The Nature and Scope of Provincial Autonomy: Oliver Mowat, the Quebec Resolutions and the Construction of the *British North America Act*

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I dislike Lord Watson's assumption of the guardianship of the autonomy of the provinces. His proper function was merely that of an interpreter of the meaning of the words of a statute.

- W. F. O'Connor

Introduction

On becoming premier of Ontario in October 1872, Oliver Mowat confronted a threat to the province's constitutional status. John A. Macdonald had obtained from the imperial law officers an opinion to the effect that lieutenant-governors could not of their own mere motion create queen's counsel, though they might be empowered to do so by provincial statute. This was only the latest in a series of such pronouncements by imperial officials since the time of the Quebec Conference, but Mowat was unperturbed. Observing that "the Confederation Act creates peculiarities which of course cannot exist in England[,] and which by the bye English lawyers when referred to have (to say the least of it) no special competence to advise upon," he carried in the Ontario legis-

* Research for this article was supported by the Social Sciences and Humanities Research Council of Canada and by the Osgoode Society. I am grateful to R. C. B. Risk for his criticism of an early draft.


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ture, not an act purporting to empower the lieutenant-governor to appoint QCs, but one declaring that "it was and is lawful for the Lieutenant-Governor" to do what the imperial law officers said he could not.\(^4\) This was the first of four acts passed between 1873 and 1888 that were calculated to bring the question before the courts. At the same time Mowat issued the first of two challenges to Macdonald to refer the matter to the Judicial Committee of the Privy Council (JCPC).\(^5\)

Mowat always insisted that his campaign to establish provincial rights was a campaign to realize the true intent of Confederation, and he could scarcely have been so confident so early had he supposed himself to be working against the meaning and intent of the BNA Act.\(^6\) Yet his testimony has invariably been dismissed as a mendacious denial of a centralist consensus to which he himself had assented, and for endorsing his view of the act the JCPC have been denounced as arrogant dunces.\(^7\) The object of this article is to reconstruct Mowat's view of Confederation and the BNA Act, and to show that the JCPC's endorsement of it reflected a fair, not a perverse reading.

This inquiry is necessary because of the persistence of the centralist-nationalist interpretation of Confederation, first formulated in the 1930s. Frederick Vaughan billed his recent restatement of this interpretation as a challenge to a "new orthodoxy," but his discussion demonstrates the continuing hegemony of the old orthodoxy. This is evident in the very works he criticized as examples of the "new orthodoxy": G. P. Browne's attempt to vindicate the JCPC's jurisprudence, Alan Cairns's influential analysis of the controversy and Peter H. Russell's standard collection of leading cases.\(^8\) Browne's is a narrow textual

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4 National Archives of Canada, Macdonald Papers, Mowat to Macdonald, vol. 331, p. 114971 (Mowat to Macdonald, Feb. 18, 1873); 36 Vict. (1873), c. 3.

5 Can. Sess. Papers (1873) no. 50. The second challenge was issued in 1886: see Ont. Sess. Papers (1888) no. 37, 24, 27-29. The other three statutes were the Escheats and Forfeitures Acts of 1874 and 1877 (37 Vict., c. 8; 40 Vict., c. 3) and the Executive Administration Act, 1888 (51 Vict., c. 5). See, in general, Paul Romney, Mr. Attorney: The Attorney-General for Ontario in Court, Cabinet and Legislature, 1791-1899 (Toronto: Osgoode Society/University of Toronto Press, 1982), 240-59, 274-81.

6 The British North America Act, 1867: 30 and 31 Vict., c. 3 (U.K.).

7 W. F. O'Connor's comment, quoted above, continues: "When the London Conference framed its terms and the Imperial Parliament enacted them the true guardians of the autonomy of the provinces had done, in their way, what Lord Watson was later presuming, without the necessary equipment, to do in his way."

Abstract. In the 1930s, the Judicial Committee of the Privy Council was criticized for allegedly perverting the meaning of the British North America Act and the intentions of its framers. This notion persists, partly because its historiographical basis—the idea that the Fathers of Confederation envisaged a dominant federal government—remains substantially intact. To the Ontario Reformers, however, the Confederation agreement had not established federal dominance. On the contrary, it had implemented the broad claims to local autonomy which Reformers had been advancing ever since the 1820s. And while those claims rested on a legally heterodox conception of colonial constitutional status, the BNA Act gave legal effect to that conception as applied to federal-provincial relations. This allowed Oliver Mowat to do what earlier Reform leaders could not have done: enforce the local claims in court.

Résumé. Dans les années 1930, le Comité judiciaire du Conseil privé a été critiqué pour avoir supposément déformé la signification de l’acte de l’Amérique du Nord britannique et les intentions de ses auteurs. Cette version des faits est encore largement partagée, en partie parce que son fondement historiographique—l’idée que les Pères de la Conféderation voulaient un gouvernement fédéral fort—demeure, elle aussi, bien admise dans l’ensemble. Pour les Réformistes ontariens, pourtant, l’accord confédéral n’établissait pas une prédominance fédérale; tout au contraire, il mettait en application les revendications d’autonomie locale que les Réformistes mettaient de l’avant depuis les années 1820. Alors que ces revendications étaient difficiles à ajuster avec le statut constitutionnel colonial, l’AANB leur a donné une reconnaissance légale en l’appliquant aux relations fédérales-provinciales. Il a permis à Oliver Mowat de faire ce que les leaders réformistes avaient tenté en vain auparavant: faire valoir les revendications locales devant les tribunaux.

study, focussed on the JCPC’s treatment of the sections of the BNA Act that deal with the division of legislative powers; Cairns justifies the JCPC not on jurisprudential grounds but by arguing that its construction of the BNA Act was more suited to contemporary society than the centralist alternative.\(^9\) Neither writer attacks the historical basis of the centralist position, the idea that the Confederation settlement was centralist in intent. Russell does emphasize that the settlement was a compromise, and that Macdonald’s centralism must not be generalized into a consensus of the Fathers, but he does not work this observation into an argument.\(^10\) Both he and Cairns concede the validity of the centralist jurisprudential critique. Cairns admits that the JCPC’s decisions were biased towards the provinces from the start and speaks of their “‘injection of a decentralizing impulse’” into the constitution; Russell writes of their “‘anxiety to preserve a division of powers appropriate for ‘classical federalism’ and thereby resist the strongly centralizing tendencies of the constitutional text.’”\(^11\)

Robert Vipond has recently addressed the intent of Confederation in a study which is the more effective for treating provincial autonomy as an expression of Upper Canadian rather than Lower Canadian aspirations; the provincial rights controversy was, after all, primarily a contest between Ottawa and Ontario, and it is only from the Upper Canadian perspective that the centralist interpretation can be finally discredited.\(^12\)

\(^{9}\) Cairns, “Judicial Committee,” 319-27.
\(^{11}\) Ibid., 8, and Cairns, “Judicial Committee,” 319, 323.
\(^{12}\) Robert C. Vipond, Liberty and Community: Canadian Federalism and the Failure of
To my mind, however, even Vipond defers too much to the centralist historiography and, perhaps for that reason, is needlessly tentative in making his own revisionist case. In this article I present Confederation and the campaign for provincial rights as phases of a long struggle by the Reformers of Upper Canada to achieve the goal that had always been their party’s raison d’être. I then describe how the JCPC came to endorse the Reform position in the Prohibition decision of 1896, that bane of mid-twentieth-century centralists which modern writers, Vipond among them, continue to find perplexing.

Confederation and the Ideology of Responsible Government

What annoyed centralists about the Prohibition Reference was the approach to the division of legislative powers established thereby and elaborated by the JCPC during the next four decades. The judgment’s author, Lord Watson, justified his reading of the BNA Act by saying that the alternative was inconsistent with provincial autonomy, and the problem of provincial autonomy has always bedevilled centralist efforts to discredit his approach. Quite apart from the repeated assurances by advocates of Confederation that the Quebec Resolutions guaranteed provincial autonomy, the preamble of the BNA Act mentioned the federal nature of the dominion, and a federal union by definition consisted of autonomous units.


13 Terms such as ‘‘the Macdonald constitution’’ and ‘‘Macdonald’s centralist orthodoxy’’ implicitly accord Macdonald’s centralism a constitutional or juridical legitimacy which Mowat for one denied (Vipond, Liberty and Community, 10, 12).


This problem is responsible for what Cairns has called the "fundamentalist" strain in centralist apologetics. Centralists have tended to treat the division of powers in isolation from the rest of the BNA Act, maintaining that its terms were so clear as to need no illumination by other parts of the act,19 but their basic argument is that the dominion was not in fact meant to be a federal union in the usual sense.20 In order to contain the centrifugal forces that had ripped apart the United States, the Fathers of Confederation had deviated from the American pattern by giving the general government both the residuary legislative power and the power to regulate trade and commerce, as well as quasi-imperial power to veto provincial legislation. Centralists see these deviations as proof that the Fathers sacrificed the principle of provincial autonomy to the imperative of political stability.

That view finds support in the words both of advocates and critics of the scheme. The federal veto and the location of the residuary legislative power led three Lower Canadian MPPs—Christopher Dunkin and the brothers Antoine-Aimé and Jean-Baptiste-Eric Dorion—to denounce the scheme as a quasi-federal mask for a unitary state. These critics had counterparts in the Maritime provinces. Confederationists, for their part, boasted of the strength those features would impart to the projected union.21 George Brown, the acknowledged leader of the Upper Canadian Reformers, made an especially telling admission in view of his resistance to centralism after Confederation: he commended the federal veto as ensuring "that no injustice shall be done without appeal in local legislation."22 Such an idea of its function went far beyond Macdonald's guidelines of 1868 and seems to admit the boldest of Macdonald's excuses for disallowing Ontario's Rivers and Streams Act of 1881. It would certainly have justified the disallowance of the New Brunswick Schools Act of 1871, an action which Macdonald then claimed was beyond his powers.23

19 Cairns, "Judicial Committee," 303-07, and see the epigraph to this article.
20 Robert MacGregor Dawson, The Government of Canada (Toronto: University of Toronto Press, 1947), 36; Vincent C. MacDonald, "The Privy Council and the Canadian Constitution," *Canadian Bar Review* 29 (1951), 1030-31; and F. R. Scott, "Centralization and Decentralization in Canadian Federalism," *ibid.* 1100-03. Compare Vaughan, "Critics of the Judicial Committee," 510, 513: "The confederation plan clearly contained a deceptive constitutionalism by giving the impression that the new constitution embodied the federal principle in an effective manner," but in reality the BNA Act was "crudely centralist," a character which "was not a result of shoddy draughtsmanship but the conscious effort of the framers of the Act."
22 Debates on . . . Confederation, 87.
Vipond suggests that the apparently centralist rhetoric of confederationist Reformers like Brown reflected the coalition government’s intention to suppress internal differences in the hope that the Canadian legislature would adopt the Quebec Resolutions without amendment.24 I do not think Brown can so easily be cleared of the suspicion that he was willing at Charlottetown and Quebec to surrender his party’s traditional insistence on autonomy for Upper Canada. Apart from his compromising conception of the federal veto, he also tried to limit the provincial legislatures to one chamber, on the ground that the full panoply of responsible government would be inappropriate to their quasi-municipal status, while opposing the idea of an elective federal upper house as inconsistent with the principle of responsible government.25 There is simply no evidence of Macdonald advocating the less centralist of two positions at Quebec as Brown advocated the more centralist position on this question, which was crucial to the case for provincial autonomy.

But Brown’s centralist fervour was rejected by the conference, and there is no need in any case to assume that it committed any Reformer but himself, though centralists have gladly done so. A harder question is posed by the confederationist Reformers’ apparent indifference to the Lower Canadian attack on the Quebec Resolutions. Vipond argues that they were far from indifferent to it but managed with some difficulty to resolve the problem. The Dorions’ critique was important, he suggests, because it raised the problem of sovereignty: in particular, the problem posed by Blackstone’s doctrine that sovereignty was indivisible and absolute, and the King in Parliament at Westminster its single locus in the British Empire. This seemed to imply that, in a confederation modelled upon the Empire, sovereignty must repose in the federal legislature. Vipond contends that the Reformers found a solution to this conundrum in their experience as “citizens of a largely self-governing colony,” which taught them that, “while the imperial Parliament was sovereign over Canada... this sovereignty did not express itself as directly or with the same bite as in Britain.”26 This awareness carried them to a conceptual distinction between sovereignty and power, which in turn enabled them to solve the problem of sovereignty by re-inventing Madisonian classical federalism; that is, just as the American federalists had solved the problem by asserting that neither the federal nor the state governments were truly sovereign because sovereignty was vested in the people, the Canadians solved it by asserting that neither the federal nor the provincial governments were sovereign because sovereignty was vested solely in the imperial legislature.

24 Ibid., 20-21.
26 Vipond, Liberty and Community, 30; see generally ibid., 22-36.
This "Madisonian" reasoning was to be decisive in the judicial arena, and it may well have underpinned Mowat's early confidence in the provincialist cause, yet it seems unlikely to have silenced the doubts expressed in the political arena. The Dorions' criticism of the confederation settlement may have been couched in terms of sovereignty, but its subject was in fact power, and from this point of view Vipond's "distinction between sovereignty and power" left both attributes in the wrong place. A general government elected by Canadians would be sensitive to party-political influences and dependent on the same revenue pool as the provinces. Could such a government be expected to use its legal powers with the same restraint as an absentee imperial sovereign? And why should that sovereign, committed (in Vipond's words) "to leave British North America to govern itself on matters that did not directly compromise or conflict with imperial interests,"27 impede the general government in the exercise of powers which had been devolved upon it at the very suit of the provinces? It is hard to see how either the reinvention of classical federalism or the benign neglect of an absentee imperial sovereign can have calmed those who thought that the Quebec Resolutions made the general government too strong in relation to the provinces.

The confederationist Reformers' steadfastness in the face of the Dorions' criticism probably owed less to any Madisonian ratiocinations than to the fact that the text of the Quebec Resolutions seemed to them to be less centralizing than the Dorions feared and fundamentalists like Vaughan still claim. According to Vipond, the Reformers were driven to reinvent classical federalism because they "were neither sufficiently presumptuous nor sufficiently sophisticated simply to reject the traditional doctrine of sovereignty outright."28 In fact, though, their doctrine of responsible government was derived from the Irish nationalist apologetics of the late-eighteenth century, which hearkened back to a pre-Blackstonean conception of the colonial estate. For this reason, it was rooted in an explicit rejection of Blackstone's doctrine.

As presented to Upper Canadians in the 1820s by William and Robert Baldwin, and in the anonymous "Letter on Responsible Government" of 1829, the Reform doctrine claimed that colonial legislative competence extended to all matters of internal policy which did not affect the integrity of the Empire, and the King in Parliament at Westminster could not legislate in such affairs without the concurrence of the colonial legislature. "The Government of the Empire is constitutionally lodged in the Imperial Parliament, conjointly with the several colonial parliaments throughout the empire," asserted Canadiensis, the pseudonymous author of the tract of which the "Letter" was purport-

27 Ibid., 30, and see below, 18, 27-28.
28 Ibid., 27.
edly a review. "Colonial Parliaments are not the mere gifts of the Imperial Parliament, or of the King to the respective Colonies, but a part of those rights to which as British subjects the Colonists were entitled." On this premise he erected an argument as to the scope of the colonial jurisdiction:

Self government being the first principle of every free constitution, nothing short of absolute necessity can be a sufficient excuse for a violation of it. As therefore the people of U.C. are represented in the Provincial, not in the Imperial Parliament, it follows that in the former must be vested the powers of Government generally, and in the latter only those special powers of Government which for the preservation of the safety and integrity of the Empire at large, it is absolutely necessary to have lodged in the hands of one body only for the whole Empire.29

The imperial jurisdiction was therefore confined to trade, navigation and military affairs. Consistently with the notion that colonial autonomy was a matter of right, Canadiensis and the Baldwins described the Constitutional Act, 1791 as a treaty between Great Britain and the colonists, which could not be materially altered without the latter's formal concurrence.30 According to this Irish Whig constitutionalism, Upper Canada was oppressed by virtue of the government's indifference and immunity to public opinion as expressed by the people's duly elected representatives in the legislature. Since the government was run by an indigenous elite with the support of the imperial authorities, this analysis fostered a vision of Upper Canada as a community subjugated by an external oppressor (the imperial government) in league with domestic collaborators. This vision had a manifold symmetry with the localistic worldview of the typical agrarian smallholder of American stock.31 Nourished by its relevance to popular experience, Baldwinite constitutionalism survived the Tory reaction of 1836-1839 intact, and Robert Baldwin formally stated his view of the new political order in his resolutions of 1841 on responsible government. Echoing the language of Canadiensis, he moved:

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That the most important as well as the most undoubted of the political rights of the People of this Province is that of having a Provincial Parliament for the protection of their liberties, for the exercise of a Constitutional influence over the Executive Departments of their Government, and for Legislation upon all matters, which do not, on the ground of absolute necessity, constitutionally belong to the jurisdiction of the Imperial Parliament, as the paramount authority of the Empire.  

Baldwin permitted his resolutions to be amended by the provincial government, but only on the understanding that the government’s vaguer phraseology meant ‘substantially the same’ as his own, and the Reformers subsequently took the amended resolutions as an official admission that what they had fought for since the 1820s was now the constitution of United Canada.

With such a view of the colonial relation, the Reformers did not need to re-invent classical federalism in order to convince themselves that they had not subordinated the provinces to a sovereign federal authority. To them, the idea that the dominion and the provinces enjoyed co-ordinate status and separate spheres of jurisdiction was inherent in the imperial model. That status was not diminished by the federal power to censor provincial legislation, because the lieutenant-governor’s power to reserve provincial legislation, and the governor general’s power to disallow it, were defined as analogous to the corresponding imperial powers over dominion legislation. This analogy preserved in the provincial constitutions the autonomy which the Reformers held to be inherent in responsible government.

It is in this context that we must assess Oliver Mowat’s claim that the consensus of the Quebec Conference was consistent with this understanding of the federal veto. Mowat had moved the resolutions establishing the veto. By his own account, he had seen no need for a veto over provincial legislation, and if there must be one he had preferred to leave it in imperial hands. Most of the delegates, however, had seen less danger that the veto would be abused by the federal government, responsible as it was to the Canadian electorate, than by the imperial government, and they had feared that the federal authority might be too weak unless it could block provincial legislation that threatened the general interest. The Conference agreed, though, that the federal powers ‘should not be used except within the limits in which the imperial veto had theretofore been exercised.’

34 Browne, ed., Documents, 162; 30 and 31 Vict., c. 3, ss. 55, 56, 90.
35 Globe (Toronto) July 4, 1887; ibid., March 1, 1888; C. R. W. Biggar, Sir Oliver
Mowat’s testimony has generally been granted little credit. He became a judge immediately after the conference and was precluded from commenting on its proceedings in the Confederation debates or otherwise. When he did so, 20 years later, he was the leader of a provincial government which was involved in a row with Ottawa over the respective powers of the two jurisdictions. Since he had been Brown’s strongest adherent among the leading Reformers in the years preceding the conference, centralist writers have readily concluded that he shared at Quebec the centralizing bias they ascribe to Brown and that his later remarks were falsehoods; indeed, their readiness to discount Mowat’s testimony epitomizes the centralist bias of most modern scholarship. It is therefore worth emphasizing that—George Brown notwithstanding—the Quebec Resolutions, in respect to the federal veto and everything else, were true to the principle of provincial autonomy as it was understood by the Upper Canadian Reformers.

But if the Upper Canadian Reformers rejected Blackstone’s theory of sovereignty, why did they not say so in reply to the Dorions’ forebodings of federal domination? It may not even have occurred to them to do so. To them it was axiomatic that the imperial government had adopted their view of responsible government in the resolutions of 1841. For more than 20 years, except during Sir Charles Metcalfe’s governorship, the imperial government had acted in a manner that confirmed that supposition. What annoyed the Reformers about the state of politics in 1864 was not relations between the colony and the empire but the union of Upper and Lower Canada, which they saw as denying Upper Canada the autonomy that ought to have flowed from responsible government. From this perspective, Confederation appeared to realize the goal which the Reformers had adopted at their great convention of 1859: the establishment of Upper Canada as a self-governing polity within a larger federation. What could the Dorions’ jeremiads avail against the
admission of Macdonald himself, an avowed partisan of legislative union, that the Quebec Resolutions contained ample guarantees of provincial autonomy?

Vipond suggests that, although Macdonald's declaration "lent fundamental legitimacy to the very principle that would be used in later years to thwart his centralism," he did not mean to do so, nor to forgo the advantages which Blackstone's doctrine of sovereignty might afford the dominion in its relations with the provinces. According to Vipond, Macdonald saw provincial autonomy as "a purely legal standard, according to which each province enjoys exclusive authority over matters within its sphere. Macdonald's conception of disallowance was consistent with such a view. According to the rules he set down in 1868 and acted on thereafter, the federal government could not interfere with provincial control over local affairs. But it could effectively define what was and was not local." 39 How can such mutual misunderstanding have occurred with Dunkin and the Dorions prophesying doom on the basis of Blackstone's doctrine? And did it in fact occur? David Mills has concluded that what had been distinct Upper Canadian Tory and Reform understandings of the relation between colony and empire had been resolved by mid-century into a nonpartisan consensus. 40 How can this consensus have engendered the conflicting notions of the nature and scope of provincial autonomy that underlay the provincial rights controversy? The answer lies in the peculiar circumstances under which responsible government came to Upper Canada, and above all in its character as a pragmatic concession by the imperial government to United Canada.

In 1841 Robert Baldwin had expressed the scope of colonial responsible government in terms befitting the idea of a sovereign colonial community, enjoying self-government as of right in all matters not clearly touching the integrity of the Empire. The government amendment, however, described the sphere of colonial autonomy merely as "all matters of internal Government," a formula consistent with the notion that the colonial sphere was whatever the sovereign imperial government might from time to time graciously concede. 41 Although Baldwin accepted this amendment as practically embodying his meaning, the two texts differed radically in their implications. This divergence was exposed by the constitutional crisis of Sir Charles Metcalfe's government. 42 The practical concession of Baldwinite responsible govern-

41 Debates of... United Canada, Vol. 1, 790.
42 Donald R. Beer, "Charles Theophilus, 1st Baron Metcalfe," in DCB, Vol. 7, 603-08,
ment in 1848 was accompanied by no official declaration as to its constitutional basis, and the disappearance of controversy on this question probably reflected a tacit agreement to drop it rather than the formation of the positive consensus that Mills perceives. The resulting ambiguity as to the constitutional character of colonial responsible government gave colour to Macdonald’s supposition that, in a confederation modelled on the empire, the general government might enjoy substantial discretion in defining the boundaries of the general and local spheres of jurisdiction.

Although the Reformers connived in suppressing the question, there is no reason to suppose that they had abandoned their old views. Baldwin’s compromise of 1841 had been accompanied by a reassertion, not a retraction, of the Reform position. Three years later, during the Metcalfe crisis, his cousin Robert Baldwin Sullivan wrote:

It . . . would be quite unprofitable to discuss the question here, whether or not we should have a Government conducted according to popular opinion, as a matter of inalienable and inherent right as British subjects, or whether we hold such a constitution, by the force of orders from Her Majesty’s Ministers. We have it, in fact, both ways theoretically; and have only to insist on our rights, whether inherent or conceded, to have it practically.

This too was no retreat from the Reformers’ appeal to right, and in discussing the sphere of responsible government Sullivan clearly envisaged as wide a scope as the Baldwins or Canadiensis. Citing the case of a governor advised by his ministers to appoint a rebel in arms to command the militia, he declared that a governor would be bound neither to follow such advice nor to consult a ministry capable of giving it, even if the ministry were upheld by the electorate. Thus the limits Sullivan posed to the scope of responsible government envisaged an extreme case, in which the integrity of the empire was clearly at stake.

The political history of the 1850s and 1860s reinforced rather than weakened the Reform commitment to local autonomy. Held in check by Baldwin, Hincks and their French collaborators during the Reform ministry of 1848-1854, the Clear Grit Reformers who rallied to George Brown after the political realignment of 1854 found their province subjected to a new Upper Canadian minority (Macdonald’s Liberal-
Conservative party) which was sustained in power by the Lower Canadian Bleus. These events only confirmed the Baldwinite vision of Upper Canada as a community subjugated by an external oppressor in league with domestic collaborators. It was only with difficulty that Brown, aided by Oliver Mowat, persuaded the Reform convention of 1859 to pursue the goal of Upper Canadian autonomy by means of a federal union with Lower Canada rather than outright separation.46

Citing Brown's attempt to deny the provinces the full institutional panoply of responsible government, J. M. S. Careless observes that the sort of federation that Brown advocated at Quebec in 1864 was much more centralized than that which the Reformers had espoused in 1859.47 But there is no evidence that Brown was speaking for anyone but himself, and in any case the conference rebuffed him. His proposals regarding the constitution of the provinces were rejected, and Mowat's resolutions established the dominion veto in terms consistent with the Baldwinite conception of provincial autonomy. Thus the Quebec agreement could be presented to Reformers not as a departure from party policy but a fulfilment of it, a construction which Macdonald apparently confirmed. At the Reform convention of 1867, the lawyer Aemilius Irving described Confederation as the realization of the policy of 1859.48 Two years later, Edward Blake stated the compact theory of Confederation, which presupposed the provinces' passage as sovereign entities across the caesura of Confederation.49 In 1872, when Mowat met the electors of North Oxford as their premier and prospective member, he reviewed the whole history of the struggle for responsible government before concluding that Confederation had realized "everything for which Reformers had been struggling up to that time."50

Macdonald's guidelines for the disallowance of provincial legislation, set out in 1868, did nothing to disturb this confidence.51 They did

46 Jones, "Ephemeral Compromise."
48 Quoted in Vipond, Liberty and Community, 33.
49 House of Commons Debates, June 11, 1869, 722-28, and Globe, November 24, 1869. The compact theory was at least a striking echo of the Baldwins' "compact theory" of the Constitutional Act but probably more than that, since Blake came from the same Irish political tradition as the Baldwins and was to end his political career as an Irish Nationalist MP at Westminster (Joseph Schull, Edward Blake [2 vols.; Toronto: Macmillan, 1975-1976], and Margaret A. Banks, Edward Blake, Irish Nationalist: A Canadian Statesman in Irish Politics, 1892-1907 [Toronto: University of Toronto Press, 1957]).
50 Globe, November 30, 1872.
51 Macdonald's latest biographers see them as establishing "a new and exacting use of disallowance, so that even the strongest of provincial rights was to be subject to central surveillance," and Vipond says the guidelines meant that the dominion could effectively define the boundaries of provincial autonomy (J. K. Johnson and P. B. Waite, "Sir John Alexander Macdonald," in DCB, Vol. 12, 598, and Vipond, "Con-
include the statement that "the general government will be called upon to consider the propriety of allowance or disallowance of provincial Acts much more frequently than Her Majesty's Government has been with respect to colonial enactments," but this merely registered the fact that Ottawa would have to consider technicalities concerning the division of powers as well as whether the legislation under review compromised the integrity of the dominion. Mowat, for his part, saw the federal veto power as supporting provincial sovereignty, not as a threat to it. A sovereign legislature was omnipotent within its jurisdiction, he argued, and the veto power gave the dominion ample authority to protect its own jurisdiction and the integrity of the dominion. The courts, therefore, could not constitutionally strike down valid provincial legislation merely on the ground of a conflict with the federal jurisdiction. One judge commented that disallowance could not adequately protect the federal jurisdiction because it would "always be considered a harsh exercise of power, unless in cases of great and manifest necessity, or where the Act is so clearly beyond the powers of the Local Legislature that the propriety of interfering would at once be recognised." In Mowat's view, of course, it was only in such extreme cases that disallowance was justified.

To say that Macdonald's guidelines did not challenge the Reformers' conception of provincial autonomy is not to say that his use of the veto did not challenge it in practice. But it took a clear interference with the normal jurisdiction of the Ontario legislature, his disallowance of the Rivers and Streams Act, to revive in the public arena the long-dormant quarrel as to the nature of responsible government. When Macdonald did this, Reformers could plausibly brand him as a new Metcalfe and claim that he himself had confirmed that Confederation had been designed to establish their own, broader conception of provincial autonomy. Vipond suggests that Macdonald's recognition of provincial autonomy in 1865 contributed to the formation of a founding myth, which was to make provincial autonomy the shibboleth of Canadian constitutional Politics," 285). These opinions overlook the constraints on the veto which to Reformers were inherent in the imperial model.

52 W. E. Hodgins, comp., Correspondence, Reports of the Ministers of Justice, and Orders in Council upon the Subject of Dominion and Provincial Legislation, 1867-1895 (Ottawa, 1896), 61.

53 Severn v. The Queen (1878), 2 S.C.R. 770, at 80-86, 96, per Richards, C.J. Fournier, J. echoed Richards's argument, ibid., 131. Risk, "Canadian Courts Under the Influence," 695, 696, 705, cites other cases in which Mowat used this argument. Risk mistakenly supposes that Mowat's use of this argument was inconsistent with his statements in the political arena. As Vipond points out, the Reformers never objected to the veto as such and favoured its abolition in the 1880s only because they did not trust Macdonald to apply it constitutionally (Liberty and Community, 189-90).

constitutional politics. It is now clear that Macdonald’s declaration had that effect because it appeared to confirm what Upper Canadian Reformers had believed, and believed in, for four decades.

Provincial Autonomy and the British North America Act

The quarrel over disallowance, then, reproduced the pre-Confederation controversy as to the nature and scope of colonial autonomy. So did those over the provinces’ constitutional status and the division of legislative powers. Ontario Reformers asserted a broad provincial jurisdiction on the basis of local sovereignty; centralists argued for a dominant federal jurisdiction on the basis of the dominion’s “quasi-imperial” sovereignty.

This term was introduced into constitutional jurisprudence by John Wellington Gwynne, the chief judicial exponent of Macdonald’s view of Confederation, in three Supreme Court judgments in 1879 and 1880. According to Gwynne, the BNA Act had revoked the old provincial constitutions and created the dominion “as a quasi Imperial Sovereign Power, invested with all the attributes of independence,” before carving therefrom “certain subordinate divisions, termed Provinces,” two of them possessing names and borders which just happened to coincide with those of their predecessors. The provincial legislative powers set out in section 92 must therefore be construed as strictly limited exceptions from the “absolute, sovereign and plenary” jurisdiction of the dominion, and further confined so as prevent any encroachment upon the dominion powers enumerated in section 91.

Counterattacking in Citizens’ Insurance v. Parsons (1880-1881), Mowat told the Supreme Court that “the provincial legislatures are not in any accurate sense subordinate to the parliament of Canada: each body is independent and supreme within the limits of its own jurisdiction.... If the local legislature has jurisdiction respecting the subject-matter... it has the most full and ample jurisdiction—plenum imperium—it has sovereign power within its own limits.” For the JCPC, he


57 4 S.C.R. 215; 7 App. Cas. 96. In the Supreme Court the case consisted of three lawsuits, two of which were heard a fortnight after judgment was given in Lenoir and the third five months later, four days before judgment was given in Fredericton. Mowat appeared in this final hearing, presumably in order to counteract the damage occasioned by Lenoir, though he may also have been forewarned of the judgments in Fredericton.

turned this argument inside out. Having induced Gwynne to invoke the
dominion's "supreme national sovereignty," he quoted Gwynne's
words in order to argue that the dominion necessarily enjoyed less
authority than the provinces had enjoyed before Confederation, "and
these Provinces, while possessing that authority were never supposed to
possess, or spoken of as possessing, any 'national sovereignty'; nor did
they possess any; nor, it is submitted, does the Dominion now."

Mowat's argument rested on two implicit premises. One was Black-
stone's perception of the power to make laws as the defining attribute of
sovereignty. From this point of view the BNA Act, in creating the
dominion, had set up two jurisdictions which, being mutually exclusive
and constitutionally identical, were of necessity constitutionally equal.
This was essentially Vipond's Madisonian argument, since it asserted an
equality between the provinces and the dominion which was consistent
with the idea that neither government was truly sovereign, both being
creatures of the imperial government. Mowat's second premise was that
the provinces were continuous with their predecessors, the idea that
underlay the compact theory of Confederation. The old provinces had
incontestably enjoyed the highest status available to a colony, and the
dominion could enjoy no higher. On this basis, therefore, to claim
"supreme national sovereignty" for the dominion was to claim for it a
status that could not exist.

The JCPC was to endorse Mowat's first premise in Hodge v. The
Queen*1 and his second in the Maritime Bank Case. As a belated
contradiction of the idea that the lieutenant-governors were constitu-
tionally inferior to the governor general, Maritime Bank has been called
a "new view of the constitution" and a reversal of 25 years' constitutional
practice. This ignores the fact that Maritime Bank was largely deriva-
tive of Hodge, and in any case it only endorsed what had always been
Mowat's view of the constitution. We can now see why Mowat thought
as he did and why the JCPC agreed with him. His argument was a nice
application of the maxim that circumstances alter cases; where the
Baldwinite claim to co-ordinate sovereignty with the empire was hetero-
dox in its contradiction of Blackstone's doctrine that sovereignty was
indivisible, in respect of federal-provincial relations what was heterodox
was Gwynne's ascription of "quasi-imperial sovereignty" to the do-
minion. Of course, Gwynne denied the premise that Maritime Bank
endorsed—that the provinces were continuous with the old colonies—

59 Ibid., 346.
60 Sir William Blackstone, Commentaries on the Laws of England (4 vols.; Oxford,
1765-1769), 1:49.
61 (1883) 9 App. Cas. 117; and see below, 27-28.
62 Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick
The Nature and Scope of Provincial Autonomy

but his denial contradicted the idea, expressed in the preamble of the BNA Act and quoted by Gwynne himself in Fredericton, that the dominion had been created in response to the colonies’ plea to be federally united.

This scrutiny of the conflict over sovereignty vindicates not only the Maritime Bank judgment but also Lord Watson’s action in bringing the principle of provincial autonomy to bear on the division of powers in the Prohibition Reference. Since both Gwynne and Mowat based their analysis on an assumption as to constitutional status, Watson can hardly be faulted for doing so. Likewise, an examination of the quarrel between Gwynne and Mowat over the construction of section 91 provides evidence to rebut O’Connor’s other main complaint against Watson: that he incorrectly applied its final (“deeming”) clause to section 92 as a whole rather than article 92(16) alone, thereby splitting the dominion’s enumerated legislative powers from its power to make laws for the peace, order and good government of Canada in a way that enabled him to deny the latter’s priority over the provincial jurisdiction.64 As it happens, Gwynne rejected O’Connor’s application of the clause65 and Mowat’s argument for the priority of the provincial jurisdiction presupposed the unity of the federal.

According to Gwynne, section 91 began by giving the dominion jurisdiction over everything that was not specifically reserved to the provinces. It amplified that grant by enumerating certain subjects of which it declared (as Gwynne glossed it), “that, ‘notwithstanding anything in the Act,’ notwithstanding, therefore, any thing... enumerated in the 92nd section, the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the class of subjects enumerated in the 91st section.” This limitation of the provincial power was reinforced by the “deeming” clause. Explicitly rejecting the idea that it applied only to article 92(16), he construed it as providing that “any matter coming within any of the subjects enumerated in the 91st section shall not be deemed to come within the class of subjects enumerated in the 92nd section, however much they [sic] may appear to do so.”66 To Gwynne, therefore, the clause helped to establish the priority of the enumerated federal powers over the provincial jurisdiction.

Mowat agreed with Gwynne as to the purpose of the opening clause67 but not as to the priority of the enumerated powers. Stressing

66 3 S.C.R. 505, at 566 (Gwynne’s emphasis), and see generally ibid., 563-70.
67 “The general object [of section 91] was to give to the Federal Parliament authority ‘to make laws for the peace, order and good government of Canada in relation to’ not all matters absolutely, but to ‘all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.’” Mowat’s analysis
words which had been almost uniformly neglected by Gwynne and the other judges who had found against the provincial power in *Severn v. The Queen, Frederiction and Citizen’s Insurance*, he noted that the subsequent enumeration of particulars was made “for greater certainty, but not so as to restrict the generality of the foregoing terms of this section,” and it was made in the form of a declaration, not an enactment. From this he concluded that the federal enumerata did not limit the provincial power:

The enumeration may contain some particulars which, unless so specified, would not have been held to be included in the general words; but, having reference to the general object which is so stated, and to the form of the section, each article in the enumeration is, where possible and as far as possible, to be so construed as not to include the powers assigned exclusively to the Legislatures of the Provinces.

Having shown that the enumerated federal powers must not be allowed to erode the provincial powers set out in section 92, Mowat then warned against resorting too hastily to the opening words of section 91 in order to justify federal legislation on subjects not coming within the enumerata. The powers enumerated in sections 91 and 92, he declared, probably embrace, and were certainly and evidently meant to embrace, for the Federal or Provincial Legislatures, all possible subjects of legislative action in Canada not expressly excluded by the Act. Resort should therefore be had to the general words in the 91st section as to possible unassigned matters, in the event only of a case happening to arise which could not by any just construction be brought within any of the enumerated particulars of either section. An unnecessary reference to the general words, in order to give or support a wider interpretation of the enumerated powers of the Federal authority than these might otherwise bear, is contrary to the intention and . . . to the proper construction of the Act.

Not only were the enumerated powers of section 91 to be defined so as not to encroach on the provincial sphere, then, but the general authority “to make laws for the peace, order and good government of Canada” was to be invoked only as a last resort.

Since Gwynne’s construction of section 91 was based on application of the “deeming clause” to section 92 as a whole and Mowat’s on the declaratory nature of the enumerative clause, it was hardly fair of O’Connor to blame Watson for following Gwynne and not following Mowat. Why, then, did mid-twentieth-century centralists so criticize


the *Prohibition Reference*, and why do modern writers find the decision so puzzling? The former were probably blinded by political dogmatism. Like the judges who had favoured the dominion in the early Supreme Court cases, but with less excuse, O’Connor habitually ignored the proviso which secured the priority of the provincial over the federal jurisdiction.69 Likewise the future Chief Justice Laskin drew an affecting distinction between “a Supreme Court of Canada . . . composed of judges for whom Confederation was a personal experience with an evident meaning” and an imperial tribunal which “could not be expected to display the sensitivity for the [BNA] Act that is to be found in the early pronouncements of the Supreme Court,”70 when in fact those early decisions had never commanded more than four voices on a six-member bench and all but one of them had reversed other Canadian courts.71 As to modern writers, the difficulty may lie in their use of a narrowly doctrinal rather than an historical approach. As I will show, the *Prohibition Reference* is best understood as an implementation of the approach to the division of powers which Mowat first presented to the JCPC in *Citizens’ Insurance*, but it was complicated by the subsequent decision in *Russell v. The Queen* and by the JCPC’s reluctance to overrule its own decisions.

Mowat’s intervention in *Citizens’ Insurance* was provoked by two Supreme Court decisions which posed a threat to the provincial jurisdiction. *Severn* had struck down a certain provincial licence on the ground that, even if it was not inherently *ultra vires*, it was an impermissible interference with the federal taxing power and perhaps also the power to regulate trade and commerce. *Fredericton* had upheld the Scott Act72 on the ground that prohibition could not be a provincial matter because it affected the trade and commerce power. Both decisions gave the enumerata of section 91 priority over the provincial power. In *Citizens’ Insurance*, provincial regulation of fire insurance contracts was attacked on the same ground as the licence at issue in *Severn* and also on the ground of provincial subordination, which was said to mean that a province could at best regulate only the contracts of insurance companies chartered within the province.

Under these circumstances, *Citizens’ Insurance* was a vital success for Mowat. The JCPC ignored the question of constitutional status, but in recommending a piecemeal approach to apparent conflicts between

69 O’Connor Report, annex 1, 27, 43. 48-50.
71 *Severn, Fredericton* and *Mercer v. Attorney General for Ontario* (1883), 5 S.C.R. 538, all reversed the courts below. *Lenoir* did not, but the constitutional question had not been raised below (Ont. Sess. Papers [1888] no. 37, 12-13).
72 *The Canada Temperance Act, 1878* (41 Vict., c. 16).
the two jurisdictions it implicitly repudiated Gwynne’s attempt to read into the BNA Act a grand design founded on federal pre-eminence.\(^{73}\)

Mowat’s influence is evident both in the arguments used to reject Gwynne’s idea of the scope of the trade and commerce power and in the analysis of sections 91 and 92 that underlay those arguments.\(^{74}\) The statement that the declaratory and “deeming” clauses of section 91 were designed “to give pre-eminence to the dominion parliament in cases of a conflict of powers” might seem to favour the dominion, but in fact it did not, because it treated those clauses as an aid to dominion legislation in certain cases and not (like Gwynne) as a bar to provincial legislation on matters coming within the federal enumerata.\(^{75}\)

A year later, however, the JCPC decided *Russell*\(^{76}\) in terms that were even more dangerous to the provincial power than *Severn* and *Fredericton*. In what was in effect an appeal against *Fredericton*, the JCPC rejected the claim that prohibition came within the provincial jurisdiction. The court held that, while the Scott Act might incidentally affect certain provincial powers, it was in essence a measure for the “public” or “national” safety. Though each province might have enacted regulations identical to those of the Scott Act as a matter of internal police, the Committee noted that the measure “was clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion” and concluded that “laws of this nature designed for the promotion of public order, safety, or morals . . . fall within the general authority of Parliament to make laws for the order and good government of Canada.” The tribunal did not say whether or not the Scott Act came within the trade and commerce power but remarked that “they must not

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\(^{74}\) The JCPC was criticized both then and subsequently for basing its construction of the trade and commerce power on the *Act of Union, 1707*, by which England and Scotland were united. See, for example, *Can. Sess. Papers* (1885) no. 85, 202; Vaughan, “Critics of the Judicial Committee,” 513; Laskin, “Supreme Court of Canada,” 132-33; and the comments of Gwynne and Sedgewick JJ. cited therein. When the decision is read alongside Mowat’s brief, however, it seems that the JCPC cited the Act of Union simply as one more illustration of Mowat’s contention that “trade and commerce” need not have the all-embracing meaning apparently ascribed to it by Gwynne (and by his colleague, H.-E. Taschereau)—see 7 App. Cas. 96, at 112-13.

\(^{75}\) The full statement was: “Notwithstanding this endeavour to give pre-eminence to the dominion parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the dominion parliament” (7 App. Cas. 96, at 108). The JCPC’s suggestion that the “deeming” clause applied only to art. 92(16) gave O’Connor ammunition to use against the *Prohibition* decision, but this was irrelevant; what mattered was the fact that, in both decisions, the clause was construed as an aid to federal rather than a bar to provincial legislation.

\(^{76}\) *Russell v. The Queen* (1882), 7 App. Cas. 829 (quotations at 837-42).
be understood as intimating any dissent from the Supreme Court’s opinion that it did.

From Mowat’s standpoint, Russell was dangerously flawed. Instead of reading the enumerata of sections 91 and 92 as a putatively exhaustive division of powers, and although the “peace, order and good government” clause of section 91 expressly defined the federal jurisdiction as that which was not provincial, it treated that clause as a distinct head of federal power which enjoyed priority over the provincial jurisdiction. Worse still, it appeared to accord Ottawa absolute discretion in deciding whether or not to overbear the provincial police power. Once the courts had determined that an impugned act of Parliament was a police measure, it seemed, they had no obligation (perhaps even no power, given the doctrine of legislative supremacy) to inquire as to its necessity. This reasoning seemed to erect an overweening federal jurisdiction analogous to the high-handed view of the veto power which Macdonald was then expounding in connection with the Rivers and Streams Act. It threatened not merely to limit the provincial jurisdiction, as Gwynne’s view of the division of powers and Macdonald’s use of the veto did in their different ways, but to extinguish provincial autonomy entirely; as counsel for Ontario was to put it in the McCarthy Act Reference, “almost every Act we [that is, the provinces] pass has something to do with peace, order and good government.”

A year later Macdonald tried to use Russell in order to neutralize the Crooks Act, Mowat’s patronage-rich liquor licensing system, by enacting a federal licensing measure, the McCarthy Act. Although he read the decision as affirming Fredericton’s assignment of the liquor trade to Ottawa in toto, to be safe he played the police card by including a preamble which proclaimed the importance of uniform licensing regulations to the peace, order and good government of the dominion. In doing so, however, he overreached himself. It was notorious that in Russell the provincialist case had been very feebly argued, and soon afterwards Mowat successfully defended the Crooks Act before the JCPC in Hodge. This affirmation of a provincial statute essentially identical to the McCarthy Act obliged Macdonald to refer the latter to the Supreme Court, which unanimously struck down the provisions that duplicated the Crooks Act. William Henry, who had dissented in Fredericton, rejected the measure in toto, a view that was to be endorsed by the JCPC on appeal.

78 The Ontario Liquor Licence Act, 1876 (39 Vict., 3. 26; R.S.O. 1877, c. 181).
79 The Dominion Licensing Act, 1883 (46 Vict., c. 30).
80 Archives of Ontario [AO], Alexander Campbell Papers, Macdonald to Campbell, August 28, 1882.
Not even Gwynne could accept the view of the federal police power which Macdonald tried to derive from *Russell*, and which O’Connor later condemned Lord Watson for rejecting. Gwynne differed from Mowat as to the scope of the provincial jurisdiction, deducing from the premise of provincial subordination that it must be defined narrowly, but he did not doubt that the Canadian constitution was essentially federal and he agreed with his colleagues that autonomous legislative spheres were the essence of federalism. Although his judgments in *Fredericton* and *Citizens’ Insurance* hinted that he might condemn the Crooks Act as an encroachment on the trade and commerce power, in the event he rejected the attempt to base the McCarthy Act on that clause as “trade and commerce run into the ground.” Likewise, when the dominion tried to claim the subject matter for Parliament on the basis of Blackstone’s definition of police, he dismissed the argument as taken from “a treatise on the laws of a country which has but one law-making power” and thus irrelevant to a federal polity.82

Coming in the wake of *Russell* and *Hodge*, the *McCarthy Act Reference* produced confusion that made the *Prohibition Reference* inevitable.83 *Russell* had seemingly implied that Parliament might enact for the peace, order and good government of Canada police measures which each province might ordinarily enact for itself. By striking down one such statute, the *McCarthy Act Reference* had apparently contradicted that implication, but neither the Supreme Court nor the JCPC had published their reasons for doing so. If the provinces could enact a measure like the Scott Act (as counsel for the dominion had posited), why could not the dominion pass one like the Crooks Act? The confusion was aggravated by Strong’s repeated iteration of another argument advanced for the dominion in both courts: namely, that the two statutes were not essentially different.84

The conundrum might be explained if a provincial statute like the Scott Act came before the courts, and in 1890 Mowat found it politically

82 Ibid., 174, 178. See also 182-83 (per Ritchie, C.J.), 54, 119, 134, 182-83, 185 (per Strong, J.), 68, 172, 189 (per Henry, J.), and see Loranger, Letters, vi, where *Russell* and the McCarthy Act are condemned as tending to promote legislative union. At the time neither the Supreme Court nor the JCPC were required to publish the reasons for their decisions in referred cases; the cited source is the verbatim record of the Supreme Court hearing. That of the JCPC hearing was printed under the title *Report of the Proceedings of the Judicial Committee of the Privy Council on the hearing of the petition of the Governor-General of Canada in relation to the Dominion Liquor License Acts of 1883 and 1884*; there is a copy in AO, Irving Papers, box 80, item 15.

83 Compare V. Evan Gray, “‘The O’Connor Report’ on the British North America Act, 1867,” *Canadian Bar Review* 17 (1939), 319: “‘The real difficulty confronting the Privy Council in deciding the *Prohibition Case* of 1896 was the previous decision in *Russell v. The Queen* ... followed by *Hodge v. The Queen* and the McCarthy Act decision of 1885.’”

84 *Can. Sess. Papers*, no. 85, 51-53, 65, 75, 127, 128, 169, 183, 192, 200 (Strong); ibid., 133ff. (Bethune, QC, for the dominion); and *Report of the Proceedings*, 82-84.
expedient to carry such a measure. A year later it was upheld by the Ontario Court of Appeal, and eventually it found its way into the Supreme Court, where the six judges divided evenly on its constitutionality. Thus the issue came before the JCPC surrounded with the greatest possible confusion. Counsel for Ontario exploited this uncertainty, reviewing the cases one by one and letting the members of the board see for themselves the mess their predecessors had made. "It is a series of conundrums," exclaimed Lord Halsbury at the end of the first day, and early on the second Lord Watson noted the danger that incautious resort to the "peace, order and good government" clause must pose to provincial autonomy. These remarks foreshadowed the leading elements of the Prohibition decision: its repudiation of Russell and of the piecemeal approach to the division of powers recommended in Citizens' Insurance.

The repudiation of Russell had to be indirect, because the JCPC saw itself as precluded by the doctrine of stare decisis from formally overruling its previous decisions, but the intention is clear from the language and structure of the argument. Watson prefaced his analysis with a declaration that, in order to determine the validity of Mowat's local option, it was "necessary to consider, in the first place, whether the Parliament of Canada had jurisdiction to enact the Canada Temperance Act," but instead of doing so he proceeded to lay down guidelines for the analysis of the division of powers before concluding with the remark that Russell had "relieved this board from the difficult duty of considering whether the Canada Temperance Act... relates to the peace, order, and good government of Canada, in such sense as to bring its provisions within the competency of the Canadian Parliament." Russell, though neither the dominion nor the provinces were represented in the argument, "must be accepted as an authority to the extent to which it goes, namely, that the restrictive provisions of the [Scott] Act... must receive effect as valid enactments relating to the peace, order, and good government of Canada." Evidently it was not to be accepted as an authority in its approach to the division of powers.

Watson's guidelines were based on a construction of the "deeming" clause. Ascribing this to the framers' apprehension that "the due exercise of the enumerated powers conferred... by s. 91 might, occa-
sionally and incidentally, involve legislation upon matters which are prima facie committed exclusively to the provincial legislatures by s. 92,” he construed it as authorizing such “occasional and incidental” encroachment; but since it did not apply to federal legislation upon matters not coming within the enumerated powers, such legislation “ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon” the provincial sphere. Any other construction

would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate, to the exclusion of the provincial legislatures.

Some such matters might attain such dimensions as to justify federal legislation, but “great caution must be observed” in reaching that conclusion.92

Thus the reference to provincial autonomy which so vexed O'Connor arose from the need to repudiate Russell’s construction of “peace, order and good government.” Mowat, writing in 1881, had doubted whether any subjects of legislation existed beyond those enumerated in sections 91 and 92.93 Russell, however, had made it necessary to suppose that a residuary power did exist and to define its scope. Confronting that necessity, Watson construed it in the only way consistent with provincial autonomy: a reserve power to legislate as and when necessary to preserve the integrity of the dominion—a positive counterpart to the federal veto, so to speak. Or rather, where Russell treated the residuary power as something like the veto as envisaged by Macdonald in disallowing the Rivers and Streams Act, Watson treated it as analogous to the veto as Mowat understood it.

92 Ibid., 359-61.
93 This assumption was consistent with Lord Carnarvon’s explanation in Parliament: “I ought to point out that... the residue of legislation. if any, unprovided for in the specific classification... will belong to the central body” (emphasis added). Oddly enough, centralist writers liked to quote this remark as showing the breadth of the federal power. See, for example, Vincent C. MacDonald, “Judicial Interpretation of the Canadian Constitution,” University of Toronto Law Journal 1 (1935-1936), 163; O’Connor Report, annex 1, 59; ibid., annex 4, 77; D. G. Creighton, British North America at Confederation: A Study Prepared for the Royal Commission on Dominion-Provincial Relations (Ottawa: J. O. Patenaude, 1939), 50; and W. P. M. Kennedy, “The Interpretation of the British North America Act,” Cambridge Law Journal 8 (1943), 150. F. R. Scott tended to stop quoting Carnarvon just before the italicized words, see his “The Development of Canadian Federalism,” Proc. Can. Pol. Sci. Assoc. 3 (1931), 233, and “Centralization and Decentralization in Canadian Federalism,” 1108.
But if the residuary power was of such a kind, how could Watson presume to review Parliament's use of it at all? Even Mowat, while insisting on his conception of the veto, had never doubted that Ottawa had a perfect legal right to veto any and all provincial legislation. The answer is that the two powers, though constitutionally analogous, differed in their legal nature. The BNA Act defined the federal veto in terms that made it precisely analogous to the imperial veto—a power to which there was no legal limit, the conventions of colonial responsible government notwithstanding. Blackstone also perceived no legal limit to the imperial power to legislate for the peace, order and good government of the empire, but Ottawa's power to make laws for the peace, order and good government of Canada was expressly limited by the BNA Act, and the terms of the limitation were properly subject to judicial construction.

According to O'Connor, of course, the JCPC's construction of the residuary power was a perversion of the terms of section 91: Watson had managed to subordinate it to the provincial jurisdiction, confining the priority of the federal jurisdiction to the enumerata alone, only by ignoring the declaratory nature of the section 91 enumeration and misconstruing the "deeming" clause. But O'Connor was mistaken, because there was no real difference between Watson's analysis and Mowat's, which stressed the declaratory nature of the enumeration in order to deny priority even to the enumerata. To Mowat, the enumeration merely created a presumption in favour of laws made thereunder which did not extend to legislation under "peace, order and good government." Watson took the same view when he construed the "deeming" clause as allowing Ottawa to encroach "occasionally and incidentally" on the provincial jurisdiction in legislation relating to the enumerated subjects alone.

This, in fact, was the largest significance of Watson's judgment. Ottawa's exclusion from the provincial sphere mattered little as long as the provincial sphere was narrow, but the Prohibition judgment determined that it was large. Here, too, provincial autonomy was important—provincial autonomy as acknowledged in Hodge. In Hodge's quasi-Madisonian terms, the provincial legislatures were no more delegates than the dominion parliament, their jurisdiction being "as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow." But if each government enjoyed plenum imperium within its jurisdiction, it followed (as Mowat had argued against Gwynne in Citi-

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94 *Globe*, July 4, 1887; ibid., March 1, 1888.
95 See above, 19.
96 9 App. Cas. 117, at 132. This was a paraphrase of the judgment of Burton, J., in the Ontario Court of Appeal, where Mowat had argued Ontario's case in person (*Hodge v. the Queen* [1882], 7 Ont. App. Rep. 246, at 278).
zens' Insurance) that the provincial imperium must limit the scope of the federal, because the latter was defined as everything that was not provincial. Watson endorsed this view by rejecting Fredericton's broad construction of the trade and commerce power and by reading the "deeming" clause as allowing Parliament to encroach only "occasionally and incidentally" on the provincial jurisdiction in the exercise of the dominion's enumerated powers.

Forty years after the event, Watson's reading was to make him the butt of centralist ire; but the centralist account of Confederation and the provincial rights controversy was not history but a vast fabric of myth. In reality the BNA Act had given legal force to that broad local autonomy which Upper Canadian Reformers had always claimed as a matter of constitutional right. When, therefore, Ottawa tried to limit the scope of provincial autonomy, Mowat was able to do what the Baldwins could never have done: vindicate the provincial claims in court.