CONSTITUTIONAL ADJUDICATION, PROVINCIAL RIGHTS, AND THE STRUCTURE OF LEGAL THOUGHT IN LATE NINETEENTH-CENTURY NEW BRUNSWICK

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The *Canada Temperance Act*[1] came into force in the city of Fredericton in May of 1879.[2] By the end of the year the New Brunswick Supreme Court had on two occasions ruled that the *Act*, (otherwise known as the *Scott Act*), was beyond the Dominion Parliament's power to regulate trade and commerce. In August, a bench consisting of the Chief Justice John Campbell Allen and the puisne judges Charles Fisher, Andrew Rainsford Wetmore and John Wesley Weldon, unanimously ruled the *Act* unconstitutional at the suit of John B. Grieves, a Fredericton publican.[3] The unanimity was as to result alone however, as each of the judges delivered his own reasons for judgment. While there was substantial similarity between those of Fisher and Wetmore, and while those of Weldon covered much of the same ground, those of Chief Justice Allen were based on reasoning that he alone adopted. It also contained an express repudiation of much of the reasoning relied on by the other members of the court.

Four months later, in the case of *The Queen on the Prosecution of Thomas Barker and The Mayor and Commonality of Fredericton*, a bench consisting of all of the judges who had decided *Grieves* but augmented by Charles Duff and Acalus Palmer, who had been appointed to the court after *Grieves* had been decided, reached the same conclusion on the same question.[4] The earlier unanimity as to result was broken however, as the newcomer Palmer delivered a lengthy dissent. Duff simply concurred in the separate judgment of Chief Justice Allen, which was substantially the same as the judgment that the Chief Justice had delivered in *Grieves*. Fisher and Wetmore also delivered reasons which were virtually identical to those which they had delivered in *Grieves*. Only Weldon gave a judgment that differed significantly in terms of content and organization from the judgment he had given earlier.

Seen in the context of the constitutional cases decided by the court in the first 25 years of confederation, *Grieves* and *Barker* represent an impressive display of judicial effort. In terms of size alone, *Barker*, the only one of the two cases to be published in the standard law reports, is particularly impressive, filling almost 50

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[1]S.C. 1878, 41 Vict., c.16.

[2][Saint John] Globe (1 May 1879).

[3]*Canada Temperance Act: Judgment of the Supreme Court of New Brunswick, Trinity Term, 1879, Ex parte Grieves*, New Brunswick Museum.

[4](1879-1880) 19 N.B.R. at 139.

pages of those reports. This contrasted sharply with the courts previously published constitutional decisions, which averaged 11 pages, a length exceeded by two of the judgments delivered in *Barker*.[5] Of course, the number of pages taken up by *Barker* was largely a function of the fact that five of the six judges who sat in the case felt compelled to issue their own reasons. But this in itself was indicative of the special character of the case. In more than half of the *British North America Act* cases decided by the court before 1893, the court spoke through a single judgment. There is only one other case in which as many as four separate judgments were delivered.[6] *Barker* was the only one in which five separate judgments were delivered.

More important than the sheer bulk of *Grieves* and *Barker* is the complex and intriguing richness of the constitutional thought that they revealed.[7] They contained careful, probing, and at times imaginative consideration of many of the issues which that bedevil judges, lawyers and constitutional scholars well into the Twentieth-Century. For example, Wetmore's *Barker* judgment anticipates the Privy Council by almost twenty years in perceiving a need to limit the scope of the Dominion's peace, order and good government power.[8] Palmer's dissenting opinion contains a discussion of the possible scope of the Dominion's criminal law power such as does not reappear in the jurisprudence for another 50 years.[9] In more general terms, and as this article will attempt to demonstrate, the judgments delivered in *Grieves* and *Barker*, and especially those of Charles Fisher, represent an impressive attempt to relate division of powers analysis to an overarching theory of the *British North America Act* as a constitution "similar in principle to that of the United Kingdom."[10] In comparison to the level and character of analysis one would expect judges of the late Nineteenth-Century to engage in, this attempt is truly extraordinary.

In short, when *Grieves* and *Barker* are read in the context of their time and place, it becomes apparent that the judges of the New Brunswick Supreme Court

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[5]The data as to the length of published reports and number of judgments given in each case is compiled from the *New Brunswick Reports*, 12 (1867-69) through 31 (1891-92).

[6]The case was *Ganong v. Bailey* (1877-78) 17 N.B.R., which concerned the power of the Lieutenant Governor to appoint "Commissioners" to hear cases for the recovery of small debts.

[7]See R.C.B. Risk, "The Canadian Courts Under The Influence" *University of Toronto Law Review*, forthcoming.

[8](1879-80) 19 N.B.R. 141 at 147-153; *A.G. Ontario v. A.G. Canada (Local Prohibition)* [1896] A.C. 348.

[9]*Ibid.* at 147-153; *In re The Board of Commerce Act, 1919 And The Combines And Fair Prices Act, 1919*, [1922] 1 A.C. 191, at 198-199; *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396 and, *Proprietary Articles Trade Association v. A.G. Canada*, [1931] A.C 310 at 324.

[10]*The British North America Act*, U.K. 30-31, Vict., c. 3, preamble.

regarded them as cases which raised difficult questions of fundamental importance. My purpose in this article is to identify those questions and understand the importance which was attached to them. My argument will be that *Grieves* and *Barker* can be understood as a debate about two distinct but subtly interrelated issues: firstly, the nature of constitutional adjudication and secondly, the relevance of a provincial rights understanding of confederation to a legal interpretation of the *British North America Act*. So viewed, the attempt of the New Brunswick Supreme Court to place temperance legislation within the division of powers created by sections 91 and 92 of the *British North America Act* casts doubt on the general assumption of Canadian historians that the inspiration for the provincial rights movement came principally, if not exclusively from Ontario.[11] It also casts further doubt on the view that the provincial rights movement was an essentially extra-legal movement which had much more to do with party political strategies, institutional dynamics or economic and sociological conditions than it did with constitutional theory as such.[12] In this respect, a detailed analysis of *Grieves* and *Barker* provides further evidence on which to question the longstanding charge that the Privy Council's "provincialist" jurisprudence was an illegitimate rewriting of the centralist constitution which the *British North America Act* is said to have clearly intended.[13] It suggests that whether by design or coincidence, the Privy

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[11]J.C. Morrison, "Oliver Mowat and the Development of Provincial Rights in Ontario: A Study in Dominion - Provincial Relations, 1867-1896," *Three History Theses* (Toronto: Ontario Department of Public Records and Archives, 1961) chapter 1 and generally; R. Cook, *Provincial Autonomy, Minority Rights and the Compact Theory, 1867-1921* (Queen's Printer, 1969) 2, 20-22, 41-42; C. Armstrong, "The Mowat Heritage in Federal-Provincial Relations" in *Oliver Mowat's Ontario* (Toronto, 1972) esp. at 103-104, 108, 118; and P. Romney, *Mr. Attorney* (Toronto: The Osgoode Society, 1986) chapter 6 generally.

[12]The role of party politics is emphasized in R. Cook, *Provincial Autonomy*, at 1 and 10; P.B. Waite, *Canada, 1874-1896: Ardous Destiny* (Toronto: McClellend and Stewart, 1971) at 175, and in J.T. Saywell, *The Office of the Lieutenant Governor* (Toronto: University of Toronto Press, 1957) at 260: The interaction of the institutions of parliamentary government and federalism is emphasized in R. Simeon, *Federal-Provincial Diplomacy* (Toronto: University of Toronto Press, 1972) chapter 1 and in C. Armstrong, *The Politics of Federalism* (Toronto: University of Toronto Press, 1981) at 3, 8 and 31: A sociological explanation is given in Alan Cairns, "The Judicial Committee and its Critics," (September 1971) 4:3 *Canadian Journal of Political Science, passim*: The role of the economy is also emphasized by R. Cook, *Provincial Autonomy*, at 20, and by C. Armstrong "The Mowat Heritage in Federal-Provincial Relations," at 94-102 and 117.

[13]The "charge" has a long pedigree; see F.R. Scott, "The Development of Canadian Federalism," *Papers and Proceedings of the Canadian Political Science Association*, 1931, 231-47, reprinted in F.R. Scott, *Essays on the Constitution* (Toronto, 1977) 35-48, and "The Consequences of the Privy Council Decisions," (1937) 15 *Canadian Bar Review*, 485; *Report Relating to the Enactment of the British North America Act, 1867, and Lack of Consonance Between its Terms and Judicial Construction of Them and Cognate Matters, (The O'Connor Report)* (Ottawa: King's Printer, 1939); V.C. MacDonald, "The Constitution in a Changing World" (1948) 26 *Canadian Bar Review*, 29, and Bora Laskin, "Peace Order and Good Government Re-examined" (1947) 25 *Canadian Bar Review*, 1054. It has been made afresh in Frederick Vaughn, "Critics of the Judicial Committee of the Privy Council: The New Orthodoxy and an Alternative Explanation," (1986) 19 *Canadian Journal of Political Science*, 495.

Council's constitutional jurisprudence gave effect to a vision of confederation and of the *British North America Act* which had found expression in the constitutional jurisprudence of Canadian courts as early as 1879.

II

The cases of *Grieves* and *Barker* were not the first occasions on which the New Brunswick Supreme Court was called upon to rule on the constitutionality of temperance legislation. In *McManus ex p Kings County Justices* it ruled that a provincial liquor licensing law which made the issuing of licenses a matter for the discretion of the sessions court of each county was an unconstitutional interference with the exclusive power of the Dominion to regulate trade and commerce.[14] The unanimous decision of the court, which included Allen, Fisher, Wetmore and Weldon, was delivered by its then Chief Justice, William Johnstone Ritchie. In this regard *Justices of Kings County* was quite typical of the New Brunswick court's early constitutional decisions, as Ritchie delivered the full court's reasons in three of the five division of powers cases that it decided before his departure for the Supreme Court of Canada in 1875.[15]

In contrast to the elaborate judgments that were to be delivered in *Grieves* and *Barker*, Ritchie's judgment in *Justices of Kings County* was short and direct. It began with Ritchie's 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 attempt to intermeddle with the same thing."[16] In a tone that clearly indicated that he believed himself to be stating the obvious, Ritchie then stated that 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."[17] No authority or rationale for this very broad reading of the word commerce, and thus of Dominion jurisdiction, was given.

Recent attempts to question its validity have been made in R.C. Vipond, *Liberty and Community: A Study of the Provincial Rights Movement in Ontario, 1867-1900*, Manuscript Loaned to the Author, and in Paul Romney, *Mr. Attorney*.

[14](1873-75) 15 N.B.R. 535; The Dominion government was given jurisdiction over trade and commerce by virtue of ss. 91(2) of the *British North America Act*.

[15]Ritchie also spoke on behalf of the court in *The Queen v. Chandler: In re Hazelton*, (1867-69) 12 N.B.R. 556 and in *Armstrong v. McCutchin*, (1873-75) 15 N.B.R. 381. The other two cases were *R v. Dow*, (1873-75) 14 N.B.R. 300, and *R. v. McMillan*, (1873-75) 15 N.B.R. 110.

[16](1873-75) 15 N.B.R. 535 at 539.

[17]*Ibid.*

Ritchie then applied his definition of commerce to the case before him. Parliament having jurisdiction to regulate trade in all 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 liquors, flours or other articles of merchandise . . . they assume to exercise a legislative power which pertains exclusively to the Parliament of Canada."[18] In short, the straightforward application of the obvious meaning of the phrase "regulation of trade and commerce" was all that was needed to dispose of the case. Ritchie simply assumed that the meaning of the phrase was so obvious that it could be defined on its own terms, without any reference to competing heads of provincial jurisdiction. It was as if the phrase were self-executing. Whatever came within the word "commerce" was, without more, to be assigned to Dominion jurisdiction. The possibility that a word such as "commerce" had to be given a more limited reading in order to accommodate provincial jurisdiction under related heads of jurisdiction wasn't even considered.[19]

The assumption underlying Ritchie's approach to the *British North America Act* was that division of powers cases were simple and straightforward. The court had only to give effect to the unambiguous phrases, such as "trade and commerce," which Ritchie believed had virtually self-evident meanings. In *The Queen v. Chandler: In re Hazelton*, the first case in which he or any other high court judge applied sections 91 and 92, Ritchie made his view of the simple nature of division of powers cases explicit.[20] The case concerned the question of whether a

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[18]*Ibid.* at 541.

[19]Ritchie was influenced in this regard by his view of the opening and closing paragraphs of section 91. While the former said 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," the closing paragraph provided that "any Matter enumerated in this section shall not be deemed to come within . . . the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." Ritchie clearly thought that the combined effect of these sections was to render the powers of the Dominion predominant. More importantly, he assumed that this predominance was to take effect in the definition of the scope of heads of jurisdiction. Dominion predominance (or paramountcy) was therefore a rule which prevented Dominion and provincial jurisdictions from coming into conflict, rather than a rule which resolved conflict in favour of the Dominion when it occurred; see *The Queen v. Chandler; In re Hazelton*, *supra* at 539. As Risk has observed, this meant that Ritchie believed that the powers of the Dominion and the provinces were mutually exclusive and separated by a "sharp line"; see Risk, "Canadian Courts Under the Influence," *supra*. It also meant that his approach to the drawing of this line was to define Dominion powers first and to simply assign whatever jurisdiction was "left over" to the provinces.

[20](1867-69) 12 N.B.R. 556.

provincial law dealing with the release of debtor's from prison came within the Dominion's jurisdiction over bankruptcy and insolvency.[21] In the course of ruling that it did, Ritchie summarised sections 91 and 92 and concluded that it was "difficult to conceive how the Imperial Parliament, in the distribution of legislative power, could have more clearly or strongly secured, to the respective bodies, the legislative jurisdiction they were respectively to exercise."[22]

Even after due allowance is made for the advantages of hindsight, it is difficult to see this statement as being anything but incredibly naive. How could a judge of Ritchie's acknowledged ability and experience, both as a lawyer and a politician, have been so wrong in his assessment of what one historian has described as "the legislative equivalent of an optical illusion"?[23] The answer may be that Ritchie's real concern in *Chandler* may not have been provincial incursion into Dominion bankruptcy and insolvency jurisdiction. Instead, he may have been more interested in countering the opposition to the very idea of constitutional adjudication which seems to have existed in New Brunswick in the years immediately following confederation. In 1868 James Steadman, then a county court judge, gave an address in which he argued that if the *British North America Act* required the constitutionality of Dominion and provincial legislation to be ruled upon by the courts, it had established "a system of government different in character from the British Parliamentary system."[24] There was, argued Steadman, no room under a constitution organized around the principle of parliamentary sovereignty for a supreme law, of the nature of the Constitution of the United States, which determined the validity of all other laws. This followed from the constitutional truism that parliament could not, by adopting a statute at a certain point in time, fetter its own ability to pass an inconsistent or contradictory statute at a future date. Thus, the *British North America Act* was just an ordinary statute. The standard rule of statutory construction, that between two conflicting statutes the later in time prevailed, applied to it as much as it did to other statutes. It was therefore considered to be amended whenever a statute was passed which was inconsistent with it or which contradicted it. While this was obviously the case in respect to inconsistent or contradictory legislation passed by the Imperial Parliament, Steadman was of the view that it was also the case in respect of Dominion legislation which went beyond the parameters of section 91 and provincial legisla-

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[21] The Dominion jurisdiction over bankruptcy and insolvency was set out in ss. 91(21) of the *British North America Act*.

[22] *Ibid.* at 557.

[23] Romney, *Mr. Attorney* at 241.

[24] 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, New Brunswick Museum 2.

tion which exceeded the jurisdiction which was set out in section 92. In either case, the effect of such legislation was to legally amend sections 91 and 92.

In terms of constitutional theory, this argument depended on Steadman's understanding of the indivisibility of the English Crown.[25] Dominion and provincial statutes were enacted by the same sovereign who enacted the *British North America Act*, and this meant that when the Governor General (Lieutenant Governor) assented to a Dominion (provincial) law which did not conform to sections 91 and 92, the same sovereign who enacted the *British North America Act* had to be taken as assenting to its amendment. The details of this understanding of what amounted to a theory of Imperial legislative unity need not concern us here. It suffices to say that it allowed Steadman to reach the seemingly incredible conclusion that a statute of the Imperial Parliament could be amended by colonial legislation. What is of more immediate relevance is Steadman's ultimate conclusion that the ordinary nature of the *British North America Act* made it incapable of rendering Dominion or provincial laws legally invalid.[26] The effect of a Dominion or provincial law which violated the jurisdictional boundaries set out in sections 91 and 92 was simply the amendment of the those boundaries. There was therefore, no basis in law on which the courts could claim the jurisdiction to rule it unconstitutional. For Steadman, judicial intervention would, given the absence of a legal basis, take the courts beyond their duty "of interpreting and applying the law" and involve them in the exercise of the "power to make and unmake law."[27] In sum, it would mean that Canada would have a constitution different from that of Great Britain, where "the judiciary is never called upon to say what Parliament is or is not authorized to do."[28]

It was this aspect of Steadman's argument, which he summarized by saying that jurisdictional disputes between the Dominion and the provinces were "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," that may have worried Ritchie.[29] It amounted to a charge that a court which ruled a law unconstitutional would not be deciding a question of law, but would instead be usurping political power from an elected Parliament or legislature.[30] It was a

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[25] *Ibid.* at 18.

[26] *Ibid.* at 15-21.

[27] *Ibid.* at 23.

[28] *Ibid.* at 21.

[29] *Ibid.* at 15.

[30] *Ibid.* at 15. It appears that there was widespread support for Steadman's views among the members of the New Brunswick Legislature; see Gordon Bale, *Chief Justice William Johnstone Ritchie*, forthcoming. This makes it more probable that Ritchie's main concern in *Chandler* was to counter the argument that his court was usurping the power of the legislative branch in ruling as to the con-

charge which was undoubtedly brought to Ritchie's attention.[31] In *Chandler* itself, the young lawyer and still committed opponent of confederation, Isaac Allen Jack, made an argument similar to Steadman's on behalf of the hapless Captain Hazelton, the debtor who sought to rely on the challenged provincial statute. Jack argued that quite apart from the question of whether the statute was or was not within the words "insolvency and bankruptcy," the court had no power to rule upon its constitutionality.[32] Reminding the judges that the assent of the Lieutenant Governor had been determinative of constitutionality before confederation, Jack argued that there was nothing in the *British North America Act* to suggest that the assent of the Lieutenant Governor was not to be determinative after confederation, at least in respect to those provincial statutes which were not disallowed by the Governor General.

As Steadman's more elaborate presentation of this argument demonstrated, it was fraught with political overtones of considerable symbolic importance. Constitutional adjudication was portrayed as a direct threat to the people's right to responsible self government according to the principles of the British Constitution. It does not seem untoward to suggest that Ritchie's legalistic and strictly textual approach to constitutional adjudication was, at least in part, an attempt to reassure those who, like Steadman, trembled at the prospect of unelected judges telling the legislative branch what it could or could not do.[33] But if the basis of the court's rulings as to constitutionality was the clear and unambiguous meaning of the words of sections 91 and 92, derived by means of the familiar tools of statutory interpretation, it would be apparent that the judges were not substituting their own will for that of the legislature. Instead, it would be obvious that

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stitutionality of the provincial law in question.

[31]Bale says that Ritchie "did not address most of Steadman's arguments" and that "This was probably because they were not known to him." He relies in this respect on the fact that Steadman's address was not printed for distribution until 1873. It seems unlikely however, that he would have been unaware of the gist of the arguments that Steadman made before his audience in 1869, especially since they seemed to have represented a good proportion of elite opinion, as Bale himself points out. It seems probable that Steadman's address was, given its subsequently favourable reception, a distillation of a point of view which was "in the air" as Ritchie heard argument in *Chandler*.

[32](1867-69) 12 N.B.R. 556 at 557: Bale seems to discount the possibility that Steadman's argument was substantially made known to Ritchie through the argument which Allen made on Hazelton's behalf. But it is clear that Allen made Steadman's central point in presenting his case, that what the provincial legislature enacted was to be taken as within its jurisdiction unless it was disallowed by the Governor General.

[33]At 20 of his "address," Steadman had said that "Wherever, under any Constitution, the people cannot rely upon their representatives in Parliament to protect their personal liberties, their "property and civil rights" from unjust or oppressive laws, but are compelled to flee to the judicial authority for protection, depend upon it despotism reigns somewhere."

they were simply giving effect to the clearly expressed and higher legislative will of the Imperial Parliament. Thus in *Chandler* itself, Ritchie began his analysis of the scope of the Dominion's jurisdiction in respect of insolvency by saying that "In construing an Act of Parliament, as in construing a deed or contract, we must read the words in their ordinary sense . . . unless it is perfectly clear that a different sense ought to be put on them."[34] He then observed 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." A line of British case law concerned with the meaning of insolvency as a branch of commercial law was then cited to support the conclusion that the provincial law came within the word insolvency "in its ordinary sense."

By defining insolvency in this manner, Ritchie was able to avoid drawing attention to any overlap which might exist between the ordinary sense of the words "bankruptcy and insolvency" and the ordinary sense of the words by which competing heads of provincial jurisdiction, such as property and civil rights, were set out. He was thereby able to avoid the difficult task of determining where jurisdiction lay in respect to those matters which could come within either section 91 or section 92. To recognize that such a decision might in some cases be necessary would of course, have undermined his claim that the Imperial Parliament had clearly set out the exact jurisdiction which the Dominion and provincial governments were respectively to exercise. It would in short, have suggested that constitutional adjudication depended on the making of choices for which the words of the *British North America Act* provided little or no guidance. It seems unlikely that Ritchie would have been willing to create such an impression. Even in interpreting statutes much less politically charged than the *British North America Act*, Ritchie was careful to emphasize that the role of the court was simply to give effect to the words by which the legislature had chosen to express its will.[35]

The result was a constitutional jurisprudence which revealed almost nothing of what one might grandly call an overall theory of the constitution. The scope of each head of jurisdiction fell to be determined by an isolated construction of the specific words by which it alone was set out. There was little or no recognition

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[34](1867-69) 12 N.B.R. 556 at 558.

[35]Ritchie's strictly textual approach to the *British North America Act* seems to have been indicative of his approach to statutory law in general. In *Jones v. Hanford*, 15 N.B.R. 467, Ritchie made the following statement in the course of applying the Dominion Government's recently passed *Insolvency Act*: "We can only judge the intention of the legislature from the words they have used . . . Even if we thought it was the intention of the Legislature that the section should apply generally, we would have no right to so construe the Act, unless the words were sufficient to show the intention; for the intention of the Legislature must be ascertained from the Statute, and not from any general inference to be drawn from the nature of the objects to be dealt with . . . ," at 473.

that particular heads of jurisdiction were part of a greater whole and that their interpretation might require an overall view of the division of powers. In contrast, such a recognition lies at the very core of *Grieves* and *Barker*.

III

In *Barker* Charles Fisher began his analysis by stating that the question before the court was whether a law such as the *Canada Temperance Act* came within Parliament's trade and commerce power.[36] In defining the scope of that power, he revealed the basis of his reading of the *British North America 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."[37] Such a geographically all-encompassing power was "a necessary incident to the Union to secure a homogeneous whole."[38] The object of the union being 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 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."[39]

Fisher took the same purposive approach in delineating the provincial heads of jurisdiction that he saw as exceptions to the geographically all-inclusive trade and commerce power. In regard to the jurisdiction conferred on provinces by s. 92(9), Fisher held the Dominion could not regulate trade and commerce in such a way as to prevent the provinces from making effective use of their power to raise revenue from the selling of "Shops, Saloon, Tavern, Auctioneer and other Licenses."[40] This was because the division of powers between the Local and Feder-

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[36]Because *Barker* was published in the reasonably accessible *New Brunswick Law Reports*, I have limited quotation from the substantially similar judgments which Fisher, Wetmore, Weldon and Allen delivered in both *Grieves* and *Barker* to the version which each delivered in the latter case.

[37](1879-80) 19 N.B.R. 168.

[38]*Ibid* at 168.

[39]*Ibid.* at 168-69.

[40]Sub-section 9 of section 92 of the *British North America Act* provides that "In each Province the Legislature may exclusively make laws in relation to . . . Shop, Saloon, Tavern, Auctioneer, and other

al Legislatures, had been "designed to secure good government, and also to enable either, from sources peculiar to itself, to raise money to carry on the government, and to discharge the duties devolving upon each respectively."[41] Since the jurisdiction of the provinces under 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 financial basis of the division of powers would be destroyed if the Dominion could nullify provincially-issued licenses in the course of its regulation of trade and commerce.[42] In short, the power of the provinces to obtain revenue from the selling of liquor licenses was crucial to the balance between revenues and legislative responsibilities which the "compact of union" had created, and it was the duty of the court to preserve this balance in the interests of the "good government" which the division of powers had been designed to secure. Thus a "reading down" of the Dominion's wide powers in respect to the regulation of trade and commerce was required.

Giving effect to the intentions of the founding fathers was also determinative when it came to interpreting the property and civil rights jurisdiction of the provinces. For Fisher, 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, regardless of whether it appeared to "trench upon property and civil rights," Fisher was of the view that provincial jurisdiction under 92(13) was to prevail over competing Dominion jurisdictions. Thus he declared that 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."[43] Similarly, he said that 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 the doubt to that doubt to that authority." 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." This was due to the fact that 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

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Licenses in order to the raising of a Revenue for Provincial, Local or Municipal Purposes."

[41](1879-80) 19 N.B.R. 171.

[42]*Ibid.* at 171-72.

[43]*Ibid.* at 169.

upon the question of property and civil rights would have rendered every effort for Union abortive." Presumably, this was due to the fact that "one Province made it a condition upon which alone it would enter the Union, that its Local Legislature should exercise this power."[44] In sum, the Fathers of Confederation regarded provincial jurisdiction over property and civil rights to be central to the division of powers, and it was therefore incumbent upon the court to do the same.

The preeminence of s. 92(3) did not however, rest solely on the importance which the Fathers of Confederation had attached to it. It is clear that Fisher regarded the section as having a purpose which transcended the conferral of legislative jurisdiction. While the purpose of 92(13) was obviously to protect the jurisdiction of the provinces in respect to the property and civil rights of the people, its more fundamental purpose was to provide protection to those rights. One does not put the matter too highly in saying that Fisher equated the rights of the individual with the exclusive jurisdiction of the province under 92(13), the latter being the means by which the former were to be secured and promoted. Thus Fisher described 92(13) as the "great bulwark around which clusters the interests and liberties of every individual within the limits of the Confederacy."[45] The provinces in short, were the protectors of the rights, and especially the property rights of the people.

From the perspective of modern constitutional learning, this appears unusual and perhaps suspect. We have been taught to regard the *British North America Act* as concerned exclusively with the relationship between two levels of government.[46] To the extent that attempts have been made to use it as a guarantee of the rights of the individual, the striking down of provincial laws has been the concern.[47] It is difficult, therefore, to think of the *Act* as premised on the notion that individual rights would best be protected by reserving jurisdiction over there to the provinces. Fisher believed that the protection and promotion of individual rights was uppermost in the minds of the Fathers of Confederation when they as-

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[44]*Ibid.* at 170. The province to which Fisher referred must have been Quebec. It 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 the Quebec elite's view of the terms of the confederation deal, including the importance which Quebecers attached to s. 92(13), see A.I. Silver, *The French Canadian Idea of Confederation,1867-1900*, (Toronto: University of Toronto Press, 1981), esp. Chapters II and VI.

[45]*Ibid.* at 170.

[46]See for example, P.W. Hogg, *Constitutional Law of Canada*, 2nd ed., (Toronto: Carswell, 1985) 634-35.

[47]See for example, *Re Alberta Statutes* [1938] S.C.R., 100; *Saumur v City of Quebec* [1953] 2 S.C.R., 299, per Rand J. at 331, Kellock J. at 353-354 and Locke J. at 373-374; *Switzman v Elbing* [157] S.C.R., 285, per Rand J. at 307, and Abbott J. at 328.

signed jurisdiction over property and civil rights to the provinces. Thus 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, were the result of that compact, jealously to guard the rights of the individual and protect the rights of property from every infringement not plainly warranted by the Constitutional Act."[48]

This then was the legal framework within which Fisher set about determining the constitutionality of the *Canada Temperance Act*. Its fundamental feature was that particular heads of jurisdiction did not simply confer the authority to enact particular types of legislation; rather, they conferred on each level of government the powers that it needed to serve the purposes for which it was naturally suited and that the Fathers on Confederation had intended it to serve.[49] To put it somewhat differently, Fisher believed that in designing the division of powers, the Fathers had been guided by certain assumptions as to the use which each level of government could or would make of particular legislative jurisdictions. The assignment of a particular jurisdiction to one level or the other reflected the preferences of the Fathers as to the purposes for which it should be used. Hence, power to regulate trade and commerce was given to Parliament because the Fathers desired that the terms of commercial intercourse be uniform from St. Stephen to Toronto, and because they believed that such uniformity would "draw together the scattered settlements of the different Provinces, of divers races and religions, into one common people," possessing, "as far as practicable, a community of interest and feeling." Similarly, power to make laws in relation to property and civil rights was given to the provinces because the Fathers believed, for some unspecified reason, that the provinces would exercise it in a manner consistent with "the security [of property and civil rights] it was designed to provide for in the different Provinces."

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. For Fisher there was no question of the *Scott Act* having been enacted for any such purpose. Its effect was to interfere with the power of the provinces to raise, from the sale of liquor licenses, the revenues that provincial governments

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[48](1879-80) 19 N.B.R. 168.

[49]Some modern commentators have expressed a similar view as to the Fathers' understanding of the nature of the division of powers. See O'Connor, *supra* at 25 and, more especially, A.S. Abel, "The Neglected Logic of 91 and 92," (1969) 19 *University of Toronto Law Review*, 487 at 499-507.

required if they were to attend to "local and municipal" matters. This meant that it upset the balance which the Fathers had created between the revenue sources and the legislative responsibilities of the two levels of government, the result being that it simply 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."[50] It was unthinkable that Parliament should be allowed to collect customs on the importation of alcohol, a source of revenue transferred to the new Dominion government by the confederating provinces, and then prevent those same provinces from collecting revenue through licensing alcohol's retail sale. 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."[51]

In effect, Fisher held that the power of the provinces to collect a revenue from the selling of licenses, and more importantly, the crucial role which that revenue played in the ability of the overall division of powers to "secure good government," meant that if the *Canada Temperance Act* was a regulation of trade, it was regulation precluded by the objects of union. But in considering the *Act* through the lens of property and civil rights, Fisher went further, and concluded that it was not an act which regulated trade at all. In four impassioned pages that moved from the abolition of slavery in the West Indies to a catalogue of practical, constructive and temperate uses of 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.[52] 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. From the point of view of the tavern keeper with a supply of alcohol in stock, the enactment of the *Canada Temperance Act* meant that the "Parliament that [had] permitted him to import it, and required as a condition a certain duty, which he has paid, declares in effect that he shall not sell it in his tavern." This said Fisher, was "an interference with his rights of property" which rendered the *Act* "a sumptuary law, depriving every man of a natural right secured by the Constitution." In effect, the *Canada Temperance Act* was not a regulation of trade adopted for the purpose of making commercial intercourse uniform, but an interference on moral grounds with the public's right to engage in a particular type of trade. The disruptive effect which the *Act* would have on the

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[50](1879-80) 19 N.B.R. 171.

[51]*Ibid.* at 172.

[52]*Ibid.* at 172-75.

commercial and domestic life of the community was for Fisher, self-evident. In addition to the hapless tavern keeper mentioned above, Fisher drew attention to the impact which the *Act* would have on the typical, presumably middle class, Fredericton household. He pointed out 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."[53] As for alcohol, "the generic liquor," Fisher noted that "We all know that it is used in most families for many purposes, neither mechanical or medicinal," and cited the manufacture of "Eau de Cologne" and the "cleaning of spots from clothes, and from furniture and such like" as examples of such notorious uses of alcohol.[54] A statute which prohibited the purchase of alcohol for these and all similarly constructive purposes simply could not be characterized as one concerned with regulation of trade.

But Fisher's concern went deeper than baking of cakes and cleaning spots from parlour draperies. He was clearly of the view that so long as alcohol was an article of merchandise in which a man could lawfully hold property, a law which limited his ability to purchase that article was incapable of being regarded as a regulation of trade, even if his only desire was to have a slug straight from the bottle. Thus, to enact "that no liquor capable of being used as a beverage shall be sold to anyone for such purpose in the locality in which the law is in force, and that no man shall be permitted to buy liquor or to drink," was to be denounced as a "sumptuary law prescribing what a man shall drink and what he shall not."[55] This was particularly objectionable given that the *Act* pursued this object by "making a distinction between the rich and the poor." Referring to the fact that the it allowed for the purchase of alcohol for any purpose provided that it was purchased in specified quantities, Fisher observed that 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 neighbor 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," woven into "the very woof of our Constitution."[56]

In sum, Fisher's view was that a law designed to restrict a man's right to buy an article of property which it was lawful to own, was not a law passed for the

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[53] *Ibid.* at 173.

[54] *Ibid.* at 173-174.

[55] *Ibid.* at 174.

[56] *Ibid.* at 175.

purpose of drawing "together scattered settlements . . . into one common people" or of making "their commercial intercourse with each other . . . analogous." It was passed solely for the purpose of a moral reform, and as such, it impinged on the individual's freedom to make his own choices as to the beverages he would drink and the manner in which he would lead his life. It was, in short, a law in relation to the property and civil rights of those who lived in the districts in which it was brought into force. It was therefore a law which could only be passed by a provincial legislature acting under the jurisdiction conferred on it by s. 92(13) of the *British North America Act*.

A similar understanding of the *Canada Temperance Act* seemed to underlie the *Grieves* and *Barker* judgments of A. Rainsfords Wetmore. In *Barker* he read the preamble of the *Act*, which spoke of the desirability of temperance and uniform legislation in regard to the traffic in liquors, and concluded that the *Act* was "solely directed to a moral reform - the promotion of temperance." Notwithstanding that such an object was "undoubtedly most desirable" and "calculated to do an immensity of good in the community," it could not be said to fall within the Dominion's power to regulate trade and commerce.[57] For Wetmore this was a conclusion which was both self-evident and necessary if the power of the provinces to raise revenue under s. 92(9) was to be left in tact. "Who would procure a licence" from the province, wondered Wetmore, "if, after its being obtained, the licensee was precluded from selling under it"? The Dominion had no right to interfere with the local authorities as to the sale and disposition of legally imported liquors, "so as to prevent their being sold and disposed of as they were at the time of Confederation," and so as to "in effect make such regulations and restrictions as virtually destroy or render useless the power of action given "to the province by sub-section 9 section 92."[58]

Wetmore's judgments also paralleled those of Fisher in equating provincial jurisdiction with the rights, especially the property rights, of the individual. Thus, in response to counsel's argument that the *Canada Temperance Act* came within the Dominion's jurisdiction over the criminal law, Wetmore noted that at the time of confederation, the importation and sale of liquors was a perfectly legal "part of the business of the country," and observed that if the "Dominion Parliament can declare the fair prosecution of a legitimate business to be a crime or offence, and thereby obtain a 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 ex-

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[57] *Ibid.* at 158.

[58] *Ibid.* at 159.

ercise." It was for the province to make laws in relation to property and civil rights and when "legally imported and manufactured, liquor is the subject of property as much as a horse or any other description of personal property."[59] If the Dominion could dictate how a man could use or dispose of his property in liquor, it could "legislate in respect to all property, and can say how you shall feed your horse or manage your household."[60]

The same theme of individual liberty appeared, albeit in less emphatic terms, in the *Barker* judgment of John Wesley Weldon. He pointed out that the importer of wine and brandy, as much as the importer of molasses and flour, paid custom duties to the Dominion Government. As a result, he had to be accorded the same right to dispose of his wares where and how he saw fit. Similarly, like Fisher, Weldon objected to the fact that the *Canada Temperance Act* was "partial in its operation," although his concern in this regard was not that it discriminated between rich and poor, but rather that it discriminated between people on the basis of their county of residence. Where the *Act* was not made operational by local plebiscite, the civil and property rights of the people were unaffected, but in communities such as Fredericton, where the *Act* had been adopted, "the civil rights of the people . . . are infringed upon, and their right to dispose of certain descriptions of property are directly interfered with."[61]

In Fisher's case, this concern for the rights of the individual was predicated on an appeal to a constitutional tradition that predated the *British North America 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." 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."[62] Similarly, in invoking the principle of equality, Fisher acknowledged that "Our Constitution does not proceed in any grandiloquent method to declare that all men are by nature free and equal," but asserted that "the struggles and sacrifices of our ancestors would have been futile if every man

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[59] *Ibid.* at 161.

[60] *Ibid.* at 162.

[61] *Ibid.* at 184.

[62] *Ibid.* at 172.

was not alike in the eye of the law." He then declared that the "great men, 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."[63]

In speaking in this comprehensive manner, Fisher made it clear that, unlike Chief Justice Ritchie in earlier New Brunswick constitutionnal cases, he did not regard the *British North America Act* as an ordinary statute which fell to be interpreted according to the standard techniques of textual exegesis. It was a chapter in the glorious constitutional tradition of the British people and it had to be interpreted as an embodiment or expression of that tradition. This meant scrupulous attention to the rights of the individual, especially to rights of property, and this in turn required an expansive reading of s. 92(13). Indeed, the difference between Fisher and Ritchie's approach to constitutional adjudication is nowhere better demonstrated than by the cavalier way in which Fisher related his interpretation of a particular section of the *British North America Act* to the decision of the Imperial Parliament to reimburse slave owners for the loss of property they suffered on the abolition of slavery. For Fisher, there was no need to justify the link which he drew between the two. 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."[64] In setting out to achieve these objects, the Fathers of Confederation were doing no more than embodying the principles of the British Constitution within the federal system that the *British North America Act* was to establish. Reference to events which illustrated the scope and content of those principles - incidents such as the Imperial Parliament's compensation of slave holders for their loss of property - was simply a means of giving effect to the "compact of union and the objects intended to be attained thereby."

IV

It does not go too far to say that the constitution which Fisher interpreted was not the same constitution that Chief Justice Ritchie applied in the earlier cases of *Justices of Kings County* and *Chandler*. For William Johnstone Ritchie, the constitution was co-extensive with the four corners of the text of the *British North America Act*. Significantly, his decisions were not dependent on an appeal to the intentions of the founding fathers meeting in Quebec. Instead, they consisted of a

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[63] *Ibid.* at 175.

[64] *Ibid.* 168.

search for the intentions which had guided the Imperial Parliament in passing the *Act*. This allowed him to treat constitutional cases like any other case concerned with the interpretation and application of a statute. He had only to interpret the words of the statutory text and enforce the legislative will which those words expressed. No opinion on the political or economic objectives that lay behind the confederation scheme - the very questions which had so divided New Brunswickers during the elections of 1865 and 1866 - need be expressed or relied on in the resolution of constitutional disputes.[65]

In contrast, Fisher's constitution encompassed much broader terrain. Unlike Ritchie, who saw his responsibility in terms of the straightforward interpretation of an ordinary statute, Fisher believed that it was significant that he was being called upon to interpret a constitution. Thus, whereas Ritchie tended to speak of the *British North America Act* or the "Act of Union," and the intentions of the Imperial Parliament, Fisher spoke of "the Constitution" or even "Our Constitution," and of the "intentions of the founding fathers." The difference in terminology reflected a fundamental difference in adjudicative outlook. While it would undoubtedly have been important to Fisher that the *British North America Act* was an *Act* of the Imperial Parliament, he regarded it as equally or even more important that it was an embodiment of the terms on which the confederating provinces had agreed to come together. This meant that the *Act* expressed the desires of a people for a particular form of union, one capable of providing them with government of a particular character. It could not therefore, be interpreted solely by relying on standard concepts of legislative intent; the political and economic aspirations of the people, as expressed by the colonial leaders who had met at Charlottetown, Quebec and London, had to be respected. This made reference to the political and economic background of confederation absolutely essential. Confederation had occurred because of the desire for a common government capable of achieving objectives which the separate provinces could not achieve by separate action. The division of powers struck a balance between this desire, which related largely to the formation of a common market and the drawing together of scattered settlements into a "common people," possessed of "a community of interest and feeling," and the desire to preserve the benefits that British North Americans already enjoyed as members of their self-governing provincial communities. For Fisher, these benefits included the powers and resources needed to attend to local and municipal affairs and the high regard for individual rights which he assumed was characteristic of provincial legislation. The objects of confederation would be frustrated if both of these desires were not

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[65]The debates which confederation engendered in New Brunswick are recounted in W.S. MacNutt, *New Brunswick: A History; 1784-1867* (Toronto: MacMillan, 1963) at 389-461.

kept in mind as the provisions of the *British North America Act* were construed judicially.

Thus the constitutional material that the court was called on to interpret was not limited to the bare words of sections 91 and 92 of the *British North America Act*. It also consisted of the history which lay behind the assignment of a particular head of jurisdiction to one level of government rather than the other. It was thus relevant to a consideration of the scope of the Dominion's trade and commerce power that one of the goals of the Fathers of Confederation had been to make it possible for the manufacturer of Toronto to deal with a merchant of Pictou or Saint Stephen on the same terms as he would with the merchant of London. In similar fashion, examples of the Imperial Parliament's solicitude for the rights of property, a solicitude which the founding fathers had sought to incorporate in the *British North America Act*, became relevant to an interpretation of s. 92(13), and a decision as to the constitutionality of the *Canada Temperance Act*.

In short, Fisher's constitution was the whole mix of political and economic ambitions and constitutional principle that had guided the Fathers of Confederation. As a result, his responsibility as a judge was an extension of the role that he himself had played as one of those founding fathers. As a Father, he had tried to ensure that the constitution of the country to be created remained true to the political values of the communities from which it was being created and the constitutional tradition to which each of those communities was heir.[66] As a judge, his role was to ensure that the new land's constitution was interpreted in such a way as to allow it to produce the kind of government - the kind of country - that it had been intended to create. In this sense, there was no distinction in Fisher's mind between the politics of constitution making and the law of constitutional in-

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[66]Although Fisher seemed to have been in favour of a complete legislative union, and hence, the abolition of the provinces as separate jurisdictions, one of his first interventions at the Quebec Conference suggests that his overriding concern was to ensure that whatever governmental structure were put in place conformed to the British constitutional model. Thus, after it had agreed that a federal union was "the system of government best adapted, under existing circumstances, to protect the diversified interests of the several Provinces," Fisher quickly 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 protection of our connection with the Mother Country." In short, if federal union were to be the goal, both levels of government had to be founded on the basis of the British constitution, and presumably, on the basis of the principles of responsible self-government. Significantly, it was Tilley who successfully amended Fisher's motion so that it contained no reference to the local governments. See Joseph Pope, *Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act*, Toronto, 1895, 8-10. As to Fisher's preference for a legislative union, see G.P. Browne, *Documents on the Confederation of British North America*, *supra* at 99.

terpretation. Whether as founding father or as judge, his role was that of the statesman determined to leave "the impress of his mind on the institutions of his country."[67]

In contrast to this overtly "political" approach to adjudication, one which was shared by Wetmore and, to a lesser extent, Weldon, Ritchie was at pains to emphasize the differences between the political and the judicial. As a judge, his role was simply to give effect to the meaning of the words of the *British North America Act*. His judgments exhibit no concern as to whether this meaning conformed to the intentions of the founding fathers, or the terms of the compact of union. The Imperial Parliament had expressed its intentions as to the confederation of the British North American colonies in plain and unambiguous words. The Dominion and provincial governments and their respective constituents had now to adjust their affairs so as to conform to the division of legislative powers that those words, objectively construed according to standard canons of statutory construction, had brought into existence. As to the wisdom of that division of powers or the consequences of its operation Ritchie had, as a judge called on to decide a question of law, nothing to say.

Any firm conclusion as to which approach to adjudication best reflected the understanding of law and the judicial office that prevailed in the broader legal community of which both Ritchie and Fisher were a part must await further research. It would be surprising, however, if Ritchie's understanding of the constitution and his judicial responsibilities in constitutional cases did not accord with what the typical New Brunswick lawyer of the 1870s would have understood as the line between law and politics.[68] He was a highly regarded judge, described by Fenety as "probably . . . the ablest lawyer this Province has ever known."[69]

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[67]C.M. Wallace, "Fisher, Charles," *Dictionary of Canadian Biography*, X, 284 at 289.

[68]The only New Brunswick lawyer of the period to attempt a comprehensive treatise on constitutional law lavished effusive praise on Ritchie for his decisions in *Chandler, Justices of King's County* and his earliest constitutional decisions as a judge of the Supreme Court of Canada, including his overturning of the majority of the New Brunswick Supreme Court in the appeal from *Barker*; 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). Travis had an extraordinary and mostly unjustified confidence in his own abilities, however, and his book and other writings were as much concerned with self-promotion as they were with constitutional law. His assessment of Ritchie's handling of constitutional cases cannot therefore be taken as necessarily representative. For an account of the unhappy fate which awaited Travis on his appointment as a stipendiary magistrate in the Northwest, see P.B. Waite, *The Man From Halifax* (Toronto: University of Toronto Press, 1985) at 195-196. Waite writes 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"

[69] G.E. Fenety, "Political Notes," a series appearing in *The Progress* of Saint John, starting on January 6, 1894. The quote is from No. 3 of the series. A similarly glowing and virtually unqualified assessment of Ritchie's legal prowess is found in J.W. Lawrence, *The Judges of New Brunswick*,

Similarly lavish praise was expressed by the province's Barristers Society.[70] It seems reasonable to assume that such praise reflected approval of the way he went about deciding cases during the 20 years he had spent on the New Brunswick bench and the 17 years he then spent on the Supreme Court of Canada. In contrast, Fisher's reputation as a jurist was not high.[71] The claim of Fenety and others, that Fisher had been "a great constitutional lawyer," seemed to have had more to do with his role as a politician in the achievement of responsible self-government than with his contribution to constitutional adjudication.[72] Indeed, it seems to have been a sort of apology for the fact that Fisher was no lawyer at all, notwithstanding that he had served on the province's highest court.[73]

To the extent therefore that their standing as jurists within New Brunswick had anything to do with their constitutional jurisprudence, it seems probable that Ritchie's formalistic reliance on the text of the *British North America Act* was more representative than was Fisher's judicial statesmanship. Of course, it must be remembered that constitutional cases were a very small proportion of the cases which Ritchie and Fisher were called upon to decide. The reputation which each possessed as a judge would probably have depended more on their handling of private law cases than it did on their disposition of division of powers cases. But even so, the temptation to regard the "judicial statesmanship" approach which Fisher, along with Wetmore and Weldon, displayed in *Grieves* and *Barker* as anomalous remains strong. In *Barker*, it was expressly repudiated by Ritchie's replacement as Chief Justice, John Campbell Allen, as well as by the newcomer to the court, Acalus Palmer. While Allen joined with Fisher, Wetmore and Weldon in finding the *Canada Temperance Act* unconstitutional, holding that it was legislation in respect to matters of a purely local nature which came within provincial jurisdiction by virtue of 92(16), he objected strenuously to the way in

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reprinted with an introduction by D.G. Bell in 1983.

[70]Minutes of meeting called for Thursday, October 6, 1892, on the passing of "The Honorable Sir William J. Ritchie, Knight, Chief Justice of Canada," in *Minutes of New Brunswick Barristers Society*, Provincial Archives of New Brunswick, B2, 18.

[71]Allusions to Fisher's poor reputation as a judge appeared in several retrospective accounts of his career; "The Death of Judge Fisher," *The* [Saint John] *Daily Telegraph*, (9 December 1880) and "Supreme Court: Judges Charles Fisher and A.R. Wetmore," *The* [Saint John] *Daily Telegraph*, (29 December 1892). See also the anecdote as to his incompetence in I. Allen Jack's journal, (17 January 1871): A20, NBM.

[72]Fenety, *supra* at No. 3; Lawrence, *supra* at 531; "The Supreme Court: Judge Charles Fisher and A.R. Wetmore," *The* [Saint John] *Daily Telegraph*.

[73]On the other hand, the fact that it would be regarded as proper to assess Fisher's political contribution by describing him as "a great constitutional lawyer" suggests that Fisher's failure to differentiate between law and politics in constitutional matters may not have been entirely atypical.

which the others had reached their conclusion. In an obvious reference to Fisher's objection that the *Canada Temperance Act* prohibited the buying or selling of alcohol for the purposes of cooking, cleaning and making perfume, Allen declared that whether or not the *Act* was "beneficial to the persons more immediately affected by it, or to the community in which they live, or to society at large, . . . is a matter with which this Court has nothing to do."[74] Palmer wrote to similar effect. After concluding that the *Canada Temperance Act* came within the Dominion's general power to make laws for the "peace, order and good government of Canada," as well as its specific jurisdictions over trade and commerce and criminal law and procedure, Palmer stated that the question of 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 whatsoever to do."[75] For Palmer, that "question must . . . be decided by the persons who control the Legislatures of the country." He ended by warning that if the courts should set themselves up in defiance of the legislature's decision as to how it should use its legislative powers, he "should tremble for the stability of our Constitution."[76]

In making these statements, Allen and Palmer were explicitly drawing the line between law and politics which had been only implicit in Ritchie's decisions in *Chandler* and *Justices of Kings County*. In so doing, they unequivocally identified and disowned Fisher's judicial statesmanship. For Fisher, the fact that the *Canada Temperance Act* precluded the acquisition of alcohol for the various purposes for which it was required in the well run household was objectionable because the individual's freedom to run his household as he pleased was part of the sphere of individual liberty which the founding fathers had sought to protect by assigning jurisdiction over property and civil rights to the provinces. Thus the statements of Allen and Palmer went to the very core of Fisher's entire approach to constitutional adjudication. They amounted to a flat rejection of Fisher's belief that, as a judge, it was his responsibility to interpret the *British North America Act* in accordance with his views as to the purposes its various provisions were meant to serve. Though, in a word, Allen and Palmer were not challenging Fisher's conclusion that the *Canada Temperance Act* was *ultra vires* the Parliament of Canada, they were rejecting the whole set of adjudicative assumptions and techniques on which that conclusion rested. It seems likely that their challenge would have been regarded as legitimate by the majority of New Brunswick's legal community. Both were recognized generally as capable lawyers and while Palmer's reputation for honesty was not high, Allen had a reputation of unswerving integrity, honesty

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[74](1879-80) 19 N.B.R. 186.

[75]*Ibid.* at 155-56.

[76]*Ibid.* at 156.

and dedication to duty.[77] He was, after Ritchie, probably the most highly regarded lawyer in the province. It seems reasonable therefore, to see the elaborate reasons which Fisher delivered in *Grieves* and *Barker* as a defiance of much more than Ritchie's earlier conclusion that local option temperance came within the Dominion's trade and commerce power. They were also a defiance of the views of the new liberal orthodoxy, as represented by Ritchie, Allen and Palmer, as to the proper role of the judiciary in the governance of society. They were in this sense a challenge to the very structure of the legal thought which prevailed in post confederation New Brunswick, at least as it had been expressed in the constitutional context. In this regard, the different views of Ritchie and Fisher as to the Dominion's power to enact local option temperance paralleled a fundamental difference of opinion as to the nature and purpose of constitutional adjudication.

V

This underlying disagreement as to the nature and purpose of constitutional adjudication explains why Fisher, in contrast to Ritchie, spent so much time and effort trying to locate the specific question of Parliament's jurisdiction in regard to temperance within a broad theory of confederation and general constitutional principle. It also explains why, in his attempts to build such a theory, he relied so heavily on the terms of the "compact of union" and the "intention of the founding fathers." But it cannot explain the other elements of his theory of confederation and of constitutional principle. In particular, it cannot explain why Fisher believed, or to be more precise, why he believed that the Fathers of Confederation believed, that property and individual liberty could be secured simply by giving the property and civil rights jurisdictions to the provinces. Why did Fisher put such confidence in provincial legislatures when it came to matters which he regarded to be of such fundamental importance?

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[77]This assessment of Allen is found in Lawrence, *supra* at 521-524, and in "The Supreme Court - Sir John Allen and John Wesley Weldon," *The* [Saint John] *Daily Telegraph*, (27 December 1892). For a contemporary appraisal see D.G. Bell, "John Campbell Allen," *Dictionary of Canadian Biography*, XII. In the case of Palmer, even as vehement a critic as Jeremiah Travis had to acknowledge that he was, "as a general lawyer . . . very much superior to Weldon, Fisher, Wetmore and Duff, and in some branches of the law is a better lawyer than Allen." Travis went on to say that "no one has any reliance whatever on [Palmer's] integrity" and that if "he should ever get over his 'wool-dyed' habits, and would act honestly and impartially as a Judge, his legal abilities would tend to improve the bench." Travis to Tilley, Tilley Papers, Mg 27, I, Di5, Vol. 21, NAC. A more restrained assessment of Palmer's stature appeared in the *Saint John Globe*, (2 June 1879), which noted on his elevation to the bench that while "his place in politics will be easily supplied,"(Palmer had just lost his seat as the Conservative M.P. for Saint John, City and County), "a good many lawyers will be required to fill the gap his elevation to the Bench will create in the legal fraternity."

In *Grieves* and *Barker*, Fisher treated the connection between provincial jurisdiction and the security of property and individual liberty as self-evident. Beyond Fisher's description of the crucial role which the property and civil rights jurisdiction had played in the deliberations at the Quebec Conferences, the judgments provide no clue as to what Fisher saw as the rationale for the connection. This of course raises the possibility that no such rationale existed. Given the contentious nature of the temperance issue and the eclectic style of Fisher's judgments, it would be reasonable to suggest that Fisher's real concern in *Grieves* and *Barker* was to frustrate a form of social engineering with which he personally disagreed. On this view, Fisher interpreted ss. 92(13) in the manner that he did in order to give the colour of constitutional law to a result which he was determined to reach on grounds of pure policy. As a result, his failure to explain his interpretation of ss. 92(13) becomes explicable, for it is obvious that if his interpretation of ss. 92(13) was purely instrumental, Fisher would have had little to say as to its underlying rationale.

Such a view derives support from the fact that Fisher's objections to the *Canada Temperance Act* do not appear (to the modern reader at least) to be of a jurisdictional nature. In denouncing it as "sumptuary legislation, prescribing what a man shall drink and what he shall not," Fisher attacked the *Canada Temperance Act* in exactly the same terms as did New Brunswick politicians who either opposed the adoption of temperance legislation or who advocated its repeal. To such politicians, temperance legislation was objectionable quite independently of whether or not it was within the jurisdiction of the enacting legislature or Parliament. It was objectionable because it was worse than the disease it was meant to cure, since it would simply drive the problem of intemperance underground. In the process, it would undermine respect for law and the Courts. Asked if he believed whether these consequences of the *Act*'s enforcement could be avoided, Charles Weldon, the Saint John lawyer, liberal Member of Parliament, committed opponent of legislated temperance and the son of Judge John Weldon, replied that "I doubt it very much in regard to a law of this character, a sumptuary law."[78]

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[78]*Royal Commission on the Liquor Traffic: Minutes of Evidence, Vol. I, Provinces of Nova Scotia, New Brunswick and Prince Edward Island*, Ottawa, Queen's Printer, 1893, 440. In the legislative debates on New Brunswick's prohibitory law of 1856, a Mr. James Boyd of Charlotte County said that "he wished it 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 he would drink three glasses every day"; Fenety, *supra* at No. 7. Fenety summarised the arguments of the opponents by writing: "People cannot be legislated into habits of sobriety. All sumptuary laws were mischievous in their tendency, would aggravate rather than allay the evil they were designed to cure. People's habits could not be rudely broken in upon. . . . So long as men of influence set their faces against all interference with the indulgence of their appetites, no restrictive law could have any effect." Fenety, *supra* at No. 7.

In the following year, in a debate on a motion to repeal the law, William End "pronounced the

In short, the grounds on which Fisher found the *Canada Temperance Act* to be unconstitutional seem to have more to do with the fact that the *Act* was indeed temperance legislation than it did with the fact that it was a law enacted by the Parliament of Canada. Presumably, a provincially enacted version of the *Canada Temperance Act* would also have been "sumptuary legislation," and one wonders why it would not also have been unconstitutional. It interesting to note in this respect that Fisher was not the only New Brunswick jurist to regard the fact that a law was "sumptuary legislation" as relevant to its characterization for division of powers purposes. His contemporary and fellow Father of Confederation, John Hamilton Gray, who MacDonald rather controversially appointed to the Supreme Court of British Columbia,[79] was called on to determine the constitutionality of a British Columbia law which imposed a head tax on the Chinese residents of the province.[80] His conclusion was that the law was *ultra vires* as coming within the Parliament's jurisdiction in respect of trade and commerce, naturalization and aliens, direct taxation and Canada's obligations in respect of treaties between the Empire and foreign countries. More important for present purposes was his observation that "Sumptuary laws affecting the domestic and personal habits of a people . . . have always been considered objectionable."[81] It was the sumptuary character of the head tax which lead Gray to the conclusion that it imposed a "Social ostracism the Local Legislature has no power to enforce."[82] It was also the sumptuary character of the law which Gray had in mind when he declared that "The Act, exceptional in its nature as to one class of foreigners, bristles with imprisonment and hard labour, and places the frightful power of conviction and punishment in the hands of any Justice of the Peace throughout the country, at the instance of a Collector whose interests it may be to gratify the promoters of the Act." [83]

Here then was a judge with experiences very similar to those of Fisher using the rhetoric of individual liberty and equality to portray the Dominion Government as the protector of individual rights. Given that Gray was himself a Father of Confederation, this casts doubt on the accuracy of Fisher's claim that the Fa-

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law as tyrannical," and argued that "it was impossible for coercive legislation to be productive of good." He concluded by saying that "Laws of the kind, all sumptuary laws, had failed to work wherever they had been tried"; *ibid.* at 12.

[79]C.M. Wallace, "John Hamilton Gray," *Dictionary of Canadian Biography*, XI, 372 at 374.

[80]The case was *Tai Sing v. Maquire*, (1875-1883) 1 B.C.R., Pt. 1.

[81]*Ibid.* at 110.

[82]*Ibid.* at 111-112.

[83]*Ibid.* at 111.

thers of Confederation thought of the protection of the individual as the special responsibility of the provinces. More importantly, because Gray's judgment does not explain why the sumptuary character of the British Columbia head tax took it beyond provincial jurisdiction, it supports the hypothesis that Fisher used ss. 92(13) as a convenient platform for the expression of views that really had little to do with the jurisdictional status of the *Canada Temperance Act* itself. Just as Gray used the *British North America Act* to prevent the province of British Columbia from enforcing legislation which he clearly regarded as inherently objectionable, Fisher used it to prevent the Dominion Government from enacting a form of "sumptuary law" which, as a member of the Court that had decided *Justices of King's County*, he had just as easily said was beyond the legislative authority of the provinces.

But even though it seems probable that Fisher's approach to the *Canada Temperance Act* owed much to a personal animus towards legislated temperance, it nevertheless seems unlikely that Fisher's *Grieves* and *Barker* judgments were totally instrumental. Since Fisher must have known that an appeal to the Supreme Court of Canada and perhaps the Privy Council was highly probable, it is unlikely that he could have believed that he could prevent the *Act* from coming into effect by reaching a conclusion as to its constitutionality which was not in fact supportable as a matter of constitutional law. More importantly, Fisher's interpretation of ss. 92(13) seems to have been similar to that of David Mills, the Ontario lawyer, newspaper editorialist and liberal Member of Parliament who became the foremost constitutional theorist of the provincial rights movement.[84] Like Fisher, Mills understood the jurisdiction which was conferred by ss. 92(13) to consist of more than jurisdiction over the body of legal doctrine known as the common law. It conferred jurisdiction over the sphere of social activity which the common law governed. It thus conferred jurisdiction over "every relation in the state of society relating to private life."[85] It was therefore a jurisdiction which encompassed virtually all private transactions which individuals might enter into with one another, as well as those aspects of government activity which affected the individual's religious, civil or political liberty.[86] It was in short, the jurisdiction which the American authority Thomas Cooley had defined as the "authority to establish for the intercourse of the several members of the body politic with each other those rules

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[84]The following summary of the immediately relevant aspects of the constitutional thought of Mills, and of the provincial rights movement generally, is taken from R.C. Vipond, *supra*, and Carl Stychin, "Formalism, Liberalism, Federalism: David Mills and the Rule of Law Vision in Canada," (1988) 46 *University of Toronto Faculty of Law Review*, 201.

[85]Canada, Parliament, *House of Commons Debates*, 1249 (1 April 1884); quoted in Vipond, *supra* at 313.

[86]Vipond, *supra* at 313.

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," and labelled "the authority or power of police."[87]

It was no coincidence that Mills cited Cooley as authority for his very broad reading of the property and civil rights power. Quite apart from the fact that he had been a student of Cooley's at the University of Michigan, he shared Cooley's liberal faith that the standard by which law was to be measured was the degree to which it protected, enhanced and fostered individual liberty.[88] It followed that in identifying the property and civil rights jurisdiction with "every relation in the state of society relating to private life," Mills implied that the provinces were better equipped than the Dominion to legislate in a manner which respected and promoted individual liberty, and the property and civil rights on which that liberty depended. He came close to making this assessment explicit when, in the course of a parliamentary speech in which he argued that the Dominion Parliament had no power to enact a law which regulated the conditions under which women and children could be employed in factories, he observed that by giving the provincial governments the exclusive power over property and civil rights, the *British North America Act* conferred upon them the responsibility "to preserve peace and good order, and to see that one man, in doing as he pleases, does not please to interfere with the property, health, comfort or freedom of another."[89] It seems unlikely that Mills, given his committment to legal liberalism, would have been willing to make the provinces' responsibility in this regard the centrepiece of his interpretation of the division of powers unless he was confident that the provinces were capable of discharging the responsibility, or that they were at least more capable of discharging it then was the Dominion Government.

In the context of a somewhat different constitutional debate, Mills' was forced to make the connection between individual rights and provincial legislative jurisdiction even more explicit. The debate arose in the wake of MacDonald's disallowance of an *Act for Protecting the Public Interests in Rivers, Streams and Creeks*, which had been passed by the Ontario legislature to allow a Liberal lumberman named Caldwell to float logs down a tributary of the Ottawa River made navigable by the widening and dredging performed by the reportedly Conservative MacLaren.[90] Pressed to defend what the advocates of provincial rights

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[87]Quoted in Vipond, *supra* at 314.

[88]Vipond, *supra* at 234-246.

[89]Canada, Parliament, *House of Commons Debates*, 883 (1 April 1885); quoted in Vipond, *supra* at 315.

[90]Detailed accounts of the "Rivers and Stream Dispute" can be found in Morrison, *supra* at 206-223; J. Benidickson, "Private Rights and Public Purposes in the Lakes, Rivers and Streams of

regarded as a violation of local self-government, MacDonald portrayed himself and the Dominion Government as the protector of the property rights of MacLaren, and of individual rights in general. Thus he declared that while he thought that "the power of the local legislatures to take away the rights of one man and vest them in another, as is done by this Act, is exceedingly doubtful," it was the responsibility of the his government, "assuming such right does, in strict ness, exist, . . . to see that such power is not exercised, in flagrant violation of private rights and natural justice . . . ."[91]

Mills' response to MacDonald's explanation was to first of all deny that MacLaren's rights of property were in fact violated by the Ontario statute.[92] But while this argument may have been sufficient to vindicate the Ontario legislature in the specific case of the *Rivers and Streams Act*, it did nothing to challenge MacDonald's claim that it was proper for the Dominion Government to use the power of disallowance where individual property rights were in fact threatened by provincial legislation. Mills therefore argued that disallowance was not only inconsistent with the right of the province's to responsible self-government with respect to those matters which came within provincial jurisdiction, but also that it was unnecessary for the protection of individual rights.[93] He did so by arguing that the accountability of a provincial legislature to the people who elected it was a better "check" upon its actions, and therefore a better and more consistent guarantee of individual rights, than the executive of a "foreign" government which was not exclusively accountable to those who would be affected by the legislatures decisions ever could be.[94] In short, if a provincial government adopted a law which violated individual rights, the people of that province could be counted upon to protect themselves through the exercise of their democratic rights. The vigilance of the people, born of the fact that they were directly interested in the measures passed by their provincial legislatures, was a more dependable guarantor of individual rights than was Dominion supervision via the power of disallowance, since the Dominion Government might easily be distracted by the wishes, opinions and even the prejudices of those who lived in other provinces. Thus, Mills argued that:

Ontario, 1870-1930," in D.H. Flaherty, ed., *Essays in the History of Canadian Law, Vol. II* (Toronto: University of Toronto Press, 1981) at 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.

[91]W.E. Hodgins, *Dominion and Provincial Legislation, 1867-1895* (Ottawa: Queen's Printer, 1896) 178; quoted in Vipond, *supra.* at 138.

[92]Vipond, *supra* at 141.

[93]*Ibid.* at 142-143.

[94]*Ibid.* at 143-144.

> Our system of parliamentary self-government is based upon the theory that the people are fit to govern themselves; that they know what they want; that they are [the] ultimate judges of what is best. We assume that Parliament may err; but that the public can do no wrong, and that in the last resort the electors must decide what the public policy shall be. If the legislature make[s] a mistake it was not intended that the strangers of other Provinces should correct it. They know much less of our local wants than the men who are on the ground – the men whom the people have trusted. They are much more likely to blunder. The corrective power is with the people, and to them the appeal lies.[95]

Again, given the priority which Mills' placed on individual liberty and private property, it must be assumed that he believed that the "appeal to the people" which he recommended would, as a matter of course, be successful. Such confidence in local democracy in part reflected Mills' belief that the property and civil rights of the individual were by definition a local matter, of concern only to those within a limited geographic area.[96] As the level of government closest to the local community, the provinces were more likely to be responsive to the wishes of the people as to the definition of the content and scope of their own and their neighbours property and civil rights.[97] In contrast, the Dominion Government was more likely to capriciously regard the rights of the people of one part of the country as a matter to be balanced against the wishes and desires of those who lived in different parts of the country, and who had no knowledge or concern for the rights of the former. In this respect, federalism was by its very nature a system of government which protected individual rights.[98] It allowed local communities to retain exclusive jurisdiction over those aspects of their social life which were of concern to them alone, while at the same time providing the institutional framework for the cooperative pursuit of common goals. It thereby prevented those who had nothing at stake in the manner in which a particular community regulated and defined the property and civil rights of the individual from intermeddling in the decision making process of that community. In doing so, it removed what Mills and other advocates of provincial rights saw as the principle threat to the rights which came within the compass of ss. 92(13).

Returning to *Grieves* and *Barker*, it does not seem unduly speculative to suggest that the confidence which Fisher placed in ss. 92(13) rested on a faith in local

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[95]*London Advertiser* (18 January 1883) as quoted in Vipond, *supra* at 143.

[96]*Ibid.* at 165-168.

[97]Vipond, *supra* at 165-167; Stychin, "Formalism, Liberalism, Federalism," *supra* at 209-218.

[98]Vipond, *supra*, at 156-168 and 195.

democracy similar to that exhibited by Mills. Fisher's assumption that provincial jurisdiction over property and civil rights would by itself lead to the protection of those rights is surely consistent with the a Millsian confidence in the efficacy of provincial responsible self-government as a guarantor of individual property and liberty. It is in other words consistent with a belief that the people of each province would use the electoral system to ensure that their local legislature respected their desires as to the drawing of lines between the public and private domains, as well as the right of each man to, in Mills' phrase, "do what he pleases with his own."[99] If that is so, the following rather intriguing question arises; given that the role of the provinces in the protection of individual rights was at the core of Mills' defense of the provincial rights movement, does the fact that Fisher viewed the rights of provincial governments to an area of legislative jurisdiction as co-extensive with the rights of the people to be free from sumptuary laws mean that his overall understanding of the *British North America Act* was that of the provincial rights movement of the 1880s and 90s?

There is evidence which suggests that this question should be answered in the affirmative, the most compelling of which are the parallels which can be drawn between Fisher's judgments in *Grieves* and *Barker* and other aspects of the thought of David Mills. Like Mills, Fisher seems to have believed that sections 91 and 92 had to be interpreted in such a way as to maintain a strict separation between the legislative jurisdictions of the Dominion and the provinces, at least when the provincial jurisdiction in question was the power to make laws in respect to property and civil rights.[100] For Mills, this requirement was a necessary corollary of his argument that provincial governments were as sovereign and supreme within their legislative sphere as was the Dominion Government within the parameters of s. 91. For if it was recognized that the two jurisdictions routinely overlapped, the paramountcy which was accorded to the laws of the Dominion by the opening and closing paragraphs of s. 91 would mean that the Dominion Parliament could nullify provincial laws by simply statutes which were inconsistent with those enacted by one or more provinces. This would allow the Dominion to make an end run round the provincial responsible self-government which recognition of the equal sovereignty of provincial governments was meant to guarantee. It is interesting in this respect to note that Fisher's view of the need for a strict separation between Dominion and provincial jurisdiction seems also to have rested on a conviction that provincial governments were as sovereign and supreme with respect to the matters which came within s. 92 as was the Dominion

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[99] *Ibid.* at 241.

[100] Fisher's views in this regard are found at (1879-80) 19 N.B.R. 169, while Mills' views as to the need for a strict separation between Dominion and provincial jurisdiction are summarized by Vipond, *supra* at 275-285. See also Stychin, "Formalism, Liberalism, Federalism," *supra*.

Government with respect to matters falling within s. 91. That at least is the point which he appears to have been making when he said that "all the exclusive powers of the Parliament and Local Legislature are co-equal in their energy and authority." [101]

Another important point of parallel between Fisher and Mills was the special priority which both attached to the property and civil rights jurisdiction. Fisher's statement that 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,"[102] echoed the views which Mills had expressed to Parliament in 1869, when he had said that if ever it were "a question whether Federal or Local Legislatures should be destroyed . . . the country would suffer far less by the destruction of the Federal power."[103] Notwithstanding that Mills had provincial jurisdiction in general rather than the property and civil rights jurisdiction in particular in mind, and even though he was speaking of the total abolition of one or the other level of government rather than an isolated choice between their respective legislative jurisdictions, he can be seen as expressing sentiments roughly similar to those of Fisher. Remembering that Mills regarded the property and civil rights jurisdiction to be the most important of those enumerated in s. 92 and that Fisher justified the priority which he attached to 92(13) by referring to the crucial role which he claimed that it played in the very existence of confederation, both can be taken as saying that provincial jurisdiction over property and civil rights was more important than any of the other jurisdictions enumerated in either section 91 or section 92.

Finally, Fisher's frequent references to the "compact of union" bring to mind the longstanding and many facetted reliance of the advocates of provincial rights, Mills among them, upon the compact theory of confederation.[104] It must quickly be added that this similarity between Fisher and Mills and other advocates of provincial rights does not appear to have been merely one of phraseology. As has been well documented, the compact theory of confederation, under which the *British North America Act* was understood as a "ratification" of the terms of a contract between the founding provinces,[105] allowed the advocates of

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[101](1879-80) 19 N.B.R., 169.

[102]*Ibid.* at 169.

[103]Canada, Parliament, *House of Commons Debates*, 858 (17 June 1869); quoted in Vipond, *supra* at 282.

[104]For general discussions of the compact theory of confederation see Norman McL Rogers, "The Compact Theory of Confederation," (1931) *Proceedings of the Canadian Political Science Association*, 205-30; Morrison, *supra* at 11-16, and Cook, *supra*.

[105]Cook, *supra* at 30.

provincial rights to portray the Dominion Government, which had been brought into existence by the *British North America Act*, as the creation of the founding provinces.[106] From this it followed that the provinces could, without the participation or consent of the Dominion Government, amend the terms of the constitution, including those which related to Dominion powers or the composition of the Dominion Parliament.[107] It also followed that the Dominion Government could only exercise its power of disallowance in a manner consistent with the fact that it owed its very existence to the provinces over which it held the power of disallowance. This meant that while the Dominion would be justified in disallowing provincial statutes which encroached on its own jurisdictional territory, it had no right to use the power of disallowance as licence to assume general supervisory control over provincial legislatures. That would entail, on the terms of the compact theory, the conclusion that the provinces had agreed to divest themselves of the sovereign independence that they had exercised in bringing confederation and the Dominion Government into being.[108] Finally, the contractual nature of confederation allowed the advocates of provincial rights to explain why the *British North America Act* referred to the Queen in setting out the executive power of the Dominion Government, but only spoke of "an officer, styled the Lieutenant Governor," in relation to the executive branch of the government of the provinces.[109] To the argument that this meant that the Lieutenant Governors were not direct representatives of the crown, the result being that provincial governments possessed only such incidents of the prerogative powers which inhered in the crown as were expressly conferred upon them, the advocates of provincial rights retorted that the absence of any mention of the Queen in relation to the constitution of provincial governments simply indicated that it had been assumed that they were to retain the sovereign status that they had exercised in creating confederation and the Dominion.

In contrast, express mention of the Queen in the case of the executive of the Dominion Government had been necessary as that government, as the mere creation of the confederating provinces, had no status other than that which those provinces agreed to confer upon it. In this way, the compact theory allowed the provincialist to reverse the arguments as to each level of governments' entitlement to the prerogative powers of the crown. Just as the status of the provinces as sovereign governments was to be assumed to be unchanged in the absence of any express mention of the representation of the crown in the executive branch of

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[106]This rather obvious implication of characterizing confederation as a compact between the founding provinces is noted by Cook, *supra* at 42-43 and Romney, *supra* at 247.

[107]Cook, *supra* at 43 and Vipond, *supra* at 5 and 243-244.

[108]Romney, *supra* at 247, 254.

[109]The details of this textual argument are succinctly summarized by Romney, *supra* at 245-246.

provincial governments, so too was the entitlement of the provinces to exercise the prerogative powers to be assumed to be unchanged, except to the extent that the terms of the *British North America Act* expressly provided otherwise.[110] In contrast, the Dominion was to be taken as possessed of only those incidents of prerogative power as were expressly conferred upon it.

The underlying assumption of Fisher's use of the concept of confederation as compact was consistent with all of these "provincialist" applications of the compact theory of confederation. Just as each of the latter followed, more or less logically, from the fundamental claim that the provinces had created confederation and the Dominion Government, Fisher's basic point was that confederation and the Dominion Government must serve the purposes for which they had been created by the confederating provinces. By arguing that the *Canada Temperance Act* did not come within the trade and commerce power because temperance was not one of the objectives that the confederating provinces hoped to achieve by assigning that power to the Dominion Parliament, Fisher in effect argued that the Dominion Parliament did not have the legislative authority to enact the *Canada Temperance Act* because the confederating provinces had not agreed to confer such a power upon it. This led to the conclusion that the *Canada Temperance Act* was *ultra vires* only if one assumed, after the manner of the advocates of provincial rights, that the Dominion Government had no powers other than those which had been expressly assigned to it by the "compact of union."

When viewed in this light, the *Grieves* and *Barker* judgments of Fisher, as well as those of Andrew Wetmore and John Weldon, to the extent at least that they developed the same themes as Fisher, take on the appearance of judicial expressions of the vision of confederation and the constitution which has hitherto been almost exclusively associated with the Ontario Government, and the troika of Oliver Mowat, David Mills and Edward Blake. This must surely cast some doubt on the view, somewhat uncritically accepted in the literature, that only Ontario under Mowat was dedicated to the full achievement of provincial autonomy as an end in itself, a view which is most strongly advanced in the now standard portrayal of the dynamics of the Interprovincial Conference of 1887. The assumption that Mowat purchased the support of the other participating provinces for resolutions concerning matters such as the Dominion's power of disallowance by agreeing to back the demands of the other provinces for better financial terms from Ottawa, appears to be almost universal.[111] The possibility that some of the other provinces may have had a genuine, but more muted committment to provincial rights in the

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[110]Romney, *supra* at 249.

[111]See Morrison, *supra* at 244-248 and 262-277; Cook, *supra* at 22 and 41-42, and Armstrong, "The Mowat Heritage in Federal-Provincial Relations," *supra* at 103-104 and 108.

strictly constitutional sphere seems not to have been considered seriously. But if New Brunswickers of the generation of Fisher, Wetmore and Weldon possessed a "provincial rights" understanding of the *British North America Act* as early as 1878, it seems credible to suggest that the provincial rights movement of the 1880s and 1890s was based on an understanding of confederation in particular and federalism in general which had deep and perhaps pre-confederation roots in the political and legal culture of New Brunswick. If so, then it is perhaps more difficult to be quite so dismissive as to the contribution which Maritime politicians may have made behind the closed doors of a gathering such as the Interprovincial Conference.

Put more broadly, *Grieves* and *Barker* make it credible to suggest that the provincial rights movement was more pan-Canadian, at least in terms of its intellectual content if not its perceived leadership, than has been thought previously to be the case. This of course assumes that Fisher, along with Wetmore and Weldon, was more representative when it came to his constitutional thought than he seems to have been with respect to his understanding of the nature of adjudication and the judicial function. It has to be acknowledged for example, that John Hamilton Gray, Fisher's fellow delegate to the Quebec Conference, used his subsequent elevation to the bench of British Columbia to expressly disavow a central tenet of the provincial rights movement; that the provinces were at "the time of Union . . . sovereign and independent States," the result being that "they had only parted with what they distinctly gave, and that, therefore, all powers not absolutely expressed as parted with remained" in the provinces.[112] In *Barker* itself both John Campbell Allen and Acalus Palmer expressly disassociated themselves from Fisher's views as to the role and preeminent importance of ss. 92(13). Allen bluntly declared that if the *Canada Temperance Act* "relates to a subject matter which is within the provisions of the 91st section of The British North America Act, it would be no valid objection that the effect of it 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."[113] Palmer acknowledged that the right of Canadians to have "alcoholic liquor to clean their clothes or to make perfumery" was as secure in the law as was their right to liberty, but pointed out that he had "never heard it contended that the Dominion Parliament could not authorize the taking away of a man's liberty, on the mere accusation of his having committed an act, which [it] had declared to be illegal for the public good."[114] Somewhat sarcastically, he doubted whether the right to possess and use alcohol

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[112] *Tai Sing, supra* at 105.

[113] (1979-80) 19 N.B.R., 187.

[114] *Ibid.* at 150.

as one saw fit was more important than a man's right to liberty "even if you throw brandy sauce into the balance."

But the most which these statements can be said to show is that support for an understanding of the *British North America Act* which anticipated the provincial rights movement was not unanimous among the legal elite of the New Brunswick of the 1870s. By itself, this cannot support the conclusion that the constitutional thought of Fisher, Wetmore and Weldon was unrepresentative of New Brunswick opinion any more than a demonstration that some members of the Ontario elite strongly disagreed with Mowat's constitutional theories could support the conclusion that the provincial rights movement was in no way representative of Ontario public opinion. Short of an exhaustive search through New Brunswick newspapers and legislative debates, there is no way of knowing whether Fisher's understanding of the *British North America Act* was more representative than was that of Gray, Allen and Palmer. What can be said however, is that it seems unlikely that Fisher, who had been at the centre of public life in New Brunswick for 40 years when he wrote his *Grieves* and *Barker* judgments, could have arrived at an understanding of confederation and the *British North America Act* which was totally unrepresentative of the values, ideas and aspirations which shaped the province's sense of itself and its place within the new country of Canada. It is perhaps important in this respect to remember that to the extent that Fisher's abilities as a lawyer were in any way celebrated, it was his contribution to constitutional law that was emphasized.[115]

It follows therefore that the implication which *Grieves* and *Barker* support, that the provincial rights movement drew on a pan-Canadian set of values and a pan-Canadian set of assumptions as to how those values could be protected, is refuted by the statements of Gray, Allen and Palmer. This aspect of *Grieves* and *Barker* may require New Brunswick historians to reconsider their conclusion that the public figures of nineteenth century New Brunswick were immune to the influence of ideas.[116] For present purposes however, its relevance goes to the larger story of Canadian constitutional history. For most of this century, that story has been told on the basis of an assumption that the Privy Council's provincialist reading of the *British North America Act* could not be explained or defended on legal grounds.[117] Recent scholarship has challenged that assumption. Paul Rom-

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[115]See note 87 and accompanying text.

[116]See Katherine MacNaughton, *The Development of the Theory and Practice of Education in New Brunswick, 1784-1900*, (Fredericton: University of New Brunswick Historical Studies, 1947) at 84-88, but esp. 85, and W.S. MacNutt, *supra*.

[117]Even defenders of the results which the Privy Council arrived at set out to explain and justify their lordships' "provincialist bias"; see Cairns, *supra*.

ney argues that the standard critiques of the Privy Council exaggerate the extent to which the *British North America Act* was a clearly and unequivocally centralist document.[118] He also argues that the critics have failed to consider whether there was a connection between the Privy Council's division of powers jurisprudence and the line of cases in which it was called upon to rule upon the status and powers of the Lieutenant Governors, and thus upon the question of whether provincial governments could claim the status of sovereign governments, supreme within their legislative sphere.[119] More broadly, Robert Vipond challenges the assumption that the provincial rights movement, whose understanding of the *British North America Act* was perhaps unwittingly given the force of law by the decisions of the Privy Council, was a strictly extra-legal movement.[120] In arguing that the thought of the movement's leading proponents had a coherent basis in constitutional and legal theory, Vipond implies that the jurisprudence of the Privy Council gave expression to a view of Canada that corresponded with an understanding of law and its relation to community which was widespread among the elite of late Nineteenth-Century Ontario.

In sum, both Romney and Vipond suggest a reappraisal of the well-worn charge that the Privy Council imposed a much more decentralized constitution upon Canada than Canadians themselves wanted. To the extent that *Grieves* and *Barker* can be seen as judicial expressions of the understanding of confederation which became the basis of the provincial rights movement and which became part of the *British North America Act* by virtue of the jurisprudence of the Privy Council, they make the case for such a reappraisal all the more compelling. For they suggest that the Privy Council, in giving a broad reading to ss. 92(13) and a correspondingly restrictive reading to Dominion heads of power, gave expression to an understanding of confederation and Canada which was pan-Canadian in scope. When the Privy Council's constitutional jurisprudence is seen in this light, it perhaps seems less of a coincidence that their lordship's made their definitive statement as to the equal constitutional status of provincial and Dominion governments in a case which originated in New Brunswick, and was argued before them by the province's premier and attorney-general, Andrew Blair.[121]

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[118]Romney, *supra* at 241.

[119]*Ibid.* at 248 and *supra* at note 93.

[120]Vipond, *supra* at chapter 1 and *passim*.

[121]*The Liquidators of the Maritime Bank of Canada v. The Receiver General of New Brunswick* [1892] A.C. 437; Both Cook, *supra* at 22 and Romney, *supra* at 259 treat the New Brunswick origin of the case as incidental and unimportant.

VI

The cases of *Grieves* and *Barker* have been reviewed from two distinct perspectives; to understand the nature of their adjudication and to understand their constitutional theory. This perspective can be synthesized by asking the following question: why have the connections drawn in the previous section between *Grieves* and *Barker*, the provincial rights movement and the jurisprudence of the Privy Council, not been identified and explored previously?

The answer lies in the nature of the legal culture within which our constitutional history has been written. Fundamental to that culture has been the idea of a sharp division between law and politics, or to put it in terms of the earlier comparison of Ritchie and Fisher, between constitutional adjudication and constitutional statesmanship.[122] Until recently at least, this belief in the distinction between law and politics has meant that our understanding of constitutional adjudication has not been unlike that revealed in Ritchie's decisions in *Chandler* and *Justices of Kings County*. We have operated on the assumption that the constitution which the judge is called upon to interpret is co-extensive with the text of the *British North America Act*, the result being that the purposes which lie behind the bare words of particular sections of the *Act* have not been regarded as part of the judge's legitimate domain. As a result, it has not occurred to us to look for evidence of the provincial rights movement, which we have categorized as falling on the political side of the law\politics divide by virtue of its association with political leaders and the competition between political parties, in the early constitutional decisions of our provincial courts. We have assumed that if the Privy Council's interpretation of the *British North America Act* is to be defended, it has to be defended solely in terms of the text of that *Act*. For that reason, the parallels which could be drawn between the Privy Council's interpretation of the *British North America Act*, and the conclusions which Canadian judges such as Fisher, Wetmore and Weldon arrived at, would seem irrelevant to an assessment of the legitimacy of the former. The wide ranging and "political" nature of the judgments of Fisher and company would, in the context of a legal culture built around the law\politics distinction, lead to the conclusion that they were not to be taken seriously as legal expositors of the text of the constitution. The fact that their conclusions as to the scope of particular legislative powers anticipated those of

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[122]The emergence of this culture, and its achievement of a position of dominance, is traced by G. Blaine Baker, "The Reconstruction of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 *Law and History Review*, 219-292. For a general discussion of constitutional scholarship in this century, including the effect of the assumed dichotomy between law and politics, see Peter H. Russell, "Overcoming Legal Formalism: The Treatment of the Constitution, the Courts and Judicial Behaviour in Canadian Political Science," (1986) 1 *Canadian Journal of Law and Society* 5.

the Privy Council by as much as twenty years would, from such a perspective, appear as mere coincidence.

Seen in this light, the debate in *Grieves* and *Barker* as to the nature of adjudication, and the parallel debate in the same cases as to the content and scope of ss. 92(13), are connected in a way that goes to the very core of understanding of Canadian constitutional history. Because Fisher, Wetmore and Weldon were on what quickly proved to be the losing side in the first debate, the position which they attempted to stake out in the second was destined to be ignored. It is perhaps not inappropriate to suggest that in the process, Canadians lost a valuable if somewhat opaque window on a crucial period of their constitutional development.