rise of Legal Formalism", (1975) 19 The American Journal of Legal History 251.

51. Bale, Chief Justice William Johnstone Ritchie, supra, at pp. 119-126.

52. See also D.G. Bell, "Judicial Crisis In Post-Confederation New Brunswick", (1991) 20 Manitoba Law Journal 181, at p. 187.

53. *Armstrong v. McCutchin* (1874), 15 N.B.R. 381, at p. 384.

54. *Ex parte Renaud*, supra.

55. Bale, Chief Justice William Johnstone Ritchie, supra, at pp. 126-127.

56. Steadman, supra, at p. 4.

57. Ibid, at pp. 17-19 and p. 21.

58. Ibid, at p. 7.

59. Ibid.

60. Ibid, at p. 20.

61. Ibid, at p. 7.

62. Ibid, at p. 20.

63. Ibid, at p. 9.

64. In *Ex parte Renaud*, which concerned the N.B. Schools Act of 1871 and the question of whether New Brunswick Catholics had a right to separate schools under section 93 of the BNA Act, Ritchie made his reliance on section 2 of the Colonial Laws Validity Act explicit; see (1872-1873) 14 N.B.R. 273, at pp. 274-275. This indicates that Ritchie relied on the same Act in deciding *Chandler*, rather than a general principle of repugnancy; see Barry Strayer, The Canadian Courts and the Constitution, (Toronto, Butterworths, 1988), at p. 7.

65. Ritchie's understanding of the purpose and effect of the BNA Act was one that was opposed in New Brunswick from the very beginning of the agitation for Confederation. Timothy Warren Anglin, editor of the Catholic New Freeman of Saint John and member of Albert J. Smith's anti-Confederation government, took the view that Confederation based on a statute of the Imperial Parliament "would undo all the work of responsible government"; see MacNutt, supra, pp. 423-424. The unmistakable implication that flowed from *Chandler* was that this was indeed what had happened.

66. *Chandler*, supra, at p. 557.

67. Steadman, supra, at p. 14.

68. Ibid.

69. Ibid, at p. 10 and pp. 15-16.

70. Ibid, at p. 9.

71. Ibid, at p. 25.

72. Ibid, at p. 21.

73. Ibid, at p. 26.

74. Ibid, at p. 7 and 15.

75. Ibid, at p. 25.

76. Ibid, at p. 19.

77. Ibid, at p. 15.

78. Ibid, at p. 10.

79. D.G. Bell, "Judicial Crisis in Post-Confederation New Brunswick", supra, at pp. 191-192.

80. *R v. The Justices of Kings County. Ex parte McManus* (1873-1875) 15 N.B.R. 535.

81. 36 Vic., A.D., 1873, c. 10.

82. *Justices of Kings County*, supra, at p. 538.

83. Ibid, p. 539.

84. Ibid, p. 541.

85. The best history of the Canadian "commerce clause" is still found in Alexander Smith, The Commerce Power in Canada and the United States (Toronto, Butterworths, 1963).

86. Ritchie had been a member of the Government of New Brunswick in 1855 when the legislative assembly passed a province-wide prohibition law that had been introduced as a private member's bill by his government colleague, Leonard Tilley. The enforcement of the law was exceedingly controversial, an election was called at the instigation of the Lieutenant Governor, and the government of which Ritchie had been a member was defeated, almost entirely because of its identification with Tilley's liquor law; see MacNutt, supra, pp. 358-362; J.K. Chapman, "The Mid-Nineteenth-Century Temperance Movement in New Brunswick and Maine", (1954) 25 Canadian Historical Review, 43, at pp. 53-58, and chapter 4, infra.

87. Bale, Chief Justice William Johnstone Ritchie, supra, at pp. 11-15.

88. (1875) Canada Law Journal 266.

89. *Severn v. The Queen* (1878)2 S.C.R 70.

90. Ibid, at p. 102.

91. Ibid, at p. 100.

92. *Valin v Langlois* (1879) 3 S.C.R 1.

93. Ibid, at p. 16.

94. Ibid, at p. 17.

95. *Queen V. Burrah* (1877-78) 3 A.C. 889 (P.C.)

96. Ibid, at p. 17.

97. *The Mayor, Aldermen and Commonality of the City of Fredericton and The Queen, On the Prosecution of Thomas Barber* (1879) 3 S.C.R. 505.

98. Ibid, at p. 530, pp. 532-534, p. 537, and pp. 542-543.

99. Ibid, at pp. 540-542.

100. *Citizen's Insurance Company v. Parsons* (1880) 4 S.C.R. 215.

101. Ibid.

102. Ibid, at p. 330

103. Ibid, at p. 238.

104. Ibid, at pp. 242-243.

105. Ibid, at p. 243.

106. Ibid, at p. 248.

107. *Mercer v. Attorney-General for Ontario* (1881) 5 S.C.R. 538.

108. *Lenoir v. Ritchie* (1879) 3 S.C.R. 575.

109. *Mercer v. Attorney-General for Ontario*, supra, at p. 636.

110. See F. Murray Greenwood, "Lord Watson, Institutional Self-Interest and the Decentralization of Canadian Federalism in the 1890's", (1974) 9 University of British Columbia Law Review, 244, at pp. 247-248.

111. *Mercer v. Attorney-General for Ontario*, supra, at p. 637.

112. Ibid, at p. 644.

113. *The Queen v. Robertson* (1882) 6 S.C.R. 52.

114. Ibid, at p. 64.

115. Ibid, at p. 65.

116. Ibid, at pp. 110-111.

117. See, for example, Bale's description of the battle between Ritchie and Gwynne in the late 1880's concerning the minister and theological orientation of the church they both attended, St. George's Anglican Church, which resulted in the division of the congregation: Bale, Chief Justice William Johnstone Ritchie, supra, at pp. 274-279.

118. P.B. Waite, "Becoming Canadians: Ottawa's Relations with Maritimers in the First and Twenty-first Years of Confederation", in R. Kenneth Carty et al., eds., National Politics and Community in Canada (Vancouver, UBC Press, 1986), at pp. 153-167.

119. D.G. Bell, Legal Education in New Brunswick: A History (Fredericton: University of New Brunswick, 1992), at p. 51.

120. *Severn v. The Queen*, supra, at p. 102.

121. Albert S. Abel, "The Neglected Logic of 91 and 92", (1969), 19 University of Toronto Law Journal 487.

Chapter 4

Federalism, the Common Market and the Blessings of British Liberty: The Constitution According to Charles Fisher

Early in the Quebec conference of 1864, Charles Fisher moved that "the constitution of the General and Local Governments shall be framed upon the British model so far as is consistent with our colonial condition, and with a view to the perpetuation of our connection with the mother country".[1] After extended debate, the motion carried, but only after being amended on a motion by Leonard Tilley, the leader of the New Brunswick delegation, that deleted Fisher's reference to the local governments.[2]

The episode illustrated how completely Fisher had been eclipsed by Tilley, his former lieutenant, even in constitutional matters. The motion has the hallmarks of a bold attempt by Fisher to define the parameters within which the conference would do its work and to establish himself as a conference leader. Rebuffed, Fisher apparently slipped into a relatively minor role for the balance of the Confederation conferences. Of his subsequent contributions, whether in Quebec or in London, where he was also a delegate, other participants and observers either said little or little that was positive.[3]

The incident is part of the larger riddle of the intentions of the founding fathers. As

constitutions on the "British model" were constitutions in which the Crown in Parliament exercised sovereign legislative authority, the willingness to pass the amendment for the "general government" but not the "local governments" possibly supports the opinion, held widely among historians, that a majority of the Fathers of Confederation aimed deliberately to create a centralized federalism under unquestioned federal government leadership. Conversely, the episode can be seen as validating precisely the opposite interpretation of Quebec and of Confederation, by saying that the sovereignty of the provinces was not recognized at Quebec or in the BNA Act simply because it was thought unnecessary. On this view, the provinces kept, as intended, the sovereignty they brought with them to the nation-making process.

If Tilley's amendment was intended to deny sovereign status to the provinces, the amendment was, of course, a serious mistake. By simply being silent on the provinces, the Quebec Resolutions and the BNA Act would end up ambiguous on a point that would be fundamental to the judicial understanding of the new constitution. As discussed in previous chapters, this ambiguity became the lens through which the courts came to see a balanced federalism between equally sovereign levels of government in place of the centrally controlled federalism that many of the Fathers of Confederation clearly desired.

As between Tilley and Fisher, the smaller irony is that Fisher would, on Tilley's reluctant recommendation, be appointed to the bench and play a small role in this process of provincial assertion. Particularly in *Fredericton*, the case that would become famous in Canadian constitutional law as *Russell v. The Queen*, Fisher would impressively struggle to build an explanation of Confederation that vindicated the motion he had made in Quebec. For whatever Tilley's amendment said about the intentions of Tilley or of the conference, what the original motion said about Fisher seems reasonably clear. His federalism, from before the consummation of union, was one in which the constitutions of the confederating provinces were preserved and protected. This meant they maintained their consistency with the "British model", including their distinct sovereignty.

Fisher was reported to favour legislative union but he was also the principal architect and builder of one of those provincial constitutions. It would therefore not be surprising if he took this understanding of federalism with him to Quebec in 1864 or to the bench in 1868. In *Fredericton*, he would recognize the importance to the success of Confederation of broad federal powers over trade, but he would also declare the powers of the provinces to be "co-equal". He would go further by claiming the provincial power of property and civil rights to be

the most important of all powers, federal or provincial, essential to the preservation in the new Canada of the sanctity of private property and of other fundamental principles of the British constitutional tradition. All this came forward in support of the conclusion that the Canada Temperance Act was unconstitutional. Tilley, the champion in New Brunswick not only of the constitutional policy of John A. Macdonald but also of the temperance movement, could not have been pleased.

The *Fredericton* case marks a dramatic turning point in the constitutional jurisprudence of the New Brunswick Supreme Court. The judges undertook detailed, probing and imaginative consideration of many of the questions that would bedevil judges, counsel and scholars well into the twentieth century. In consequence, the judges in the majority, particularly Fisher, moved their Court's grasp of the BNA Act forward in ways that anticipated fundamental components of the interpretations of the BNA Act that would become law through the decisions of the Privy Council. They did so by abandoning the strict and simplistic positivism of their earlier cases. Instead, to varying degrees, each assigned meaning to federal and to provincial powers by interpreting them in the context of the rationale for assigning each power to either the national or the local governments. In the case of Fisher especially, this meant giving the federal government the power needed to create a common Canadian marketplace. But it also meant reserving to the provinces full authority over the activities of daily life and community interaction, in order that private property and personal and domestic autonomy might be preserved and secured by the constitution. In this, he articulated the essential core of a provincial rights understanding of Confederation. Fisher elaborated these themes most fully and in him they resonated most closely with a personal story that embraced responsible government, Confederation and constitutional adjudication.

Part II sets the stage by introducing the Canada Temperance Act, the adoption of the Act by plebiscite in Fredericton and the refusal of the Fredericton City Council to comply with the court's first ruling on the invalidity of the Act. The possible explanations for this are considered, including the general standing of the Court, the possibility of continuing opposition to judicial review and the similarity of the judges' arguments for constitutional invalidity with the arguments of the political opponents of temperance legislation. This puts *Fredericton* into the context of temperance politics and discourse in New Brunswick.

Fisher's career in politics and law, emphasizing his roles as one of the leading fathers of responsible self-government in New Brunswick, as government leader, as law reform commissioner and as Father of Confederation, is outlined in part III. The main objective is to

capture some of the political and social ideas that animated Fisher's politics and arguably, his constitutional adjudication.

In part IV, the chapter moves to a detailed unpacking and reconstruction of Fisher's thinking in *Fredericton*, comparing it to the judgments of Chief Justice Allen and of Judges Wetmore and Weldon, all of whom voted with Fisher against the temperance legislation. Some themes that emerge here for further analysis in the balance of the chapter are the highly political nature of Fisher's approach to constitutional interpretation; the centrality to Fisher and the other judges of the distinction between federal jurisdiction over the economy and provincial jurisdiction over private, domestic, and community life; the role of alignment between government revenues and legislative powers in Fisher's interpretation of sections 91 and 92; and, the connection made by Fisher and the other judges between provincial jurisdiction over private, local and community life and the protection of property and civil rights and of personal and domestic autonomy. Part IV also outlines the ways in which Fisher and the other judges anticipated later Privy Council decisions. Building on the themes introduced through the evolution of Ritchie, it further challenges the criticisms of the Privy Council that rest so heavily on the assumption that such Canadian antecedents did not exist.

Part V analyzes the understandings of law and of judging that allowed or propelled Fisher to interpret the BNA Act purposively, functionally and expansively. It is argued that Fisher self-consciously sought to imitate the grand style of judicial statesmanship particularly associated with the great judges of America and with their constitutional decisions. In this, he exhibited a "pre-classical" legal consciousness. The significance of this for our understanding of New Brunswick's legal culture in the 1870's is considered. The implications of the demise of this consciousness for the development of the law of federalism in Canada and our historical understanding of that development are considered.

In part VI, a more detailed reconstruction of Fisher's understanding of the general structure and organizing rationale of the division of powers is undertaken. It is argued that Fisher saw the BNA Act as giving to each level of government one overall or overriding core area of legislative authority, rather than a list to each of discrete legislative powers. It is argued that Fisher's tried to interpret federal powers against the rationale of a national common market and provincial powers against a rationale of provincial distinctiveness and autonomy on private and domestic life and standards of personal behavior. This analysis brings together Fisher's understanding of Confederation and the interpretive functionalism or purposiveness of his approach to constitutional adjudication. It begins building the argument

that his judgment in *Fredericton* is best understood as a provincial rights explanation of Confederation. The broader significance of these connections are related to the rationale that Fisher's approach may have provided for later Privy Council decisions and to the role that the subject matter of *Fredericton* may have played in shaping Fisher's approach to the case.

Part VII ends the analysis by making the case for Fisher's representation of a provincial rights understanding of Confederation, particularly in his advocacy for individual rights and personal autonomy. It connects *Fredericton* with Fisher's earlier experience of responsible self-government and the continuing importance in post-Confederation New Brunswick of the ideas and values of that experience. This strengthens our understanding of the place of New Brunswick in the provincial rights movement and it reinforces the argument that this movement was a movement of constitutional law and theory as well as one of federal-provincial and party politics.

In all of these ways, the chapter is a snapshot of the transition of the New Brunswick Supreme Court from the subordinate federalism of *Chandler* to the coordinate federalism of *Maritime Bank* through the lens of Fisher and *Fredericton*.

II

The Canada Temperance Act, commonly known as the Scott Act, became law on May 10, 1878.[4] It required the Governor General in Council to hold an election in any city or county from which it received a petition, supported by the signatures of at least one-quarter of the electors, expressing a desire to have the Act enforced in the city or county. Where the Act was brought into force, section 99 stated that, "no person, unless it be for exclusively sacramental or medicinal purposes, or for *bona fide* use in some art, trade or manufacture ... shall, within such county or city ... expose or keep for sale ... any spirituous or other intoxicating liquor". Nothing done in contravention of this prohibition could be rendered legal by, "any license issued to any distiller or brewer ... nor yet any other description of licence whatsoever". The Act then specified the persons ("druggists and vendors as hereinafter provided") entitled to sell liquor for the exempted purposes and the conditions under which these sales were to be allowed. Distillers and brewers within the county or city were permitted to sell their own produce provided they did so, "in quantities not less than ten gallons, or in the case of beer, not less than eight gallons", and provided that the sale was to a druggist, "and others licensed as aforesaid or to such other persons as he has good reason to believe will

forthwith carry the same beyond the county or city, and of any adjoining county or city in which ... this Act is then in force". A similar exception was created for the producers of wine, "having their manufactury [sic] within such county or city" and all, "manufacturers of pure native wines made from grapes grown and produced by them in the Dominion of Canada". Finally, the Act exempted sales made by, "any merchant or trader exclusively in wholesale trade". These sales were to be subject to the same restrictions as to quantity and purchasers that applied to distillers, brewers and wineries.

Persons in violation were, "liable on summary conviction to a penalty of not less than $50 for the first offence, and not less than $100 for the second offence, and to imprisonment for a term not exceeding two months for the third and every subsequent offence". Property connected with the violation was made subject to forfeiture. The Act also addressed procedural matters, such as the power of magistrates to issue search warrants and restrictions on rights of appeal to superior courts, and matters of the law of evidence, such as the circumstance in which the keeping of alcohol for the purpose of sale was to be inferred and the quality of evidence that was to be sufficient for conviction.

The Act was quickly and, in the words of one historian, "heartily endorsed in Maritime Canada".[5] It was brought into force in eight maritime communities before it was adopted in any other part of Canada. Fredericton became the very first Scott Act community in the country[6] when it took effect there on May 1, 1879, just one year after it became the law of the land.[7] Rumours immediately circulated that Fredericton liquor dealers would test the legality of the Act, and their challenge was not long coming.[8] On May 6, the City Council heard applications for retail liquor licences from, among others, John B. Grieves and Thomas Barker, both Fredericton hoteliers. On May 7, the Council rejected all applications.[9] Soon afterwards, Grieves was convicted for selling liquor contrary to the Act, and applied to the Supreme Court for certiorari to have the conviction quashed.[10] A summons was issued by Justice Weldon to the convicting police magistrate, to show cause why the order should not be given.[11] Weldon then made a conditional order on Grieves' behalf, and the case came before a panel of Weldon, Chief Justice Allen and Justices Fisher, Wetmore and Duff, on the question of whether the order should be made absolute.[12] Counsel for Grieves, "wishing fairly to test the validity of the enactment ... prosecuted the broad *ultra vires* question for the consideration of the Court".[13] Press reports cited the "general opinion of members of the bar who have heard the argument and expressions thrown out by the Judges" to effect that, "they will declare the Act *ultra vires*, as being an interference with the civil rights, and the rights of property of the

people of the Province, subjects exclusively vested in the Local Legislature by the British America Act [sic], and the legislation not being necessary for the regulation of trade and commerce."[14] This view was reiterated in a Reform Club address by the endlessly self-promoting Jeremiah Travis, as yet in only the early stages of his attempts to have himself recognized as Canada's chief authority on constitutional law.[15]

But the predictions of Travis and other members of the bar proved accurate. On August 12, a Supreme Court of five judges unanimously gave judgment for Grieves. All but one of the judges gave their own reasons for doing so. All were of the view that the Canada Temperance Act did not come within the power of Parliament to make laws for, "the regulation of trade and commerce", a conclusion, as critics of the Court pointed out, inconsistent with the Court's previous decision in *Justices of Kings County*. Only Judges Wetmore and Weldon considered other heads of federal legislative power. Both concluded that it was not within Parliament's jurisdiction over the criminal law, and Wetmore also rejected Parliament's general authority to make laws for the "peace, order and good government of Canada". On the positive side, Wetmore and Weldon agreed with Fisher that the Scott Act was a law in relation to property and civil rights and an interference with the power of the local legislatures to raise a "revenue for provincial, local or municipal purposes" from liquor licences. The licensing power was also approved of by Allen, though he relied principally, with Wetmore, on the view that the Canada Temperance Act dealt with, "matters of a merely local or private nature in the province", under subsection 92(16) of the BNA Act.

Grieves was destined never to be published in the law reports. It was superseded almost immediately by the Court's decision in *The Queen on the Prosecution of Thomas Barker v. The Mayor &c of Fredericton*, decided in December of 1879. This was *Grieves* reargued and decided for a second time. Why this proved necessary probably spoke volumes about the climate of opinion that surrounded the Canada Temperance Act and the attempt of Fredericton liquor dealers to have it struck down. In the wake of the Court's decision in *Grieves*, Barker and several other hoteliers reapplied to city council for tavern licences, obviously expecting a reception quite different from what they had received in May. They were no doubt surprised when the council remained adamant in its view that the Canada Temperance Act was still in force in the city. Barker then applied to the Supreme Court for a mandamus directing the council to issue the licences, and the Supreme Court called on the city to show cause why mandamus should not issue. The city responded by declaring that, "We, the Mayor, Alderman and Commonality of the City of Fredericton ... do humbly certify and

return ... that we refuse and still do refuse to grant a licence to the said Thomas Barker to sell spirituous liquors by retail ... for the following reason to the contrary: The Canada Temperance Act of 1878 was declared in force in the said city of Fredericton on the first day of May last".[16]

The city council had decided to at best ignore, at worst defy, the Supreme Court. Confronted with this threat to judicial authority, the court proceeded to give a second direction to the city council by deciding Barker's case exactly as they had decided *Grieves*. The only significant change in the outcome, apart from some minor rewriting by Weldon and Allen, was the addition of the dissenting opinion of Judge Acalus Lockwood Palmer. Palmer had not participated in *Grieves*, but in the companion case of *Ex Parte Owens* he had stated that his mind was clear that the Canada Temperance Act was not *ultra vires*.[17] In *Fredericton*, he argued that the Act could be upheld on any one of Parliament's powers to regulate trade and commerce, to make the criminal law or to make laws for the "peace, order and good government of Canada".

Speculation as to the motives of the city council leads in several different directions. It may have reflected continuing support in New Brunswick for Steadman's scepticism of the authority of the courts to rule on the constitutionality of legislation under the BNA Act. It was only four years since the legislative publication of Steadman's pamphlet and unlike *Chandler*, the Court was now using its power to invalidate broad social legislation that was widely and deeply supported in New Brunswick. And so, one possibility is a lingering resentment toward this new pretension by a Court that some regarded as inferior from its predecessors.[18] In addition, the judges had in *Grieves* done little for their credibility by failing to speak through a single judgement, as they had done in *Chandler* and in *Justices of Kings*. They had not even been able to achieve a majority opinion for their unanimous conclusion. Their judgments were a muddle of overlapping and diverging arguments and assertions, thrown out at readers and at each other, without the benefit of any discernable framework of common or guiding principle or analysis, seemingly in the hope that readers would be able to find or construct a compelling rationale from all those offered.

All this came after the Court's rather troubled attempts to sort out the jurisdiction over fishing in waterways above the ebb and flow of the tide. In 1876, in *Robertson v. Steadman*, the Court dealt with the question in a majority decision by Allen that Robertson's licence under the federal Fisheries Act to fly-fish in the waters of the South-West Miramichi was valid and took priority over the riparian rights of Steadman under a crown grant from the province.[19] This meant Parliament had the power to grant exclusive fishing rights on inland waterways, and that

Steadman and his associates committed trespass in fishing in the waters licensed to Robertson. Anticipating the attitude that the Fredericton city council would later adopt to *Grieves*, Steadman simply continued on fishing. When Robertson forcibly took possession of Steadman's rod, reel and line, an action of trespass for assault was brought against him. In the case of *Steadman v. Robertson*, decided in 1879, the former minority opinion of Fisher became, in the absence of Allen, the majority decision of the Court.[20] Robertson's license was invalid because Parliament had no authority to grant it, and a verdict of $100 was entered in Steadman's favour. It looked like the personal opinion and rivalries of the judges, rather than the law, determined the outcome in constitutional cases. Constitutional law seemed to depend on what judges were available.

In *Grieves*, the credibility problem could have been accentuated by the failure to give any convincing explanation of why the case was not governed by *Justices of Kings County*. One critic (almost certainly Travis) pointed out that taken together, the two cases meant that the Court had ruled that neither the provinces nor the Dominion had the power to prohibit the sale of alcohol, a result that was inconsistent with what everybody, including the judges themselves, took to be the exhaustive nature of the division of powers. The resulting frustration of the will of the people in favour of local-option temperance from one level of government or the other, was intolerable. The people, "could not afford to be tricked by men too often placed in position by mere political accident", observed the critic, suggesting that if the judges "claim the right to override the Legislature ... we must ask the executive to replace them by men of better judgment".[21] This echoed the thinking of Judge Steadman very pointedly.

The judges' treatment of *Justices of Kings County* was indeed unimpressive. Wetmore tried to distinguish the two cases by saying that the earlier case decided that regulation of the sale and use of alcohol only came within Parliament's authority when alcohol was dealt with as an article of merchandise. It did not come within the trade and commerce power where the purpose of the regulation was a "moral reform", such as the, "promotion of temperance".[22] As an interpretation of *Justices of Kings County*, this was simply inaccurate. Ritchie's unqualified assertion that the provinces had no authority, "directly or indirectly to prohibit the manufacture or sale, or limit the use of any article of trade or commerce", was not in any way predicated on the purpose of the prohibition or limitation. Moreover, the provincial legislation in *Justices of Kings County* did the very thing that Wetmore claimed that Parliament could not do. It authorized, albeit quietly and indirectly, the "promotion of temperance". If the

provinces could not legislate in this way, did it not follow that Parliament could?

Wetmore's colleagues were no more persuasive. Fisher opted for the strategy of the less said the better. He stated the obvious, that *Justices of Kings County* decided that the local legislatures had no power to authorize municipal prohibition, but then overlooked the equally obvious corollary, that Parliament therefore could authorize municipal prohibition.[23] For his part, Weldon simply did not mention *Justices of Kings County* in *Grieves*. In *Fredericton,* he only mentioned the case in passing, unhelpfully noting that it established that the, "local authorities ... cannot prohibit or interfere with trade or commerce".[24] The reasoning of Allen was more elaborate but ultimately equally unconvincing. He acknowledged doubts as to whether *Justices of Kings County,* "did not require me to decide in favor of the validity of the Act in question".[25] If the provinces had no power to authorize local prohibition, the Dominion Parliament must, said Allen, have such power. But the obvious conclusion, that the Canada Temperance Act was therefore constitutional, was avoided by pretending it was not, after all, a law that prohibited. It did not, said Allen, prohibit but simply restrict and regulate the sale of liquor. In *Fredericton*, Allen supported this questionable characterization by claiming that the Act, "in effect authorizes the inhabitants of each town or parish to regulate the sale of liquor, and to direct by whom, for what purposes, and under what conditions, spirituous liquors may be sold therein".[26] The Act, of course, did no such thing. Where activated, it conferred almost no discretion on the city or county council as to the persons who could buy or sell alcohol, or the circumstances in which the sale of liquor could take place. All was stipulated in the Act. Moreover, to characterize the Act by the provisions that authorized the sale of liquor was to treat the exception as the rule. All transactions that were not for sacramental, medicinal or mechanical purposes or in the excepted quantities, were not merely regulated by the Act but prohibited. And even if the Canada Temperance Act was merely regulatory, what basis was there for saying that the power of Parliament, which was, after all, the power to *regulate* trade and commerce, extended to the prohibition of the traffic in intoxicating liquors but not to its regulation?

So viewed, *Grieves* therefore appeared in direct contradiction of the law already declared by the Court and the more highly regarded Ritchie. Jeremiah Travis intervened to make the point. Writing in the Globe between *Grieves* and *Fredericton*, he argued that all of the judges had erred in *Grieves* by not applying the last paragraph in section 91 in accordance with *Justices of Kings County*. All the judges made the mistake, Travis wrote, of thinking the law was *ultra vires* because it affected matters within provincial heads of power. The mistake

rested in failing to take the next step of deeming it not to be provincial because it was clearly also legislation that affected the traffic in liquor and was therefore within trade and commerce.[27]

Thus Fredericton city council may have assumed that *Grieves* was simply not the law. A contributing consideration may have been the suspicion that the judges had decided *Grieves* in accordance with their own personal views on prohibition. In the case of Allen, his political background provided some foundation for suspicion. He had first joined the executive council in 1856, when elected as an opponent to the prohibitory liquor law narrowly adopted in 1855.[28] It was true that he was generally thought beyond reproach but nevertheless, the unwillingness to follow *Justices of Kings County* made it appear that Allen did no more as judge than he had done as politician -- exercise the powers of office to frustrate a badly needed and progressive social reform. By ruling the Canada Temperance Act unconstitutional while at the same time leaving *Justices of Kings County* in place, the judges managed the neat trick of removing the power to enact local-option prohibition from both the provinces and Parliament. This left in place the possibility of a nation-wide ban on the importation and manufacture of liquor, such as Tilley's law had attempted for New Brunswick. Wetmore, Weldon and Allen all noted this. But given the New Brunswick experience, they also all knew how unrealistic this was.[29]

The suspicions of temperance promoters must have been stoked by the language the judges used to describe the Canada Temperance Act. To varying degrees, all spoke of the provincial jurisdiction over property and civil rights as if it were a constitutional guarantee of property and civil rights, almost a bill of rights. Accordingly, each suggested that the division of powers was not only concerned with the jurisdictional rights of governments. It also concerned the rights of the individual, and more specifically, the need to protect those rights from encroachment by Parliament. Thus Fisher spoke of the duty of the Court, "jealously to guard the rights of individuals and protect the rights of property from every infringement not plainly warranted by the Constitutional Act".[30] He called the Act "sumptuary legislation", as if this, by itself, established constitutional invalidity.[31] He invoked the "natural rights" that were, "secured by the Constitution". Wetmore warned that if Parliament could pass the Canada Temperance Act, federal despotism was nigh. For Parliament could then, "legislate in respect of all property, and can say how you shall feed your horse or manage your household".[32] Allen similarly worried about a Parliament empowered to dictate, "what we shall eat and what we shall drink, and wherewithal we shall be clothed".

In sum, Fisher and the others each appeared to be saying that the Scott Act was

unconstitutional not only because it affected property and civil rights, and thus provincial jurisdiction, but because it violated property and civil rights. To New Brunswick temperance advocates, this may have sounded suspiciously familiar. Fisher's use of the adjective "sumptuary" was particularly redolent of the debates surrounding the prohibition bills of 1852 and 1855. The 1852 bill had been denounced from the bench by Lemeul Allen Wilmot, Fisher's old colleague in the campaign for responsible government, as, "law that was conceived in tyranny". The 1855 bill introduced by Leonard Tilley as a private member's bill, provoked a reaction in the legislature that was no more constrained.[33] It was declared that, "People cannot be legislated into habits of sobriety",[34] and that, "All sumptuary laws were mischievous in their tendency", for they invited resistance and the breaking of the law, thereby complicating the ill they were intended to cure by driving it underground. One member of the legislature promised civil disobedience by declaring that he, "wished to be distinctly understood, that if the Temperance Party would go for moral suasion only, he would never drink another glass of liquor again -- but if they insisted on saying `You shall and you shant', he would as distinctly tell them that he would drink three glasses every day". This appeal to the right of the individual to govern his own conduct was, like Fisher's judgment in *Grieves*, expressly linked to the British way of government. Tilley's bill was, "as un-English as anything possibly could be", for in no other country under the British flag, "had a sumptuary law been enacted".

Beyond the legislature, Tilley's law had met the predicted resistance and further appeals to the rights and privileges of British subjects. Petitions from all corners of the province were dispatched to the lieutenant governor and the Queen, praying for executive intervention and relief. One from Saint John merchants pointed to the patent inefficiency, "of legislative enactments in matters relating merely to the moral sentiments of the people", which could not, and should not, be controlled by, "coercive measures".[35] The law was an interference, "with their constitutional rights as British subjects". Another petition invoked the "spirit of the age" in castigating Tilley's law as, "arbitrary, tyrannical, and unjust in the highest degree, and as a serious inroad upon the rights, privileges, property and fortunes" of Her Majesty's loyal New Brunswick subjects.[36] Imperial disallowance was justified in the name of the, "sacred privacy and privileges of domestic life". Such language was not part of New Brunswick history in 1879: Anglin of Saint John used it in the House of Commons to attack the very legislation that Fisher and the others now said was unconstitutional.[37]

Against this background, the constitutional principles invoked by Fisher, Wetmore and

Allen looked familiar and suspicious. The reputations of the judges would not have provided reassurance. Excepting Allen, the *Grieves* judges did not have strong reputations, either as lawyers or for personal integrity. Travis was not the most objective observer but certainly the most expressive and he seemed to have the ear of the "temperance men".[38] Allen was "kindly" but only a "fair lawyer" and lacking in promptness due to "indolence". Weldon, appointed out of "political necessity", was in "the lowest rank of the profession" and "an octogenarian". Fisher was a "politician rather than a lawyer" who stood even lower in the profession than Weldon. Wetmore "never read but one law book in his life" and was well known to be a "blackguard". Duff, who had somehow agreed with all four of the others, was suffering from "years of debauchery". Together they were "a set of abject incapables" and *Grieves* was full of "glaring absurdities". Unlike himself, the judges of the Court did not possess a "scientific knowledge of the law".

In addition, none of the judges gave a very clear indication of how property and civil rights could be protected by keeping them from Parliament. It was, after all, the New Brunswick legislature that had enacted the much more restrictive laws of 1852 and 1855. Did this not suggest that the people of New Brunswick had more to fear from Fredericton than from Ottawa? If so, what grounds were there for treating 92(13) as a guarantee of property and civil rights in the provinces? It might have been true, as Fisher tried to demonstrate, that legislatures acting under the British constitution had always shown the highest regard for property and civil rights. But where was this expressed as a legislative limitation in the BNA Act, which everywhere spoke of the powers of government and almost nowhere of the rights of the people?

In addition, temperance advocates would have thought the judges to be as wrong on the justness of the Canada Temperance Act, as the opponents of Tilley's law had been on the justness of that measure. To a committed temperance advocate like Tilley, it was fallacious to speak of temperance measures as coercive and tyrannical. Their principle was liberation, the destruction of a vice that controlled the individual and lay behind virtually every other social evil, from sickness to crime to poverty.[39] Prohibition therefore served the dual purpose of freeing the individual who was dependent on drink and protecting the property and health of the whole community. More broadly, sobriety was portrayed as the indispensable condition precedent to, in the spiritual sphere, Christian salvation, and, in the civic sphere, to responsible and productive citizenship and progressive social advancement. Legislated sobriety encroached on individual liberty for the moral welfare of person and the whole community.

This made it indistinguishable from other laws, such as those of public health, the constitutionality and propriety of which no one doubted.

Accordingly, judicial pontificating on the sacred rights of the individual was not only of dubious relevance to the question of jurisdiction but also bad statesmanship. Combined with the failure of the judges to follow *Justices of Kings County*, this could well have framed *Grieves* as an aberration to be ignored. This is precisely what the City of Fredericton appears to have done.

It is indeed difficult to argue that *Grieves* and *Fredericton* were not influenced by the bias of the judges against temperance legislation. All the judges professed neutrality on what Fisher called the "policy of the law" and Wetmore went so far as to acknowledge that the Canada Temperance Act was, "calculated to do an immensity of good in the community, as I am satisfied it has already affected".[40] These protestations rang hallow, especially when placed beside Fisher and Wetmore's vivid depictions of the disruption and injustice that the Act would cause.

But this does not mean that *Grieves* and *Fredericton* are without interest to the history of constitutional law. Despite the clumsiness of their apparent bias against the Scott Act, the judges appreciated that their conclusions had to have a genuine basis in the BNA Act. This propelled them to cast aside *Justices of Kings County* and undertake a fresh examination of the boundary between trade and commerce and provincial powers, especially over revenue through licences and property and civil rights. It seems to have forced them, perhaps for the first time, to really think about the premise lying beneath the simplicity of *Chandler* and of *Justices of Kings County*, that provincial powers were subordinate and therefore subject to reduction to the extent needed to accommodate federal legislation on all matters that could possibly come within federal powers literally and broadly construed. The result was a different understanding of the division of powers that was more advanced and subtle than that revealed in the Court's earlier cases. It came from the judges' attempt to push beyond dictionary interpretations of 91 and 92 to functional interpretations that relied on the relationship between enumerated powers and the general mandate and function of each level of government within the overall system of government that Confederation created. Fisher went the furthest and was the strongest in this new departure. Carefully read and placed in the context of late nineteenth century constitutional thought, his two judgements demonstrate that blocking temperance was not Fisher's only concern. He was equally motivated by a conviction that the objects for which Confederation had been achieved required a more balanced division of

powers than that which flowed from *Justices of Kings County*. This seems consistent with his role in the battle for responsible self-government and with a determination to see New Brunswick rights continued and preserved under Confederation. It was also consistent with a public policy approach to law and a reputation for expertise in an older constitutional law tradition in which law served the objects of "good government" and the protection of the people and their rights through responsible self-government.

III

To understand Fisher's *Grieves* and *City of Fredericton* judgments in these terms, it is helpful to place those judgments in the context of his political and legal career prior to his appointment to the bench. That appointment came in October of 1868.[41] It was reward for his support of Confederation and consolation for the seat in MacDonald's first cabinet that had gone instead to Peter Mitchell.[42] As a result, the appointment generated little enthusiasm in legal circles. It was later said that Fisher's knowledge in constitutional law, by which was meant his knowledge of the theory and practice of responsible government, was "freely conceded", but that, "he was not credited with a profound acquaintance with the English common law".[43] After all, politics rather than the law had always been Fisher's metier, and there was little in Fisher's background to suggest either a judicial temperament or technical legal skill. Some doubted his intelligence.[44] One commentator contended he could not really be considered a lawyer.[45]

But Fisher had indeed been admitted as an attorney to the New Brunswick Barristers' Society in 1831, and after spending a year at one of the Inns of Court, became a barrister in 1832.[46] Within two years he was a candidate for election to the legislative assembly, unsuccessfully contesting York County in the 1834 election.[47] In 1837 he ran again, this time successfully. He slowly built a reputation for himself as a moderate reformer, committed to the principle that the government should be responsible to the legislative assembly. In this he followed the lead of Lemeul Allen Wilmot, the senior member from York, whose oratorical eloquence seems to have been acknowledged by all, and much feared by members of the government.[48] Fisher, in contrast, was said to be, "of awkward and uncouth speech and manner".[49] The suspicion however, was that Fisher prepared the motions that Wilmot spoke to with such impressive effect, and that he was, in fact, "far superior to Wilmot as a tactician as well as in his knowledge of constitutional law".[50] MacNutt's assessment is that Fisher,

"probably possessed a better knowledge than anybody else in the province of the law and theory of the constitution", and that he was, "probably the coolest head and best brain" among those who described themselves as liberal reformers in the 1840's and early 1850's.[51]

In 1848, Fisher and Wilmot controversially agreed to enter a coalition government headed by Edward Barron Chandler and Robert L. Hazen, prominent supporters of the political *status quo* and leaders of what the reformers liked to portray as the family compact.[52] This led to the confrontation with Ritchie discussed in chapter 3. All that might be added to that discussion is that Fisher defended himself to Joseph Howe by saying he, "would regret the day when the organization of violent antagonistic political parties would be found necessary in this province", where there, "was little enough talent for one good government".[53] His preferred approach was participation in a coalition within which, "the growing influence of the liberals would in ten years give the liberals all without any violent movement". In time, Fisher would revise his views, but as of 1848, the fear of parties was a general attitude.

Once in office however, Fisher did place preferment over principle. In the election of 1850 he suffered personal defeat in York County, but did not tender his resignation from the executive council. When he finally did so in January of the following year, there was more than a little hypocrisy in his claim that he acted in accordance with, "my ideas of Responsible Government".[54] It was true that the lieutenant governor Sir Edmund Walker Head had since the election violated the principles of responsible government by filling two vacancies on the Supreme Court without the advice of his council. It may also have been true that Fisher alone, "was prepared to admit that responsible government had for a time ceased to function".[55] But he was poorly placed to make much of the point, given that his own resignation was overdue.

Nevertheless, Fisher learned from this experience. What had given Head his opportunity was a divided executive council. A majority of the council had advised against filling the vacancies on grounds of public economy, while a minority (including Wilmot, who successfully advanced his own name for consideration) advised to the contrary.[56] Without firm party lines, Head had been able to act by taking advantage of the divided executive, confident that, should resignations from government occur, he would be able to find others in the assembly who would be willing to share responsibility for his decisions. Fisher became the champion of the party system and set about welding together, "a party that would gain power and control all aspects of government, especially the actions of the governor".[57]

Fisher was not to return to the legislature until 1854 but was not removed from affairs of state during this period.[58] In 1852 he was named (together with William Kinnear and James

Chandler) to a commission to consolidate, simplify and arrange provincial statute law into a uniform code, to make recommendation in court practice that would lessen expense and advance justice and to review the law of evidence.[59] In the introduction to its third and final report, the commission expressed the philosophy of progress in accordance with which it had conducted its work: "We are of the opinion that whilst every thing social, industrial and political in this Province is rapidly improving according to the requirements of modern civilization, the practice of our Courts, and the administration of justice generally, retain too many features of a barbarous age, and too much of its ancient and gothic character, and we think nothing but a series of radical reforms will adapt them to our age and country".[60] Taking the cost of litigation and the advancement of justice as their themes, the commissioners made a wide range of recommendations.[61] The stated rationale for dispensing with special pleading says much about the overall thrust of the commission's work. The law was to be shorn of undue technicality to ensure that litigation was efficient and that cases were decided on their real merits. Under the system of special pleading, argued the commission, "the law appears to delight in technicalities, and important rights are exposed to be sacrificed to a quibble", a state of affairs that was, "a disgrace to an enlightened people".[62] It was a system under which delay and expense were so ruinous as to often make victory indistinguishable from defeat. It meant, "learned Judges [...] gravely employed in discussing artificial distinctions instead of the real merits of the case".[63]

This aspect of Fisher's career has usually been mentioned in passing, undoubtedly because his legal activities, including his years as a judge, are generally regarded as diversions from his main interest of politics.[64] But in a study that focuses primarily on Fisher the judge, his participation in the commission is intriguing. It casts some doubt on the charge made at his appointment to the bench that he knew little law. At any rate, the legal content of the commissioner's work is less important than the general attitude that lies behind their report as a whole. It put substance over form. It emphasized practical reform and the law's responsibility "to satisfy the legitimate demands of a progressive people" and to contribute to social betterment and provincial advancement. It took guidance from wherever good guidance could be found, including "the Mother Country" but also Massachusetts, Maine and Chancellor Kent and Joseph Story. It approached law as public policy, to be based on the right principles and ideas that worked, not their traditional acceptance or jurisdictional pedigree.

Fisher's return to the legislature in 1854 produced immediate results. He quickly moved a want of confidence motion on the government's failure to resist the lieutenant

governors actions in 1851.[65] The motion passed by a large majority, and Fisher was called by the new lieutenant governor, Thomas Manners-Sutton to form a government. It was the first time that a New Brunswick government had been forced to resign because of its failure to maintain the confidence of the legislature. Responsible government had become reality and Fisher did as much or more as anybody in making it happen.

The new government included Leonard Tilley as Provincial Secretary and William Ritchie and Albert Smith as ministers without portfolio. Fisher became Attorney General, a post he was to hold until 1861, save for the hiatus caused by his government's defeat in the liquor election of 1856. Nobody in the government came from the old established loyalist families that had ruled the province since its foundation.[66] They owed their position to hard work either in the professions, as in the case of Ritchie, or in business, as in the case of the druggist Tilley. To Manners-Sutton, they were a government based on, "the principle that the direction of public affairs had been too long in the hands of men of property and liberal education".[67] More objectively, it meant government by a new social and economic class, one dedicated to the themes of nineteenth century politics - liberalism, social upthrust and economic progress.[68] These came through in Tilley's prohibition bill and Smith's attack on King's College, a provincially funded institution that taught the classics and the theology of the Church of England, and therefore smacked of privilege and established religion.[69] The new philosophy also came through in the Parish Schools Act of 1858, by which the government attempted to establish an uniform and secular system of education funded by local rates.[70] It was written to permit daily scripture readings and this led to an amendment authorizing the Douay translation for Catholic children. This would raise the question of whether this established constitutional rights under the BNA Act and the first serious battle over provincial rights. As a judge, Fisher would say it did not.[71]

Consistent with their self-image as the political embodiment of the "spirit of the age", those who followed Fisher regularly expressed confidence in the people and, more particularly, democracy. Fisher himself feared "unbridled democracy", and he bitterly objected to universal manhood suffrage.[72] But his government did increase the franchise by extending the vote to all who earned at least £100 a year, to "secure the fair representation of intelligence and property at the polling booths".[73] Fisher wished to go further, by abolishing the traditional £25 property qualification, but was vetoed by his own party. The result was a franchise law for the urban middle classes, the small businessmen and the rising professionals that Fisher and his government represented and that Fisher extolled as, "the most disinterested, the most

independent and the most unprejudiced of all".[74] This confidence in democracy, and more particularly, the middle class electors of New Brunswick, is an important part of the backdrop of Fisher's judgments in *Grieves* and *Fredericton.*

There is another aspect of the political orientation of Fisher and his party that may find echoes in *Grieves* and *Fredericton.* Throughout his time in government, Fisher opposed New Brunswick's contribution to the militia or the military fortifications of the province. He argued that the province was under no obligation to tax itself for the benefit of Imperial defence when the Empire had revoked the economic advantages that compensated New Brunswick for her colonial status, most notably, the timber preferences and the navigation acts.[75] This attitude anticipated Fisher's understanding of Confederation. It saw the role of the larger political unit almost completely in terms of the maintenance and enhancement of trade. Second, Fisher saw the imperial connection as a contract between equal (or almost equal) and independent entities. If the centre did not honour its end of the original bargain, then the self-governing colonies were free to disregard their end. This anticipated Fisher's description of Confederation as a "compact of union".

As the 1850's drew to a close, Fisher's hold on his party and the government started to slip. This was due to the inevitable restlessness of the younger and more ambitious of his followers, such as Albert Smith.[76] It was also partly due to increasing inattentiveness on Fisher's part, and his willingness to let more and more of the general work of the government fall on Tilley while he restricted himself to the legal work of attorney general.[77] In addition, there was increasing resentment from supporters toward Fisher's increasingly selective distribution of political patronage.[78] There was no doubt that patronage had been instrumental to the building of a political party that was, by the standards of New Brunswick, reasonably solid.[79] MacNutt thought this was Fisher's, "great contribution to New Brunswick's development".[80] But too many of the spoils went to Fredericton and the upper Saint John River, and to Fisher's family and friends. The dismissal of Marshall d'Avray, the chief superintendent of education, and his replacement by Henry Fisher, Fisher's brother, was a glaring example.

Fisher was therefore vulnerable in 1861 when evidence emerged that he had, under false names, been purchasing crown lands along the route for the Saint John to Shediac Railway, in contravention of the regulation that prohibited such purchases by anybody in government.[81] Rumours circulated that other members of the government were also involved, and the official who exposed Fisher also accused Tilley of at least awareness. But it was

Fisher who paid the full price of scandal. The rest of the executive council tendered their resignations, unwilling to serve any longer with the man who had brought them to power, and Manners-Sutton gladly called on Tilley to form a government. Embarrassingly, Fisher desperately refused to resign the office of attorney general, despite being dismissed from the executive council. It was only when Tilley advised the lieutenant governor to exercise the powers of suspension found in the Royal Instructions that Fisher relented. In London, word of Fisher's fall led the Duke of Newcastle (the colonial secretary) to comment that he was, "not ignorant that Mr. Fisher is one of the worst public men in the British North American provinces and his riddance is a great gain to the cause of good government in New Brunswick".[82] This reflected the bias of the dispatches of Manners-Sutton and of Head, but has nevertheless cast a lasting pall over Fisher's historical reputation.

A last flourish of political excitement started in 1864, when Tilley returned from Charlottetown committed to a union of all of British North America. Fisher was added to the New Brunswick delegation to the Quebec Conference, although apparently, not for his heralded expertise in constitutional matters. There, as discussed earlier, his impact was negligible. Fisher then accompanied Tilley to London in 1866. As the Canadians refused to make all but the most minimal changes in the scheme that had been agreed to at Quebec, Fisher's contribution, like that of all the delegates from New Brunswick and Nova Scotia, must have again been slight. He appears at one point to have declared that he could remember forty objections to the Quebec Resolutions made in the New Brunswick legislature, but in the end decided to submit to what was by then a final and complete package.[83] It was, however, later claimed by William A. Henry of Nova Scotia, then a Justice of the Supreme Court of Canada, that he and Fisher were responsible for the first draft of the BNA Act.[84]

Fisher's career in federal politics was brief and unhappy. Overlooked for cabinet, he became discouraged when the decision was made to proceed with the northern route for the Intercolonial.[85] Appointed to the bench on Tilley's somewhat qualified recommendation in 1868, Fisher may have been glad to leave politics, but leaving it was not the same thing as leaving it alone. In 1879, he used the courtroom in Saint John to speak of the city's prospects for commercial development and of the need for a "more direct line of railway to Canada".[86] Just a few days earlier, he had lectured the crowd assembled for court business in Woodstock on the need for a new courthouse and other local infrastructure, as well as the financing opportunities.[87] His obituary indicates that there were other such incidents and that many regarded them to be inappropriate "political harangues". The writer preferred to see them as

"words of counsel from one of great experience and much knowledge of affairs, who wished to see New Brunswick foremost in everything".[88] After reading *Grieves* and *Fredericton* however, one wonders whether Fisher would have thought the explanation necessary. They suggest that Fisher saw his judicial responsibilities in highly political terms, and that he understood his role as judge to be an extension of his work as a politician. In both roles, Fisher saw his task as one of statesmanship, of making decisions that would promote New Brunswick's material development while ensuring that the province was governed in accordance with British principles. The differences between the constitutional adjudication of Fisher and that of Ritchie derive significantly from this fundamental point.

IV

Fisher began *Grieves* and *Fredericton* with declarations of judicial neutrality and objectivity. Claiming he did not know whether the Canada Temperance Act, "has worked well or ill", he proclaimed that "With the policy of the Act I have nothing to do". His duty was "simply to expound the law".[89] The balance of his judgments revealed this duty to be remarkably broad. It encompassed the deliberations of the Fathers of Confederation, a description of the various domestic applications of liquor and alcohol in Fredericton households, the glorious history of Britain's unique commitment to the protection of property and individual liberty, and the contribution of liquor licencing to public finances and good government.

For Fisher, the only question in *Grieves* and *Fredericton* was whether the Canada Temperance Act was a regulation of trade and commerce. He did not consider any other potential sources of federal authorization, such as the criminal law power or the general authority over "peace, order and good government", and this was, at the time, a major technical deficiency. On the trade and commerce question, Fisher's answer could, at one level, be easily stated; the Canada Temperance Act was not a regulation of trade and commerce because it interfered with the power of the provinces to raise revenue from liquor licenses and, more importantly, because it dealt with matters of legislation, namely, property and civil rights, that were within the exclusive legislative jurisdiction of the provinces. It seems certain that if Fisher had considered other heads of Dominion jurisdiction, such as the criminal law power, he would have said that a law in relation to property and civil rights was beyond all of the powers of Parliament. Therefore, Parliament could not use the criminal law power to

encroach on provincial jurisdiction any more than it could the trade and commerce power.

Fisher's analysis began with a general consideration of the trade and commerce power that revealed the core of his understanding of the BNA Act: particular provisions were to be interpreted in accordance with the "objects of the compact of union". Thus, the power to regulate trade and commerce was not to be limited to the regulation of foreign trade, since it, "was clearly intended by the framers of the Act that Parliament should have the power to regulate trade between the several Provinces, and the internal trade of each Province as well as the foreign trade of the whole Dominion".[90] Such a geographically all-encompassing power was, "a necessary incident to the Union to secure a homogeneous whole".[91] The object of the union had been to, "draw together the scattered settlements of the different provinces, of divers races and religions into one common people" and to "give them as far as practicable a community of interest and feeling" by making in "so far as could be done with their relative position their commercial intercourse with each other . . . analogous". It was therefore essential that "the merchant or manufacturer in Ontario should find in Nova Scotia or New Brunswick the same principles of commercial law as were in operation in his own Province; and transact his business, buy, sell and trade upon the same principles with an inhabitant of Pictou or Saint Stephen as with a citizen of Toronto or London".[92]

The result was a trade and commerce power without geographic limitation, or rather, a trade and commerce power determined more by function that by geographic categories. To this extent, Fisher followed Ritchie and *Justices of Kings County*. The difference was in the reasoning that got him there. Ritchie used the meaning of the words "trade and commerce" and the absence of any words expressly limiting their scope. Fisher used the "objects of the compact of union", largely unstated in the BNA Act.

The same purposive approach applied in delineating the provincial heads of jurisdiction that he saw as exceptions to the geographically all-inclusive trade and commerce power. For example, sub-section 92(9) empowered the provinces to, "make laws in relation to ... shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local or municipal purposes". Fisher held that Parliament could not regulate trade and commerce to prevent provincial access to this revenue. The reason was that the division of powers was, "designed to secure good government", and to enable both levels of government, "from sources peculiar to itself, to raise money to carry on the government, and to discharge the duties devolving upon each respectively".[93] Likewise, the jurisdiction of the provinces under subsection 92(9), "was the result of the compact by which the Confederated Provinces

agreed to transfer to the Federal Authorities certain sources of revenue, and to retain to themselves other sources, so selected and distributed, as to adapt their position and capacity to the condition and position of the body to which they were respectively apportioned". The ability of the provinces to obtain revenue from liquor licenses was essential to the balance between revenues and legislative responsibilities created by the "compact of union". It was the Court's duty to preserve this balance and to thereby advance the "good government" Confederation promised. Thus, a reading down of the trade and commerce power was required.

The intentions of the founding fathers were also determinative of the meaning of the property and civil rights jurisdiction. This jurisdiction was of special importance. Despite what he said about the need to deem all legislation necessary to the regulation of trade and commerce as being within Dominion jurisdiction, even if it "trench[ed] upon property and civil rights", Fisher was sure that property and civil rights was intended to prevail over all competing Dominion jurisdictions. He had, "ever considered that the power to deal with property and civil rights the least liable to assault, and the power of all others to be most sacredly guarded and maintained".[94] Similarly, if there was any doubt as to whether the Canada Temperance Act interfered with property and civil rights, it was his duty to, "give the benefit of that doubt to that authority".[95] Both statements reflected Fisher's view that, "a determination to reserve to the Local Legislature the exclusive right to deal" with the subject of property and civil rights, "was the primary question to be solved before any terms of Union could be agreed upon".[96] While other "objects of importance were discussed and disposed of as incidental to the new state of things the Union would call into existence", a failure "to agree upon the question of property and civil rights would have rendered every effort for Union abortive". [97] This was because, "one Province made it a condition upon which alone it would enter the Union, that its Local Legislature should exercise this power".[98] Here, Fisher must have had Quebec in mind.

Like Wetmore, Fisher also relied on the first paragraph of section 91 for the preeminence of 92(13). He did not cite the paragraph in *Grieves* or *Fredericton*, but he had done so in the fishery cases, and said it meant, "that the Parliament should have power to enact laws in relation to all matters not coming within the classes of subjects assigned exclusively to the local legislature".[99] Neglecting to mention the notwithstanding clause, he then set about interpreting the federal power over sea coasts and inland fisheries and the provincial power over property and civil rights in such a way as to enable, "both classes to run together".[100] Matters which came within property and civil rights were not to be construed as

coming within the federal power over inland fisheries. In *Grieves* and *Fredericton*, this was equally so as between the federal trade and commerce power and provincial powers over property and civil rights and the granting of liquor licences.[101]

But section 91's description of provincial powers as "exclusive" was not the principal authority for the special importance of property and civil rights. The description applied to all provincial powers and Fisher's point was that property and civil rights were different, the power, "to be most guarded and maintained". The real foundations for this were the intentions of the Fathers of Confederation to make property and civil rights central to the division of powers. According to Fisher, they did so because their object was larger and more fundamental than conferring one more legislative power on the provinces. Their more fundamental purpose was to protect property and other civil rights. This equated the rights of the individual with the jurisdiction of the province under 92(13), the latter being the means by which the former were to be secured and protected. Hence, Fisher described 92(13) as the, "great bulwark around which clusters the interests and liberties of every individual within the limits of the Confederacy".[102] It was the duty of the court, "in view of the compact of Union and the objects intended to be attained thereby, and the knowledge that the powers conferred upon Parliament for Federal and semi-national purposes, and the Local Legislature for local and municipal purposes, and the security of civil rights and property ... jealously to guard the rights of the individual and protect the rights of property from every infringement not plainly warranted by the Constitutional Act".[103] Giving the provinces the authority to deal with "local and municipal purposes" and the responsibility for protecting property and civil rights were, significantly, separate objectives. The provinces, in short, were the guardians of the rights, and especially the property rights, of the people.

This was the legal framework within which Fisher set about determining the constitutionality of the Canada Temperance Act. Its fundamental feature was that the division of powers did not only divide legislative authority. It also divided responsibility for advancing the political, economic and social objectives of Confederation. This was the more fundamental division upon which the division of legislative power was built and it guided, on Fisher's model of adjudication, the interpretation of those powers.[104] The courts could not allow legislation to stand unless it was for the advancement of the objectives for which the relied upon authority had been allocated. They could also not allow legislative powers to be used in ways that prevented the other level of government from pursuing the objectives that formed the rationale for its legislative powers. In this context, the constitutionality of the

Canada Temperance Act depended on whether it was enacted for one of the purposes for which the Parliament had, by the "compact of union", been given the power to regulate trade and commerce. It equally depended on whether it would interfere with provincial pursuit of the objects of Confederation for which they had responsibility by the same compact of union.

The Scott Act could not pass either test. It interfered with the power of the provinces to raise, from liquor licences, the revenues that provincial governments required if they were to adequately attend to "local and municipal" matters. It upset the synergy that the Fathers had created between revenue sources and legislative responsibilities. It therefore could not be the "mode by which Parliament in the exercise of its legitimate constitutional power would proceed to regulate the trade in any article of merchandise".[105] It was unthinkable that Parliament should be allowed to collect customs on the importation of liquor, a source of revenue transferred to the new Dominion by the confederating provinces, and then prevent those same provinces from collecting revenue from retail sale of the same liquor. That would be contrary to the clear, "intention of the framers of the Constitutional Act, that both Legislatures should have the power of raising a revenue upon intoxicating liquor in the manner they had always been accustomed to do for their separate use".[106]

What was more, the Scott Act was unnecessary to the achievement of the objectives that national regulation of trade and commerce was intended to advance. It was not legislation passed for the purpose of drawing "together the scattered settlements of the different Provinces, of divers races and religions, into one common people". It had nothing to do with the creation "of a community of interest and feeling", and it did not contribute to national uniformity in the terms of commercial intercourse. To the contrary, it created diversity in the terms of trade as between the counties and cities within each province.

In considering the Act through the lens of property and civil rights, Fisher went further. The interference with the licence power meant that even if the Act was a type of trade regulation, it was not a regulation of trade open to Parliament. But the Act's interference with property and civil rights meant that it was not in reality a regulation of trade and commerce at all. In four impassioned pages that moved from the abolition of slavery in the West Indies to an enumeration of domestic activities that would be made more difficult or even impossible without liquor or alcohol, Fisher drove home the point that the purpose of the Canada Temperance Act was to restrict the individual's right to buy, sell and use alcohol as he pleased.[107] In the counties or cities in which it was adopted, alcohol could only be bought and sold for sacramental, medicinal or mechanical purposes. This rendered the property rights of

those who owned alcohol practically worthless. Such a law was not enacted for the purpose of regulating trade, but was instead an attempt to abolish a branch of trade in the name of moral reform. Looking beyond the effect that the Act would have on the liquor trader, Fisher stated with confidence that there were, "few families in this city who do not at certain times indulge in what are commonly called luxuries", and that everyone knew, "that many of these cannot be made, and are not made, without the use of wine or brandy".[108] As for alcohol, "the generic liquor", everybody knew, "that it is used in most families for many purposes, neither mechanical or medicinal", such as "Eau de Cologne" and the "cleaning of spots from clothes, and from furniture and such like" as examples. How could a statute that prevented the purchase of liquor or alcohol for these reasonable and obviously temperate purposes be said to be a statute for the regulation of trade and commerce? It interfered with the very purpose of "commercial intercourse", which was making both the necessities and enjoyments of life available to the private householder.

In sum, a law designed to restrict a man's right to buy or sell lawful property was one passed solely for the purpose of a moral reform. It therefore impinged on a man's right to make his own choices as to how he would spend his money and organize and conduct his household and private life. It was a "sumptuary law, depriving every man of a natural right secured by the constitution",[109] and the power to regulate trade just did not contemplate a "sumptuary law prescribing what a man shall drink and what he shall not".[110] It was particularly objectionable that the Canada Temperance Act pursued this object by, "making a distinction between the rich and the poor".[111] For under the law, the, "man who can afford to buy his eight gallons of beer or cider, or his ten gallons of wine or brandy, and carry it beyond the city, or the next county, if the law is in force, may do so, whilst his poorer neighbour cannot buy a quart of beer or home made wine". In this way the law was a respecter of persons and as such, violated the principle that every man was alike in the eye of the law, a principle which Fisher described as "indestructible" and woven into, "the very woof of our Constitution".

This constitution was larger than the BNA Act. In support of his claim that, "There is nothing the Constitution guards more sacredly than property", Fisher referred to the "history of Britain", which, "affords the strongest proof in the annals of all history of the regard for the rights of property entertained by the British people, inspired by her greatest jurists and statesmen acting in the spirit of the Constitution".[112] As an example of this glorious history, he cited the abolition of slavery in the West Indies, where the Imperial Parliament, "provided the means to compensate the owners for the loss of their property in the slaves", notwithstanding

that, "it would be impossible upon abstract principles of ethics to maintain the right of property of one man in the flesh and blood of his fellow".

Similarly, with equality. "Our Constitution", said Fisher, "does not proceed in any grandiloquent method to declare that all men are by nature free and equal", but nevertheless, "the struggles and sacrifices of our ancestors would have been futile if every man was not alike in the eye of the law".[113] The "great men", said Fisher, "who in the ages that are passed, have laid the foundation of our Constitution upon fixed principles, would have laboured in vain, if at this day, when the nineteenth century is closing upon us, every inhabitant of this Dominion, irrespective of race or color, was not entitled to equal rights". How the Canada Temperance Act discriminated on the basis of race or colour was not made clear. But what was clear was that Fisher, unlike Ritchie, did not think of the BNA Act as an ordinary statute to be interpreted like a deed or contract. It was a chapter in the glorious constitutional tradition of the British people and it had to be interpreted as an embodiment and expression of that tradition. This meant scrupulous attention to the rights of the individual, especially to rights of property, and an expansive reading of subsection 92(13). Indeed, the difference between the Fisher and the Ritchie methods was perhaps best demonstrated by Fisher's connection of his interpretation of the BNA Act to the reimbursement of slave owners on the abolition of slavery. For Fisher, the parallel needed no explanation or justification. The duty of the Court to, "jealously guard the rights of individuals and protect the rights of property", was based on the "knowledge" that the powers conferred on the provinces by the founding fathers were conferred, "for local and municipal purposes, *and the security of civil rights and property*".[114] In setting out to achieve these objects, the Fathers of Confederation had acted as statesmen in the British tradition who understood that the principles of the British Constitution had to be embodied within the federal system of government they were creating. Reference to the historic events that illustrated the scope, content and importance of those principles was simply a means of giving effect to the, "compact of union and the objects intended to be attained thereby".

On the basis of this framework, Fisher interpreted the BNA Act in ways that can clearly be seen to have anticipated the later decisions of the Privy Council on what would become fundamental elements of Canadian federalism law. One of these elements flowed from the abandonment of the simple and absolute "rule of construction" that Ritchie had found in the "deeming clause" at the foot of section 91. According to Ritchie, by this rule the scope of federal powers unilaterally determined the boundaries that separated federal and provincial jurisdiction, since all matters capable of coming under both were for that reason always to be

assigned to the federal side. In contrast to this one-sided approach, Fisher's technique was to regard federal and provincial powers as co-defining and mutually qualifying. In the fishery licensing case, he had said that federal powers over sea coast and inland fisheries and provincial jurisdiction over property and civil rights had to be interpreted to allow, "both classes to run together". In *Grieves* and *Fredericton*, Fisher applied this technique, as did the other judges, to "read down" trade and commerce to leave room for provincial powers, including the collection of revenue from licencing. Such co-determinacy meant a relationship between the federal and provincial orders predicated on relative equality of status, rather than one routinely defined by federal paramountcy. In *Fredericton*, Fisher expressed it by saying the exclusive powers of the Parliament and Local Legislatures are "co-equal in their energy and authority".

Fisher's recognition that the interpretation of federal powers had to be as influenced by provincial powers as the interpretation of the provincial was influenced by the federal, was a large and significant step toward coordinate federalism. It anticipated the enunciation of the same concept by the Privy Council with words that were very similar to Fisher's. In *Citizen's Insurance v. Parsons*, it said the powers of both levels of government, "must be read together, and that of one interpreted, and, where necessary, modified by that of the other". Fisher's co-determinacy also more fundamentally anticipated the provisional recognition of provincial sovereignty by the Privy Council in *Hodge v. The Queen* in 1883, as well as its ultimate recognition by the New Brunswick Supreme Court and the Privy Council in *Maritime Bank*.

Fisher also foreshadowed the Privy Council by placing a broad interpretation of property and civil rights at the centre of the entire division of powers. This was quickly to become such a pervasive element of the Privy Council understanding of the BNA Act that it is unnecessary and perhaps impossible to cite the specific case that best marks the intersection between Fisher and the Privy Council on this essential issue. It suffices to say that within a few years, the Privy Council said in *Citizen's Insurance v. Parsons* that the words, "property and civil rights" were used in the BNA Act in, "their largest sense". To be sure, Fisher made claims for this head of power that would probably have seemed as extravagant to the late nineteenth-century Privy Council as they do today. Nevertheless, in saying that property and civil rights was the key to the division of powers and was largely synonymous with the activities of private and domestic life, Fisher pointed to where the Privy Council would soon go.

The corollary to prescience on property and civil rights was prescience on the fate of the Dominion power over trade and commerce, the pride of the centralists. Fisher anticipated

the "reading down" of this potentially sweeping power and the Privy Council's realization that it could not be implemented literally and without regard to the impact on provincial powers. There were very important differences between the solution of Fisher and the Privy Council to this potential problem, to be discussed momentarily. For now, it is enough that the general thrust of what Fisher said on trade and commerce, that it covered the regulation of trade generally and for the purpose of creating a national market, generally foreshadowed what happened in the Privy Council, starting in *Citizen's Insurance v. Parsons*, continuing in *Hodge v. The Queen* and the *McCarthy Reference* and culminating in *Local Prohibition Reference.*

Taken together, the explanation of trade and commerce and of property and civil rights represented an early and rough attempt by both Fisher and the other judges of the majority to create what is now known as the "aspect doctrine", the principle of legislative characterization which says, in the familiar words of *Hodge v. The Queen*, that "subjects which in one aspect and for one purpose fall within section 92, may in another aspect and for another purpose fall within section 91".[115] What Fisher was trying to capture is that the liquor trade had a national (or general) and a local (or unique) dimension or aspect, and that only legislation dealing with it in the former respect was within the rationale (or logic) of federal rather than provincial regulation. In this, he anticipated the Judicial Committee's decision in *Citizen's Insurance Co. v. Parsons* that trade and commerce did not extend to the regulation of a particular trade in a particular province.[116]

Fisher's prescience on these points raises the question of Fisher's representativeness. Obviously, he did not have the support of Palmer the dissenter, but that will be taken up in the next chapter. But a short review of Allen, Wetmore and Weldon, with whom Duff agreed collectively, establishes Fisher's representativeness for the balance of the Court, at least on essential elements. True, in *Fredericton,* Allen seemed anxious to disassociate from Fisher. He surely had Fisher in mind when declaring that, "Whether or not such an Act ... bears hard upon one class of the community, and effects the poorer people differently from those in more wealthy circumstances, is a matter with which this Court has nothing to do".[117] More bluntly, he said the legislation's interference with private rights was not a valid ground of constitutional objection.[118] This was similar to what Palmer stated more strongly as grounds for dissent, almost certainly in opposition to Fisher, that under the Canadian constitution the people had no "reserved rights". Concern about Fisher's claim to be protecting private rights may explain why Allen doubted the applicability of the provincial authority over property and civil rights by noting that legislation on many matters of federal

competency could only be made by Parliament legislating directly on property and civil rights.

At the same time, Allen recognized, with Fisher, that federal legislation that affected property and civil rights needed to have limits. On trade and commerce, he expressed the same view as Fisher, that federal legislation could not, contrary to *Justices of Kings County*, be justified solely on the basis that it affected trade. Partly, this was because the drafters of section 91 had given Parliament powers over such areas as navigation and shipping, weights and measures, currency, and patents and inventions. All of these would have been unnecessary if trade and commerce had been thought to, "include everything which might be concerned incidentally with the operations of trade, or the transactions of commerce". But partly also, trade and commerce was limited because Parliament might otherwise, "legislate upon what we shall eat and what we shall drink and wherewithal we shall be clothed". Disagreement with Fisher's rights rhetoric notwithstanding, this amounted to saying the same thing as Fisher, that the BNA Act did not authorize federal "sumptuary legislation". Granted, Allen ended up classifying the matter of the Canada Temperance Act under "local matters in the Province" and subsection 92(16), rather than "property and civil rights" and 92(13), but clearly he shared Fisher's concern for federal encroachment on private rights and domestic autonomy. And like Fisher, he used it to justify a qualification of the trade and commerce power.

Allen's application of the local matters power was a function of Parliament's decision to implement temperance community by community, rather than nationally. The thought here was that the Act itself admitted the localness of temperance. It therefore fell under provincial jurisdiction over local matters. Wetmore agreed but provided a supporting argument that more extensively overlapped with that of Fisher. Like Fisher, he thought the Scott Act would, "destroy or render useless" the power of the provinces to raise revenue from liquor licensing". By itself, this excluded the Act from Parliament's general authority over the peace, order and good government of Canada, a possibility that only he and Palmer considered, and which hinted at what was to come in Local Prohibition. The criminal law power was also inapplicable for reasons that echoed the themes of the sanctity of private property and of personal autonomy that were so important to Fisher. Here, Wetmore suggested a division between federal offences that were part of criminal law proper and provincial offences that fell under provincial authority over local matters.[119] In effect, a division between federal and provincial criminal law, with the provincial portion encompassing offences that went to "municipal regulation" and the maintenance of peace and public order. Criminal law and federal

jurisdiction, in content, were for true crimes. This dichotomy prevented Parliament from extending its jurisdiction by making crimes out of conduct perfectly lawful as of Confederation, thereby gaining legislative control over it. For otherwise, "If the Dominion Parliament can declare the fair prosecution of a legitimate business to be a crime or offence, and thereby obtain control over it in one instance, it can do the same in respect of every action of the inhabitants, social or otherwise, and every description of property, and thereby entirely subvert every freedom of action and every right of property which the people supposed they had a right to enjoy and exercise".[120] It could, "legislate in respect of all property", even though property and civil rights were provincial, saying, "how you shall feed your horse or manage your household". [121]

As with Allen, this applied Fisher's themes of individual and domestic autonomy to the jurisdiction of the provinces over local matters, but in a way that made a more direct connection to the property and civil rights jurisdiction. Wetmore broadened the application of these themes to the criminal law power. Because he believed that the Canada Temperance Act was moral reform legislation not legislation on trade, he located the jurisdictional choice between the provincial responsibility for "municipal police" under "local matters" and the federal power over criminal law. But the core of the reasoning built on common ground with Fisher: the exclusion of sumptuary legislation from Parliament's reach.

Weldon also touched upon some of the same themes as Fisher, but in a judgment that only suggested their influence and did nothing to develop them. He took a seemingly more narrowly commercial approach to the concern of encroachment on rights. This was, for him, not so much a concern for householders but a concern for equal treatment between the merchants who imported liquor and merchants who imported other articles of merchandise, be it "flour or molasses".[122] He found the "civil rights" of people in affected counties and cities to be "infringed", but said even less than Allen as to how this mattered to constitutionality.[123] He defined the trade and commerce power in relation to liquor as limiting Parliament to saying, "what may be imported and what prohibited". This prevented conflict with the provincial authority over raising necessary revenue for municipal and provincial purposes.[124] Here, Weldon built on his passing observation that, under sections 91 and 92, Parliament and the legislatures were, "supreme within the limits so set forth". [125]

This analysis establishes the representativeness of fundamental elements of Fisher's argument. The other judges were not as explicit as Fisher in assigning equal interpretive weight to provincial powers, but their analysis and conclusions demonstrate application of the

principle. Similarly all applied the basic features of the grand division of legislative labour between Parliament and the legislatures that Fisher described in greater detail. Specifically, all accepted private and domestic life and the life of the local community to be comprehensively provincial, though this came through faintly in Weldon, with qualifications in Allen and only strongly in Wetmore, the former premier. Each also accepted the corollary, that federal powers were broad and sweeping but only in relation to the national life of the new Canada. This meant a trade and commerce power adapted for the regulation of the economy generally, but not to the regulation of a particular line of business, especially in the name of a social reformation implemented at the level of the local community.

Thus it was not only Fisher but the Court that in *Grieves* and *Fredericton* anticipated the general thrust of later Privy Council decisions. Indeed, it is essential to understanding the significance of Fisher that on each of the points of intersection between him and the Privy Council, his thinking ran parallel to that of Allen and Wetmore and, to some extent, Weldon. In several important ways, the other judges reinforced Fisher on points that pointed to later Privy Council outcomes. For example, Weldon's statement that under sections 91 and 92, Parliament and the legislatures were both, "supreme within the limits so set forth", showed that the influence of a growing appreciation of the relationship between jurisdictional and status questions was not limited to Fisher. Like Fisher's description of provincial powers as "co-equal", this speaks to the background to *Maritime Bank*. Similarly, Wetmore reinforced the depth of the Court's transition from Ritchie's "rule of construction" to the interpretative co-determinacy endorsed in *Citizen's Insurance Co. v. Parsons*. Like Fisher, he also did not base co-determinacy only on the description of provincial powers as "exclusive". He based it openly on the practical concern that the alternative meant matters intended for the provinces becoming federal, at a rate and to an extent largely self-determined by Parliament. This would violate the "compact of union" and undermine the good government that the division of powers had been deliberately designed to promote, partly through provincial autonomy on matters to the people. Wetmore also sharpened the Court's approximation of the aspect doctrine. He shared Fisher's view that the power to regulate trade and commerce meant trade and commerce generally, not the trade in particular articles of merchandise or a particular category of transactions. But unlike Fisher, he concluded that all economic regulation thereby excluded from federal competency was a "local matter" within provincial jurisdiction under subsection 92(16). This actually complemented Fisher's view of the purpose and scope of the trade and commerce power better than did Fisher's own reliance on property and civil rights. In saying

that the power was limited to regulation that built a, "community of interest and feeling" or produced uniformity in the "principles of commercial law", Fisher was trying to say that the power was limited to aspects of trade and commerce that had a national dimension. The logical corollary was that all other aspects of trade and commerce were of a local or provincial dimension, and hence within subsection 92(16).[126]

It is also worth noting that Allen and Wetmore anticipated the Privy Council in ways that Fisher did not, but on the basis of a wider or varied application of the same fundamental insights that drove Fisher's analysis. In *Local Prohibition*, Lord Watson's argument on trade and commerce would be the same as Allen's, that the presence in section 91 of more specific powers of economic regulation, such as weights and measures and navigation and shipping, showed that the trade and commerce power had not been framed to encompass trade and commerce generally but only certain aspects of the subject. The conclusion of Allen and Wetmore, that the Scott Act came within "local matters", virtually ignored when *Fredericton* went to the Supreme Court of Canada and dismissed summarily in *Russell v. The Queen*, was adopted in the end by the Privy Council, also in *Local Prohibition*. Allen and Wetmore also anticipated the later assignment of liquor laws to the provincial power over municipal institutions. Both used the "local matters" heading to do so, but it was clear that for both, the inclusion of municipal institutions within "local matters" was part of what made "local matters" applicable. This was strongest in Wetmore due to his characterization of intemperance as a matter of "municipal police" but it was implicit also in Allen. In this, they anticipated not only the rationale for *Local Prohibition's* use of "local matters" but also the ruling in *Hodge v. The Queen*, that Ontario's liquor licensing law was valid, *Russell v. The Queen* notwithstanding, because it was legislation on municipal institutions. As Allen and Wetmore both used local matters as the best expression of the same generic provincial jurisdictional base in private and domestic life that Fisher saw expressed in property and civil rights, their vindication on local matters and on municipal institutions would be a vindication in which Fisher could have shared.

But having said all this about the representativeness of Fisher, it needs to be emphasized that he went further than the other judges in applying the political and economic objectives of Confederation and British constitutional principles to constitutional interpretation. And he was the most aggressive and expansive in his claim that the BNA Act guaranteed private property and personal freedom. These points of distinction are central concerns of the rest of this chapter.

V

In *Chandler* and *Justices of Kings County*, Ritchie had interpreted the BNA Act on the basis that the words of sections 91 and 92 were to be interpreted according to their "ordinary sense", unless it was, "perfectly clear from the context that a different sense ought to be put on them".[127] He carried out constitutional adjudication as if the words of the constitutional text only needed to be read to be understood. His context included only what was written in the BNA Act. This identifies Ritchie's approach as being very consistent with positivism or formalism.

Fisher's jurisprudence was entirely different. He operated from the premise that the language of sections 91 and 92 were to be interpreted to ensure that the division of powers achieved the objectives of the "compact of union". This amounted to an attempt to write in the "grand style" that is associated with great American judges, such as Chancellor Kent, Joseph Story, and John Marshall. Like these judges of early America, Fisher believed that the responsibility of the judge (at least in the constitutional context) was to decide cases in accordance with broad considerations of policy and principle, not just legal technicalities.[128] His duty was to ensure that the division of powers served the needs of a young and growing country, which desired economic and national unity, but which also wished to retain the benefits of British constitutionalism, benefits that were, in Fisher's view, synonymous with provincial government. These aspirations, not the mere words of section 91 and 92, were the normative framework for constitutional adjudication. Constitutional adjudication was the continuation of the work of the founding fathers.[129] And like Marshall of the United States, Fisher saw in the constitutional document only the general outlines of the federal framework that the founding fathers (himself included) had intended to create.[130] Flesh had to be put on the bones with fidelity to the nation-building vision of the founding fathers, by deciding cases in the context of the grand objectives of state that lay behind Canada's foundation. This called for judicial statesmanship, not garden variety statutory interpretation.

Implicitly but unmistakably, this was a rejection of the literalness of Ritchie's decisions in *Chandler* and *Justices of Kings County*. Where Ritchie implicitly drew a sharp line between the politics of constitution making and the law of constitutional adjudication, Fisher's judging was highly political. This was one indication of what has been called a "pre-classical" understanding of law. Another was his eclecticism in identifying the sources and breadth of

the law. His constitution included the unwritten principles and traditions of British constitutionalism, principles and traditions that Fisher thought the Fathers of Confederation had incorporated into the BNA Act by reserving the property and civil rights jurisdiction to the provinces. This was consistent with an understanding of law and of judging that was more typical in North America in the late eighteenth and early nineteenth centuries than in the latter decades of the nineteenth century. Law was more likely then to be an amalgam of statutory enactment, common law principle, custom, and natural and divine law.[131] This was particularly so where the subject of constitutional law was concerned.[132] In Fisher's case, such eclecticism explains how he could delve into British parliamentary and constitutional history, invoke the concept of natural rights and attack the justness of "sumptuary legislation" and still claim that his duty was simply "to expound the law" of the constitution.

There were other points of similarity between Fisher's judgments and a pre-classical understanding of law. One was Fisher's insistence on the sanctity of private property, which was in the pre-classical age the "universal principle that seemed to require the most zealous protection".[133] Another was the way in which Fisher took the law of the constitution to be a wholly distinct and separate body of law, peculiarly concerned with the questions and problems of government. Questions of jurisdictional competency were not to be decided by interpreting heads of legislative power in light of commercial law jurisprudence, as they had been in *Chandler*. Instead, they were to be answered by placing those heads of power within the broader system of government that the constitution had been designed to create. They were, in other words, to be interpreted by remembering that they were constitutional provisions designed to achieve a constitutional purpose. This contextualization made for a style of judicial reasoning and writing that dealt openly with the political, economic and social setting of the constitution and of the legislation that came before the courts under the constitution. It meant a constitutional adjudication in which the judge openly declared his views on the purpose of specific heads of legislative jurisdiction, and more broadly, of each level of government. It meant, in other words, that judges decided constitutional cases by expressly taking a position on questions that would be contested in the political arena.

In general outline, this view of constitutional law and of the judicial function broadly conformed to the tendency within a pre-classical legal consciousness to see law in functional terms. Legal doctrine was not, for the most part, organized around abstract legal concepts such as contract or torts, but around the specific details of different types of economic or social relationships.[134] Thus much of private law doctrine was constructed around master and

servant, buyer and seller, agent and principal, insurer and insured, rather than around a general and abstract concept of contract. Each relationship was distinct and legal relations were structured accordingly. They were built on rights and obligations reflecting the inherent nature of the relationship and the status of the parties. In this light, law was the embodiment of the "moral sense of the community".[135] It followed that judging was predicated on a commitment to a particular vision of social and economic order, a definite and substantive social morality. Adjudication was neutral and objective, but only in the sense that the vision of social or economic order embodied in the law was a reflection of the natural, or perhaps the divine order of things. It was not understood to be neutral and objective in the late nineteenth century sense, when judicial decision-making came to depend on generalized principles and concepts purported to embody what was common to widely variable relational situations. In the area of contracts, for example, this meant that the law (and adjudication) focused on the formal elements that were said to be part of all agreements - offer and acceptance, consideration, performance. The law could be portrayed as neutral and objective on the balance of power embedded in legal relations.

Applying this model to *Grieves* and *Fredericton*, it can be said that Fisher's division of powers was decidedly pre-classical. The division of powers that he purported to interpret and enforce existed in the inherent capacities of, and rationale for, the national and local levels of government. Each were in Fisher's opinion naturally suited to perform certain functions, if not perfectly, then better than the other level of government. It was this natural or inherent division of powers that had guided the Fathers of Confederation in enumerating the specific powers that the Dominion and provincial legislatures were each to exercise. It also guided Fisher in his determination of the constitutionality of the Canada Temperance Act. His judgments were neutral or objective only in the sense that he believed this order to be inherent in federalism, or at least in Canadian federalism. It was for the good of the country.

Possibly, such judicial statesmanship was a convenient vehicle for constitutionalizing strong personal opposition to prohibition. But the opposition to federally mandated temperance could itself be seen as part of the larger conviction that it was the duty of the judge to fashion from the bare words of the *BNA Act*, a constitution that served the best interests of the country and its people. For Fisher, this was a constitution that kept all "sumptuary legislation", not just temperance legislation, beyond the jurisdiction of the national Parliament. It seems obvious as well that Fisher was trying to persuade in *Fredericton*; his judgment stands out not only from the others written in the same case but from his own judgments in

other constitutional cases. If his statesmanship was an artifice, it was a transparent one and obviously counter-productive to his objective. Moreover, the eclecticism and functionalism of his judgment in *Fredericton*, and the view of law that they suggested, were consistent with Fisher's background. They were very consistent with the law reform work of the legislative committee he served on in the 1850's, and especially with its eclecticism and functionalism.[136] Further, a pre-classical orientation to law, or at least to constitutional law, was very consistent with what can be surmised about Fisher's legal education and later formation as a lawyer engaged in the battle for responsible self-government. In early nineteenth century New Brunswick, the education for aspiring lawyers was classical and internationalist as much as doctrinal and English and while this was breaking down by the time Fisher studied in the 1820's, it could not have broken down entirely. Therefore, in addition to Blackstone and to Littleton, he probably would have read from writers such as Burlamaqui, Grotius, Pufendorf or Vattel.[137] In addition, his constitutional reading would probably have been similar to that of Lemeul Wilmot, his colleague in the fight for responsible self-government, who in 1835, "brandished and quoted from 'one of the best of the books,' Jean Louis DeLolme's Constitution of England, first published in 1772".[138]

It seems more likely therefore, that Fisher's imitation of the grand style reflected his understanding of the importance of the case before him, as well as his understanding of the scope of the judicial office, at least when it came to the constitution. If so, *Fredericton* indicates that the pre-classical legal consciousness was still influential in New Brunswick in 1879. The views of Travis notwithstanding, Fisher was obviously an important member of the province's legal and political elite. It is hard to believe his adjudicative style stood entirely outside the broader culture. Moreover, in *Fredericton*, Wetmore exhibited many of the same stylistic qualities. So did Palmer, even though he disagreed vehemently with Fisher on the constitutional questions, as will be discussed later. It can even be said that Fisher's representativeness is reinforced by Steadman, who argued that constitutional questions were political and therefore questions for statesmen and not judges. Fisher agreed with the diagnosis but not the remedy. Constitutional questions were different and thus demanded a different approach to adjudication. It is interesting that one of the authorities he quoted was Vattel and that Fisher's old colleague, Henry of Nova Scotia, would quote from the same passage when *Fredericton* reached the Supreme Court of Canada. But Henry included parts of the passage that Fisher omitted, such as the admonition that, "the most important rule in cases of this nature is, that a constitution of Government does not, and cannot, from its nature,

depend in any great degree upon verbal criticism or upon the import of single words ... [for] we should never forget that it is an instrument of Government we are to construe". From the perspective of Fisher, who obviously read the full passage, the point may have been that, contrary to *Chandler*, the BNA Act was a constitution, not an ordinary statute. Its interpretation represented a higher judicial calling that demanded judicial statesmanship. In *Grieves* and *Fredericton*, Fisher tried to supply it.

On the other hand, Ritchie was much more highly regarded as a judge and, as discussed in chapter 3, his approach was very different. In addition, Allen also was clearly uncomfortable with Fisher's blurring of the lines between the authority for, and the wisdom of, the Canada Temperance Act, even though he also seemed to apply the most important part of Fisher's functionalism - treating provincial jurisdiction as a surrogate for individual rights. Next to Ritchie, he was the New Brunswick judge who stood highest in professional and public regard. Further, he was the same generation as Fisher, and would probably have read many of the same books. In addition there was Travis, recently back from Harvard, everywhere proclaiming the rigours of a "scientific knowledge of law", and describing *Grieves* and *Fredericton* as "ridiculous".

What emerges is a picture of a judicial community, and perhaps a broader legal community, highly divided and perhaps undergoing significant even fundamental cultural change. This fits with David Bell's interpretation of the post-Confederation period as one of "judicial crisis" in New Brunswick.[139] The elements of this crisis included the politicization of the appointment process, the involvement of the Court in controverted elections, several high profile and very controversial convictions against newspaper men for "scandalizing the court", and the eventual disgrace of Judge Palmer in 1894. The larger context was a growing disenchantment with Confederation and the perceived decline, in its wake, of the public institutions of the province, including the Court and the legal profession generally. This was accompanied by nostalgia for the halcyon days of patrician and hereditary Loyalist leadership, particularly in the judiciary, by the social class that men like Fisher had replaced, first in politics and then on the bench.

It seems that *Fredericton*, like *Chandler*, may have both reflected and contributed to this larger turmoil. It also seems possible that just as Ritchie's positivism may have partly been a response to the challenge of legitimacy that openly confronted the Court in *Chandler*, Fisher's judicial statesmanship in *Fredericton* may have been his response to the more pervasive questioning of legitimacy that Bell describes. From this perspective, Fisher's

judgments were an attempt to change and to broaden the way in which the Court approached constitutional interpretation. If so, he had support from Wetmore but little, if any, from the other judges, despite being in substantial agreement with all of them but Palmer on the constitutional questions. The effort was doomed to failure in any event, because it flew in the face of the fundamental forces of change that were, by 1879, transforming Canadian legal culture. By the end of the transformation, arguably completed by the end of the century, the legal consciousness described by Vipond as legal liberalism and by Risk as the rule of law model was dominant within the Ontario legal community and the Canadian community of constitutional scholars, most of whom were located in Ontario.[140] It has been argued that the agents of the transformation included the model's ascendancy within the leading universities of England and of America, the emergence of a national network of law book distribution that emphasized English books; the general rise in Canada of "Britishness" and of an attitude of subservience to British intellectual and cultural leadership, and finally, a significant increase in the influence of the Privy Council, significantly through constitutional cases. All of these had a sphere of influence that included New Brunswick as well as Ontario.

Fisher's reach for a functional or purposive jurisprudence had no chance against such omnipresent countervailing forces, not within New Brunswick and especially not beyond. Indeed, *Fredericton* might itself have been an example of these forces at work in microcosm. When finally brought before the Privy Council as *Russell v. The Queen*, it was disposed of in a judgment that, in comparison to the judgments in the New Brunswick Supreme Court, was narrow, woodenly technical and even simplistic. There was none of the rich discussion of the context of the objects of Confederation and their relationship to the division of responsibility over community and personal morality and the relationship of that division to the parallel division of responsibility over trade and the economy. In this, it was not only Fisher who suffered repudiation. The Privy Council's approach was equally a repudiation of the approach of Gwynne of the Supreme Court who also penned a judgment premised on judicial statesmanship, as *Fredericton* passed through the Supreme Court of Canada. The fact that his vision of Confederation was virtually the diametric opposite of Fisher's and that his judgment supported the conclusion of the Privy Council that the Canada Temperance Act was constitutional, helps to frame *Russell v. The Queen* as an episode in imperial repudiation of the attempt of some Canadian judges, from both sides of the provincial rights divide, to construct a functional jurisprudence of Canadian federalism.

It is possible to see a longer term irony in this. From the Fisher point of view, the Privy

Council would soon realize the error of its ways on the constitutional dimensions of *Russell v. The Queen* and gradually reverse itself in the Fisher direction in a series of cases including *Hodge v. The Queen*, the *McCarthy Reference*, and *Local Prohibition*. Fisher's judgment showed that this change of direction could have been explained as a credible understanding of Confederation and of the grand architecture of the division of powers. But this explanation was not available to the Privy Council and not only because they were British and not Canadian judges. It was not available because it called for a transparently functional approach to constitutional interpretation and explication that the Privy Council, as part of a broader set of Imperial influences, had helped to eradicate from Canadian constitutional law, and perhaps from Canadian law more generally. From this perspective, it is perhaps possible that it was the bias of the Privy Council toward a new conception of the rule of law, rather than its alleged provincial bias, that damaged Canadian constitutional law and our historical understanding of its development.

VI

Fisher's judgments were full of claims about the intentions of the Fathers of Confederation. This is one of the marks of difference with Ritchie, who spoke of the intentions of the Imperial Parliament. Fisher could in this way claim to speak of what he knew, having been a Father of Confederation himself. His judgments need to be considered from that perspective, as a testimony of understanding of what had been intended and understood at Quebec by a judge who could say "I was there".

Most obviously, he believed federal powers were for the pursuit of common or national objectives. Indeed, they were the powers needed to build a nation, to bring "scattered communities" into a "homogenous whole". He defined his new nationality with economic objectives. The purpose of the federal government was to establish a common system of trade. Fisher described this as common principles of commercial law, but it was not clear what this encompassed. One distinction that was clear was that between law that dealt with trade and commerce generically and law that dealt with particular trades for objectives specific to those trades, at least if the objective had a moral dimension. All of the former was within trade and commerce, the latter, totally beyond. It was also evident that the constitutional limits on the federal power were functional and not geographic. Federal power existed to specify the general terms of trade as much within New Brunswick as between New Brunswick and

Ontario. Conversely, a law for all of Canada that regulated a specific branch of trade was likely to be *ultra vires*, again, especially if the purpose was "sumptuary".

On the provincial side, the association of provincial power with local community and private life is manifest, even though Fisher spoke less of the general provincial mandate than he did of the general federal mandate. Primarily, he spoke of one provincial power, property and civil rights, as if it were the whole of provincial power. The line he seemed to draw was between federal authority over the economy as a public institution that dealt with the "how" of economic transactions, and provincial authority over property and civil rights, that covered all or most of the "what", "where", "when" and, most importantly, the "why" of economic transactions. In other words, provincial authority dealt with the private choices of what commodities to buy, at what price and quality and for what purposes, and with the implications for the neighbours of both buyer and seller. The federal role was to provide the economic framework through which these choices could be made, and obviously over a broader terrain than was possible for separate provinces. The choices themselves, and the activities they connected with were all provincial in large measure because they were outside the rationale for federal economic authority, which suggested an understanding of the provinces as the true holders of residual authority, regardless of what the BNA Act said. But they were also provincial because provincial authority encompassed what might be called social relations or daily life. Thus the descriptions of household activities that were in jeopardy because of the Canada Temperance Act.

Along these lines, Fisher can be read as consistent with the theory that the Fathers of Confederation (or some of them) thought of both sections 91 and 92 as one comprehensive or general grant of legislative authority, each divided into "classes of subjects" for application purposes, rather than as two "heap[s] of legislative power to be disjunctively scrutinized".[141] Like others, his basic dichotomy was between Canada as an economic community and the provinces as social communities.[142] He seemed to think that the federal government had been given general authority over the economy and that although this authority was broken down into general and enumerated powers, it was still all one general authority over the economy, all of it to be construed against the rationale for federal economic responsibility. This was clearest in the manner in which Fisher drew attention to the more specific federal economic powers to make the point that they also dealt with aspects of the general economy, or the infrastructure of trade and commerce, rather than with particular branches of trade. In contrast, the provincial powers were all in relation to what has been since described as the

"life of the neighbourhood", community behavior", personal conduct", "the lifestyles and social values of their people", or "the patterns, values and institutions of everyday community contact". The exclusive reliance on property and civil rights might be against this interpretation but it seems plain that Fisher viewed it, like others, as an omnibus description of provincial authority rather than as one discrete authority among many. Here, Fisher's recognition of the role played in Confederation by the importance attached by Quebec to property and civil rights is of interest. That importance flowed from the Civil Code's correspondence with, "the power to recognize and empower individuals, and to facilitate social relations between them". Fisher's reference, in light of how he applied property and civil rights, may suggest awareness of this context from the Confederation conferences. Further, Fisher needs to be seen here in light of the consensus with Wetmore and Allen, that the interference of the Scott Act with private life made it provincial. Allen and Wetmore both said this made it legislation on local matters. When the three are taken together, the court can be said to have treated responsibility for private life or social matters as an organizing principle that cut across the different parts of section 92.

It was not a framework unique to Fisher and the other New Brunswick judges.[143] Fisher's articulation of it is nevertheless important. It connects the framework to the Confederation conference table and provides modest evidence for the model's influence within the Confederation process. More substantially, it shows the emergence and application of a division of powers more favourable to the provinces than could have been produced under *Chandler*. It attested to the importance of local matters, the category of powers of which Macdonald and others were so dismissive. In this regard, it was but a step away from explicit declaration of the importance of local control over local matters. It represents an articulation of the elements of provincial rights thinking on the New Brunswick bench that had a deeper rationale than mere parochialism. This adds significance to the ways in which Fisher and his colleagues anticipated the rulings of the Privy Council. It suggests that Privy Council interpretations of the BNA Act gave voice, imperfectly and unintentionally perhaps, to an understanding of the "logic of 91 and 92" that was first of all compelling and second, influential in the courts of at least one province as early as 1879. This does not say that they were the right outcomes, just that they could be rooted in a rationale that carried the legitimacy of being indigenous to a Canadian court and a Canadian understanding of Confederation. Of course access to that rationale, or any rationale based on an understanding of what Confederation was meant to accomplish, was unavailable to the Privy Council, and not only because it was

geographically isolated from direct knowledge of Canada and its affairs. An approach such as Fisher's required openness to a broader history than could be found in the common law or in earlier statutes. It required openness to social and economic context and most fundamentally, to a jurisprudence that decided between competing claims on the basis of which best fulfilled political, social and economic objectives and values, and which therefore best articulated those objectives and values. Within the paradigm of legal liberalism, legal formalism or rule of law thinking that characterized the broader patterns of legal reasoning that prevailed in England in the late nineteenth century, all of this was impossible for the Privy Council even to contemplate. It took them beyond the objective and apolitical delimitation of spheres of autonomy by applying to the BNA Act much the same principles of law and methods of textual analysis that they would apply to any other statute.[144]

Fisher's reliance on an understanding of the organizing characteristic of sections 91 and 92 is interesting in one further respect. It may help to explain why *Grieves* and *Fredericton* produced such a different approach from Fisher, and the other judges, than had *Chandler* and *Justices of Kings County*. Within this perspective of Fisher's understanding of the general scope and rationale for provincial jurisdiction, it becomes possible to see how he might have perceived the risk posed by the Canada Temperance Act as a truly drastic challenge to provincial competency. It was a threat, not just to one head of provincial authority, but to the entire sphere of provincial legislative authority and autonomy. The Act dealt with liquor and the trade in liquor but also with something larger. It dealt with liquor by dealing with the life of the neighbourhood, personal conduct, community behavior, lifestyles and social values and, "the patterns, values and institutions of everyday community contact". In short, it cut across and to the core of the "organizing principle" of all provincial authority. If Parliament could so invade the heartland of provincial authority to get at intemperance, what prevented it from doing the same on whatever subject Parliament adopted as sufficiently pressing? From this perspective, jumping from the Canada Temperance Act to a generalized federal power to prescribe, "what a man shall drink and what he shall not" was more than colourful rhetoric. It also conveyed the seriousness of what was at stake in the jurisdictional claim on which the Canada Temperance Act rested. Without the mediating influence of the doctrinal refinements to come of "pith and substance" and "aspect" and "necessarily incidental", the implications of the Canada Temperance Act to the organizing logic of all provincial power probably seemed very serious. From this angle, *Grieves* and *Fredericton* perhaps illustrate the role that the subject matter of constitutional litigation played in the New

Brunswick court's process of learning federalism and of evolving from subordinate to coordinate federalism. The experience of being confronted with the Canada Temperance Act may have either contributed to a new level of awareness of "the logic of sections 91 and 92", or, it may at least partly explain the urgency for the articulation of that logic. Either way, for the New Brunswick judges, the outcome may have been a deeper understanding of the implications and complexity of Canada's constitution.

VII

In *Grieves* and in *Fredericton*, Fisher did more than explain the criteria the Fathers of Confederation had used to design the division of powers. He gave his understanding of why he and the other Fathers of Confederation had wisely divided economic and social regulation. On the federal side, it was the desire for a common and uniform system of trade across the country as a means for building a homogenous nation out of "scattered settlements". On the provincial side, it was to provide for "local and municipal purposes" but more fundamentally, it was to ensure the "security of civil and property rights". From this knowledge came the duty of the Court to "jealously to guard the rights of the individual and protect the rights of property from every infringement not plainly warranted by the Constitutional Act".

From a modern perspective, this does not appear credible. The BNA Act is now firmly regarded as exclusively concerned with the relationship between levels of government.[145] Indeed, to the extent that attempts to use the Act to protect individual rights are now remembered, the instances are all cases of provincial rather than of federal encroachment on individual rights.[146] Even these cases have been overtaken by authoritative judicial statement that "human rights" are not a discrete "matter" within the scheme of the division of powers.[147]

Even Fisher's colleagues had difficulty with Fisher's premise. As mentioned above, Allen shared Fisher's concern that an unqualified federal power over trade and commerce made the freedoms of individual New Brunswickers vulnerable. But he was also uncomfortable with the implication from Fisher that the responsibility of the court was to protect individual rights through the interpretation of the BNA Act. It was, said Allen, no valid objection that the effect of the Canada Temperance Act, "is to interfere with private rights, and to prevent persons from selling, as they think proper, property which they had acquired before the Act passed".[148] Palmer in dissent was equally direct. Without mentioning Fisher by name, he accused him of mistaking the Canadian for the American constitution by having interpreted

the BNA Act as if there were in Canada, "powers reserved to the people" and "inalienable rights" on which neither Parliament of the local legislatures could legislate. "Even the Great Charter", said Palmer, "does not pretend to protect or secure the rights and liberties of the people against Parliament, for it does not declare that these things shall not be interfered with, but that only what is done, shall be done by the law of the land, that is by Parliament".[149]

Such resistance to judicial enforcement of constitutional rights was prevalent in late nineteenth century Canada.[150] Although Fisher's language at times did suggest a bill of rights buried somewhere in the BNA Act, it would be highly surprising to find him in disagreement with this fundamental element of the prevailing Canadian belief system. His judgments were a celebration of the glorious constitutional tradition of Britain, where Parliament reined supreme. There can be little doubt therefore, that he meant what he said in reply to Palmer, that he had, "never intimated or entertained the idea that there was any reserved power in the British North America Act, 1867".[151] But this left the question unanswered: What was the relationship between the power of the legislatures to make laws on property and civil rights and the protection of those rights? And what was the role of the Court?

The answer, unavoidably speculative, appeared to have five components, four of which were more or less expressly stated and the fifth that was implied. The first was clearly stated, that Confederation had established a mandate for the protection of the rights of individuals. The second, stated with equal clarity, was that provincial legislatures were given the direct and primary responsibility for discharging this mandate, which was embodied in their power to make laws on property and civil rights. The third element, more indirectly stated, was that the responsibility of the legislatures consisted largely in exercising their powers in accordance with the guidance provided by British constitutional tradition, learning and example. The fourth element, more opaque, was that it was the duty of the Court to guard against violations of rights not warranted by the constitution. Essentially, this seemed to mean not legislated by the local legislature acting under 92(13).

To understand how these elements fitted together for Fisher in the context of federalism, it is helpful to recall our discussion of the provincial rights movement. To David Mills, Edward Blake, and Oliver Mowat, provincial jurisdiction over property and civil rights was, "[the] authority to establish for the intercourse of the several members of the body politic with each other those rules of good conduct and good neighbourhood which are calculated to prevent a conflict of rights and to ensure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a corresponding enjoyment by others"[152]. It encompassed,

as it seems to have for Fisher, "every relation in the state of society relating to private life".[153] It encompassed virtually all private transactions between individual citizens, as well as those aspects of government activity which affected the individual's religious, civil or political liberty.[154] It was axiomatic that all such rights were subject to limitation by constitutional authority, but it was equally axiomatic that such limitation was a responsibility solely for provincial legislatures acting in accordance with responsible self-government. This was more than a demand for power. It rested on confidence and faith in local democracy. Provincial legislatures were closer to local communities, closer at least, than the Dominion Parliament. Accordingly, they could be counted upon to be more responsive to local values, customs and opinions when exercising the power to legislatively define or curtail property and civil rights.[155] They were less likely to make mistakes and more likely to take corrective action when mistakes were made, than was the more distant and more heterogeneous Dominion Parliament. There, divisions between groups based on language, religion or regional interests were more likely, and less likely to be bridged by shared values or common interests. The risk was therefore greater of laws that were oppressive because made by some groups against others.[156]

On this theory, federalism was by its nature a system that protected not only community rights but individual rights, subject to certain conditions being met.[157] One of the most important conditions was that political accountability to the community needed legal protection; the value of relative proximity and communal homogeneity would be lost if legislative decisions were subject to interference and adjustment by an authority that had less of both; hence the demand for provincial autonomy as the necessary condition for provincial self-government, discussed earlier.

This understanding of federalism, very similar to that of the American anti-federalists from a century before, fits well with the four elements of Fisher's thinking described above.[158] It also suggests the implicit fifth element, namely, the greater risk posed to rights by the more remote and diverse Dominion Parliament. Fisher was doing no more than Blake or Mills did in the House of Commons, expressing the virtually self-evident proposition (for him) that the rights of the people would be better protected if left in the hands of the provincial legislature, by virtue of that legislature's greater accountability to the holders of those rights. What he added was the role of the courts, not to protect rights directly but indirectly, by interpreting the jurisdiction over property and civil rights with jealous regard for the people's access to local legislatures on matters affecting their rights. In other words, with jealous regard for the scope

and integrity of provincial self-government.

On this last point, it is worth noting the tendency of Mills, Blake and Mowat to characterize Dominion intervention into provincial affairs through (for example) the disallowance of provincial legislation, as interference with the peoples's rights by a "foreign" government.[159] What they meant was a government foreign to the community of interest that they posited with respect to "local matters" and especially with respect to the limitation of property and civil rights. In *Fredericton*, there is a strong implication of the same attitude in the spectre, raised not only by Fisher but also by Allen and Wetmore, of a Parliament able and likely to dictate "what a man shall drink and what he shall not" or to "say how you shall feed your horse or manage your household".

This positions Fisher's *Fredericton* and *Grieves* judgments as rudimentary articulations of core elements of provincial rights thinking. Such an interpretation is consistent with the earlier conclusion that he rooted his interpretation of heads of power in an overall understanding of the division of powers that generally differentiated between Canada as one economic community and the provinces as distinct social communities. It fits well with his insistence on 92(13) as inviolable from federal encroachment, notwithstanding his inability to convincingly reconcile that exclusivity either with the "notwithstanding" or "deeming" clauses of section 91. Further, it is consistent with Fisher's long and deep history in the battle for responsible self-government, with all its arguments for the protection of the rights of the people through the elimination of external interference in the control of the legislature over local government. Fisher spent years making those arguments in the legislature in Fredericton. It seems likely that he went to Quebec and to London with the association of that assembly with the rights of the people firmly embedded in his understanding of the constitution. His motion at Quebec, that both local and national governments be built on the British model, suggests as much. He was steeped in the two defining events of British North American constitutional experience, namely, self-government and Confederation. The Duke of Newcastle might have been right that Fisher was "one of the worst public men in the British North American provinces", but he was nevertheless one well positioned to make and care about the connection between these two seminal events.

This interpretation of Fisher is supported by Phillip Buckner's thesis that the provincial rights movement may have had more support in the Maritimes than has been recognized, given that many Maritime opponents of Confederation drew on the themes of localism and provincial autonomy that figured so largely in the later provincial rights movement.[160] It might

modestly reinforce that thesis. It might also indicate that in New Brunswick, these themes of localism and autonomy cut across the divide of opposition to and support for Confederation, just as they did in Ontario and other provinces. As Vipond and Romney have persuasively shown, the involvement of Brown and Mowat and other leaders of Ontario's Reform Party with Confederation was not inconsistent with subsequent advocacy of the provincial rights position. Fisher may point to the same conclusion for New Brunswick.

Fisher may also provide insight on the priorities of the Maritime version of provincial rights. The protection of provincial revenue sources was obviously very important to him: he interpreted subsection 92(8) as a virtual constitutional guarantee of licensing revenues against interference from federal legislation. Wetmore was equally strong on this point. When *Fredericton,* reached the Supreme Court of Canada, so was Henry of Nova Scotia.[161] In the case of Fisher, this concern for provincial revenues was linked to his description of the overall plan behind the division of powers and the "good government" that both levels of government were to achieve together. In the context of a judgment that reads overall like a provincial rights model of Confederation, this emphasis on revenues may be evidence that in a Maritime context, autonomy had to mean fiscal autonomy and not only legal autonomy simply because the former could not be taken for granted. This suggests a different perspective from the Maritime preoccupation with "better terms" than is common in the literature. It may not have shown disinterest in provincial rights thinking. It may have been an application of provincial rights thinking.

But the main point is that Fisher reinforces the growing support in the literature for the view that the inspiration for provincial rights was much more pan-Canadian than previously thought.[162] If a New Brunswick judge of Fisher's generation and background possessed a provincial rights understanding of the BNA Act as early as 1879, it becomes plausible to suggest that the provincial rights movement of the 1880's and 1890's rested on an understanding of Confederation, and of federalism generally, that had deep and perhaps pre-Confederation roots in the political and legal culture of not only Ontario but of New Brunswick as well. In this context, the fact the Fisher made some of these connections in constitutional adjudication is of interest. It may support both Romney and Vipond that the connection between provincial rights and responsible government was a legal and not solely a political understanding of Confederation. Fisher was not articulating the rudiments of the constitutional theory of the movement in a political forum, but in the course of a judicial interpretation of the BNA Act. He was at least one prominent late nineteenth century Canadian jurist who

understood that the arguments for provincial rights were legal arguments.

Here however, an important distinction between Fisher and the wider intellectual context for provincial rights needs to be made. Like David Mills, Fisher linked provincial jurisdiction with liberty but it seems clear that Fisher's conception of liberty was not the abstract and analytical legal liberalism to which Mills ascribed. Fisher's conception of liberty almost certainly was not of the late nineteenth century but instead, of an earlier age. Indeed, it probably had more in it from the seventeenth century than from the nineteenth century.[163] This links to another point of differentiation between Fisher and Mills, Fisher's grandly discursive approach to adjudication. Mill's liberalism went hand in glove with the abstract, objective and apolitical legal reasoning of the late nineteenth century, called the rule of law tradition by Risk and others. Applied to federalism by Mills and others, this meant the legal relations between the provinces and the Dominion were to be defined by judicial definition of the sphere of autonomy of each, through interpretation of the BNA Act by the same principles of interpretation that applied to the establishment of the boundaries in all other legal relations. This generality assured judicial objectivity. It also assured provincial success, due to the conviction that autonomy was embedded within these general principles.

In contrast to this model, Fisher's liberalism was manifested through a more pre-classical legal consciousness in which law was more dependent on social context. The law embodied the principles and policies thought to be the right ones for each category of legal relations, or more specifically, for the social order that each category of legal relations was expected to represent. Thus Fisher did not react to the Canada Temperance Act on the basis of principles applicable throughout the law or throughout the law of statutory interpretation. He reacted to it on the basis of the eclectic amalgam of principles, history, traditions and policies that he thought of as distinctively constitutional.

This comparison obviously depends, with slight evidence, on a great simplification of two very different and complex modes of thinking. Nevertheless, it captures enough of the truth of each way of thinking and of the difference between Mills and Fisher to support the following observations. The first is that Fisher possibly contributes to our understanding of the relative weight of the influences that, according to Vipond especially, contributed to the legal theory of the provincial rights movement, and to its success through the Privy Council. Vipond emphasizes the legal liberalism of the late 19th century and its methodological manifestations in legal formalism or rule of law thinking, but also argues from the continuity of provincial rights with the experience of provincial self-government. Liberty was fundamental to Fisher's thinking

but his judicial style was more consistent with the understanding of law and of judging that legal formalism or rule of law thinking displaced. But what he shared with the advocates of provincial rights was the experience and understanding of provincial self-government. The fact that this was enough commonality to produce significant convergence between his constitutional vision and that of the broader provincial movements may emphasize the extent to which provincial self-government was the driving core of the provincial rights movement.

The second point is that, in the context of this complex mix of parallels and differences, Fisher's generation and background speak to the complex continuity between the intellectual influences of the late nineteenth century with older and more diffuse patterns of thinking. In a small way, he contributes to our appreciation of the difficulty of untangling the strands of political and legal thought that came together, not only in the provincial rights movement but across the spectrum of constitutional thought, in the early years of Confederation.

VIII

The *Grieves* and *Fredericton* judgments of Charles Fisher amply reward careful reading. To be sure, they do not achieve the heights of statesmanship and grand eloquence that Fisher strived after. But they do contain an interesting and provocative explanation of the underlying structure of the division of powers by one who participated in the Quebec and London conferences. This in itself makes the judgments of historical value, for few of the Maritime fathers ever spoke (or wrote) at any length or in any depth about their understanding of the nature or purpose of the division of powers agreed to at Quebec.[164]

Fisher's judgments can therefore be read as an attempt to belatedly state a New Brunswick position on Confederation and the shape of the federal system of government that it brought into existence. As such, they show that at least one Maritime Father of Confederation believed that the terms of union agreed at Quebec were intended to create a far more decentralized federation than the BNA Act has been generally assumed to have contemplated. To be sure, Fisher thought that federal powers in the area of economic regulation were of crucial importance to the building of a new nation, and he accordingly agreed with Ritchie that they embraced intra-provincial as well as inter-provincial and foreign trade. He would not have agreed with the Privy Council's eventual evisceration of the trade and commerce power. But Fisher also believed that several heads of provincial jurisdiction, especially subsection 92(13), were of equal or even greater importance to the success of the

federal system of government that the BNA Act established. Clearly, he could not have shared the view of Macdonald and other leading centralists, that the provincial governments were to be subordinate and inferior to that of the Dominion both in political importance and legal status. To Fisher, the operation of provincial legislatures was the element of the Confederation compact that ensured the continued operation within British North America of the principles of the glorious British constitution. The matters assigned to the federal government were of great practical importance, but it was the legislatures of the provinces on which the property and liberty of the subject depended. Accordingly, Fisher would have agreed with Macdonald that provincial jurisdiction extended only to local matters, but he would not have drawn Macdonald's conclusion, that this meant that provincial powers were of less importance than those of the national parliament. To him, the property and civil rights jurisdiction was a matter of local jurisdiction precisely because it was too important to trust to the distant and relatively unaccountable national assembly.

Fisher's identification of the provincial jurisdiction over property and civil rights with British regard for private property and individual liberty is undoubtedly the most interesting and suggestive aspect of his judgments. It shows that he regarded the responsible self-government that each of the confederating provinces had achieved before Confederation as the constitutional context within which the division of powers was to operate. For him, provincial legislatures had been given the property and civil rights jurisdiction so that they could continue to serve the role they had played ever since the achievement of responsible self-government -- the protection of private property and other civil rights. In the pre-Confederation era, the threat had come from royal governors acting in accordance with the wishes of the distant colonial office and a local and politically unaccountable elite. In the post-Confederation era, the threat came from the national Parliament of a geographically large and sociologically diverse country in which the representatives of the people of New Brunswick were a small minority. All of this supports and reinforces scholarship that argues that the mid-nineteenth century battle for responsible self-government before Confederation was the intellectual and cultural backdrop against which constitutional debate was conducted in the early decades of Confederation. More particularly, it supports and reinforces the view that the provincial rights movement can to some extent be seen as a continuation of the pre-Confederation campaign within the separate colonies of British North America for responsible self-government under the umbrella of the British Empire.

The relationship between property and liberty and the legislative assemblies of the

provinces was, of course, a good deal more complex and controversial than Fisher was aware or willing to acknowledge. Nevertheless, what he attempted in *Grieves* and *Fredericton* was the creation of a constitutional jurisprudence that treated the BNA Act as the constitutional document that it was obviously intended to be. This is what took him beyond Ritchie's reliance on the ordinary canons of statutory construction as he attempted to fit sections 91 and 92 within the British constitutional tradition and the nation-building aspirations of the founding fathers. In making this attempt, Fisher took constitutional jurisprudence beyond the rather sterile debate as to what the ambiguous wording of sections 91 and 92 truly "meant." As much as his garbled presentation would allow, his judgments openly stated the political and legal values, ideas and assumptions on which they rested. Accordingly, they invited debate and criticism on the fundamental question of the nature and purpose of the government and country that the BNA Act brought into existence. Fisher recognized that these fundamental questions were always at issue whenever the courts tried to define the boundary between federal and provincial jurisdiction, especially where controversial legislation such as the Canada Temperance Act was concerned. In this sense, his judgments were premised on the open acceptance of the necessarily creative and political dimension of constitutional adjudication. They were in this sense more honest and forthright, and a good deal more interesting, than much of the constitutional jurisprudence by which they were soon to be superseded.

This invites emphasis on one final point. Critics of the Privy Council have said that it imposed a decentralized constitution on Canada as part of an imperial agenda of divide and rule. But the focus on the explanation for the Council's bias in favour of the provinces in constitutional cases has perhaps obscured recognition of a broader form of intellectual Imperialism that operated through the Privy Council, that of legal positivism, formalism or liberalism. From this perspective, the concern that the Privy Council cut Canada off from a centralist constitution is perhaps subsumed in a larger concern that the Privy Council cut Canada off from the rich complexity of the blueprint of the founding fathers and from a jurisprudence that was worthy of that rich complexity because it was based on functionalism and fundamental principle instead of the parsing of words.

Endnotes

1. Joseph Pope, ed., Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act (Toronto, Carswell, 1895), at p. 9; G.P. Browne, ed., Documents on the Confederation of British North America (Toronto, McClelland and Stewart, 1969), at pp. 135-136.

2. William M. Whitelaw, The Maritimes and Canada Before Confederation (Toronto, Oxford University Press, 1966), at pp. 241-242.

3. Christopher Moore, 1867: How the Fathers Made a Deal (McClelland & Stewart, Toronto, 1997), at pp. 211-212; and C. M. Wallace, "Charles Fisher", Dictionary of Canadian Biography, X, 284-290, at p. 288, and Pope, supra, at pp. 9-10; and Browne, supra, at pp. 135-136.

4. S.C. 1878, 41 Vic., c. 16.

5. C. Mark Davis, "Rum and the Law", in James H. Morrison and James Moreira, eds., Tempered by Rum: Rum in the History of the Maritime Provinces (Porters Lake, Pottersfield Press, 1988), p. 46.

6. Ibid, p. 46.

7. [Saint John] Globe, (1 May, 1879).

8. Affidavits and some of the pleadings for *Ex parte Grieves* and City of *Fredericton v. The Queen* are available in the files of New Brunswick's Supreme Court in the Public Archives of New Brunswick; R67.3, Rs42, S879. The affidavits include the handwritten minutes of the Fredericton city council for the meetings at which the applications for liquor licences from Grieves, Barker and others were received and considered. The status of *Ex Parte Grieves* and of *City of Fredericton* as test cases is confirmed by the file on the latter case that is part of the Weldon,Maclean Papers at the New Brunswick Museum. The se show that Charles Weldon, son of Judge Weldon, leading lawyer of Saint John and MP for Saint John after 1879, when he defeated Acalus Palmer, directed preparations for the appeal to the Privy Council from the finding of the Supreme Court of Canada that he Canada Temperance Act was valid federal legislation. The files are inconclusive as to his earlier involvement. The correspondence between Weldon and James Kaye and Henry Rainsford, the lawyers who had represented Grieves and Barker in the New Brunswick Supreme Court and in the Supreme Court of Canada, show that the real client in the cases was a group of liquor traders, including those in Saint John, and that Weldon was their main agent.

Weldon's correspondence also reveals that national temperance organizations asked the Dominion government to participate in the appeal before the Privy Council, but were denied. Weldon,MacLean Papers, Box 4, PK23, New Brunswick Museum.

9. Files of the Supreme Court of New Brunswick, N.B. Archives, Fredericton.

10. [Saint John] Globe, (16 May, 1879).

11. [Saint John] Globe (10 June, 1879).

12. [Saint John] Globe (23 June, 1879).

13. This characterization of the arguments made on behalf of Grieves is from the judgment of Justice Wetmore; *Canada Temperance Act: Judgment of the Supreme Court of New Brunswick, Trinity Term, 1879, Ex parte Grieves*, Manuscript in the New Brunswick Museum, (hereafter *Grieves*), at p. 1.

14. [Saint John] Globe (23 June, 1879).

15. [Saint John] Globe (14 July, 1879).

16. *The Queen on the Prosecution of Thomas Barker v. The Mayor of Co. of Fredericton* (1879-1880) 19 N.B.R. 139, (hereafter *Fredericton*), at p. 141.

17. Owens was, like Grieves, a tavern keeper who had been convicted for selling contrary to the Canada Temperance Act and who had applied to the Supreme Court for certiorari. His application was heard by Palmer, Chief Justice Allen and Justice Duff on the same day that argument was heard in Grieves. Allen and Duff quashed the conviction without giving reasons, which was not surprising given their participation in Grieves; [Saint John] Globe (23 June, 1879).

18. See D.G. Bell, "Judicial Crisis in Post-Confederation New Brunswick",(1991) 20 Manitoba Law Journal 181.

19. *Regina v Justices of the Peace for Kings County* (1875-76) 16 N.B.R. 621.

20. *Robertson v Steadman* (1878-1879) 18 N.B.R. 580.

21. [Saint John] Globe (2 September, 1879).

22. *Grieves*, supra, at pp. 6-8; Wetmore made essentially the same argument in *Fredericton*, supra, at pp. 162-164.

23. *Grieves*, supra, at pp. 18-19, and *Fredericton*, supra, at p. 170.

24. *Fredericton*, supra, at p. 183.

25. *Grieves*, supra, at p. 27.

26. *Fredericton*, supra, at p. 188.

27. [Saint John] Globe 27, October, 1879, and 29 October, 1879. This is essentially the premise of the book Travis published in 1884, except there, he qualified the position by agreeing that matters within 91 and 92 could be legislated upon by the provinces until the Dominion legislated on them; see Jeremiah Travis, A Law Treatise on the Constitutional Powers of Parliament and of the Local Legislatures under the British North America Act, 1867 (Saint John, Sun Publishing, 1884) at p. 46.

28. The story of the passage and enforcement of the New Brunswick prohibition law of 1856, and of the election that it precipitated is retold in W.S. MacNutt, New Brunswick: A History (1784-1867) (Toronto, MacMillan, 1963), pp. 358-362, and in J.K. Chapman, "The Mid-Nineteenth Temperance Movement in New Brunswick and Maine", (1954), 25 Canadian Historical Review 43, at pp. 53-58. See also T.W. Acheson, Saint John: The Making of a Colonial Urban Community (Toronto, University of Toronto Press, 1985) at pp. 138-159; James Hanney, History of New Brunswick (Saint John, 1909), at pp. 173-179 and, by the same author, The Life and Times of Sir Leonard Tilley (Saint John, 1897), at pp. 212-219.

29. The prohibitory law of 1856 was widely disregarded. Some observers claimed that it was only effectively enforced against those too poor to secure the services of a lawyer. Others emphasized the habits of law-breaking that the law engendered, and the "system of espionage, evasion and contention" that its enforcement required. These complaints, together with the decline in provincial customs revenue that the ban on importation precipitated, encouraged the Lieutenant Governor, Thomas Manners-Sutton (who was at any rate poorly disposed to the Government of Fisher and Tilley) to unilaterally force an election which resulted in a resounding defeat for the government and personal defeat for the main proponent of prohibition, Leonard Tilley: see Davis, supra, p. 45; MacNutt, supra, at pp. 358-362; Chapman, supra, at pp. 53-59; and Hannay, The Life and Times Of Sir Leonard Tilley, supra, esp. at p. 216.

30. *Grieves*, supra, at p. 20; *Fredericton*, supra, at p. 172.

31. *Grieves*, supra, at p. 20 and p. 22; *Fredericton*, supra, at p. 173 and p. 174.

32. *Grieves*, supra, at p. 6; *Fredericton*, supra, at p. 161.

33. As stated above, the bill was introduced by Tilley as a private member's bill, not a government measure. It was adopted by the narrow margin of 21 to 18. Tilley was the Provincial Secretary at the time, and the response of his government colleagues is of some interests in the present context. Three, including William Ritchie, voted against the measure and Tilley, while three others, including Fisher, voted with Tilley. Given the views he expressed in *Grieves* and *Fredericton* it seems unlikely that Fisher was motivated by genuine support for the measure. It is more likely that his motivation was the strictly political one of maintaining the support of Tilley, and the Sons of Temperance that Tilley at that time headed, for his nascent liberal

party. This would explain his apparent failure to speak on behalf of the bill and his willingness to vote against Tilley on a motion of amendment that would have seen the law come into effect in the summer of 1856 rather than on the first of January of that year. See New Brunswick, Journals of House of Assembly (1855), February 1 - April 20, at pp. 247-248.

34. The quotations from the legislative debate on the liquor bill of 1855 are taken from the series of articles that George E. Fenety published in the [Saint John] Progress, starting on January 6, 1894, and entitled "Political Notes: A Glance at the Leading Measures Carried in House of Assembly of New Brunswick from the Year 1854". The quotations come from No. 7 and 14 of the series, which ran to twenty numbers and which was intended as a continuation of Liberal historian George Fenety's Political Notes and Observations, published in 1867.

35. New Brunswick, Journals of the House of Assembly, 1856, 14 February - 1 May, at p. 126.

36. Ibid, at p. 127.

37. Timothy Warren Anglin, the Saint John newspaper editor and Member of Parliament for Gloucester stepped down from his position of Speaker of the House of Commons, "to protest most solemnly against legislation of this kind". It was, said Anglin, legislation of "the most pernicious character that can possibly be conceived, and also of the most tyrannical nature". It rested on a declaration "that it is the right of the majority in any portion of this Dominion to dictate to the minority of the people what they shall eat and what they shall drink, and what opinions they shall profess, or even what they shall wear". In response, David Mills, argued that the Scott Act rested on the same principle as existing laws that prohibited the sale of intoxicating drink within two miles of any public work and the sale of liquor to Indians. It was simply an extension of the public health concern on which those more limited prohibitory laws rested. The Scott Act was, said Mills, "police legislation designed for the general well-being of the community". It was indistinguishable from laws that restricted the carrying of offensive weapons. It was also important in Mills' view to remember that the law would have the effect of reducing the burden which the evil of intemperance placed on that part of the population that was already "sober and industrious". It seems plausible that Mills position may have to some extent reflected his membership in the Government. In light of the argument of this chapter that Fisher's judicial invalidation of the Scott Act rested on a rudimentary provincial rights understanding of Confederation, Mills support for the Act is interesting. See Canada, House of Commons Debates (1878), Vol. 5, at pp. 2402-2403 and p. 2405-2406.

38. J. Travis to S.L. Tilley (3 August, 1882), NAC, Tilley Papers, vol. 21, National Archives of Canada; see also Bell, supra. Travis was eventually appointed stipendiary magistrate in Calgary and quickly got into trouble by imprisoning the editor of the Calgary Herald for contempt of court, largely because the paper had dared to criticize Travis decisions. In consequence, his appointment to the bench was allowed to lapse by the Minister of Justice, John Thompson. In recounting the episode, P.B. Waite said of Travis that, "Administrators sooner or later encounter a man like Travis, agreeable and pleasant on the surface but underneath vindictive, unreasonable, inexhaustible and

treacherous as a snake"; see P.B. Waite, The Man From Halifax: Sir John Thompson, Prime Minister (Toronto, University of Toronto Press, 1985), at pp. 195-196.

39. A good and brief account of the motivations of the New Brunswick temperance movement is found in Chapman, supra, at pp. 45-47 and in Acheson, supra, at pp. 138-159. The movement's larger intellectual context, that of the late nineteenth and early twentieth century commitment to programs of social uplift, is reconstructed in Ramsey Cook, The Regenerators: Social Criticism in Late Victorian Canada (Toronto, University of Toronto Press, 1985). For a general treatment of the movement in the Maritimes, see the essays by Moreira and Davis in James H. Morrison and James Moreira, Tempered by Rum; Rum in the History of the Maritime Provinces, supra.

40. *Grieves*, supra, at p. 15 and p. 4; *Fredericton*, supra, at p. 165 and p. 158.

41. C. M. Wallace, "Charles Fisher", Dictionary of Canadian Biography, X, 284-290, at p. 289.

42. Ibid, at p. 288.

43. These views were recounted in a retrospective published on Fisher's career in the [Saint John] Daily Telegraph (29 December, 1892). The piece was written by James Hannay, lawyer, historian and liberal party propagandist.

44. The young Saint John lawyer Isaac Allen Jack, took considerable glee in recording in his journal a story related to him of the consternation of Charles Duff, a prominent Saint John lawyer, who realized at the conclusion of a case argued before Justice Fisher, that Fisher had completely failed to understand what the case was about; Isaac Allen Jack's Journal, (17 January, 1871), New Brunswick Museum, A20. Jack was convinced that the Supreme Court of the 1860's and 70's was generally inferior to that of earlier days, as was evident from two articles he wrote just before Fisher's appointment; "Regarding the Judicial Appointment of Judge Weldon and the Failure to Make Judge Wilmot Chief Justice", [Saint John] Evening Globe (5 December, 1865), and "The Bench of New Brunswick", [Saint John] Daily Telegraph and Morning Journal (12 August, 1869). Clippings of both articles are to be found in a scrapbook of articles by or about Jack in the possession of the New Brunswick Museum, Saint John. Jack's views in this regard reflected his conviction that the Province had been run by a better quality of man when governed by those of the old and established families of predominantly loyalist stock. In 1874 he went so far as to argue that Canada had to develop an indigenous aristocracy; see I. Allen Jack, "Canadian Aristocracy", Maritime Monthly, July, 1874, at pp. 65-77.

45. Travis to Tilley, supra. Weldon, as Travis reminded Tilley, had abandoned legal practice for the insurance business several years before being appointed to the bench due to, in Travis' view, "the habitual drunkenness" of the "two or three on his own side, who, otherwise, would have been preferred to him, were of such habits, from habitual drunkenness, as to make him, without any practice of law, and with the lowest rank in his profession, ... on the whole preferable to them". To be lower in the profession than one himself at "the lowest

rank" was to be low indeed. His views are certainly extreme and to be liberally discounted, as his purpose in writing Tilley was to extol, in embarrassingly egotistical detail, his own qualifications for the bench. Throughout his long letter he sought to appeal to Tilley's temperance sympathies by discrediting the judges who had struck down the Canada Temperance Act in *Grieves* and *Fredericton*.

46. Wallace, supra, at pp. 284-285.

47. Ibid, at p. 285; W.S. MacNutt, supra, at p. 242.

48. MacNutt, supra, at p. 319.

49. Joseph Wilson Lawrence, The Judges of New Brunswick and Their Times, (Fredericton, Acadiensis Press, 1983 Reissue) at p. 529. This volume is a reprint prepared for the New Brunswick bicentennial by David G. Bell. See also MacNutt, supra, p. 292.

50. Lawrence, supra, at p. 529, quoting Hannay.

51. MacNutt, supra, at pp. 291-292.

52. Wallace, supra, at p.285; MacNutt, supra, at p. 319.

53. Wallace, at p. 285.

54. MacNutt, supra, at p. 342; Wallace, supra, at p. 286.

55. MacNutt, supra, at pp. 342-343.

56. MacNutt, supra, at p. 342.

57. Wallace, supra, at p. 286.

58. In 1852, Fisher was an unsuccessful candidate in the York County by-election made necessary by Wilmot's appointment to the bench. Years later, the author of his obituary (probably Hannay) marvelled that York County electors failed to appreciate the principled stand he had made on behalf of liberalism and responsible government in resigning over Bond Head's actions; "The Death Of Judge Fisher", [Saint John] Daily Telegraph, (9 December, 1880). Not surprisingly, the author neglected to mention that Fisher had, by his own theories of government, no right to executive office when he offered his resignation to Bond Head.

59. Act for the Further Amendment of the Law and the Better Advancement of Justice, R.S.N.B. (1854), Vol. 1, s. 1.

60. Third Report of the Commissioners, R.S.N.B., (1854), Vol. 3, p. xvii

61. Ibid. These recommendations included the union of courts of law and equity; the abolition of the Courts of Common Pleas (small claims courts) everywhere except in Saint John; the abolition of appeals from the Supreme Court to the Executive Council; the rescission of the rule against parties appearing as witnesses in their own causes; the reduction in the number of the forms of action to four - contract, tort, replevin and ejectment; the abolishment of all fictions in the

action of ejectment; the substitution of a standard summons, in place of the bills of york and common capiases, as the mode for commencing all civil litigation; the abolition of imprisonment for debt; and the elimination of, "all the useless statements, averments, and verbiage" contained in declarations in the traditional form, as well as the "whole system of special pleading".

62. Ibid, at p. xxv.

63. Ibid, at p. xxv.

64. The ambitiousness of the Commission is noted in Philip Gerard, "The Maritime Provinces, 1850-1939: Lawyers and Legal Institutions", (1996) 23 Manitoba Law Journal 380. Gerard writes at pp. 380-381: "These reforms were meant to be iconoclastic, to break with an older tradition now castigated as self-serving and non-egalitarian. Charles Fisher's New Brunswick Liberals were not called 'the Smashers' for nothing. [For example] The feudal doctrine of the unity of legal personality of husband and wife - the fiction by which marriage subsumed two natural persons in one legal persons - was breached in all three Maritime provinces. New Brunswick led the way in 1851 by declaring that the wife's property would no longer be responsible for the husbands debts".

65. MacNutt, supra, at p. 355-356.

66. Ibid, at p. 357.

67. Ibid, at p. 357.

68. Ibid, at p. 292, p. 357, p. 363.

69. The fate of Tilley's prohibition bill, which became law in January of 1856 and which precipitated the defeat of Fisher's government, is reviewed in chapter 3. Smith's attack on King's College, an attack that was supported by other followers of Fisher's government, led to the establishment in 1859 of the University of New Brunswick - a provincial university beyond denominational control and open to all on equal terms; see MacNutt supra, at pp. 367-372.

70. See Katherine F. C. MacNaughton, The Development of the Theory and Practice of Education in New Brunswick, 1784-1900, (Fredericton, University of New Brunswick, 1947).

71. This is, of course, a reference to the case of *Ex parte Renaud* (1872-1873) 14 N.B.R. 273, in which the New Brunswick Supreme Court ruled that the statutory provision that allowed the Douay bible to be substituted under the pre-Confederation law for Roman Catholics students had not established a legally enforceable right or privilege to denominational schools. This meant that the province was not precluded from rescinding the exemption by virtue of sub-section 93(1) of the BNA Act, which is what the government of George Edwin King did in passing the Common Schools Act of 1871. Fisher wrote reasons concurring in this conclusion. He argued that the great and fundamental principles of Christian morality and justice were not denominational, but common to all Christians, and that the Bible was indisputably the best method of inculcating these principles, "which

are the ornaments of human society", and the "great charter of our salvation". Thus the secular character of the education proscribed under the Act of 1858 was not compromised by the provision requiring a daily bible reading, for it was an "historical fact, that when the question of reading the bible in the Common Schools of one of the Cities on this Continent was debated, the Jews voted for it, on the ground that it was well adapted to the instruction of children, because of the sublime principles of morality it contained". As to the provision for the reading of the Douay translation to Catholic children, Fisher rather unconvincingly relied on the fact that the school in which this took place was still a Parish School under the pre-Confederation Act. This begged the question, as the argument of Renaud's counsel was that the reading of the Douay Bible in effect transformed a school which would otherwise have been a Parish or Common School into a *de facto* denominational school.

72. MacNutt, at p. 363.

73. Wallace, supra, at p. 286.

74. MacNutt, supra, at p. 363.

75. MacNutt, supra, at pp. 374-375.

76. Together with William Ritchie, Smith's rivalry with Fisher was longstanding and bitter; see MacNutt, p. 386. Smith and Ritchie were, on the other hand, allies, and continued to be during Ritchie's career on the bench; see P.B. Waite, supra, at p. 227.

77. As in other jurisdictions, the attorney general was in New Brunswick expected to personally conduct criminal trials and any civil litigation in which the government might become involved. Given that Fisher served as Attorney General for more than six years, this means that he probably came to the bench in 1868 with more legal experience than some critics were willing to allow.

78. Wallace, supra, at p. 287.

79. MacNutt, at p. 385.

80. Ibid, at p. 384.

81. Ibid, at pp. 385-388.

82. MacNutt, supra, at p. 388; Wallace, supra, at p. 289.

83. MacNutt, supra, at p. 457.

84. Canada, Sessional Papers (1885), no. 85, at p. 144.

85. Wallace, supra, at p. 288.

86. [Saint John] Globe (26 November, 1879).

87. [saint John] Globe (19 November, 1879).

88. "The death of Judge Fisher", supra.

89. *Grieves*, supra, at p. 15; *Fredericton*, supra, at p. 165.

90. *Grieves*, supra, at p. 17; *Fredericton*, supra, at p. 168.

91. *Grieves*, supra, at p. 17; *Fredericton*, supra, at p. 168.

92. *Grieves*, supra, at p. 17; *Fredericton*, supra, at pp. 168-69.

93. *Grieves*, supra, at p. 19; *Fredericton*, supra, at p. 171.

94. *Grieves*, supra, at p. 18; *Fredericton*, supra, at p. 169.

95. *Grieves*, supra, at p. 18; *Fredericton*, supra, at p. 170.

96. *Grieves*, supra, at p. 18; *Fredericton*, supra, at p 170.

97.. *Fredericton*, supra, at p. 170.

98. *Grieves*, supra, at p. 18; *Fredericton*, supra, at p. 170. The province to which Fisher referred was undoubtedly Quebec, which regarded the preservation of its distinct system of civil law as synonymous with provincial jurisdiction over property and civil rights. For a detailed consideration of elite Quebec views of the terms of the Confederation deal, including the importance which Quebec attached to s. 92(13), see A.I. Silver, The French Canadian Idea of Confederation, 1867-1900, (Toronto, University of Toronto Press, 1981), especially chapters 2 and 6.

99. *Justices of Kings County* (1875-1876) 16 N.B.R. 621, at p. 637; *Robertson v. Steadman* (1878-79) 18 N.B.R. 580, at p. 593.

100. *Justices of Kings County* (1875-1876) 16 N.B.R. 621, at p. 638; *Robertson v. Steadman* (1878-1879) 18 N.B.R. 580, at p. 596.

101. Fisher differed from Wetmore in that he tried to argue that this view of the line between federal and provincial jurisdictions was also required by the last paragraph of section 91. In both of the fishery cases, he paraphrased this paragraph (incorrectly) to the effect that "none of the classes of subjects enumerated in the 91 st section should come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects assigned exclusively to the local legislatures and specifically stated in the last paragraph of the 92 nd section". This converted a provision that was clearly designed to preserve some degree of federal jurisdiction in respect of matters within section 92, into a provision that had the opposite effect of removing from section 91 all matters that came within section 92 enumerations. This mistake on Fisher's part was identified by Jeremiah Travis, who himself made the mistake of assuming that the final paragraph had to be interpreted in the way it was by Ritchie (the correct way in Travis' view) or in the way it was by Fisher. In reality, the second potentially valid interpretation was that eventually adopted by the Privy Council, which was that a matter that came within section 92 could nevertheless be the subject of valid federal legislation if it also came within a section 91 enumeration.

This did not however mean, as Ritchie believed it did, that the matter was in the meantime removed from provincial legislation. See *Justices of Kings County* (1875-1876) 16 N.B.R. 621, at p. 637; *Robertson v. Steadman* (1878-1879) 18 N.B.R. 580, at pp. 593-594; Travis, supra at pp. 5-12; Paul Romney, Mr. Attorney: The Attorney-General for Ontario in Court, Cabinet and Legislature, 1791-1899 (Toronto, University of Toronto Press, 1986) at pp. 272-274; and *A.-G. Ont. v. A.-G. Can (Local Prohibition Reference)* [1896] A.C. 348, at pp. 359-360 and 354-355. It should be noted however, that Fisher's view of the concluding paragraph of section 91 may have changed by the time he wrote his judgments in *Grieves* and *Fredericton*. At several points in these judgments, he said that the Canada Temperance Act would be constitutional, regardless of whether it encroached on provincial jurisdictions, if it was found to be necessary to the regulation of trade and commerce. He may have thought that this early version of the necessarily incidental doctrine was required by the last paragraph of section 91, for he said that if the Canada Temperance Act was found to be necessary to the regulation of trade and commerce, it would have to "be deemed to be within the power of Parliament". *Grieves*, supra, p. 18; *Fredericton*, supra, p. 169. On the other hand, in the fishery cases, Fisher also spoke of legislation that would be within federal jurisdiction because necessary to effective regulation of the fisheries. As these were the cases in which Fisher explicitly interpreted the deeming clause in the erroneous manner explained above, it may be that his views as to the need to allow Parliament to in some instances "trench" on provincial matters had nothing to do with the text of section 91.

102. *Grieves*, supra, at p. 18; *Fredericton*, supra, at p. 170.

103. *Grieves*, supra, at p. 17; *Fredericton*, supra, at p. 168.

104. Some modern commentators have expressed a similar view as to how the Fathers of Confederation understood the division of powers; See Report Pursuant to Resolution of the Senate to the Honourable Speaker by the Parliamentary Counsel, relating to the Enactment of the British North America Act, 1867, any lack of consonance between its terms and judicial construction of them, and cognate matters, the O'Connor Report, (Ottawa, 1939), at p. 25 and, more particularly, A.S. Abel, "The Neglected Logic of 91 and 92", 19 University of Toronto Law Review, (1969) 487 at pp. 499-507.

105. *Grieves*, supra, at p. 19; *Fredericton*, supra, at p. 171.

106. *Grieves*, supra, at p. 20; *Fredericton*, supra, at p. 172. Somewhat confusingly, in speaking of the respective powers of Parliament and the legislatures to raise "a revenue upon intoxicating liquor in the manner they had always been accustomed to do", Fisher seemed to assume a pre-Confederation existence for the Dominion government. What he may have been trying to refer to is the divided jurisdiction over liquor revenues that had prevailed since 1867.

107. *Fredericton*, at pp. 172-175.

108. *Grieves*, supra, at p. 21; *Fredericton*, supra, at p. 173.

109. Fredericton, at p. 173.

110. *Grieves*, supra, at p. 22; *Fredericton*, supra, at p. 174.

111. *Grieves*, supra, at p. 22; *Fredericton*, supra, at p. 175.

112. *Grieves*, supra, at p. 20; *Fredericton*, supra, at p. 172.

113. *Grieves*, supra, at p. 22; *Fredericton*, supra, at p. 175.

114. *Grieves*, supra, at p. 17; *Fredericton*, supra, at p. 168.

115. *Hodge v. The Queen* (1883) 9 App. Cas. 117, at p. 130.

116. *Citizen's Insurance Co. v. Parsons* (1881) 7 A.C. 96.

117. *Fredericton*, at p.186.

118. *Ibid*, at p. 187.

119. Ibid, at p. 160.

120. Ibid, at p. 161.

121. Ibid, at p. 162.

122. Ibid, at p. 184.

123. Ibid, at p. 184.

124. Ibid, at p. 183.

125. Ibid, at p. 180.

126. A modern analysis of the underlying logic of the division of powers which supports the position that Fisher and Wetmore tried to stake out can be found in Albert J. Abel, "The Neglected Logic of 91 and 92", supra, esp. at pp. 499-507.

127. *The Queen v. Chandler. In re Hazelton* (1867-1869) 12 N.B.R. 556, at p. 560.

128. The "grand style" of the great American judges of the early eighteenth century is described in Elizabeth Mensch, "The History of Mainstream Legal Thought", in David Kairys, ed., The Politics of Law: A Progressive Critique (Pantheon Books, New York, 1982), pp. 18-40, at pp. 19-23; in Morton J. Horwitz, The Transformation of American Law: 1780-1860 (Boston, Harvard University Press, 1977), at pp. 1-30; and in Karl Lewellyn, The Common Law Tradition (Boston, Little Brown, 1960), especially at pp. 36-41 and pp. 62-72.

129. This view of Marshall's constitutional jurisprudence, which is a standard one, is presented in Archibald Cox, The Court and the Constitution (Boston, Houghton Mifflin, 1987), chapters 2 and 3. The phrase "judicial statesmanship" is used in reference to Marshall's decision in Marbury v. Madison on page 60.

130. Ibid, p. 77.

131. Professor Blaine Baker has demonstrated that eclecticism was a dominant element in the legal culture of mid-nineteenth century Upper Canada: see G. Blaine Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 8 Law and History Review, 219, esp. at pp. 233-262, and by the same author, "`So Elegant a Web': Providential Order and the Rule of Secular Law in Early Nineteenth Century Upper Canada" (1988), 38 University of Toronto Law Journal, 184. As Baker persuasively argues, one feature of an eclectic approach to the definition of law was that the applicability of a principle or rule did not depend on its jurisdictional origin. American and European sources were regularly used to develop the law, to the extent at least that they explained the principles and rules that were ordained by nature or God, and which accordingly applied in all well-governed societies. This jurisdictional eclecticism would have been familiar to Fisher. The commission that he served on in the 1850's for the consolidation and revision of statutes, and the reform of court practice and the law of evidence, consulted and followed the example of Maine and Massachusetts and of the United States generally, in its work; see (1854) Revised Statutes of New Brunswick, Vol. 1, p. x, p. xiii; Vol. 2, pp.ix-x; Vol. 3, p. xxii and p. xxiv.

132. See for example, the classic account of the eclectic origins of the constitutional thought of Revolutionary and late eighteenth century America in Gordon S. Wood, The Creation of the American Republic, 1776-1787 (New York, W.W. Norton, 1969) at pp. 3-10 and throughout.

133. Mensch, supra, at p. 20.

134. Ibid, at p. 22.

135. Morton J. Horwitz, "The Rise of Legal Formalism" (1975), Vol. XIX, The American Journal of Legal History, 251-264, at p. 251; and, by the same author, The Transformation of American Law, 1780-1860, supra, at pp. 1-30 and passim.

136. Baker, "The Reconstruction of Upper Canadian Legal Thought in the Late-Victorian Empire", supra, at pp. 244-245.

137. D.G. Bell, Legal Education in New Brunswick: A History (Fredericton, University of New Brunswick, 1992), at PP. 4-23, and especially at pp. 4-5 and pp. 18-23.

138. Gregory Marquis, "In Defence of Liberty: 17th Century England and 19th Century Maritime Political Culture", (1993) 42 University of New Brunswick Law Journal 69, at p. 84.

139. See Bell, "Judicial Crisis in Post-Confederation New Brunswick", supra, and Legal Education in New Brunswick, supra, at pp. 51-56.

140. Baker, "The Reconstruction of Upper Canadian Legal Thought in the Late Victorian Period", supra, at pp. 262-270, and R.C.B. Risk, "Constitutional Scholarship in the Late Nineteenth Century: Making Federalism Work" (1996) 46 University of Toronto Law Journal 427.

141. Abel, "The Neglected Logic of 91 and 92", supra.

142. See Risk, supra, attributing the same basic understanding to the Quebec jurist T.J.J. Loranger in his, Letters Upon the Interpretation of the Federal Constitution (1883).

143. Richard Risk and Robert Vipond,"Rights Talk in Canada in the Late Nineteenth Century: 'The Good Sense and Right Feeling of the People'" (1996) 14 Law and History Review 1, at p. 12, quoting the Quebec MP, Galium Amyot on a federal Day of Rest Act: "When we joined Confederation, we joined it as a commercial partnership, not as a salvation army".

144. Risk, "Making Federalism Work", supra, at pp. 450-451 and pp. 452-457, and Risk, "Canadian Courts Under the Influence", at pp. 730-731.

145. See, for example, P.W. Hogg, Constitutional Law of Canada (Carswell, Toronto, 1997), at pp. 781-785.

146. See for example, *Re Alberta Statutes* [1938] S.C.R. 100, and *Switzman v. Elbling* [1957] S.C.R. 285.

147. *Scowby v. Glendinning* [1986] 2 S.C.R. 226.

148. *Fredericton*, at p. 187.

149. Ibid, at p. 152.

150. Risk and Vipond, supra.

151. *Fredericton*, at p. 165.

152. Quoted in Robert Vipond, Liberty and Community: Canadian Federalism and the Failure of the Constitution (Albany, State University of New York Press, 1991), at p. 175.

153. Canada, House of Commons Debates, 1 April, 1884, 1249; quoted in Vipond, supra, 174.

154. Vipond, supra, at p. 174.

155. Vipond, supra, at pp. 177-182 and pp. 89-91; Stychin, "Formalism, Liberalism, Federalism: David Mills and the Rule of Law Vision in Canada", (1988) 46 University of Toronto Faculty of Law Review, at pp. 209-218; and see generally, Murray Greenwood, "David Mills and Co-ordinate Federalism, 1867-1903", (1978) 16 University of Western Ontario Law Review, 93.

156. Risk and Vipond, supra, at pp. 19-20.

157. Vipond, supra, at pp. 89-91 and pp. 177-182.

158. Ibid, at p. 179; the tendency of the Anti-Federalists to equate state or local government and virtuous government, is described and explained in Gordon S. Wood, The Creation of the American Republic, 1776-1787 (New York, W.W. Norton, 1972), at pp. 10-28 (esp. at p. 25), pp. 515-516, and pp. 519-524. See also Edmund S. Morgan, The Birth of the Republic (Chicago and London, University of Chicago Press, 1977 Revised

Edition), at pp. 109-111 and pp. 147-148. A brief sketch and analysis is also provided by Mark Tushnet, "Federalism and the Traditions of American Political Theory", (1985) 19 Georgia Law Review 981, at pp.982-984 and pp.988-991. The place in Anglo-American political thought of a distrust of distant government, and its influence within Canada, is explored in Elwood H. Jones, "Localism and Federalism in Upper Canada to 1865" in Bruce Hodgins et al., eds., Federalism in Canada and Australia: The Early Years (Wilfred Laurier Press, 1978), at p. 20.

159. Vipond, supra, at pp. 47-82 and pp. 114-139, and Paul Romney, Getting it Wrong: How Canadians Forgot Their Past and Imperilled Confederation (Toronto, University of Toronto Press, 1999) at pp. 42-55, pp. 87-108 and pp. 109-123.

160. Phillip A. Buckner, "The Maritimes and Confederation: A Reassessment", in Ged Martin, ed., The Causes of Canadian Confederation (Fredericton, Acadiensis Press, 1990), at pp. 86-113, at pp. 106-113. See also Peter M. Toner, "New Brunswick Schools and the Rise of Provincial Rights", in Bruce W. Hodgins, et al., eds., supra.

161. *The Mayor, Aldermen and Commonality of the City of Fredericton v. The Queen (on the Prosecution of Thomas Barker)* (1880) 3 S.C.R. 505, at pp. 554-556 (per Henry J.)

162. See the literature reviewed in Baker, "The Reconstruction of Upper Canadian Legal Thought in the Late Victorian Period", supra.

163. Marquis, "In Defence of Liberty: 17th Century England and 19th Century Maritime Political Culture", supra.

164. The exception, John Hamilton Gray's, Confederation: or, the Political and Parliamentary History of Canada from the Conference at Quebec to the Admission of British Columbia (Toronto, Copp, Clark & Co., 1872), is an unrevealing compilation of speeches and newspaper articles.

Chapter 5

Federalism, Nationalism and Constitutional Stability: The Constitution According to Acalus Palmer

The *Fredericton*[1] case is the centre of this thesis because it best shows the judges of the New Brunswick Supreme Court in transition from the subordinate federalism of *Chandler*[2] to the coordinate federalism of *Maritime Bank*.[3] Fisher's judgment has been profiled because it best articulates the explication of the overall architecture that each of the judges in the *Fredericton* majority to some extent shared. In addition, Fisher is simply the most interesting, particularly in the link he made within constitutional adjudication with some of the fundamental influences of the provincial rights movement.

Acalus Palmer, the dissenter, fundamentally disagreed with Fisher's understanding of Confederation. He rejected the assumption, common to all of the majority, that the provinces as the relevant community of interest for matters, such as intemperance, that concerned or threatened the social fabric. He instead portrayed intemperance as a threat of national dimensions that needed to be addressed as such, at least if Parliament made that determination. Obviously, this reflected what he thought about the seriousness of intemperance. But it also flowed from his rejection of Fisher's idea that Canada was an

economic union. For Palmer, it was a new society. Palmer also disagreed vehemently with Fisher on the mechanism chosen by the founding fathers for the embodiment within the BNA Act of the principles of the British constitutional tradition, including the protection and security of property and other individual rights. Fisher said it was the division of powers. Palmer responded that it was the construction of the constitution of both federal and provincial governments in accordance with the British model of the "balanced constitution". This meant that the BNA Act, in true fidelity to British precedent, left the protection of property and other rights to Parliament or to the legislatures, depending on which had jurisdiction over the legislative "matter". It meant Fisher was trying to take the court beyond its proper station. It meant he was threatening Canada's constitutional stability.

Separate consideration of Palmer is important for three reasons. First, the challenges Fisher not only on his understanding of the BNA Act and of the balance of power between Parliament and the legislatures but also on his account of the objects of Confederation and their relationship to the constitutional values of British, and therefore Canadian, constitutionalism. Most obviously, where Fisher emphasized the special importance of the jurisdiction over property and civil rights, Palmer emphasized the breadth and sweep of Parliament's powers. Where Fisher emphasized individual liberty, Palmer emphasized constitutional and social stability. Where Fisher emphasized the role and responsibilities of judges, Palmer emphasized the role of Parliamentary institutions and of executive power, particularly the executive power of the central state. Where Fisher implicitly expressed his own confidence and the confidence of the founding fathers in local democracy, Palmer emphasized the importance to the Confederation scheme of appointed upper houses of "sober second thought". Finally, where Fisher emphasized the continuation of the provinces as distinct communities joined together through Confederation by common economic interests and matching (and limited) federal powers, Palmer emphasized Confederation as the creation of a new and common nationality held together by a federal government with powers broad enough to address matter deemed by the national government to be of national interest. By seeing Palmer's challenge to Fisher at this level, we can see that the disagreement within the court in *Fredericton* was deeply rooted on issues that Palmer and Fisher thought fundamental.

The second reason for looking at Palmer in more detail is that he represents the opposite tradition from Fisher in the New Brunswick reaction to Confederation. He supported Confederation, not on the basis that it would protect the position of the provinces, but on the basis that it was close enough to a legislative union to be an acceptable alternative to outright

abolition of the provinces. His judgment in *Fredericton*, taken together with his parliamentary speeches, can be read as an attempt to interpret the BNA Act so that it could function as much as possible like the legislative union that he would have preferred. The speeches and *Fredericton* together give the outlines of the constitutional rationale for this attitude to Confederation, which was shared in New Brunswick among those who, like Palmer, preferred a legislative union but accepted Confederation as the best that could be achieved, and those who, like Allen, opposed Confederation because it called for a federal and not a legislative union. In this way, just as Fisher provides a look back on the branch of New Brunswick opinion that either embraced or spurned Confederation on whether or not it satisfied their desire for provincial independence and importance, Palmer provides a look back on the thinking of those who either rejected or accepted Confederation on the opposite criteria.

Palmer's abiding preference for legislative union, or a federalism that was as close as possible to legislative union, also connects him to the broader Canadian attitude that saw a predominant national government at the centre of the BNA Act. Just as Fisher's judicial construction of a rudimentary provincial rights framework sheds light on the broader Canadian movement for provincial rights, Palmer's efforts to construct a defense of centralized federalism and relate it to constitutional adjudication, sheds light and perspective on the foundations in Canadian constitutional thought of that understanding of Confederation, whether from within or without New Brunswick. It will be seen that Palmer's constitutional arguments reflect key elements of nineteenth-century toryism. Part of the interest in Palmer is that he took this approach with him from the floor of the House of Commons to the New Brunswick bench.

This leads to the third reason for separate consideration of Palmer. In *Fredericton*, he defended the essential elements of the *Chandler* approach to division of powers analysis but, unlike Ritchie, provided a much broader constitutional rationale for it. He articulated the constitutional premises that, in his view, lay behind the words of the BNA Act and compelled their interpretation essentially in accordance with the interpretation that had been given to them by Ritchie. His jurisprudence was, in this regard, more like that of Fisher, with whom he bitterly disagreed on the constitutional questions, than it was like that of Ritchie, whom he sought to vindicate. It was highly functional. It connected openly to the basic principles and objectives that were larger than the words of the particular provisions dealing with this or that power, or even with all of the words of sections 91 and 91 taken togther. In short, Palmer also was prepared to judge constitutional cases in the grand style that historians now call "pre-

classical".

Like Fisher, Palmer saw this larger framework of principles and objectives as connected to the desire of the Fathers of Confederation for a federal constitution that was somehow nevertheless "similar in principle to that of the United Kingdom". But where Fisher saw the connection federalism and the British constitution in provincial responsibility over property and civil rights, Palmer saw it in the preservation of parliamentary sovereignty as the fundamental operating principle of the constitution, even with federalism. In this respect, he and Fisher taken together show how wide and fundamental the debate in *Fredericton* was relative to the more restrained and limited discussion and analysis observable in the constitutional jurisprudence of other nineteenth century courts, especially the Privy Council.

II

To see Palmer in these terms, it is necessary to place *Fredericton* in the context of his earlier career, especially his parliamentary speeches on the constitution. When Palmer came to the bench in 1878,[4] he had just lost his seat in Parliament in the general election of that year. Although he had described himself as an "independent liberal" during the MacKenzie administration, Macdonald and Tilley may have had little difficulty in thinking him deserving of reward. In the New Brunswick elections of 1865 and 1867, he had taken on the hopeless task of running in favour of Confederation against the anti-Confederation leader, Albert J. Smith, the "lion of Westmorland".[5] Then in Parliament, particularly after the 1874 election, Palmer showed himself to be an able supporter of some of the key elements of John A. Macdonald's nation- building platform for the new country and a dependable supporter of Macdonald's constitutional positions. The latter showed through persistence and some effectiveness as critic of the constitutional ideas and theories of David Mills, Parliament's leading advocate for "provincial rights".

Palmer came to the bench with a reputation for high legal ability. Writing in 1911, William H. Tuck, then New Brunswick's retired Chief Justice, remembered Palmer as a "great lawyer" who "had brain power equal to that of any man I ever knew".[6] Even Jeremiah Travis, who said little good about anyone but himself, had to agree he was a talented and able lawyer.[7] On the other hand, he arrived on the bench with an equally strong reputation for questionable honesty. Born in 1820 in Westmorland County, the son of a long serving member of the legislative assembly, Palmer was called to the bar in 1846, having been a

student at law with Edward Barron Chandler, later Father of Confederation and then a leader of what young radicals like Fisher and Lemuel Wilmot liked to call the "compact party".[8] Quickly, Palmer got into ethical difficulties. Just one year after his admission to the profession, he was the target of three separate complaints from disgruntled clients that resulted in a public meeting at Dorchester. In 1848, a Barristers' Society motion recommended censure and an order to, "forthwith restore to the respective parties mentioned in said report, the monies improperly exacted from them".[9]

In 1853, Palmer was again in trouble. In *Doe v. Dobson*, the Supreme Court described Palmer's initial fee on an appeal from a taxation of costs as "extraordinary", "monstrous" and "startlingly disproportionate". "The concoction of such a Bill", said the Court, can only be explained by a system which might be adopted by a person who would put down every charge divisible by extreme ingenuity in the hopes that in the mass of extortion some few fragments might escape detection".[10] The Barristers' Society expressed horror and deep concern for public confidence in the profession and requested the attorney general apply to the Court for an order requiring Palmer to show why he should not be struck from the role of attorneys.[11] Nothing came of this and by 1861, Palmer was able to get elected as bencher of the Bar Society, something that said, in the view of several prominent lawyers, all too much about the standards of the profession in New Brunswick.[12] Eventually, Palmer was elected society president in 1877. By then, he had moved to Saint John in 1867[13] and been elected to Parliament in 1872 and then re-elected in the Pacific Scandal election of 1874.

In Parliament, Palmer was a strong Canadian nationalist. He showed strong support for aggressive nation-building led by a federal government armed with the powers and the policies needed to build a new country and claim a continent. For example, he supported the government's involvement in railway construction in the west.[14] He also supported the annual resolutions in supply through which Macdonald, after 1874, developed his "national policy", built on tariffs designed to foster domestic manufacturing activity,[15] perhaps at the cost of his seat in 1878.[16] Palmer's nationalism went almost to the point of thinking of Confederation as the achievement of Canadian independence. In a debate on possible application of British shipping law to Canadian tonnage, he claimed rights of self-government for Canada virtually the same as those of an independent country and saw this reflected in Parliament's power to make all laws necessary for the peace, order and good government of the country.[17] He distinguished between the legal power of the Imperial Parliament to legislate for Canadian ships, which he conceded existed, and the constitutional right to legislate for Canada, which

he said did not exist.

On constitutional matters, the two most interesting speeches came in debates with David Mills. One was on the permissible scope of the federal government's power to establish a Supreme Court and the other on Senate reform and constitutional amendment. In both, a major theme for Palmer was the creation through Confederation of strong national institutions and the particular importance of those institutions to New Brunswick and other small provinces. In particular, both speeches show that Palmer saw federalism giving way where necessary to facilitate effective national institutions. This was consistent with the more general manifestation of Canadian nationalism and the association of it with Parliament's grand domain over the "peace, order and good government of Canada".

Both debates took place in 1875, and are, as between Mills and Palmer, best understood as skirmishes in their larger debate about the essential character, even identity, of the BNA Act. The context for the Supreme Court debate was the authority of Parliament under s. 101 of the BNA Act to establish "... a general Court of Appeal for Canada ...for the better administration of the *laws of Canada*". Under this provision, the liberal government introduced a bill that proposed giving the new Supreme Court jurisdiction to hear appeals under provincial as well as federal law.[18]

Mills opposed the bill and relied on the "federal principle" to support his argument that "the laws of Canada" meant (and could only mean) the laws of the federal government and not the law of the various provinces.[19] It could, said Mills, be no concern of the people of New Brunswick (for example) how the courts interpreted the laws which only applied to those who lived in Ontario.[20] And if the people of New Brunswick were dissatisfied with the manner in which their own courts were construing their own laws, the remedy was their control of their provincial legislature, not an appeal to a federal court largely composed of men with no experience of the laws of New Brunswick. Local provincial self-government, not judicially imposed national uniformity, was the only avenue of redress that was consistent with the "federal principle". The very essence of the federal principle was that national institutions should only be concerned with matters affecting the whole nation, not those of direct concern only to those living in one of the federation's component parts. In contravention of this principle, the Supreme Court Bill treated "the whole judicial department ... as though this was a legislative union".[21]

Palmer's rejection of the "federal principle" and the Millsian doctrine of constitutional duality was a mix of the theoretical and the practical. He started by saying, "the mode of

argument adopted by the honourable member for Bothwell, drawn from the eternal fitness of things or what he called the federation principle, might be very well when applied to a question of policy, but was entirely out of place in discussing a mere question of law".[22] He worried that some members, following Mills, "were too apt to lose sight of the fact that they were not to decide what powers they [i.e. Parliament] should have, but simply what powers the British North America Act had given". This was to be done by the ordinary rules of statutory interpretation, including the principle that the ambiguity of "laws of Canada" was to be resolved by looking at the, "law and status of the parties affected by the Act before it was passed", so as to identify the "evils it was intended to remedy". These were revealed by the Quebec Resolutions, which spoke of a Court of Appeal "for the Federated Provinces", not Canada, and thus captured provincial as well as federal law.[23] This showed that the evil that the Fathers had targeted was the inability of the "smaller Provinces" to support Courts of Appeal. Against this background a "General Court of Appeal *for Canada*" meant exactly what Mills said it could not: a court with jurisdiction to hear appeals under provincial law.

Overall, Palmer's analysis of section 101 built on several of the themes that ran through the rest of his speeches on the constitution and on into his rulings in constitutional cases. First, he was a Canadian nationalist who generally identified with strong national institutions that transcended federal-provincial jurisdictional boundaries. Palmer's federalism was definitely not one of water-tight compartments, at the legislative, the executive, or judicial levels.[24] Another and closely related tendency was the particular association of the interests of New Brunswick, and of other small provinces, with these national institutions rather than with provincial institutions. The national parliament, the federal executive and other national institutions had the capacity to provide to the small provinces what they could not provide to themselves. A third and broader theme also reflected in the Supreme Court speech was the understanding of law in general and of constitutional law in particular that lay behind Palmer's explanations of Confederation and of the BNA Act. He insisted on a *sui generis* treatment of the BNA Act with interpretations based on the specific words of each section and upon the specific history of Confederation, rather than on a general theory of federalism.

Palmer's speech on Senate reform and the process of constitutional amendment built on each of theses themes and introduced another: the role of Confederation as bulwark against democratic excess and as a guarantor of political and social order. Mills began the debate by arguing it was necessary to, "confer upon each province the power of selecting its own senators and to define the mode of their selection". Again consistency with the "federal

principle" was the objective.[25] It was an anomaly for Mills that a federal constitution should give the central government the power to appoint those who were intended to represent the constituent states within the national legislature. The Senate was a federal rather than a national body. It had never been intended to perform the kind of general legislative function that the House of Commons, as an elective body, had been designed to discharge. But the senators could only be expected to effectively discharge their limited but essential task if they acted as genuine representatives of the provinces; the sovereign entities whose interest they were supposed to protect. In Mills' view, this imperative dictated provincial rather than federal appointment or, if provinces so wished, provincial election of senators.

Mills anticipated the challenge that he knew would come from the "Honourable member for Saint John". [26] In 1874, Palmer had argued that Parliament had no right to amend any part of the constitution without the consent of the provinces. Melodramatically, he had described the contrary suggestion from Mills as, "decidedly vicious". Now Mills explained that Palmer was under the fundamental misapprehension that the BNA Act created a single indivisible constitution. Instead, it created two distinct and complete constitutional orders, that of the government and Parliament for the whole Dominion and that of the separate, sovereign and independent provinces. As the Senate was part of the constitution of the national government, it followed that any amendment of the BNA Act relating to the Senate could in no way be seen as diminishing or affecting the constitutions of any of the provinces. Provincial approval (or even consultation) was not necessary. Parliament could unilaterally amend the Senate provisions just as any of the separate provinces could unilaterally change the mode by which it selected its legislative council.

The argument was classic Mills. It relied on his bedrock principle of constitutional liberalism, that the role of constitutional law (as of all law) was to demarcate and enforce the boundaries within which each level of government (and all legal actors) could enjoy a sphere of absolute autonomy. The problem was that the theory did not fit well with Mills' immediate objective, which was to have the House of Commons recognize the Senate as a federal body subject to provincial appointment. It was at the very least peculiar that this federal body, which the provinces were entitled to control, was simultaneously to be seen as a part of the distinct constitution of the national government that could be changed without provincial consent. The provinces had the right to control the Senate by virtue of what Mills called "the federal principle", but not the right to decide how they would exercise that control, or indeed, whether they would exercise it at all.

Palmer tried to exploit the contradiction. He asserted that the essence of the federal principle was that no change could be made to a federal institution such as the Senate without the consent of the provinces for whose protection the Senate was created.[27] For Palmer, echoing the views of Steadman, the fact that the separate provinces were self-governing before Confederation meant that the Imperial Parliament could not have enacted the BNA Act without their consent. It could not therefore have provided for a Senate appointed by the federal executive without the same consent. It followed that the mode of Senate appointment could not be altered without the consent of the same self-governing colonies. Accordingly, Mills was wrong to bring his resolution for imperial amendment before Parliament. Instead, he should have brought a resolution calling for a "joint [sic] convention of the provinces, afterwards initiating any measure on the subject in the Local Legislatures, and afterwards passing it through the Dominion Parliament".

Palmer also challenged Mills' theory of constitutional duality even more directly than he had done so in the Supreme Court debate.[28] He found it impossible to accept that the Constitution of Canada and of New Brunswick were distinct. He accepted each had, "a mode of government peculiar to its self", but the government and legislature of both operated under a single and indivisible constitutional regime. Confederation had been achieved because each of the original provinces, "supreme in its own jurisdiction", had agreed to transfer certain of their powers to a central Parliament. But this transfer had been subject to, "certain well defined conditions", one of which was that the transferred powers "be dealt with by a nominative Senate". This showed, in Palmer's view, that the BNA Act formed a seamless constitutional web, and that accordingly, Mills' theory of divided and separate jurisdiction in the area of constitutional amendment was plainly wrong.

Mills had attempted to show that unilateral reform of the Senate was permissible because it did not "diminish the powers of the local Legislatures". This was for Palmer an impossible dichotomy. The powers of the local legislatures were a function of the compact under which the confederating provinces had agreed to transfer certain powers to a national government and Parliament of a certain character and composition. As Palmer rather cleverly pointed out, a Senate nominated by the federal executive was as much a part of that Parliament as an elected House of Commons. It followed that Parliament could no more reassign the power to appoint senators than it could unilaterally transform the House of Commons into an appointed body. He described unilateral amendment as a "dangerous" principle that would be "subversive of the independence of his Province". Either move would

entitle the provinces to order the return of the powers they had agreed to transfer to the national Parliament and government as part of the Confederation package. Obviously, this was very much a contractual analysis, similar to a provincial rights analysis and it is important to note that Palmer invoked the provincial rights of New Brunswick on several occasions in his career in Parliament.[29] However, he invoked provincial rights on this issue to prevent a change that might weaken the preeminence of the centre in federalism by putting the Senate in the hands of the provinces.

In short, a Senate appointed by the national government and the existing division of powers were interconnected elements of a single constitutional framework. In making this argument, Palmer again distanced himself from what he called Mills' theorizing about the "eternal fitness of things"; the specific details of the 'compact of union" were determinative, not constitutional theories. Mills had said a Senate intended to protect the provinces but appointed by the federal government was more consistent with a legislative union than a federal one to emphasize the seriousness of the mistake that he saw in the BNA Act. Perhaps to emphasize the depth of his disagreement, Palmer responded by sharing that he had, at Confederation, supported the Quebec scheme of union even though his preference had been for a legislative union. He told Mills and the House he would support it still, if others joined him, as the best means of achieving "equality" for New Brunswick and the other small provinces.[30]

In this and the Supreme Court debates, Palmer tried to make, or to keep, Confederation as much like a legislative union as possible, the obvious limitations of the BNA Act notwithstanding. He clearly saw this as in the best interests of New Brunswick, hence the suggestion that a legislative union would mean provincial equality for New Brunswick. One side of Palmer's thinking on this might be suggested by the use he made of the inability of New Brunswick (and of Nova Scotia) to support a court of appeal in the Supreme Court debate. The larger point may have been that inequality was the consequence of federal rather than legislative union because of the differential capacity of provinces to utilize provincial powers.

A broader explanation for the connection between legislative union and provincial equality is that Palmer's understanding of Confederation rested largely on the principles of nineteenth-century toryism.[31] This is seen most directly in his opposition to an elected or partly elected Senate. But essentially tory premises are detectable in his support for legislative union and his insistence that senators not only be appointed but appointed by the Dominion government. Both were consistent with the tory preference for a high level of centralization of power. Part of the rationale for this position was that decentralization of power tended to

increase the influence of democratic institutions relative to the influence and independence of the executive branch, represented by the Crown and its advisors.[32] But another part of the thinking was that centralization of power within larger political entities created larger public offices and opportunities for the "men of ambition" who would thereby have their horizons lifted above the factionalism, favouritism, pettiness and division of local politics.[33] Centralized authority, in other words, stimulated broader vision and loyalties, and higher and nobler aims.[34]

Palmer probably thought legislative union promised equality for New Brunswick because it would lift Canadian politics above the divisiveness, the smallness and the regionalism of local politics. His thinking may have been along the lines that, as long as the provinces existed as distinct entities, national politics would be conducted by men concerned with protection of the interest of their province, rather than with national interests that transcended provincial divisions. This replicated the differential capacities of the provinces within national institutions due to their relatively small representation in those institutions. In contrast, legislative union (or near legislative union) would reduce or eliminate the competition between provinces within national institutions that would always work to the disadvantage of the provinces with the smaller representation. It would do so by producing statesmen motivated by a common and inclusive national interest in place of politicians who thought of themselves primarily as representatives in national affairs of distinct provinces. This would extricate the smaller provinces from the squeeze that the federal union placed them in. In the provincial realm, they were left with powers that they could not exercise to the same extent as larger provinces. In the federal realm, their relatively small representation meant limited influence, accentuated by the configuration of even national politics around the distinct interests of the separate provinces rather than around a common national purpose. Palmer's favourite example of the latter was the continuing payment of lower salaries to the federally appointed judges of Nova Scotia and New Brunswick than to the federally appointed judges of Ontario and of Quebec, seven years after Confederation.[35] Palmer appeared to accept that this dynamic of provincial over common national interests was an unavoidable part of a federal union but he refused to accept that the inexorable logic of "the federal principle" required strengthening the dynamic through either a Senate appointed by the provinces or a Supreme Court with a jurisdiction limited to federal law.

This interpretation fits with his New Brunswick background. Within the New Brunswick context, those who had either opposed Confederation because it was not a legislative union or who, like Palmer, supported it because it was sufficiently like a legislative union, identified

with the view that New Brunswick politics would always be squalid, petty and undignified because the province was not large enough to produce enough good men for statesmanship.[36] Across nineteenth century British North America, such low expectations for local politics was not limited to New Brunswick but it was certainly pronounced in New Brunswick. In New Brunswick, it came largely but not exclusively from the conservative elements of New Brunswick politics, and was almost certainly reinforced by resentment against the shift in power between social classes that had accompanied responsible government. For those who fell into opposition to Confederation on this basis, the fear was that a federal union could only make matters worse by siphoning off the few good men to the broader horizons of national politics, making local politics even more debased and degraded.

The more specific relevance of this to the Senate debate is that Palmer was saying that the Senate protected against the risk of democratic excess in two ways. One was the straightforward means of counterbalancing the elected chamber with an appointed upper chamber. In other words, the Senate protected against excess from the House of Commons. But also, the Senate guarded against democratic excess by protecting the national government and Parliament from the influence of local factionalism. It did this by being a centrally appointed and therefore a national rather than a regional body. Of course, this amounted to a fundamental disagreement with Mills as to what the purpose of the Senate was. Mills said it was representation of the provinces. Palmer said it was representation of property and national over local interests.

Palmer's position on the Senate and his support for legislative union were not the only signs of the influence of essentially tory ideas. The vehement objection to "constitutional dualism" was consistent with the fundamental tory premise that in every state, federal or not, there had to be an ultimate and universal sovereign authority.[37] The influence of this idea can also be seen in Palmer's support in 1878 for Macdonald's resolution for parliamentary censure of the lieutenant governor of Quebec, after he unconstitutionally dismissed Quebec's Conservative government. This support rested partly on the conclusion that the lieutenant governors were appointed by the federal government and were therefore federal officials like any others, but it was also more fundamentally based on the view that Canada's constitutional stability required local executives to be accountable to the federal executive.[38] The premise of ultimate constitutional unity also makes sense of Palmer's conclusion that Parliament (and the legislatures) could conditionally delegate legislative authority to the provincial legislatures (or to Parliament). It followed for Palmer from the doctrine of parliamentary sovereignty

because it authorized delegation without limitations in the United Kingdom and parliamentary sovereignty applied in Canada as much as in the United Kingdom. In addition, parliamentary sovereignty would prevent delegations from being abused or becoming permanent since it meant that each successive parliament or legislature could revoke prior delegations and were therefore accountable for legislation made under delegated authority.[39] The latter episode provided a further and distinct point of connection with tory thinking - the premium placed on the ability of central governments with a strong executive to provide energetic government.[40] It is also interesting because the delegation question arose in relation to the Dunkin Act, the local option temperance legislation of old Canada and Palmer used his part of his speech on delegation to state his view that temperance was a federal matter.

Generally, Palmer's fairly consistent themes were his preference for the national over the local, the minimization of federalism's interference with the capacity for strong federal action, a strong emphasis on parliamentary sovereignty, and the distinction between constitutional and pure democracy. Clearly, Palmer's constitution was very similar to the constitution of John A. Macdonald and the Conservative Party. It positioned a federally appointed Senate at the centre of Confederation. It accentuated the features of the BNA Act that were most like those of a legislative union. It gave the federal executive ultimate control of the executives of the local governments. It gave the Dominion a broad mandate to establish institutions that were national, not merely federal, including a Supreme Court chosen from the best lawyers across the country with a mandate over provincial as well as federal law. It proclaimed Parliament to be "paramount" and therefore able to delegate legislative power to the provinces, to dictate how it was to be used and to withdraw it, as and when Parliament saw fit. Overall, Palmer seemed to agree with Macdonald that a, "constitution similar in principle to that of the United Kingdom" was one under which the federal Parliament and the federal government could function as much like the Parliament and government of the United Kingdom as possible. It was a constitution in which federalism played a subordinate role to this imperative.

The political and constitutional value served was stability, the value on which all of the main elements of tory constitutional thinking were based.[41] The emphasis on stability was one of the strongest indications of continuity between late-nineteenth century thinking and earlier loyalist ideals. For the loyalists, the instability of the American colonies, and particularly their independence from a central authority, explained the American War of Independence. For the later Tories, the lesson was refreshed by the American Civil War. Interestingly, Palmer came

to Parliament advertising that he was the grandson a loyalist who, "left a large property at Westchester, N.Y. at the time of the War of Independence".[42] With much hyperbole, he supported Macdonald's motion by saying the Liberal argument that the Lieutenant-Governors were independent of the federal government would mean that, "Local Governments would now be overturned, turmoil and disaster would be introduced throughout the length and breadth of the land if this principle, fraught with evil to the people of this country, was endorsed".[43]

On the other hand, as much as these positions linked Palmer to the John A. Macdonald on account of the constitution, it is important to note the differences in Palmer's views and in the explanations he gave for the outcomes that both he and Macdonald supported. For example, as much as Palmer agreed with Macdonald on the specific question of senatorial appointment, there can be little doubt that Macdonald must have disagreed with Palmer's argument that all amendments to the constitution required approval at a constitutional conference. Similarly, whereas Macdonald rested his argument for the delegation of Parliament's legislative powers, with or without conditions attached, upon the subordinate status of the provincial legislatures as "quasi-legislators", Palmer sought to reach the same result through applying to federalism a doctrine of parliamentary sovereignty that worked both ways: it applied to delegations from the provinces to Parliament as much as to delegations in the other direction.

In both cases, Palmer can be seen to have found a way to support Macdonald (or the outcome that Macdonald would surely also have supported in the Senate debate) but on reasoning that avoided the broader implications of the supporting arguments used by Macdonald (or, in the Senate debate, that he might have used). Palmer, as one of the few Maritime participants in these debates, can therefore be seen to be searching for a middle position between the two extremes, respectively represented by Mills and by Macdonald, in debates that read very much like Ontario debates. A sense of the vulnerability of New Brunswick (and of other small provinces) with either extreme may be the explanation. On constitutional amendment for example, Palmer's attack on the logical purity of Mills position, that each level of government had a distinct constitution that it could therefore unilaterally amend, was almost certainly based on the perception that the logic worked more to the advantage of Ontario than it would for New Brunswick and other small provinces. It meant Ontario and New Brunswick would both have equal control over their respective local constitutions but unequal control over the (to Palmer) more important constitution of the federal government, due to the very different levels of representation enjoyed by the two provinces in

the House of Commons. Hence Palmer's concern for the implications of the Mills theory to the "independence" of New Brunswick. Of course, Macdonald's approach to constitutional amendment would, from this perspective, be even worse. New Brunswick might even lose the ability to control amendments of it's own constitution. In contrast to both alternatives, a requirement that all proposed changes be submitted to a constitutional conference, where each province would have an equal say, promised security or, to use Palmer's word, "independence" for all provinces, including New Brunswick.[44]

In the end however, the differences with Macdonald are of far less significance in understanding Palmer than the differences with Mills. These reflected fundamental cleavages in the way each understood the BNA Act and related differences in the way each framed and thought about the Act's meaning. The differences on constitutional understanding in turn point to differences in the underlying patterns of thinking about law and legal reasoning that the two men drew upon.

For Mills, the fundamentally important characteristic of the BNA Act was that it was a federal constitution.[45] Federalism was the central, organizing and defining principle of the Act and consistency with the "federal principle" was, and had to be, the Act's organizing principle. As explained in chapter 2, it linked Canada's constitution to the mainstream of late-nineteenth century Anglo-American legal liberalism. But it also linked Canada's constitution to the constitution of the United States. On this view, the differences between the BNA Act and the American constitution were less important than the federalism they had in common.

In comparison, Palmer started from the opposite premise, that the uniqueness and particularity of the BNA Act (including its historical context) explained its meaning and governed its interpretation. For him, the BNA Act was first, the constitution of Canada and second, a federal constitution. Federalism was but one of the mechanisms used by the Fathers of Confederation to accommodate and address the divergent and even competing or contradictory interests and objectives of the sovereign political communities that had come together in the "compact of union". The other and equally important mechanisms included a Senate tasked with protecting property as well as provincial interests, and therefore appointed by the federal government; a Supreme Court with jurisdiction over provincial as well as federal cases; federal supervision of provincial governments through control over lieutenant governors; and the powers to disallow or reserve legislation. These departures from the abstract "federal principle" were not mistakes, but conscious responses to the interests, objectives and principles of good government that were either not addressed by federalism or

which federalism would positively harm. Hence, just as conformity to an abstract and ideal federalism had given way in the making of Confederation, it had to give way in the interpretation of the constitutional statute that was designed to implement Confederation. Federalism governed in constitutional interpretation only to the extent actually adopted by the specific provisions of the BNA Act.

In sum, it can be said that the BNA Act was a different constitution for Palmer than it was for Mills. The BNA Act was for Mills best understood as a federal constitution; for Palmer, it was only the statutory component of the constitution of Canada. Each drew upon different constitutional traditions in their respective efforts to understand and to explain the BNA Act. The emphasis that Mills placed on the existence of two distinct constitutions within the Act, one national and the other provincial, and his emphasis on the equal sovereignty and autonomy of the provincial governments, obviously reflected American influences. It seems equally clear that Palmer's understanding of the Act followed an older British tradition. For Palmer, the BNA Act was to be understood primarily as the product of political accommodation, through pragmatic statesmanship, of the varied, competing and even contradictory interests and objectives of the distinct political communities that came together to form a union. Whether or not Palmer himself would have made the connection, this perhaps placed the BNA Act more in the tradition of the Quebec Act in British North America, and of the United Kingdom's own Act of Union, than in the tradition of the constitution of the United States. It was more about inter-community accommodation than it was abstract principle. More fundamentally, the consistency with British tradition seems apparent in the attempt to portray the BNA Act as a single indivisible constitutional regime of interlocking parts. For him, the separate federal and provincial components were brought together into a greater integrated constitutional structure through federal appointment of the Crown's representative to the provinces, the federal powers of reservation and of disallowance, a Senate appointed by the national government, a national Supreme Court with jurisdiction over provincial as well as federal law, and the operation of the doctrine of parliamentary sovereignty across jurisdictional lines. These were not, to Palmer, imperfections in Canada's federalism, but essential and deliberate elements in a constitutional framework that was federal but also, "similar in principle to that of the United Kingdom". Significantly, most of these aspects of the constitution seemed clearly based either on the constitutional framework of the Empire (as in the case of disallowance, reservation and federal appointment of lieutenant governors), or upon the constitutional model of the United Kingdom itself (as in the case of the jurisdiction of the Supreme Court or the appointment of Senators).

Most of these examples emphasized the importance of national political institutions and of the constitutional principles that Palmer said governed legal powers and rights. This was a significant aspect of the underlying difference with Mills. Indeed, it can be said that the role of politics in Palmer's explanations of the BNA Act, including the operation of its federalism, and his confidence in the protection and maintenance of the constitution through political processes, was a major fault line cutting across his more specific disagreements with Mills. It appears to place those differences into not only different constitutional traditions but also into different ways of thinking about law generally. To understand all that we can about the legal mind that Palmer brought with him to the bench, we need to explore this fault line. What we arguably learn is that, as constitutional lawyers, Mills and Palmer represented different stages in the evolution of the common law mind that took place across the nineteenth-century. Whereas Mills represented the latter stages of this evolution, now associated legal formalism, positivism or liberalism, and a sharp distinction between law and politics, Palmer's ideas, like the constitutional ideas of Charles Fisher, represent an earlier or "pre-classical" stage in which law was much more explicitly understood to be a branch of statesmanship.

As outlined in chapter 2, the Mills defense of provincial rights significantly rested on an understanding of the rule of law that reflected the key elements of the legal liberalism, fast replacing Palmer's understanding of constitutionalism in England as well as in Canada. One of these elements is the conviction that the courts, and only the courts, were suited to the task of boundary demarcation and enforcement that defined the rule of law.[46] Positively, this reflected supreme confidence in the ability of the legal method to objectively, clearly and consistently translate the abstract principle of individual autonomy into legal rights appropriate to each area of law, be it the law of property, of commercial relations or of the constitution. Negatively, it reflected the view that political institutions could not be trusted to either consistently understand the extent of the entitlement of each actor to autonomy or to consistently place that entitlement ahead of extraneous political considerations, including institutional self-interest. This understanding of law therefore produced, indeed demanded, a new sharpness in the distinction between law and politics, between legal and political reasoning and between the mandate of legal and political institutions. At the heart of these distinctions was the association of politics with discretion and the definition of discretion as the antithesis of law. In the debate on censure of Quebec's lieutenant governor, and more forcefully in later debates on Macdonald's use of the power of disallowance to protect private property against provincial legislation, Mills' argument was that the violation of the liberty in the

affected provinces was more serious because discretionary, unsanctioned by any clear and knowable and limitation. It ignored what Mills called the "superior barrier of law" established between matters of federal and provincial concern by sections 91 and 92 of the BNA Act.

In the case of Palmer, we have nothing like the body of literature produced by Mills and therefore, we have no way of knowing what he thought, or if he thought, about the shifting world of legal and philosophical ideas that eventually crystalized as legal liberalism. From what is available, it seems very likely that he thought about law in terms that reflected older patterns of legal thought, at least when it came to the constitution. His emphasis on the specific details and unique historical context of the BNA Act is consistent with an earlier mode of legal thinking in which law was generally understood to be more context dependent. So was the priority he placed in his explanations of the BNA Act upon the specific function of each element of the Act, rather than on any overriding principle applicable to the whole constitution. Most important, in contrast to the sharp distinction between law and politics that Mills not only demonstrated but explicitly argued for, Palmer's arguments demonstrated a more ambiguous differentiation between one and the other. Even as he criticized Mills for not respecting the difference between law and "policy", Palmer incorporated the same political processes and institutions that Mills critiqued as legally archaic into his legal explanation of the BNA Act and, more particularly, into his explanation of the Act's federalism. Thus, federal control of lieutenant governors was acceptable because it was regulated by the constitutional principles of restraint that governed London's control of the governor general. Mills criticized such control because it was discretionary, not subject to review and therefore, not consistent with the rule of law. Palmer's response had two parts. First, he implicitly disagreed with Mills on the extent to which the political authority in each case was discretionary. He firmly believed in the normative strength and effectiveness of the constitutional limitations that he layered on top of the federalism of the BNA Act, such as the regulation of inter-jurisdictional delegation through parliamentary sovereignty or the application to the Governor in Council of the same principles of restraint in the supervision of lieutenant governors that had, pre-Confederation, applied to the colonial office.

Palmer's second response to Mills would probably have cut in the other direction. He would have said that the discretionary aspect of these political processes was exactly what made them useful and important and indeed, essential. Just as Mills reflected American influences in thinking of the constitution primarily as a branch of law to be enforced by the courts, Palmer probably reflected pre-Dicey English influences in thinking of the constitution

as a political instrument. No specific statements or conclusions lead neatly to this conclusion. It comes instead from the general sense that pervades his parliamentary speeches that, even after the adoption of a written constitution that spoke of exclusive rights to legislative jurisdiction, much of the constitution, and even that part of it which could be enforced in the courts, rightly and wisely continued to be reachable through political institutions and through the exercise of political judgement, guided by constitutional principles that operated in political rather than in judicial forums. Along these lines, the parallels to the thinking of Judge Steadman was significant.

Confidence in the relative dependability and trustworthiness of national political institutions was the opposite of Millsian confidence, encountered earlier, in the relative virtuousness of local politics. This opposition suggests the normative foundations of Palmer's differences with Mills on the function of law, or at least of constitutional law, and on methodological questions, such as the particularity of Canada's constitution and the blending of law and politics. For Mills, provincial politics deserved respect because the provinces were, as legal persons, entitled to the same protection of their liberty as other subjects of the law. In contrast, Palmer's cardinal value was social and political order. As will be seen, this comes through clearly in his explanation in the *Fredericton* case for his broad reading of federal heads of power, including the criminal law power.

The stress placed on order or on stability, and on the role of the federal government as the guarantor of that order within Canada's political structure, resonates with the earlier speculation that Palmer saw the preeminence of the national government as Confederation's remedy for the dominance of faction, and pettiness, probably among provinces and within provinces, and as the instrument of a new transcending national identity. It associated provincial independence with political fragmentation and here, it is not difficult to surmise that Palmer, the proud loyalist heir, had the example of the United States in mind. If so, he was saying that what threatened the constitution in the long run was the competition that could not be solved by the assertion of legal rights between governments: indeed, this would make the problem worse and more intractable. What instead was needed was the clear and understood superiority of the common national government over the others.

As the focus now shifts from Palmer's disagreements with Mills to his disagreements with Fisher it is worth noting that the latter can be seen as the culmination of the former. In the years after Palmer's departure from Parliament, Mills proceeded to argue for the equal sovereignty of the provinces as a platform from which to deny unilateral federal management

of the constitution. His arguments against disallowance and against the paramountcy of federal legislative powers were of a piece in this regard. At the same time, he methodically built the case for the mutual exclusivity of federal and provincial powers and for a broad and generous reading of the scope of the powers of the provinces. The end result was a constitution in which most questions were questions of jurisdiction that fell exclusively to the courts. The result was a highly decentralized constitution. In contrast, Palmer tried to use his position on the bench, on a much more modest scale, to resist this trend toward the judicialization and the decentralization of the constitution. He did this by framing the argument for limiting the range of questions, interests and rights that would be understood to fall within sections 91 and 92 and the judicially defined federalism of the constitution. His objective in doing so was to protect what he saw to be the proper and necessary role of political institutions, including the Senate but especially the federal executive, to perform their mandate across jurisdictional boundaries under a constitution "similar in principle to that of the United Kingdom".

III

In the election of 1878 that returned Macdonald and the Conservatives to power, Palmer lost his seat to Charles Weldon, the Saint John lawyer (and son of Judge Weldon) who would soon become the quarterback for the liquor interests as *Fredericton* moved beyond the New Brunswick Supreme Court toward the Privy Council. In June of the same year, the Globe, no friend of Palmer's, acknowledged his appointment to the bench as the judge in equity and begrudgingly admitted that while his place in politics would soon be filled, his appointment meant the bar had lost one of its more able members.[47]

In *Fredericton* Palmer would show that the constitutional arguments he had used in Parliament would be similar to those he was prepared to apply from the bench. *Fredericton* would be the most significant example of this but it would not be the only example. Another case even more directly showed that Palmer saw the bench as a platform from which to continue his participation in the debates between Macdonald and the Conservatives and Mills and the Liberals on constitutional controversies. In 1881, sitting in equity, he was asked to issue an injunction restraining the Catholic Bishop of Saint John from promoting provincial legislation that would change the terms of a trust.[48] Palmer demurred in part by saying that, "by the instructions to the [Lieutenant]-Governor, he is prevented from assenting to any bill

unless he has the advice of the Attorney-General that it does not injuriously affect private rights".[49] Further relief, if needed, would be available through the federal power of disallowance for, "if it were discovered that private rights had been destroyed without compensation and unjustly, it would I think, be the duty of the Governor-General to disallow the Bill".[50]

All of this was unnecessary for the simple case Palmer had to decide. It probably had more than a little to do with the case's timing. Palmer's decision, complete with the brief digression on the role of the power of disallowance within Canada's constitution, was issued at the height of the storm in Parliament and the press over Macdonald's application of the power of disallowance to Ontario's Rivers and Streams Act. Macdonald's defence, of course, was that the Ontario Act violated property rights.[51] It seems clear that Palmer went out of his way to throw some gratuitous judicial support behind the political and subordinate federalism that Macdonald was busy defending in Parliament, largely in debate with Mills. When the episode is put in context with Palmer's parliamentary support for Macdonald, it seems sure that Palmer did so because he shared the vision of the country that Macdonald gave in answer to the attack from Mills, that, "we are not half a dozen provinces", but "one great Dominion".

In *Fredericton*, two years before the rivers and stream debate, Palmer encountered a version of the argument that Mills would make against Macdonald in 1881: the BNA Act protected property by giving property rights to the provinces and by prohibiting federal legislation that encroached on those rights. Consistent with his approach to the constitution in parliamentary debates, Palmer responded by putting the federalism of the BNA Act into the broader context of the British constitution of parliamentary institutions.

He began by observing that, "a very casual view of our Constitution as settled by the *British North America Act* will show that such powers, and indeed all powers of legislation in Canada, do exist either in the Local or the Dominion Parliament, and one or the other has the right to exercise such powers, except when they come in conflict with the powers of the Imperial Parliament".[52] This meant that, "although all Courts in Canada are obliged to see that any Acts passed by either Legislature are within their powers ... yet ... the field of inquiry is not as extensive under the Constitution of Canada as it is under the Constitution of the United States".[53]

Here, Palmer referred to the "great and fundamental" difference between the American and the British idea of legislative power. In the American model, the power to legislate flowed from the people, so that no legislative body had any power except as was delegated to it, "by

the people in convention expressed in their written Constitution".[54] Any power of legislation not expressly so delegated was reserved to the people, "so that many laws no legislature in that country has power to pass". By contrast, under the British model, all legislative power was divided among the three estates of Parliament – the Queen, the Lords and the Commons[55]. None could legislate without the concurrence of the other and, where such concurrence existed, there was no limit on their collective power to legislate as "the Queen in Parliament". In consequence, no right could exist in the kingdom not subject to Parliament's control, "and consequently no question can ever arise in an English Court as to the power of the British Parliament to do what they may attempt".[56] Echoing Judge Steadman, Palmer believed this to be obvious given that English courts, unlike their American counterparts, were established by statute, not the constitution. They were therefore incapable of interfering with the properly expressed will of Parliament.

This was a simple exposition of the British idea of the "balanced constitution", by which the country was protected from the despotism of unbridled democracy as much as from the despotism of an unaccountable aristocracy, all without any derogation from parliamentary sovereignty. In Palmer's words, it was a Constitution under which, "the people on one hand are restrained from passing laws from sudden popular impulse, and on the other they are protected from any being passed to effect them without the consent of their representatives".[57] It was also a Constitution under which both "the Sovereign and the people are equally protected from any power, Court or Judge in the land setting up their opinion against the supreme will of the nation when properly expressed by the three estates in Parliament". It was this protection and assurance, noted Palmer, that accounted for the stability and longevity of the English Constitution. Undoubtedly, given the comparison of Canada with the United States, Palmer meant stability and longevity relative to the constitution of America.

The point of this survey of basic constitutional principles was to set the stage for the allegation that the judges in the majority, especially Fisher and Wetmore, had fundamentally misunderstood the limits of their powers as judges under a Constitution expressly stated to be "similar in principle to that of the United Kingdom". The concept of reserved rights beyond Parliament's reach was unknown to such a Constitution, notwithstanding the modifications made necessary by, "the Confederation of the Provinces in our position as a dependency of the Empire". These qualifications to the principle of parliamentary sovereignty meant that Canadian courts had the responsibility to decide which legislature, federal or provincial possessed the power of legislation in respect of any particular matter. They had no right or

power however, "to deny it to both".[58]

In Palmer's view, the majority had presumed to exercise such a right, as if they were American judges applying the Bill of Rights. They had declared the Canada Temperance Act to be unconstitutional because it violated the people's rights of property and of liberty. To Palmer, this was nonsense and heretical. Paraphrasing Fisher, he could acknowledge that the civil rights of Canadians included the right, "to have alcohol to clean their garments and make perfumery, and for cooking purposes".[59] Together with life, liberty and property, these were rights "secured by the law". They were secured against the Crown, the Courts, and every power in the land but not against the duly enacted laws of Parliament. It could not be otherwise under a British Constitution, where no man held any property or rights of any kind except to the extent allowed "by the will of the supreme power of the nation" - i.e. Parliament. Even the "Great Charter" said Palmer, "does not pretend to protect or secure the rights or liberties of the people against Parliament, for it does not declare that these things shall not be interfered with, but that only what is done shall be done by the law of the land, that is by Parliament".[60] Palmer made the same point more sarcastically when he said that personal liberty and the right to have alcoholic liquor were among the inalienable rights of all Canadians, but that the latter could not be said to be more important than the former "even if you throw brandy sauce into the balance".[61] And yet, said Palmer, all acknowledged that Parliament could lawfully authorize the imprisonment of any man for any reason it thought sufficient.

Clearly, Palmer's point was that under a British form of government, properly understood, the constitutional protection of property rights and of individual liberty did not, indeed could not, depend on a judicial power to set aside duly enacted legislation, whether or not it was under guise of applying a constitutionally defined division of powers. This protection was afforded, in the case of federal legislation, within Parliament itself, where the Canadian equivalents of the three estates of the realm were each represented. This representation ensured that a balance between the popular will and the sober wisdom of experienced statesmen, contributed by the appointed Senate, would be achieved. It also meant that the argument of the majority, that the protection of private property and individual liberty was a subject of legislation assigned exclusively to the provinces, was absurd, or at least un-British!

Here, it needs to be noted that Palmer's rejection of the judicial power asserted by Fisher were of a piece with the earlier rejection of lieutenant governor autonomy from as well as with the conclusion that the division of powers presented no legal barrier to cross-jurisdictional delegation. The protection of parliamentary sovereignty from a "Court or Judge"

was an application of a broader principle, under which it was protected from "any power". The imperative was the same, regardless of the nature the power that presumed to set itself up against Parliament: constitutional stability and longevity. This bolsters the earlier characterization of Palmer as a tory constitutionalist. Of course, his explication of the balanced constitution is itself a powerful example of the influence of a core element of the tory constitutional model. While clearly not exclusive to the tory model, the balanced constitution was a centrepiece of tory constitutional thinking, and of tory thinking in Canada about colonial union, from the arrival of the loyalists.[62] Palmer's application of it in division of powers analysis served two purposes. Negatively, it undercut Fisher's claim that a suitably British respect for private property dictated a broad reading of provincial jurisdiction and the claim that one of the roles of the courts was to, in effect, guard property and other rights by allocating matters to provincial jurisdiction when legislation on them infringed those rights. Positively, it said that broad federal powers could be given (indeed, had to be given) a broad interpretation, partly because this is what proper respect for parliamentary sovereignty demanded and partly because it did not threaten property or other civil rights. In other words, putting legislative powers into the context of the BNA Act's conformity to the balanced constitution did more than neutralize Fisher's judicial guardianship of provincial authority. It actually justified a broad and expansive interpretation, or at least a deferential interpretation, of the powers of Parliament.

Palmer saw this implication of consistency of the BNA Act with the British model embodied within the opening and closing paragraphs of section 91.[63] The opening paragraph said that Parliament had the legislative authority to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the subjects of legislation, exclusively assigned to the provinces. This meant that whatever was not within a specific head of provincial power was by default within federal jurisdiction. The first paragraph also said that, "notwithstanding anything in this Act, Parliament's jurisdiction extended to all matters coming within 'classes of subjects' specifically enumerated in section 91." Then the closing paragraph said that no matters coming within the powers enumerated in section 91 were to be deemed to be matters of a local or private nature falling within section 92 and the jurisdiction of the provinces.

Like Ritchie in *Chandler* and in *Justices of Kings County*, Palmer concluded that the notwithstanding provision from the first paragraph meant that a subject of legislation falling within any of Parliament's enumerated powers was within Parliament's exclusive jurisdiction regardless of whether it also fell within any of the enumerated powers of the provinces. In fact,

the provision meant that the matter could not also fall within a provincial head of authority. He also agreed with Ritchie that this broad federal paramountcy was reinforced by the final paragraph of section 91. The difference with Ritchie was that Palmer's overall analysis provided a rationale for this interpretation that was deeper than Ritchie's reliance on the plain meaning of the words. The rationale was maximization of the BNA Act's compliance with parliamentary sovereignty and the protection, by that means, of constitutional stability and longevity. The rationale, in other words, was, the commitment of the Fathers of Confederation and of Canada to a "constitution similar in principle to that of the United Kingdom".

This meant a relationship between federal and provincial powers greatly at odds with the interpretive co-determinacy of the majority, most fully articulated by Fisher, to say nothing of the claim of a special preeminence for the property and civil rights power. Palmer's rejection, albeit implicit, of such co-determinacy was predictable given his consistent efforts to make the BNA Act as much like a legislative union as possible and his emphasis on judicial respect for the legislative commands of Parliament. From the Palmer perspective, Fisher's co-determinacy must have violated the fundamental rule of sound constitutional organization, that, "there must be in every state a supreme legislative authority universal in its extent, over every member".[64] The interpretation of the opening and closing paragraphs of section 91 therefore echoed what Palmer had said in the debate on inter-jurisdictional delegation, that Parliament was "paramount".

With the issue framed in these terms, it was easy for Palmer to agree with Fisher and the majority that the promotion of temperance was the real object of the Canada Temperance Act and that legislative uniformity, "was merely for the purpose of better effecting the first, that is, the promotion of temperance or preventing the spread of intemperance".[65] This meant that the Act could only be upheld as a moral reform, the very characterization that made it provincial for the rest of the judges. Palmer applied Ritchie's ruling in *Justices of Kings County* that a provincial scheme of local-option temperance was *ultra vires* as legislation relating to the regulation of trade and commerce, but probably only to highlight the discomfort of the majority in failing to follow precedent.[66] Unquestionably, the main thrust of his analysis was to do battle with Fisher and the others on their own terms, on the premise that the Canada Temperance Act was legislation for a moral reform of social and domestic life.

This showed the depth of Palmer's confidence in the federal claim to jurisdiction - so did the perfunctory analysis of each of the heads of provincial jurisdiction that had been cited by one or more of the majority. Like Ritchie in *Justices of Kings County*, he quickly ruled out

the power to issue licences on the ground that the object of the Canada Temperance Act was not raising revenue.[67] This was clear enough as conclusion, but made no effort to meet the argument of Wetmore and of Fisher that the power to issue licences for revenue-raising purposes entailed a right to such revenues. The property and civil rights power was rejected with equal ease. It could only apply on the theory that legislation that affected property and civil rights was, for that reason alone, beyond federal power, since all legislation affected such rights to some degree.[68] This was a caricature of the argument of Fisher and of Wetmore. It gave no response to their claim that the Canada Temperance Act was not only "on" property and civil rights but simultaneously not "on" any federal head of power. The provincial residual power over "local matters" was also disposed of summarily. On this, Palmer was satisfied with declaiming that, "Surely the uniformity of laws on the subject of traffic in anything throughout Canada, or uniformity in punishment or procedure for an offence, cannot be the subject of merely a local or private nature within the province".[69] This begged the question. It also implied that whatever Parliament regarded as an appropriate subject for uniform legislation could not, for that reason alone, be defined as a matter of local interest. It also did not deal with the failure of Parliament to actually legislate uniformity "throughout Canada", or throughout New Brunswick for that matter.

In each case, the absence of analysis reflected Palmer's view that each of the provincial claims was overwhelmed by the stronger federal claim under the criminal law power, bolstered by the general paramountcy of all enumerated federal powers. Three influences converged: Palmer's personal view that intemperance was a national problem, his deference to the determination of Parliament that it was a national problem, and his conviction that Canada was more than a common market but was instead a new and national society. Palmer's judgment made it clear that he regarded intemperance as a social cancer that threatened the moral fabric of the entire national community. Essentially, this was because there *was* a national community and like all communities, the health of the whole depended on the health of the parts. Legislation that prohibited the sale of liquor, "except in a way that would not be destructive of the morals of the community, or would not cause the members of the community to be immoral, useless, diseased, vicious or criminal", could not be "deemed to be a matter of merely a local concern", especially when, "the supreme will of the country declares that its regulation is necessary for the public good".[70] It stood on the "same footing as any other vice", including the keeping of a "bawdy house", in which case:

"In the keeping of such house, the house and what is done in it is purely local,

> but it tends to destroy the morals and contaminate the society in which it is situated, and in this subject the community generally has an interest. It is an injury to the whole Dominion that such a class should exist in any part of it, and I think no lawyer will pretend that laws that are passed making such things illegal and punishing them by fine and imprisonment can come under the head of matters of a merely local and private nature. *And so I hold that if the community think, and the three estates of our Dominion will*, that the keeping open of places to sell intoxicating drink is dangerous or destructive to the community, that it entices young men and others to drink what is noxious and injurious to them, the law suppressing it, making it illegal, and punishing it with fine and imprisonment, cannot be a law on a mere local or private matter within the Province ...".[71] [emphasis added]

Belief in the national dimensions of the social evil of intemperance,[72] coupled with deference to Parliament's determination that the "welfare of the country" required criminal prohibition, made it, "too clear for argument" that prohibiting the sale of intoxicating drink was "a matter relating to criminal law".[73] Criminal laws were, after all, "designed and passed to protect society and the State from what is decided to be destructive or injurious in any way to the public".[74] Parliament, the legislature empowered to enact criminal law, had by passing the Canada Temperance Act determined that the sale of intoxicating drink for all but a few limited purposes was injurious and destructive to the community. The Act was therefore criminal legislation, a characterization reinforced by Parliament's use of words such as, "offence" and "punishment", and the provision of a penalty of three months' hard labour for the offence of attempting any compromise, compounding or settlement of the offence of selling contrary to the Act.[75] This placed the offences created by the Act "on the footing of a felony". It meant, said Palmer, that, "what is prohibited is made illegal, and the violation of the Act is called an offence, and the offender is punished, and the offence is so heinous that it cannot be settled or compounded". It made the argument that the Act was on civil rights or civil procedure "absurd".

The legal foundation for this was Blackstone's distinction between public and private wrongs, which Palmer used to articulate the boundary between criminal law and property and civil rights.[76] The criminal law power encompassed all legislation passed for the "public good", "the welfare of the country", the protection of, "society and the State from what is decided to be destructive or injurious in any way to the public", and all wrongs, "considered in reference to their effect on the community in its aggregate capacity". Property and civil rights, in contrast, encompassed only the law as related to wrongs between individuals and civil injuries. Because these distinctions were among, "the great leading ideas propounded by all other

elementary writers on English law", their influence on the BNA Act was one "we would expect". In consequence,

> This would put the power in the Dominion Parliament to declare any such thing, *which in their wisdom they thought destructive or injurious to the public good*, an offence against the State, and direct what punishment they chose to follow. This power could in no way be limited, either by the fact that it interfered with the property and civil rights of individuals, as this would in no way interfere with the Local Legislatures legislating and making what civil or municipal laws they chose, to redress the private individual for any infringement of his civil rights.[77] [emphasis added]

Hence, the general paramountcy of all enumerated federal powers that came from the notwithstanding provision and from the deeming provision of section 91 was reinforced by the inherent, natural and necessary priority of criminal law over private law, and in a way that reinforced deference of the courts to the wisdom of the Dominion Parliament as to what was and was not a criminal matter.

This lawyer's analysis was however, heavily influenced by Palmer's sense of the relative importance of Canada's two levels of government and the scope of the community of interest that each government represented. Quite apart from the technicalities of Blackstone's distinctions between branches of the law, there was a heavy sense pervading Palmer's analysis that temperance legislation was federal because intemperance was a serious social evil affecting the "welfare of the country". The importance of the matter, in other words, argued for federal competency. Important matters were federal matters. In addition, there was an equally pervasive sense that temperance was a national matter because Canada was a national community in which the social problems of the parts affected the well-being of the whole. Canada was more, in other words, than Fisher's economic union. It was instead, as Macdonald would say, "one great Dominion ", not "half a dozen provinces".

Such nationalism was, of course, very consistent with Palmer's positioning in the parliamentary debates with Mills. Just as in Parliament, his interpretation of the Constitution served Parliament's ability to deliver energetic national government. Intemperance was a serious social evil and it therefore demanded a national legislative response. More specifically, it required overtly paternalistic legislation, to prevent "young men and others" from consuming "what is noxious and injurious to them". It required legislation that would prohibit the sale of alcoholic drink, "except in a way that would not be destructive of the morals of the community, or would not cause the members of the community to be immoral, useless, diseased, vicious or criminal". The emphasis on social control and the protection of both society and individuals

contrasted sharply with Fisher's virtually libertarian denunciation of the Canada Temperance Act as, "a sumptuary law prescribing what a man shall drink and what he shall not". The difference appears to link with and to broaden the association of Palmer with Canadian toryism is several ways.

First, in talking about the constitution, Palmer put constitutional stability, represented and protected by the federal government, ahead of the autonomy of the provinces. In *Fredericton*, his characterization of the Canada Temperance Act put collective social stability ahead of individual autonomy. This suggests that Palmer did not emphasize stability when talking about the constitution because he took his ideas on the constitution from tory thinking but that instead, his ideas on the constitution were of the tory persuasion because of the importance to him of social stability and order across a broader spectrum of political, social and economic questions.

Second, the emphasis on social stability and order in the discussion of the rationale of the Canada Temperance Act, particularly in contrast to Fisher's emphasis on autonomy, marks Palmer's thinking with yet another aspect of nineteenth century Canadian tory constitutional thinking. Three times in *Fredericton*, Palmer spoke of constitutional stability and the importance to it of judicial deference to the will of Parliament. Largely, he took the importance and value of constitutional stability to be self-evident, although he did write pointedly that it had been two hundred years since England had seen any form of insurrection and the avoidance of insurrections was, as discussed earlier, a major rationale for the tory constitution. But another and more fundamental rationale was the protection of liberty and of property. This was the great object of the consolidation of power horizontally to the national level from the local and vertically from the legislative to the executive branches, for property and liberty both depended on strong government that could restrain the "limitless ambition of men".[78] On this view, liberty and property depended not on the absence of laws but on the presence of laws that restrained interference from others. In the context of Fisher's attack on the Canada Temperance Act as an interference with liberty and property, Palmer's counter emphasis on the threat posed by intemperance to the whole community was not, from this perspective, an argument against the centrality of liberty and property to the constitutional order. Instead, it was an argument that Fisher, and the rest of the majority, had misunderstood what liberty and the protection of property really required. It was not the freedom from legislation but rather the restraint of legislation against those who would interfere with property and liberty that protected property and liberty. The Canada Temperance Act was such legislation. Therefore, the very

aspect of the Canada Temperance Act that Fisher said made it inconsistent with British principles, and therefore outside federal jurisdiction, was the aspect of the Act that, for Palmer, made it consistent with British principles and therefore, legislation that needed to be accommodated within federal jurisdiction, through judicial deference to the will of Parliament. Thus, when Palmer ended his judgment by declaring that, "if the supreme will of the Dominion ... is ever attempted to be thwarted by the Courts or any other power in Canada, when properly declared by the three estates of the Dominion or Provinces, each in their respective spheres ... I should tremble for the stability of our Constitution", he meant the constitution that protected property and liberty as well as federal jurisdiction.[79]

This leads to one further point on Palmer's *Fredericton* decision. It is that his approach to the interpretation of the BNA Act was, like that of Fisher, very much in the pre-classical mold. This is obscured somewhat because of all his talk of deference and all of his scolding of Fisher and the others for stepping beyond the Court's limited mandate.[80] As indicated above, he ended up more or less in the same place as Ritchie and it is therefore tempting to conclude that he only delved into the broader context of the BNA Act to establish that the irrelevance of this context to constitutional adjudication. To establish, in other words, that the judges were simply to interpret and apply the words of the BNA Act, as Ritchie had done.

On closer examination however, it becomes clear that Palmer's approach to constitutional adjudication was more like Fisher's than Ritchie's. He equally read the BNA Act functionally, in the context of the objects of Confederation, including continued consistency with the principles of the constitution of the United Kingdom. The difference with Fisher was over the content, not the applicability of those objectives and principles to constitutional interpretation. Palmer's point was not that Fisher was wrong to interpret the BNA Act in light of the principles of the British constitution but instead, that he had simply done so mistakenly. The balanced constitution did more than establish the negative, that the courts did not have a role in the protection of individual rights in constitutional adjudication. It established the positive, that the courts should be deferential to Parliament's determinations of what legislation was needed for the "peace, order and good government of Canada", because these determinations were made through a constitution "where the people ... are restrained from passing laws on sudden impulse, and ... they are protected from any being passed to affect them without the consent of their representatives". Another way of highlighting the essential similarity in approach between Palmer and Fisher is to observe that there was a world of difference between the judicial deference of Palmer and that of Ritchie. Ritchie's was based

on the understanding that the BNA Act established clear jurisdictional limits within which the Court had no authority to interfere and beyond which the Parliament (or legislature) had no authority to tread. It was the same kind of deference owed on the judicial review of any statutory body. Palmer's, in contrast, was based on respect for the determinations of Parliament, including on the scope of its own mandate, because it was a Parliament in which the three estates of the realm worked with and against each other and which was as sovereign within Canada as the Parliament of the United Kingdom was there. This meant more than deference to how Parliament chose to exercise its legislative authority. It meant substantial deference also to Parliament's own determinations of the matters it needed to legislate upon. It was therefore a deeper deference that respected the peculiar delicacy of judicial review under the constitution.

IV

In the appeals from the New Brunswick Supreme Court's decision in *Fredericton* Palmer was to enjoy vindication. First, the New Brunswick majority was overturned in the Supreme Court of Canada, where Ritchie applied *Justices of Kings County* and the trade and commerce power, along with Fournier and Taschereau. Gwynne also relied on trade and commerce but also on peace, order and good government, because, like Palmer, he thought it obvious that intemperance was, "an evil of a national, rather than of a local or provincial character".[81] The Privy Council upheld the Supreme Court of Canada by ruling, in *Russell v. The Queen*, that the Scott Act was outside all provincial heads of authority and legislation in the nature of criminal law. This brought it within Parliament's general authority over peace, order and good government.

In the longer term, the vindication would, as explored in chapter 4, belong to Fisher and the other New Brunswick judges. In the *Local Prohibition Reference*, the Privy Council would not overrule *Russell v. The Queen*, but reduce it to a shell of its previous centralist glory. Provincial legislation identical to the Canada Temperance Act would be upheld under provincial authority over property and civil rights and *Russell v. The Queen* would be distinguished on the suggestion that the Scott Act may have been necessary to deal with a national epidemic of drunkenness that existed in the 1870's. Along the way, the peace, order and good government power was separated from other federal powers and limited to matters of national dimensions, the trade and commerce power was pronounced not to authorize the prohibition

of trade, and the broad scope of the property and civil rights power was confirmed definitively.

From another perspective, Palmer immediately experienced repudiation with Fisher and the other judges, the survival of the Canada Temperance Act notwithstanding. As strongly as he disagreed with every conclusion Fisher had drawn from the BNA Act, Palmer and Fisher were in agreement on three fundamental points: first, the Scott Act was social and moral reform legislation, not economic legislation; second, that jurisdictional authority to enact it depended on which level of government had the general authority and, equally important to both Palmer and Fisher, the responsibility to speak for the community in defining acceptable standards of private and social behavior; and third, that the answer to this question depended not only on the words of the BNA Act but the nation-building objects those words were chosen to express. In effect therefore, Fisher and Palmer together framed the jurisdictional question as a choice between the community of interest that Canadians were to share as Canadians and the community of interest they shared as residents of their distinct provinces. This made the jurisdictional choice into an understandable one between the national authority to make criminal law and the local authority over "municipal police", whatever its source in the subsections of 92, rather than a choice between the municipal police power and the national trade and commerce power.

Palmer's assertion that the authority and responsibility for temperance belonged to Parliament (at least if Parliament wanted it) expressed his confidence that Confederation created (or manifested the existence of) a new national society and not, as Fisher implied, a mere economic union that existed only to provide channels of trade and commerce to the distinct societies of the different provinces. Because Canada was a society, it was axiomatic that federal powers encompassed social problems and here, there was a strong intimation that the scope of Parliament's powers would evolve to meet the evolving needs of this national society. Fisher in effect gave the competing explanation of Canada, that Canada as an entity only had authority over the matters that had been defined as matters of common interest by the "compact of union". For both, the conclusion on jurisdiction over temperance flowed fairly directly from their understanding of the type of community the Dominion of Canada was intended to be.

In contrast, the explanation given by the Privy Council for essentially the conclusion reached by Palmer amounted to little more than a matching of the words "peace" and "order" from the peace, order and good government power to the conclusion that the object of the Scott Act was maintaining public order. There was no real discussion of why "public order"

was a national concern rather than a local concern, and not much if any recognition that public order might be a matter divided between Parliament and the legislatures. This separated the conclusion - that peace, order and good government encompassed matters of public order generally - from the rationale that Palmer (and Gwynne) provided for it, namely, that intemperance was national because it fell within the community of interests that Canadians shared as members of the national society that Confederation had created. One consequence may have been that the conclusion was left more vulnerable to subsequent revision than it otherwise might have been. Without such a rationale, it was perhaps easier for the Privy Council and others to later conclude that *Russell v. The Queen* was a case about intemperance in the 1870's, rather than a statement about the general scope of Parliament's governance mandate for Canadian society. To exactly the same extent, it became easier to say that "peace, order and good government" was an emergency power, instead of a description or manifestation of the amplitude of the overall authority and responsibility that Confederation envisaged for the national government it had created.

One further point in this line is that the federal power over trade and commerce continued to be at play in the liquor cases after *Russell v. The Queen* perhaps because the insight of Palmer (and of Fisher and other Canadian judges) that temperance legislation was social and not economic legislation was only faintly captured by the Privy Council's linguistic reliance on the words "peace, order and good government". The importance of this is that the authority to regulate trade and commerce continued to be raised in the liquor cases, with the result that the division of powers respecting economic regulation came to be significantly defined in liquor cases, where the underlying question was the division of responsibility over social morality or community standards, rather than in cases more representative of typical and generic forms of economic regulation. Trade and commerce may have suffered as much damage as it did because the question of jurisdiction over economic regulation got mixed with this other jurisdictional question. For example, the conclusion that the power to regulate did not include the power to prohibit comes to mind. In the case of the liquor trade, it made sense applied to all heads of federal power if one accepted that the communities for the definition of community standards were the local ones. But it made less sense applied to a power of economic regulation.

In a New Brunswick context, Palmer is interesting and important because he shows us that Fisher's provincial rights vision of Canada was far from being universally accepted among the New Brunswick judges or undoubtedly, among the broader political and legal elite that

Palmer represented as much as Fisher. He is also important, however, simply for the debate about Confederation and the British constitution that he had with Fisher. This debate, for Palmer as for Fisher, raised questions and issues that went to the core of their respective understanding of Canada's constitutional order and of New Brunswick's place within it. It reveals what New Brunswick judges, or at least some of them, understood the stakes to be in federalism cases, or at least in *Fredericton*. For Fisher and Palmer, but also for the other *Fredericton* judges to a varying extent, the questions at play within and between 91 and 92 included some of the great questions of nineteenth century constitutional and political theory, such as the balance between liberty and order, the role of the courts and the legislatures in the protection of private property, and the differences between the American and the British constitutions. The importance they attached to these questions and their understanding of the relationship of these questions to the BNA Act, made their interpretive disagreements so important to them and so revealing to us. The *Fredericton* case allows us to glimpse the relationship of that deeper level of constitutional thinking to how New Brunswick judges thought about the BNA Act.

In particular, the debate between Palmer and Fisher reveals how prominent New Brunswick judges answered the critical question of how Canada's constitution was going to be at once federal and, "similar in principle to that of the United Kingdom". For both of them, this question was embedded in the jurisdictional question of where temperance fit within sections 91 and 92. In Fisher's case, this was because the BNA Act embodied the substance of British constitutional values, and especially the sanctity of property and of each man's household, through the provincial jurisdiction over property and civil rights. This meant a broad reading of that jurisdiction and judicial vigilance against federal encroachments to ensure consistency with the constitution of the United Kingdom. For Palmer, the consistency of the BNA Act with the constitution of the United Kingdom was institutional rather than substantive, existing in the replication of the balanced constitution in Ottawa and in provincial capitals. This produced a broad and generous reading of federal authority in part because the rationale for vigilance (judicial protection of property) was removed and partly because such vigilance against the expressed will of the three estates of the realm would itself be contrary to the principles of the constitution of the United Kingdom.

In this, as in the other elements of his thinking, Palmer reflected the influence of ideas and values from nineteenth century Canadian toryism. Palmer's understanding of these ideas does not appear to have been original and so, he cannot be said to add to our understanding

of them. But he does demonstrate an effort to apply those ideas to judicial interpretation of the BNA Act, and this is of some interest. Palmer tried to translate the ideas of the tory vision - the advantages of centralized power over local, the need for an ultimate sovereign in every state, the importance of appointed upper chambers as checks on democracy - into more than favourable interpretations of the provisions that defined federal authority. He translated them into an approach to judicial review that left the evolution of the division of powers significantly to be determined by Parliament's own determinations of what was within the "peace, order and good government of Canada". This obviously created a division of powers that was consistent with the importance attached in tory thinking to the centralization of power, and therefore, a national parliament as much as possible like that of the United Kingdom. It did this, however, through a process of judicial review that also allowed Canadian courts to be as much as possible like those of the United Kingdom. In other words, it meant both outcomes and a means of achieving those outcomes, that would contribute to the objective of a constitution similar in principle to the constitution of the United Kingdom. It might therefore be said that Palmer shows an attempt at the translation of "political federalism" into a way of doing constitutional adjudication.

Another aspect of Palmer's toryism is what it tells us about the environment of constitutional thought in new Brunswick. Just as Fisher is consistent with the thesis that New Brunswick support for a federal union rested on some of the same cultural and intellectual influences as provincial rights in other provinces, Palmer suggests that New Brunswick support for legislative union or a centralized federal union, also drew upon a base in constitutional thought and values that New Brunswickers shared with other Canadians. The debate between Fisher and Palmer in *Fredericton* about the interpretation of the BNA Act may be seen as the continuation of the earlier New Brunswick debate about whether to join or to spurn Confederation. Although both had supported Confederation, it appears that Fisher may have done so because the proposed union was sufficiently federal and that Palmer did so for the opposite reason, that it was sufficiently like a legislative union. One interpretation of *Fredericton* therefore, is that the disagreements between the judges, and especially between Fisher and Palmer, signified elite recognition of this dichotomy of constitutional expectation. It came at a time when the direction of Confederation was still very much in the balance and the battle between centralization and federalism, both within New Brunswick and beyond, was still to be won and lost. The question of Parliament's authority over temperance, like the earlier debate about judicial review, may have served as a catalyst for debate and self-

reflection on the meaning of Confederation for New Brunswick, for New Brunswick institutions and most important perhaps, for New Brunswick's political and legal elite. Constitutional adjudication became, in other words, a forum through which the New Brunswick elite tried to mediate New Brunswick's transition from independent colony to Canadian province. It perhaps played this role in part because of the continuing influence within the New Brunswick judicial community of a pre-classical legal consciousness, for this not only permitted but probably encouraged judicial efforts of Fisher and therefore Palmer to put the BNA Act into the context of New Brunswick's earlier constitutional experience.

Here, it is again useful to connect *Fredericton* to David Bell's thesis of prolonged crisis in the judiciary of post-Confederation New Brunswick. He portrays a loss of confidence in the judiciary within the legal profession, New Brunswick politics and in the provincial press based partly on allegations that the Court was not as competent or as objective as in earlier days. Bell relates this to the emergence of party patronage as virtually the only path to judicial appointment, to the Court's involvement in controverted elections and to several judicial scandals, including the one that would end Palmer's career in 1894.[82] But he also argues that this crisis of confidence in the judiciary was part of the larger process of New Brunswick's adjustment to Confederation under which provincial institutions were generally found wanting and ineffective relative to their predecessors, particularly during the mythologized loyalist error. In that larger process, disillusionment with the transfer of power from Fredericton to Ottawa was mixed with and perhaps even subordinated to, disillusionment with the earlier transfer of power within New Brunswick from members of the great loyalist families to the class of men, including Fisher, who came to power through responsible government and who, after all, had been called the "Smashers".

It seems plausible to suggest that this environment, which included the reaction to *Chandler* as well, was one of the influences that made *Fredericton* a case of such singular importance for the New Brunswick Supreme Court. More specifically, it seems plausible to suggest that the debate between Fisher and Palmer reflected and responded to this larger malaise. Fisher's judgment can be interpreted as reacting to the environment of disillusionment and collective self-doubt by advocating constitutional retrenchment through the reassertion of New Brunswick's independence and importance as a distinct society, capable of making its own decisions in accordance with its own values, all within the context of an economic union. He stressed collective and individual liberty and the continuity of Confederation with the provincial achievement of responsible self-government. Palmer in

contrast, appeared to represent the opposite hope, of the transcendence of the limits both of local identity and of local institutions through further and growing integration into the new and larger nationality that Confederation made possible. He stressed social and constitutional order and faith in national leadership and national institutions that were free of local entanglements. It can be said, more tentatively perhaps, that much of this represented the continuity of Confederation with elements of the constitution that pre-dated responsible self-government.

Bell suggests that the Court's involvement in constitutional adjudication, including in *Fredericton*, contributed to New Brunswick's judicial crisis, partly because constitutional adjudication was understood by some as an agent of the court's politicization, and partly because the Court's constitutional jurisprudence was so bad and seemingly unprincipled. A slightly different perspective is that the judges of New Brunswick were not able to use their brief moment in the constitutional sun to do anything more than reflect New Brunswick's internal constitutional division: to the extent they could have agreed that resolution of those divisions were within their role, they were not able to rise above the divisions to present a positive vision for Confederation's relationship to New Brunswick's constitutional past and future that most or a majority of them could ascribe to. They did not perhaps, deliver the substance of judicial statesmanship, but only its methodologies. Their failure is perhaps the deeper explanation for the contribution of constitutional adjudication to New Brunswick's judicial crisis. In any event, that failure would soon be overtaken and indeed forgotten by New Brunswick's inculcation of a new and modern legal consciousness under which the constitutional history of a small province could have nothing to do with judicial interpretation of the BNA Act.

Endnotes

1. *The Queen on the Prosecution of Thomas Barker v. The Mayor & Co. of Fredericton* (1879-1880), 19 N.B.R. 139.

2. *The Queen v. Chandler. In re Hazelton* (1867-1869), 14 N.B.R. 556.

3. *Liquidators of Maritime Bank v. Receiver-General for New Brunswick* (1888), 27 N.B.R. 379.

4. [Saint John] Globe (2 June, 1879).

5. Canadian Parliamentary Guide, 1875, pp. 281-282; Acalus Palmer, to Hon. S.L. Tilley, 6 June, 1866, N.B. Mus. (6-F1-46).

6. [Saint John] Globe (13 December, 1911); see also D.G. Bell, Legal Education in New Brunswick: A History (Fredericton, University of New Brunswick, 1992), at p. 53, where the author says that, "no one doubted Palmer's exceptional ability" as a judge in equity, and that, in practice, he had been "distinguished".

7. Jeremiah Travis, Saint John, to Sir Leonard Tilley, St. Andrews, 3 August, 1882, Tilley Papers, National Archives of Canada.

8. James C. Graves and Horace B. Graves. Judges of the Supreme Court of New Brunswick (1784-1967), Public Archives of N.B.

9. Minutes of the New Brunswick Barristers Society, 3 February, 1848, Public Archives of New Brunswick.

10. Minutes of the New Brunswick Barristers Society, 5 February, 1853, Public Archives of New Brunswick.

11. Ibid; The Barristers' Society expressed horror and deep concern about the public's confidence in the Bar and requested the attorney general to apply to the Court for an order requiring Palmer to show why he should not be struck from the role of attorneys.

12. A. L. Palmer, Fredericton, to the Benchers and Members of the Barristers Society of New Brunswick, 12 April, 1861; Charles Watters, Chairman, to the Benchers of the Barristers Society of New Brunswick, 15 February, 1861, Public Archives of New Brunswick.

13. Canadian Parliamentary Guide, 1875, supra.

14. Canada, House of Commons Debates (1873), p. 166.

15. Canada, House of Commons Debates (1877), Vol. 1, pp. 596-599 and p. 1181; (1878), Vol. 5, pp. 991-1005 and pp. 1741-1743.

16. The tariff question, made an issue toward the end of the MacKenzie administration by Macdonald's annual resolutions in favour of protective tariffs, was one of Palmer's principle interests as Member of Parliament. In 1877 and again in 1878, he gave what were, for him, very long speeches on behalf of Macdonald's policy of using the federal government's jurisdiction over customs and trade as implements of national economic development. More fundamentally, Palmer's speeches show that he shared Macdonald's view that in a country with half a continent to claim and develop, industrial development was a vital affair of state. This necessitated state activism and, in late nineteenth century terms, interventionist use of federal powers of economic regulation. Thus when Richard Cartwright, MacKenzie's finance minister, told the House in 1877 that tariffs could have no more influence on industrial development than a fly could have on the rotation of a wheel, Palmer gave a long lecture on the importance of tariffs to the industrial development of the United States. Canada, concluded Palmer, was as "much adapted to manufacturing' purposes as the United States". All that was lacking was a fiscal policy which taxed the consumption of those foreign goods that could be manufactured in Canada. It was inexcusable thought Palmer, that the liberal government insisted on arranging the customs schedule without considering whether or not particular articles were susceptible of Canadian production. Taking existing custom duties on the importation of tea as an example, Palmer complained that the poor man had to pay more to live, and the cost of labour was thereby increased, without any compensating encouragement to Canadian industry; Canada, House of Commons Debates (1877), Vol. 1, pp. 596-599, and p. 1181; and Canada, House of Commons Debates (1878), Vol. 5, pp. 991-1005; and pp. 1741-1743.

17. Canada, House of Commons Debates (1876), Vol. 2, pp. 619-622 and p. 624. In fact, he said, his views were known to be so strong on the issue that he was being accused in Saint John of advocating a virtual declaration of separation of Canada from Great Britain.

18. James G. Snell and Frederick Vaughan, The Supreme Court of Canada: History of the Institution (Toronto, University of Toronto Press, 1985), pp. 7-11.

19. Canada, House of Commons Debates (1875), Vol. 1, at pp. 741-744.

20. Ibid, at p. 741.

21. Ibid, at p. 742.

22. Canada, Debates of the House of Commons (1875), Vol. 1 at pp. 926-927, at p. 926.

23. Ibid, at p. 927.

24. At the same time, Palmer objected to the provision of the Bill that gave the new Court original jurisdiction in constitutional cases involving provincial legislation, saying, "it was an unconstitutional and illegal attempt to wrest from the local authorities what was vested in them by the Constitution"; Ibid, at p. 927.

25. Canada, Debates of the House of Commons (1875), Vol. 1 at pp. 399-408, esp. at p. 400, p. 401 and p. 403.

26. Ibid, at p. 406.

27. Ibid, at p. 407.

28. Ibid.

29. Examples of Palmer's reliance on provincial rights included his speeches on the New Brunswick schools question [see Canada, House of Commons Debates (1873), Vol. 1, p. 166 and pp. 176-179 and Canada, House of Commons Debates (1875) at pp. 562-580] and his interventions on provincial jurisdiction over leasing of fishing waters in inland waters, the same question that gives rise to *The Queen v. Robertson* in the New Brunswick Supreme Court [see Canada, House of Commons Debates (1877) Vol. 1, at pp. 1003-1004].

30. Canada, House of Commons Debates (1875), Vol. 1, at p. 406.

31. Peter J. Smith, " The Dream of Political Union: Loyalism, Toryism and the Federal Idea in Pre-Confederation Canada", in Ged Martin, The Causes of Canadian Confederation (Fredericton, Acadiensis Press, 1990), at pp. 148-171.

32. Ibid, at pp. 160-164, and p. 166.

33. Ibid, at pp. 168-169.

34. Ibid, at p. 169.

35. Canada, Debates of the House of Commons (1873), at p. 58 and (1874), at p. 40.

36. W.S. MacNutt, New Brunswick - A History: 1784-1867 (Toronto: MacMillan, 1963) at p. 422; P.B. Waite, The Life and Times of Confederation (Toronto, University of Toronto Press, 1962) at pp. 237-238.

37. Smith, supra, at p. 161.

38. P.B. Waite, Canada, 1874-1896: Arduous Destiny (Toronto, McClelland & Stewart, 1971), pp. 97-99; Canada, Debates of the House of Commons (1878), Vol. 5, pp. 1878-2000, pp. 1956-1962, and pp. 2013-2025.

39. Canada, Debates of the House of Commons (1877), Vol. 1, pp. 1367-1372.

40. Smith, supra, at p. 160, and pp. 169-171.

41. This belief reflected the analysis that both the American civil war and the American war of independence were caused by the instability that ensued from the independence of the American states.

42. Canadian Parliamentary Guide, 1875, supra, at p. 281.

43. Canada, House of Commons Debates, 1878, Vol. 5, at p. 1961.

44. One of the ironies on the Mills-Palmer debate on Senate reform and constitutional amendment is that Mills was left advocating a pro-federal process of amendment (unilateral federal amendment) to achieve what was, from his perspective, a pro-province reform (provincial appointment or election of the Senate), while Palmer was left advocating a pro-province process (constitutional conferences) to maintain a pro-federal status quo (a Senate appointed by the federal government).

45. Robert C. Vipond, Liberty and Community: Canadian Federalism and the Failure of the Constitution (Albany, State University of New York, 1991) at pp. 15-45.

46. Ibid, at pp. 131-139.

47. [Saint John] Globe, (2 June, 1879).

48. *Corporation of the Brothers of the Christian Schools v. Attorney-General of New Brunswick, and The Right Reverend John Sweeney, Roman Catholic Bishop of Saint John* (1876-1893) N.B.R. (Truman) 103.

49. Ibid, p 108.

50. Ibid.

51. Vipond, supra, at pp. 76-82 and 125-131. Detailed accounts of the "Rivers and Streams Dispute" can also be found in J.C. Morrison, "Oliver Mowat and the Development of Provincial Rights in Ontario: A Study in Dominion-Provincial Relations, 1867-1896", in Three History Thesis (Toronto, Ontario Department of Public Records and Archives, 1961), at pp. 177-233; J. Benidickson, "Private Rights and Public Purposes in the Lakes, Rivers and Streams of Ontario, 1870-1930", in D.H. Flaherty, ed., Essays in the History of Canadian Law, Vol. II (Toronto, University of Toronto Press, 1981), at p. 365; and Carl Stychin "The Rivers and Streams Dispute: A Challenge to the Public-Private Distinction in Nineteenth-Century Canada", (1988)46 University of Toronto Faculty of Law Review 341.

52. *Fredericton*, supra, at p. 143.

53. Ibid.

54. Ibid.

55. Ibid.

56. Ibid, at pp. 143-144.

57. Ibid, at p. 144.

58. Ibid, at p. 145.

59. Ibid, at p. 150.

60. Ibid, at p. 152.

61. Ibid, at p. 150.

62. Smith, supra, at pp. 161-162.

63. *Fredericton*, supra, at p. 145-146, and at pp. 154-155.

64. Joseph Galloway, Historical and Political reflections on the Rise and Progress of the American Rebellion (London, 1790), pp. 38, 39, quoted in Smith, supra, at p. 161; this followed the Blackstone formulation, that, " There is and must be in all [governments] a supreme, irresistible, absolute, uncontrolled authority in which the *juria summi imperii*, or the rights of sovereignty, reside"; quoted in P.S. Atiyah and R.S. Summers, Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions (Oxford, Oxford University Press, 1987), at p. 244.

65. *Fredericton*, supra, at p. 142; this may also have been a tactical concession of sorts, for Fisher and Allen were surely right that a national system of local-option temperance would undermine rather than create uniformity. On the other hand, Palmer was sure that Allen was wrong in concluding that the Act's local-option machinery by itself made it legislation on "matters of a merely local or private nature in the province". It was indisputable, said Palmer, that if Parliament, "had the power to pass the law absolutely, they could pass it with any condition or restriction as to its being in force that they chose". This was "plain in principle" and further, it had, "been the habit of all Legislatures to take such a course". Examples of this legislative habit were given, but none related to the point of Allen and more especially of Fisher, that while Legislatures generally had the power to make conditional laws, the BNA Act had been designed to permit Parliament to regulate trade and commerce on a nationally uniform basis. It was, as Fisher noted, the desire for such uniformity that explained the assignment of trade and commerce to the federal Parliament in the first place. Palmer's examples did not any more satisfactorily answer Wetmore's point, that the nature and purpose of criminal law required it to be uniform from county to county.

66. *Fredericton*, supra, n. 1, pp. 153-154; Justices Wetmore, Fisher and Weldon, and Chief Justice Allen, all said that the case only decided that the provinces could not prohibit the sale of liquor, whereas the question in relation to the Canada Temperance Act was whether the power to regulate the sale of liquor belonged to the provinces. Palmer pointed out that the BNA Act conferred a jurisdiction to regulate trade and commerce upon Parliament, and argued, quite reasonably, that if this jurisdiction authorized the prohibition of sales, it had also to authorize the regulation of sales. He highlighted the contradiction in the majority's position by saying, "I could understand the argument that an Act empowering Parliament merely to regulate trade might not

authorize it to prohibit, and that such prohibition might be deemed an interference with civil rights; but I confess myself unable to understand how the prohibiting of the sale would be regulating it, and the restricting of it and directing how it should be sold, not regulating it".This established the logical flaw in Fisher, Weldon and Allen's treatment of *Justices of Kings County*. But it also came perilously close to saying that *Justices of Kings County* had been wrongly decided, at least insofar as it relied upon the federal trade and commerce power. The legislation which Ritchie and the Court had ruled invalid was prohibitory and therefore, as Palmer admitted, it "might be deemed an interference with civil rights". This was consistent with Fisher's point, later made by the Privy Council in a different context, that regulation implied the continued existence or operation of the activity to be regulated. It also showed the wisdom in Wetmore's observation that in *Justices of Kings County*, the only question raised was whether the provincial Act interfered with trade and commerce, and that "Property and civil rights were not referred to in the judgment". All of these complications may have contributed to Palmer's decision to rely principally on the criminal law power, although his obvious view that the Canada Temperance Act was not really about trade was clearly the main influence. From this perspective, Palmer's criticism of the majority's view that, in the area of temperance, the federal government could prohibit but not regulate, was a bit pedantic. It may have been based on Ritchie's failure (apparently appreciated by Palmer) to correctly define the jurisdictional alternatives relevant to a determination of competency over temperance and the liquor trade. When applied in delimiting the boundary between federal criminal law and provincial police powers, the distinction between a federal power of prohibition and a provincial power of regulation was not without merit, *Justices of Kings County* notwithstanding. It could certainly not be dismissed summarily, as it was by Palmer.

67. Ibid, at p. 146.

68. Ibid, at pp. 146-147, at pp. 149-151.

69. Ibid, at p. 147.

70. Ibid.

71. Ibid, at pp. 147-148.

72. It is easy to underestimate the seriousness with which temperance was widely viewed in the late nineteenth century and perhaps also to underestimate the extent to which it was a serious national problem in the late nineteenth century; see P.B. Waite, "Sir Oliver Mowat's Canada: Reflection on an Un-Victorian Society", in Donald Swainson, ed. Oliver Mowat's Ontario (Toronto, MacMillan, 1970) 12, at pp. 16-23.

73. *Fredericton*, supra, at p. 148.

74. Ibid, at p. 149.

75. Ibid, at p. 153.

76. Ibid, at pp. 149-151.

77. Ibid, at p. 151.

78. Smith, supra, at p. 165.

79. Supra, n. 1, p. 156.

80. Palmer ended his judgment by saying, at pp. 155-156:

> " ... I desire to say that I express, and claim no right to express, any opinion on the policy of the Act. Whether the enforcement of such a law will benefit or injure the community is a question with which, sitting here as a judge, I have nothing whatever to do. That question must, in my opinion, be decided by the persons who control the Legislatures of the country. I do not deny that I have an opinion on the question, and as a citizen of Canada will by any influence I may possess endeavour to influence legislation in that direction ... but after the supreme will of the State has decided the question, whether in accordance with my opinion or not, and passed the Canada Temperance Act ... I think it my duty to see that the law is enforced quite irrespective of the policy of passing it ...".

It is important to note however that these comments were directed at the scope of the court's role in relation to Parliament's decision under the BNA Act to pass the Canada Temperance Act, not to the scope of the court's role in interpreting the intentions of the Imperial Parliament (at the request of the founding fathers) in passing the BNA Act. The argument is that it was at that level that Palmer showed his version of judicial statesmanship, largely by explaining the constitutional rationale for deference at the lower level of analysis.

81. (1879) 3 S.C.R. 505, at pp. 526-543 (Ritchie), p. 543 (Fournier), 557-560 (Taschereau) , pp. 560-574, esp. at p. 571 (Gwynne).

82. Palmer's judicial career came to an abrupt end in 1894 when he retired rather than face parliamentary impeachment for having accepted bribes in relation to a receivership case. Apparently, he had never succeeded in abandoning what Travis had in 1884 called his "wool-dyed habits"; Typically however, Palmer treated a presumptive mortal wound as merely a set-back; at the age of seventy-four, he moved to New York to carry on a new career, during which he undertook the writing of a treatise on international law. In 1898, he returned to Saint John. See D.G. Bell, Legal Education in New Brunswick: A History, supra, at pp. 51-56 and at p. 80. Before his unseemly departure, Palmer had one other opportunity after *Fredericton* to hold forth on Canada's new constitution and to express his Canadian nationalism on constitutional matters. In *Nicholson v. Baird*, decided in 1884, one of the questions raised in an equity case was the applicability of English bankruptcy legislation to property in Canada. Palmer ruled against it by saying that it would be a violation of the constitutional rights of Canadians for the Imperial Parliament to legislate for Canadians in derogation of the rights of self-government recognized in the BNA Act. As in Parliament, he distinguished between the legal power of the Imperial Parliament to legislate on matters assigned to Canadian legislatures by the BNA Act, and the constitutional right to exercise that power. Canadians stood in the same position relative to British legislation

as, "any foreign or British subject in a foreign state" and, "a Canadian is not in any sense an English subject - that is, subject to the laws of England". The position was reinforced by reference to the views of Draper C.J. from the Ontario case of *Regina v. Taylor*, eventually to be made almost famous by Dicey's criticism, that when section 91 of the BNA Act described federal powers as exclusive, it meant exclusive not of the powers of the provinces since these were otherwise addressed, but exclusive of the powers of the Imperial Parliament.; see (1884) N.B.R. (Equity Cases) 195.

Chapter 6

The Conclusion - *Maritime Bank*

In chapter 1, three constitutional decisions of the New Brunswick Supreme Court were said to stand out from the rest. We have discussed the first two. *The Queen v. Chandler*[1] was decided in 1869 through a unanimous decision of the Court's Chief Justice, William Ritchie, that struck down provincial legislation on the release of debtors from prison. It portrayed constitutional interpretation as ordinary statutory interpretation and proclaimed the perfect clarity of sections 91 and 92 of the BNA Act, due largely to Ritchie's view that section 91 established an invariable "rule of construction" by which any and all matters that could potentially be claimed by both governments were defined always to be federal. Parliament and the legislatures were both characterized as merely statutory and subordinate bodies, neither enjoying the plenary authority that the provincial legislatures had enjoyed before Confederation.

The second case was *The Queen on the Prosecution of Thomas Barker v. The Mayor & c., of Fredericton*,[2] where, by a 5-1 vote, the Court struck down the Canada Temperance Act. The court abandoned Ritchie's rule of construction and gave provincial powers equal definitional weight with federal powers. Two of the judges (Fisher and Weldon) made the equal status of provincial powers explicit but Wetmore and Allen seemed implicitly to endorse the

same position by applying the same mutual co-determinacy between federal and provincial powers that Fisher and Weldon did. All but Palmer read down Parliament's authority over trade and commerce and broadly interpreted provincial powers either over property and civil rights or local matters. One of the judges (Wetmore) did the same for the federal criminal law power. All but Palmer relied to some extent on a broad extra-textual understanding of Confederation that trade and commerce was for regulation of the economy as a whole and that provincial powers, be it property and civil rights or local matters, were for the regulation of life within local communities and private households, including decisions on the purchase and use of liquor or any other lawful commodity. Again excepting Palmer, all to some extent associated the protection of provincial jurisdiction with the protection of property and liberty from federal encroachment. Fisher went farthest in this connection, and thereby most strongly reflected a nascent provincial rights understanding of the BNA Act. Each, to varying degrees, departed from Ritchie's premise that constitutional interpretation was simply ordinary statutory interpretation and that the words of the BNA Act were self-sufficiently clear. Instead, each brought a sense of the BNA Act as a constitutional instrument to bear and on this, the consensus included Palmer, though again, Fisher went farthest.

Of course, the New Brunswick Court's ruling in *Fredericton* was overturned, eventually by the Privy Council in *Russell v. The Queen*, but also by the Supreme Court of Canada under the leadership of William Ritchie. Ritchie wrote one of the two substantial opinions, strongly rejecting the analysis and conclusions of Fisher and of the other members of the majority in the New Brunswick Court. He imposed the almost absolutist reading of trade and commerce that he had applied in *Justices of Kings County* and the asymmetrical rule of construction he had developed in *Chandler* to once again conclude that legislation only needed to affect its purpose by affecting trade and commerce to come within 91(2) and outside all of 92.

This repudiation at the hands of Ritchie on the fate of the Canada Temperance Act obscures the substantial similarity between the understandings of the BNA Act that informed the ruling that Ritchie overturned and the understanding of the BNA Act that was in the process of emerging from Ritchie's other constitutional cases. Almost simultaneously with the decision of the Supreme Court of Canada in *Fredericton*, Ritchie discarded the asymmetrical rule of construction of *Chandler* for an approach of interpretive co-determinacy in *Citizen's Insurance v. Parsons*. In the same case, he opted for a reading down of the trade and commerce power that moved him substantially in the same direction as the New Brunswick Court had moved in *Fredericton*, toward an understanding of federal authority resting in the

regulation of systems of trade or in the generic elements of trade and commerce. In the same case, he interpreted property and civil rights broadly. Soon afterwards, in *Mercer v. The Attorney General for Ontario*, Ritchie endorsed a provincial equality of status with the Dominion. In doing so, he implicitly endorsed the view of Fisher, shared with all of the judges of the New Brunswick Supreme Court save Palmer, that federal and provincial powers were "co-equal". Finally, in 1882 in *The Queen v. Robertson*, Ritchie made his abandonment of the *Chandler* rule of construction explicit. Encouraged by the Privy Council's decision in *Citizen's Insurance v. Parsons*, and apparently inspired by growing intellectual and personal tension with Gwynne, he strongly reiterated his commitment to the co-determinacy of federal and provincial powers, limiting overlap and federal paramountcy to circumstances of necessity. Finally, he applied the qualification of regulatory generality that he had more obscurely applied to the trade and commerce power in *Citizen's Insurance v. Parsons*, to the federal fisheries power.

In the context of *The Queen v. Robertson*, Ritchie's agreement on each of these points with the New Brunswick Supreme Court was direct. The case was not an appeal from the New Brunswick Supreme Court but arose from the same saga that had given rise to the New Brunswick Court's ruling in *Steadman v. Robertson*, decided before *Fredericton*, on the basis of an opinion by Fisher that applied the same framework to the fisheries power that he later applied to the trade and commerce power in *Fredericton*. In particular, Fisher's view that federal power over the fishery was limited to the fishing industry and did not extend to the regulation of property rights in fish once caught, was an application of the same understanding of the general rationale for federal economic powers that he would apply to read down the trade and commerce power in *Fredericton*. In *The Queen v. Robertson*, Ritchie expressly adopted it and applied it in the fisheries context.

It can therefore be said that by 1882, substantial consensus existed among the judges of New Brunswick on the meaning of the BNA Act and that this consensus was significantly in favour of the key claims of the provinces, both as to status and jurisdictional mandate. It can also be said that it was a consensus that anticipated the general thrust of later Privy Council decisions but that was fashioned independently of significant Privy Council influence or direction. Only Fisher strongly linked the elements of this consensus to provincial rights as a general interpretive principle, although Ritchie's use of the word "autonomy" might also be evidence in that direction. But all of the judges, save Palmer, had by 1882 come to understand sections 91 and 92 in ways that were broadly consistent with the objectives if not the

arguments of provincial rights.

Thus, the experience of New Brunswick prior to 1883 is contrary to the assumption that has informed much of the criticism of the Privy Council, that it reflected an understanding of the BNA Act without Canadian antecedents. In addition, the experience of New Brunswick judges reveals the influence within Canadian constitutional adjudication of some of the factors that may have been influential in shaping the Privy Council's understanding of the BNA Act. Further, the experience of New Brunswick judges reminds us that judicial understanding of the BNA Act was a dynamic process that in New Brunswick moved quickly from the centralism of 1867 to the elements of decentralized coordinate federalism of the 1880's and 1890's. That the judges of one province made this transition by 1882 suggests the misleading simplicity of comparisons of Privy Council interpretation from the 1880's, the1890's and later to the political statements of intent of 1867.

In this context, the conclusions to be drawn from this thesis may best be illustrated by proposing a new perspective of the decision of the Privy Council in *Liquidators of the Maritime Bank v. The Receiver-General for New Brunswick*, the third of the cases profiled in chapter 1.[3] The standard view of this case is that it represents the culmination or simply the confirmation of the Privy Council's determination to bestow a status and an importance on the provinces that they were not intended to have. The case is therefore almost exclusively seen as one in the series of Privy Council decisions by which coordinate federalism was imposed on Canada, most of which came from Ontario and out of the concerted campaign of that province for provincial rights.

This thesis suggests a different perspective that sees *Maritime Bank* as the culminating event not only for the development of Privy Council doctrine but also for the transition of the New Brunswick judges from their own version of subordinate federalism to coordinate federalism. To understand the significance of this broader perspective, it is necessary to once again visit the rulings in *Maritime Bank*, this time starting with the decision of the Supreme Court of New Brunswick.

II

In March of 1887, the Maritime Bank failed, with $35,000 on deposit from the province of New Brunswick. On behalf of the province, the Liberal Government of Premier and Attorney General Andrew Blair claimed preference over all other creditors on the basis of the

prerogative right of the Crown to priority in the payment of debts. The liquidators of the Bank denied this claim on the basis that the lieutenant governors were not representatives of the Queen and New Brunswick and therefore did not have the prerogative rights it claimed.

By stated case, New Brunswick and the liquidators took this question to the New Brunswick Supreme Court early in 1888. Blair's role was a direct one; he appeared as lead counsel in front of the New Brunswick Court and in the appeal that would go to the Supreme Court of Canada. He would go to London as well for the liquidators' appeal before the Privy Council, though he would leave the oral argument in that venue to English counsel, Horace Davey. The obvious importance of the case was also indicated by the profile Blair gave to it in the legislature. As it progressed from the New Brunswick Supreme Court in 1888 through to the Privy Council in 1892, Blair updated the House on the progress of the litigation and reminded all of its importance. In Speeches from the Throne in 1887 and 1888, prosecution of the case was portrayed as a government priority. The1893 speech would celebrate victory by saying that the win in the Privy Council, "established beyond all future controversy the status of the executive of the provinces, and has recognized that a direct relationship exists between the provincial executives and the sovereign of the empire".[4]

This caught the source and extent of Blair's broader interest in the case. There was more at stake for Blair than $35,000, and even more than protection of the province's rights as creditor in future cases. Instead, Blair seems clearly to have self-consciously fought *Maritime Bank*, and to have fought it personally, as a battle in the war of the provinces with the federal government for the recognition of provincial rights. He pushed the case forward and argued it on the understanding that it had the potential to decide the question of the status of the provinces for all purposes, not just in respect of provincial rights in creditor-debtor matters. In between the Bank's failure in March of 1887 and arguments before the New Brunswick Supreme Court in February of 1888, Blair had been to the Quebec Interprovincial Conference of 1887 that had so heartily endorsed the provincial rights view of Confederation, including resolutions that reflected and confirmed the distinct and equal independence of the separate provinces.[5] In the legislature, much of the talk in 1887 and in 1888 was for or against provincial rights, with the government's participation in the Quebec conference as the principal context.

The other variable that may well have factored into the profile that Blair gave to *Maritime Bank* was that by 1887, the provinces clearly had the upper hand in constitutional litigation. Federal powers had been reduced and provincial powers expanded in provincial

wins in *Citizen's Insurance v. Parsons*, *Hodge v. The Queen*, and the *McCarthy Reference*. On the very issue at stake in *Maritime Bank*, the status of lieutenant governors and therefore of provincial governments, the Privy Council had already provided considerable encouragement. In *Hodge v. The Queen*, it had declared local legislatures to be, within the limits of section 92, as supreme as the Imperial Parliament or the Parliament of the Dominion. In addition, it had in *Mercer v. The Attorney General for Ontario*, confirmed the right of Ontario, and of other provinces, to property that, under common law, was crown property. It may well have seemed therefore, that success was a foregone conclusion in *Maritime Bank*, and that judicial recognition of the regal status of the lieutenant governors was a virtual formality.

Blair seemed to argue the case before the provincial Supreme Court with this expectation. He made three arguments. The first was that each of the provinces possessed all of the prerogative powers going into Confederation and that the liquidators could not discharge the onus that fell to them from the constitutional principle that the rights of the Crown could only be abridged expressly by pointing to anything in the BNA Act which stripped the provinces of those powers. The second argument was that section 64 of the BNA Act actually confirmed the continuation of the Crown's direct involvement in provincial government by continuing the "Executive Authority" of New Brunswick and Nova Scotia, "as it exists at the Union". The third argument appealed to broader policy considerations. "Divest the Crown of its executive rights as represented by the Lieutenant Government", said Blair, "and the whole machinery of Government would stop". In contrast, acceptance of his position would mean, "the whole scheme of Union is made consistent and harmonious" and "The executive authority, as represented by the Federal and Provincial Governments, reaches out in both directions and covers the whole ground". Interestingly, Blair appears not to have cited *Hodge v. The Queen*, clearly the strongest authority available to him, though he did cite the Privy Council decision in *Mercer* and Todd's Parliamentary Government.

Counsel for the liquidators argued bluntly that the lieutenant governors did not represent the Queen except to the extent specifically provided for in the BNA Act. This rested less on dissection of the provisions of the BNA Act than it did on the general proposition that Confederation had totally and necessarily altered the constitution of New Brunswick from that of a colony to that of administrative sub-division of a colony. It was no longer, "a Colony of Great Britain, but only a portion of a Colony of Great Britain", and lieutenant governors were no longer vice-regal, but merely, "part of the Colonial Administrative staff". Post-Confederation dispatches from Earl Carnarvon and Earl Granville were the main authority. It was, moreover,

impossible for the Crown to be,"represented by two persons whose prerogative rights are over the same jurisdiction".

The composition of the bench that heard these arguments had changed considerably since *Fredericton*. Fisher had died in 1880, even before the appeals from *Fredericton* had run their course, and been replaced by George Edwin King, who had been premier from 1872 to 1878 and who had, as attorney general, so strongly protested against the Court's decision in *Chandler*. He was a highly regarded lawyer who would eventually be appointed to take Ritchie's place on the Supreme Court of Canada. In 1882, John Fraser, who had followed King into the premier's office, replaced Charles Duff on the bench. Finally, Weldon had died in 1884 and been replaced by William Tuck, later to be Chief Justice, but he, like Palmer, took no part in *Maritime Bank*. One result was that the bench that heard *Maritime Bank* consisted of three former premiers (Wetmore being the other), along with a former attorney general (Allen). Blair's argument, that the whole machinery of provincial government depended on the Crown's direct participation, may have been well suited to his judicial audience.

Although both Allen and Fraser wrote opinions, Allen's was the more interesting. In 1877 he had, in *Ganong v. Bayley*, dissented from the Court's decision that provincial legislation for the establishment and appointment of parish courts was, on the one hand, within provincial jurisdiction over the administration of justice and, on the other hand, not a violation of section 96 of the BNA Act.[6] Allen's view had been that even if the courts were not what would now be called "section 96 courts", the appointments were outside provincial jurisdiction. The reason was that, quite apart from section 96, only the Crown could appoint judges and this meant all judges, even justices of the peace, had to be appointed by the governor general. The reason was that lieutenant governor, in consequence of the BNA Act, no longer represented the Crown, as he had, "when he derived his authority directly from the Sovereign". Instead, "the Governor General alone, is appointed by the Queen's commission, and acts as the representative of the Sovereign in the Dominion".[7]

Now in *Maritime Bank*, Allen took the opposite line. The question was now whether the BNA Act had taken away provincial possession of the rights of the Crown, not whether it had given the provinces such rights.[8] This ensured Blair's success, for it showed acceptance of his fundamental premise, and that of the provincial rights perspective, that Confederation had continued the pre-existing provinces (while dividing one of them in two), not created them. From this premise, the conclusion that lieutenant governors still represented the Crown was not only plausible but perhaps inescapable, for it meant that the opposite conclusion would

require some express denial of sovereign status to the provinces. There was, of course, little in the BNA Act that satisfied that standard. The most the Act did was make less provision for the connection of lieutenant governors to the Crown than it did for the Governor General. This justified the conclusion that the Crown was not generally part of provincial governments only if one accepted the premise that the provinces, like the Dominion government, were created by the Act.

From the perspective of Privy Council criticism, Allen's reversal might be easy to explain as the obvious influence of the Privy Council's distorted if not biased understanding of the BNA Act. After all, *Hodge v. The Queen* was decided in 1883 and was cited before Allen and the rest of the Court in another case the day before *Maritime Bank* was decided.[9] But it is interesting that Allen did not cite *Hodge* in *Maritime Bank*, even though he did cite the Privy Council decision in *Mercer*, which arguably gave much less direct support to his change of position. Instead, Allen relied primarily and extensively on Ritchie's 1881 dissent in *Mercer*, which unlike the later ruling of the Privy Council, dealt with lieutenant governor status generally and directly. He quoted Ritchie's conclusion that a review of the BNA Act showed that the, "Provincial executive and authority was to be precisely the same after as before Confederation", his assessment that, "Special pains appear to me to have been taken to preserve the autonomy of the Provinces, so far as it could be [sic] consistently with a federal union", and his description of the argument that the lieutenant governors did not represent the Crown as "fallacy".[10] Further, Allen relied on another and more recent Supreme Court of Canada case upholding a federal claim of Crown preference in debt recovery, partly for Ritchie's reiteration of his *Mercer* views and partly for Justice Strong's statement that although the BNA Act "apportioned" the prerogative rights of the Crown, they continued to exist in their "integrity" in both levels of government, however their "locality" might have been changed to reflect the division of powers.[11]

It is also interesting that Allen did not mention *Lenoir v. Ritchie*, the 1879 case on provincial Queen's Counsel in which the Supreme Court had found that lieutenant governors were not representatives of the Crown.[12] Fraser did, but only to suggest that counsel had not explained to Justice Gwynne that the BNA Act dealt specifically with some elements of the connection of lieutenant governors of Quebec and Ontario to the Crown because this was made necessary by the division of old Canada into two provinces.[13] Otherwise, Fraser like Allen, relied on Ritchie in *Mercer* and Strong's later *obiter dicta*. In addition, unlike Allen, he went through an analysis of many of the sections of the BNA Act bearing on provincial status

to reach his own conclusion that, "I cannot see anything in the British North America Act which takes away or abridges the Executive authority (by which I mean the Provincial Executive authority) in respect of all subjects and matters which are declared to be Provincial".[14]

In the Supreme Court of Canada, Blair met even less trouble.[15] With the exception of Gwynne who predictably dissented, the judgments were short. The judges gave their conclusions in Blair's favour, without bothering much or at all with supporting reasoning. It is hard not to sense that the judges saw the case as raising an important question, but one that had already been all but answered. Strong said, "there can be no doubt that the provinces have this right"[16] and Taschereau agreed and said, for good measure, that he had said the same thing 12 years previously while on the Superior Court in Quebec.[17] Patterson went on a little longer, but only to say that he could not really add anything to what had been said by Allen and Fraser. He found their reasoning in accord, "with the spirit and tenor of the British North America Act".[18] Even Gwynne's dissent suggested more of resignation than of resistance. There was perhaps a little sarcasm in his inability to understand why governments that were as democratic as those of Canadian provinces needed or wanted the powers of royalty based on ancient common law.[19] This left him believing that, "the only object to be gained by regarding such debts to be debts due to Her Majesty would seem to be to lay a foundation for introduction into the constitution of the provinces of this Dominion of a vexatious and obnoxious privilege not introduced by the terms of the BNA Act".[20] He ended by saying in effect, that the court should not be allowing itself to be used for such a purpose.

Once again, it was interesting that *Hodge v. The Queen* was not cited by Blair or mentioned by any of the judges.[21] This changed when the case came before the Privy Council almost three years later in 1892.[22] Taking over for Blair, Horace Davey cited *Hodge v. The Queen* as showing that the provinces were in no sense subordinate but had, "coordinate authority within their respective spheres". As is well known, Lord Watson agreed. After saying he could find neither principle or authority for the proposition that the effect of Confederation had been to leave Her Majesty with only one government in North America,[23] he wrote the classic judicial statement of coordinate Canadian federalism:

> The object of the [BNA] act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. [...] in so far as regards those matters which, by section 92, are specially reserved for provincial legislation, the legislature of each province continues to be free from the control of the Dominion, and as supreme as it

was before the passing of the Act.[24]

The apparent inconsistency of this doctrine with disallowance and other implements of central control manifest in the BNA Act would become fundamental to Privy Council criticism. Interestingly however, those who argued against the representation of the Crown by lieutenant governors, be they judges or counsel and whether in *Maritime Bank* or in earlier cases, such as *Lenoir v. Ritchie*, seem never to have relied on an inference of subordination drawn from the federal government's power of disallowance. Instead, their main arguments were that the BNA Act did not *say* that the Queen was part of the legislatures and second, the lieutenant governors were appointed by the federal government rather than directly by the Queen. On the latter, Watson simply said there was nothing anomalous in one representative of the Crown being appointed by another.

As discussed in chapter 2, recent scholarship has stressed the importance of the provincial victory on the status question to the outcomes in division of powers cases. It is therefore interesting that in *Maritime Bank*, Watson used the reverse logic. Finding first that the provinces were not just administrators but legislators, he said he would need very express language to "warrant the inference that the Imperial Legislature meant to vest in the provinces of Canada the right of exercising supreme legislative power to which the British Sovereign was to have no share".[25] On the other hand, this showed, not surprisingly, that Watson did connect the two questions of legislative authority and of constitutional status. As argued in chapter 4, the judges of New Brunswick had made the same connection in *Fredericton* more than 10 years earlier.

III

Inevitability pervades Watson's judgment in *Maritime Bank*. In the contest between the two great and divergent theories of Confederation that had dominated Canada's development practically since 1867, Watson resolved it by finding nothing to be said for the theory held by some of those who had done the most to make Confederation happen. For the critics of the Privy Council, his dismissiveness helped to confirm the suspicion that Watson and the Privy Council operated, at worse, from an agenda of their own or, at best, without even a basic understanding of Confederation. Either way, *Maritime Bank* is seen, along with *Local Prohibition*, as one of the culminating events in the Privy Council's deliberate or unwitting re-writing of the BNA Act, starting with cases such as *Citizen's Insurance v. Parsons* and *Hodge*

v. The Queen in the late 1870's and early 1880's.

The judicial history of *Maritime Bank* gives a different perspective on the case. It shows that the sense of inevitability did not start with Lord Watson but with the judges of the Supreme Court of Canada. Moreover, the Privy Council ruling was anticipated not only by the judges in the Supreme Court but by the judges of the New Brunswick Supreme Court. From this perspective, it is more difficult to see the Privy Council's ruling solely as an application of the earlier and equally erroneous *dicta* of *Hodge v. the Queen*. It was also validation of the views of almost every Canadian judge who participated in the case before it reached the Privy Council on appeal.

Of course, those same Canadian judges gave judgment in *Maritime Bank* in a legal environment that included *Hodge* and the other earlier Privy Council cases. This makes it impossible to see their judgments as pure and untainted Canadian precursors of the Privy Council's ruling. The suspicion that they only anticipated the Privy Council's handling of the case because of the influence of earlier Privy Council decisions might be heightened by the fact that the Supreme Court of Canada had, before *Hodge*, ruled in *Lenoir v. Ritchie* that the lieutenant governors did not represent the Crown except on the specific matters expressly provided for in the BNA Act. Nevertheless, it is worth recognizing that the Privy Council decided *Maritime Bank* by upholding rather than by overturning Canadian Courts, if only because this fact has either not been mentioned at all or not been given any weight in the standard view of *Maritime Bank*, that it represented a view of Confederation generally at odds with that held by Canadian judges and other Canadian lawyers. Also, it seems slightly remarkable that *Hodge* could have been so influential in directing the outcome in *Maritime Bank* in both Canadian Courts and yet not be mentioned by even one of the six judges who wrote judgments in one or the other of those two Courts, or apparently by counsel in argument in either Court. It may be worth remembering here that *Hodge* was a case about liquor licensing competency, not provincial sovereignty, and that the paragraph from *Hodge* applied by Watson in *Maritime Bank* was *dicta*. Ever since *Maritime Bank*, the connection of *Hodge* to the sovereignty issue has, of course, become not only obvious but also the predominant source of the case's continuing significance. Prior to *Maritime Bank*, the connection may not have been so apparent.

A less precise but perhaps more substantial point is that *Maritime Bank* was not only the culminating event in the development of the jurisprudence of the Privy Council. It was the culmination of the evolution of the New Brunswick Supreme Court from the statutory and

subordinate federalism of *Chandler* to the full acceptance of the coordinate federalism that can be seen in development in *Fredericton* in 1879. It was an evolution that was reinforced by the convergence of the Court with what was, after 1875, the separate evolution in the thinking of William Ritchie as a member of the Supreme Court. This convergence was apparent in the reliance of both Allen and Fraser in *Maritime Bank* on Ritchie's pre-*Hodge* dissent in the *Mercer* case, where Ritchie, like Watson later, spoke of the protection of the autonomy of the provinces as an object of the BNA Act.

Thus, to say that the Privy Council's *Maritime Bank* ruling was anticipated by the decision of the New Brunswick Supreme Court in the same case is accurate but incomplete. It would perhaps be more complete to say that the New Brunswick Supreme Court handled *Maritime Bank* in a way that anticipated the Privy Council ruling in the same case because New Brunswick judges had already anticipated the key ingredients of coordinate federalism not only before *Maritime Bank* in 1892 but also before *Hodge* in 1883. Moreover, both in the case of Ritchie and the judges on the New Brunswick court, they arguably had also integrated the elements of coordinate federalism by linking an appreciation of the equal sovereignty of the provinces to the scope of provincial and of federal powers respectively.

The implications of this analysis are, first, the basic point that the recognition of the sovereignty of the provinces was not a Privy Council innovation imposed on Canada without Canadian precedent. That of course did not make it the right outcome but it does make it a little more difficult to argue that it was obviously the wrong outcome.

Second, seeing *Maritime Bank* in the context of the earlier jurisprudence of the New Brunswick judges, rather than solely in the context of earlier Privy Council jurisprudence, shows that the judges of New Brunswick came to believe that Confederation protected the continuing sovereignty of the provinces at least partly because of the evolution in their thinking about federalism that occurred through their own experience in constitutional adjudication. By itself, this may suggest that the members of the Privy Council went through a similar process, given the agreement in *Maritime Bank* between the New Brunswick judges and the Privy Council judges on the fundamentally important question of provincial government status.

Third, linking *Maritime Bank* to the earlier jurisprudence of the New Brunswick judges suggests strongly that the provincial sovereignty issue was not any more an isolated question for the Privy Council than it was for the judges of New Brunswick. Instead, it was one that connected to other important questions such as the role and importance of the respective mandates of the provinces and of the federal government within Confederation, the

relationship of particular heads of power to those general mandates, and the implications of federalism for provincial responsible self-government. As referenced throughout this study, it has been suggested by other scholars that the provinces, and more particularly the provincial rights movement, may have been successful in the Privy Council, perhaps especially on the status question, because their interpretive arguments connected with these larger themes in ways that resonated with the judicial representatives of the English empire. A variation on this theme might suggest that regardless of the intellectual or other mechanisms of provincial success, the important point is that the jurisprudence of the Privy Council can be understood as based on Canadian constitutional ideas and experience because it accepted arguments that had foundations in those ideas and that experience. *Maritime Bank* perhaps at a minimum contributes to the latter and perhaps even to the former perspective by showing the New Brunswick judges coming to the same place as the Privy Council on the question of status but through a process that makes apparent the connection of that question to some of these larger themes, many of them associated with provincial rights. If the connections were there for the New Brunswick judges, perhaps they were also for the Privy Council judges.

Fourth, *Maritime Bank* perhaps suggests that more consideration needs to be given to the possibility that the constitutional decisions of Canadian judges helped to shape the Privy Council's understanding of the BNA Act. To a large degree, this possibility has probably been discounted because of the impression that the judges of the Privy Council and Canadian judges were fundamentally at odds on the Act's meaning and effect. *Maritime Bank* challenges that impression directly. It was, of course, only one case decided near the end of the seminal period of Privy Council decisions, but it was nevertheless a case of near complete transatlantic judicial consensus concerning a point of fundamental importance that had perhaps deep implications for the Privy Council's understanding of other issues, such as those subsequently determined in *Local Prohibition Reference*.[26] Moreover, it seems plausible to propose that the writing of Canadian judges in other cases may have had a more diffuse but equally important cumulative influence on the Privy Council. Ritchie's decision in *Citizen's Insurance v. Parsons* was close enough to that of the Privy Council in the same case to permit him to suggest a cause and effect relationship. Similarly, the decision of the Privy Council in *Russell v. The Queen* seems to show clearly the influence of Palmer's dissent in *Fredericton*, at least on the characterization of temperance legislation. What each of these examples perhaps shows is that Canadian judgments were read in London and that, in consequence, the Privy Council would have become aware of the range of Canadian judicial thinking on most

of the important questions that would eventually be addressed in Privy Council decisions. Thus the appeal in *Mercer* would have brought Ritchie's dissent and conclusion that the BNA Act was structured to protect provincial autonomy to the attention of members of the Privy Council, not only before *Maritime Bank* but before *Hodge v. The Queen*. Similarly, the appeal in *Fredericton* would have told the judges of the Privy Council that Canadian judges were divided on the scope of the trade and commerce and the property and civil rights powers. It would have told them that some Canadian judges limited federal powers to those needed for the creation of a common market and associated provincial powers with the life of the community or, more generally, with social matters. In both cases, it may be a mistake to conclude that because the Privy Council found it unnecessary to deal with the status of the lieutenant governors in *Mercer* or with trade and commerce in *Russell v. The Queen*, or rejected the Fisher view of property and civil rights outright in *Russell*, that the views expressed in these cases on these questions had no lasting impact on Privy Council members. The continuity and overlap both in the membership of the Privy Council and in the lawyers who appeared before it on Canadian constitutional cases might suggest otherwise. So perhaps does the fact that the direct agreement between the Canadian and English judges on the provincial sovereignty issue appear to correlate with more indirect agreement on other and related issues, such as the general shape of federal and provincial legislative authority.

Maritime Bank is also important to this study in one further respect. It represents strong acceptance by the judges of the New Brunswick Supreme Court of a central tenet of the argument for provincial rights, the constitutional sovereignty of the provinces within their constitutionally defined jurisdictional boundaries. It thereby reinforces the conclusions based on Fisher in *Fredericton* that New Brunswick thinking on the constitution was neither indifferent to the provincial rights movement nor interested in the movement only to the extent it encompassed advocacy for better terms. In fact, it shows New Brunswick judges at the vanguard of the judicial articulation of the fundamental constitutional premise of provincial rights.

On this point, *Maritime Bank* also shows that the understanding of Confederation held by New Brunswick judges in 1888 was consistent with a broader New Brunswick commitment to the constitutional elements of the provincial rights movement. This comes through in the role of Andrew Blair, first in identifying the constitutional opportunity presented amidst the wreckage of the Maritime Bank and second, in exploiting that opportunity through constitutional litigation. Both were contemporaneous with Blair's participation in the Quebec Conference of

1887 and his advocacy in New Brunswick for the resolutions from that conference. It is therefore hard to believe that the importance of the case to Blair did not include its relevance to the idea that was central to the justification of many of these new Quebec resolutions, namely, that the provinces had retained their status through Confederation as sovereign governments. If so, Blair's insistence at Quebec for Ontario support for better terms might better be interpreted as good negotiating rather than as disinterest in the constitutional questions of the conference.

From the perspective of the critics of provincial rights, the affinity between Blair and the New Brunswick judges might be said only to confirm that provincial rights was a political demand without legal foundations in Canada's constitution. It might also be said to show nothing more than that some Canadian judges were prepared to be as gullible or as disingenuous as the judges of the Privy Council. This ignores the significance of *Maritime Bank* having roots in *Fredericton*, decided a decade earlier when the provincial rights movement had not yet crystallized into the political movement undeniably manifested at the 1887 Quebec Conference. But also, it assumes the existence of a belief in a distinction between constitutional law and politics that, as *Fredericton* perhaps indicates, was not yet fully operational or had not yet come to mean to the actors of the nineteenth century what it would come to mean either to later lawyers or scholars.

Endnotes

1. *The Queen v. Chandler. In re Hazelton* (1867-1869) 12 N.B.R. 556.

2. *The Queen on the Prosecution of Thomas Barker v. The Mayor, Aldermen and Co. of Fredericton* (1879-1880) 19 N.B.R. 139.

3. *Liquidators of the Maritime Bank v. The Receiver-General for New Brunswick*(1888) 27 N.B.R. 379.

4. New Brunswick, Synoptic Report of the Proceedings of the House of Assembly 9 March, 1893, at p. 6; see also 13 March, 1890 (at p. 8); 7 march, 1889 (at p. 6); and 1 March, 1888 (at p. 5).

5. On the conference generally, see P. B. Waite, Canada, 1874-1896: Arduous Destiny (Toronto, McClelland and Stewart, 1971), pp. 194-195.

6. *Ganong v. Bayley* (1877-1878) 17 N.B.R. 324.

7. Ibid, p. 333.

8. *Liquidators of Maritime Bank*, supra, at p. 392.

9. *Ex parte Danaher* (1888) 27 N.B.R. 554, at p. 558.

10. *Liquidators of Maritime Bank*, supra, at pp. 393-394.

11. The case was *The Queen v. Bank of Nova Scotia* (1886) 11 S.C.R. 1, and was quoted at p. 392 by Allen.

12. *Lenoir v. Ritchie* (1879) 3 S.C.R. 575.

13. *Liquidators of Maritime Bank*, supra, at p. 401.

14. Ibid, at p. 400; the largest group of these provisions were those dealing with the establishment of the constitutions and institutions of Ontario and Quebec. These provisions included section 63 (appointment of first set of executive officers for Ontario and Quebec), section 65 (vesting and division of executive and legislative powers of Upper and Lower Canada and of "old Canada" in an between Ontario and Quebec), sections 69 and 70 (creation of legislature for Ontario), sections 71 and 72 (creation of legislature and legislative council for Quebec), section75 (filling vacancies in Quebec Legislative

Council), and section 82, (power of Lieutenant-Governor to call together the Legislative Assembly of Ontario or of Quebec). Various of these provision empowered the Lieutenant-Governors of Quebec or Ontario to exercise specific powers in the Queen's name and this was argued by some (such as Gwynne of the SCC) to imply that the Lieutenant-Governors could not have been intended to represent the Crown generally since these grants of specific authority would have been unnecessary. Although refutation of this argument seemed to have been Fraser's main concern, he confused it with the different argument that the Lieutenant-Governors of Ontario and Quebec had powers to do certain things in the Queen's name which the Lieutenant-Governors of other provinces did not. In both respects, he relied on section 64, which continued the executive authority for New Brunswick and Nova Scotia. In part this made specific enumeration of powers that could be exercised in the Queen's name unnecessary for New Brunswick and Ontario and this answered the implication that new Brunswick and Nova Scotia had a different status than Ontario and Quebec. In part also it explained why specific enumeration had been necessary for Ontario and Quebec, namely, there was no pre-existing executive authority for each province that could be continued. Of interest, neither Fraser or Allen addressed the difference between section 58, which provided generally of Lieutenant-Governors without speaking of the Queen, and section 17, which established the Parliament and provided expressly for the inclusion of the Queen.

15. *Liquidators of the Maritime Bank v. The Receiver-General for New Brunswick* (1888) 20 S.C.R. 695.

16. Ibid, at p. 697.

17. Ibid, at pp. 697-698.

18. Ibid, at p. 707.

19. Ibid, at p. 702.

20. Ibid, at pp. 703-704.

21. Patterson said he thought he saw an intimation of the status of the provinces that supported New Brunswick's position in *Maritime Bank* in the Privy Council's post-*Hodge* decisions in *St. Catherines Milling Co. v. The Queen* 14 A.C. 46 and in *Attorney General of British Columbia v. Attorney General of Canada* 14 A.C. 295.

22. *Liquidators of Maritime Bank v. The Receiver-General for New Brunswick*(1892) A.C. 437.

23. Ibid, at p. 441.

24. Ibid, at p. 441.

25. Ibid, at pp. 442-443.

26. These included the relative breadth of federal and provincial powers in key areas such as trade and commerce and property and civil rights and the relationship of Parliament's general authority over peace, order and good government to its enumerated powers. It is interesting

to note that the Privy Council also decided *Hodge v The Queen* in favour of provincial supremacy in the legislative sphere (subject to section 92 limits), by upholding a ruling of a Canadian court, in that case the Ontario Court of Appeal; see *Hodge v. The Queen* (1883) A.C. 117, at pp. 132-133.

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