

the American constitution have proved to be far less of a barrier to the development of national economic policies than have the judicially created restrictions in Canada.”<sup>26</sup> This is “ironic” because the Constitution of the United States explicitly limits its federal government’s regulatory power to “commerce among the states,” whereas article 91 of the BNA Act of 1867 imposes no such limitation. Among the explicitly enumerated powers entrusted to “the exclusive Legislative Authority of the Parliament of Canada,” one finds quite simply “the Regulation of Trade and Commerce.” The “judicially created restrictions” mentioned in the text quoted above refer primarily to a series of late nineteenth and early twentieth century decisions by the Judicial Committee of the Privy Council (JCPC), the British institution, which, despite the creation of the Supreme Court of Canada in 1875, de facto exercised the ultimate judicial authority in Canadian affairs until 1949.

In the late 1920s and early 1930s, Canadian constitutional scholars who favored a more active role for their federal government subjected the JCPC decisions limiting Ottawa’s power over commerce to a withering attack. The gist of their argument was neatly captured in a pithy and oft-quoted sentence from the pen of W.P.M. Kennedy, dean of the Honour School of Law at the University of Toronto: “Seldom have statesmen more deliberately striven to write their purposes into law, and seldom have these more signally failed before the judicial technique of statutory interpretation.”<sup>27</sup>

Kennedy’s complaint finds considerable support in the unadorned text of the BNA Act which the JCPC had construed quite narrowly. Article 91 confers upon Parliament a sweeping power “to make Laws for the Peace, Order and good Government of Canada in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.” Then, for good measure, it specifies a long list of explicit federal powers that are added “for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section”--that is, of the peace, order, and good government or “POGG” clause, as it came to be known. Among these enumerated powers one finds “the Regulation of Trade and Commerce.”