The Urge to Idealize: Viscouut Haldane aud the Constitution of Canada

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In this article the author asserts that Viscount Haldane "misread" the *Constitution Act, 1867* and assigned to the provinces a higher status than is warranted by the clear text of the *Act*. Suggesting that this misinterpretation was conditioned by Haldane's romantic idealism, philosophical training and political beliefs, the author examines Haldane's *Autobiography*, fee books, letters and unpublished Memoirs and discovers examples of his habit of re-constructing central events of his life in accordance with fundamental principles and preconceived ideals. In particular, the years leading up to his first Canadian constitutional case are studied to illustrate both the importance Haldane attached to that case and its influence on his developing provincial bias. The later years of Haldane's life are also examined with a view to demonstrating how two cherished ideals, Imperialism and Irish Home Rule, influenced his actions as a politician, War Secretary and Lord Chancellor. Finally, Haldane's constitutional decisions are reviewed in an attempt to show how these ideals shaped his judgments and affected the course of Canadian constitutional law.

L'idéalisme romantique du Vicomte Haldane, son éducation et ses convictions politiques motivèrent l'éminent magistrat, selon cet article, à allouer aux provinces davantage de pouvoirs que ne le prévoyait le texte de la *Loi constitutionelle de 1867*. Passant en revue l'*Autobiograpy* de Lord Haldane, ses mémoires inéedites et ses écrits privés, l'auteur y puise autant d'exemples d'une tendance à insérer dans des cadres préconçus les événements vécus. Une étude des années précédant l'arrêt *P.G. Québec* c. *Reed* révèle toute l'importance accordée par Haldane à son premier dossier constitutionnel et démontre à la fois l'influence qu'eut cette affaire sur son préjugé favorable aux provinces. D'après l'auteur, l'imperialisme britannique et la Irish Home Rule, deux idéaux privilégiés par Lord Haldane, tant à titre de pliticien, de ministre de la guerre que de lard Chancellier, façonnèrent les jugements rendus par celui-ci et, en conséquence, la destinée constitutionnelle canadienne.

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Synopsis

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Richard Burdon Haldane is a pivotal figure in Canadian constitutional history. From 1911, when he became Lord Chancellor, until his death in 1927, Viscount Haldane was the Privy Council's Canadian constitutional expert. He wrote the opinions in nearly half of the fifty-odd Canadian constitutional appeals which came before the Privy Council in his time there, and three of his twenty-three constitutional judgments have become classics. *Re The Board of Commerce Act, 1919*,[1] *Fort Francis Pulp and Power Co.* v. *Manitoba Free Press Co.*,[2] and *Toronto Electric Commissioners* v. *Snider*[3] are taught in every class on Canadian constitutional law.

The dominant theme of Haldane's judgments is that the federal and provincial governments have equal status; that each is sovereign in its own sphere.[4] This view is an accepted feature of Canadian constitutional theory; it is commonplace for Canadian lawyers to talk in terms of two Crowns, and of course it is politically realistic for them to do so. The provincial governments are, after all, entirely separate from and independent of the

[1][1922] 1 A.C. 191, (1921) 60 D.L.R. 513, [1922] 1 W.W.R 20 (P.C.).
[2][1923] A.C. 695, (1923) 93 L.J.P.C 101, [1923] 3 D.L.R. 629 (P.C.).
[3][1925] A.C. 396, [1925] 2 D.L.R. 5, [1925] 1 W.W.R. 785 (P.C.).
[4]"Within the spheres allotted to them by the Act the Dominion and the Provinces are rendered on general principle co-ordinate Governments." *Great West Saddlery Co.* v. *A.G. Canada* [1921] 2 A.C. 91, 100, (1921) 58 D.L.R. 1, [1921] 1 W.W.R. 1034 (P.C.); and see, *infra*, text associated to notes 6 and 66.

federal government. More important, in their own spheres, they are, as Haldane often pointed out, fully as powerful.

But as realistic and accepted as it is, the two-Crowns approach is not supported by the text of the *Constitution Act, 1867*.[5] The *Act* gives the provincial governments extensive powers; indeed, on the most plausible reading, it gives them even greater powers than it gives the federal government. But it does not, on *any* reading, give the two levels of government equal status, or make them both sovereign. The *Constitution Act, 1867* divides up the *power* to govern, but it does not divide up *sovereignty*. The Queen is not mentioned in section 92, only in section 91, and thus the powers in section 92, even if they are more extensive than those in section 91, are not sovereign powers.

The legislative authority of the provinces is derivative, not sovereign. This is explicit in the structure of the constitution, which passes the sovereign authority to govern Canada from the Queen to the Governor General as head of the federal government. In the *Act*, the heads of the provincial governments, the Lieutenant Governors, have exactly the relationship to the Governor General that their titles suggest — that of lieutenants to a general. They are appointed by him; they hold office at his pleasure; they take their oaths of office before him; and they are paid by his government, not theirs. In the *Constitution Act, 1867*, the relationship of the Lieutenant Governors to the Governor General is clearly that of subordinate to superior, not equal to equal.

Of course, the Governor General and the Lieutenant Governors are *symbols*, like the Queen, with no real power, and even in 1867 they would have been seen as symbols. But the *Constitution Act, 1867* is written in terms of those symbols and thus, particularly as regards sovereignty, which is, after all, a symbolic notion, the relationship between the Governor General and the Lieutenant Governors establishes the relationship between the governments they nominally head. If you ignore the gloss the case law has put upon the constitution, and look solely at the text, it is apparent that in terms of sovereignty the provincial governments are subordinate to the federal government in the same way that the Lieutenant Governors are subordinate to the Governor General. This could not be any clearer in the *Act* than it is, or any more express. The federal government is even given the power to disallow provincial legislation.

[5]30 & 31 Vict., c. 3 (U.K.) [formerly the British North America Act].

In *Re Initiative and Referendum Act*, Haldane spelled out the way he read the *Constitution Act, 1867* as regards sovereignty:

> The scheme of the Act passed in 1867 was . . . not . . . to subordinate Provincial Governments to a central authority . . . . [E]ach Province was to retain its independence and autonomy and to be directly under the Crown as its head.[6]

This statement is clearly false in terms of the language of the *Act*. The *Constitution Act, 1867* does not envision the provincial governments as being "*directly* under the Crown". The *Act* very clearly envisions Canadian government as having this structure:

The Queen
Federal Government
Province A Province B . . .

Haldane misread the *Act* as regards sovereignty and said it gave Canadian government this structure:

The Queen
Federal Government Province A Province B . . .

This article is an attempt to explain why, or perhaps a better word is how, Haldane was able to misread the clear, unequivocal text of Canada's constitution. In essence, the thesis is that Haldane's interpretation grew out of his idealism. The first step in the analysis is to show that this idealism was a fundamental component of Haldane's personality. He was a romantic who saw things not on their own terms but in terms of his preconceived ideals. The evidence for this romantic or idealistic inclination is contained in a comparison of Haldane's *Autobiography*[7] with his letters to his mother.[8] Written daily over a period of forty-eight years, these letters show that in his *Autobiography* Haldane repeatedly "reconstructed" the events of his life. In telling the story of what happened to him, he romanticized or idealized reality.

The second step of the analysis is to show that Haldane's inclination to romanticize or idealize had an impact on his public life and judicial work. The effect of the two-Crowns approach is to lower the status of Canada's federal government and raise the status of the provinces. This result fits in

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[6]*Re The Initiative and Referendum Act* [1919] A.C. 935, 942, (1919) 48 D.L.R. 18, [1919] 3 W.W.R. 1 (P.C.).

[7](London: Hadder & Staughton, 1929) [hereinafter cited as *Autobiography*].

[8]Haldane wrote to his mother every day for forty-eight years. She kept all his letters and, together with certain other of his papers, they are now in the National Library of Scotland, Edinburgh, in manuscript. They have not been published. I will cite the letters to his mother by date only; all other selections from the Haldane Papers are cited by volume number and date.

with two ideals which figured prominently in Haldane's life: British Imperialism and Irish Home Rule. Haldane's attachment to the former is well known. The extent of his involvement with Irish Home Rule is not. Finally, in the conclusion of this paper, the consequences of the two-Crowns approach are considered.

I. The Urge to Idealize and the Quebec Appeal

The best place to start an exploration of Haldane's romantic or idealistic inclination is with his *Autobiography*. It is quite a wonderful, if very old-fashioned book, in which Haldane tells, for instance, how he first came to occupy the position of a judge.

> When I was about six years old my nurse ... conducted me to see the House of Lords, then in recess. She persuaded the attendants there to let her place me on the Woolsack [the Lord Chancellor's seat], and then explained: "The bairn will sit there someday as of right."[9]

Of course, such prophecies are only recorded when they are fulfilled; Haldane did become Lord Chancellor and that gives the story a sense of meaning or purpose. This same sense of meaning and purpose is present in Haldane's account of the fateful day when he was appointed Lord Chancellor.

> Early one morning in the Whitsuntide recess, in June 1912, I received a message from Lord Loreburn, the Lord Chancellor, to say that he was stricken with illness and must resign at once. He asked me to communicate this to the Sovereign as he was too ill to do so himself. I saw the King, and the Chief Whip communicated by wireless with Asquith who was on the Admiralty yacht in the Mediterranean. The reply was: "Consult Haldane as to who should succeed him at the War Office." To fill the Woolsack at once was an urgent matter, for the House of Lords was about to sit and there was now no Chancellor. Nothing official could be done until the Prime Minister returned on the Monday morning, and great secrecy had to be preserved. However, we arranged provisionally that there should be a Council on the Monday afternoon at which the Great Seal could be transferred, and that I should be sworn in by the Master of the Rolls at 10:30 on the Tuesday morning. I met some of the judges at a dinner on the Friday night. Of course, I could not tell them about the resignation or of matters which were not then finally settled. They reproached me for never having come to pay my old friends at the Courts a visit. I said that I should not only like to do so, but thought that I might possibly be able to do so on the Tuesday morning. The Great Seal was given to me by the King at six on the Monday afternoon, and next morning I appeared, according to promise, in Court of Appeal No. 1 to pay my visit to the judges, but in a full-bottomed wig and the Chancellor's robes. That night I dined at Lincoln's Inn with my fellow-Benchers. After dinner I slipped away and crossed into New Square, to look at the staircase of No. 5, where my old garret had been. I went up the stair, and on reaching what once was my door heard barristers at work late, just as I myself more than thirty years before used to stay in chambers

[9] *Autobiography*, 26.

> to work late. I raised my hand to the knocker intending to ask to see my old room. But I felt shy and returned down the steep stair unobserved. It was thus that I returned to the services of my old Mistress, the Law.[10]

Of course, a certain amount of idealizing is inevitable in any autobiography. You have to think your life means something or you would not bother to write it down. But the thing that stands out in Haldane's *Autobiography* is the delight he takes in idealizing things, the pleasure he gets out of overplaying the significance of what happened to him. Indeed, this inclination to dramatize events is so strong that it sometimes leads Haldane to recast them. Thus, he says that he dined at Lincoln's Inn the *day after* his appointment as Lord Chancellor and this dinner is the highlight, the romantic twist, in his return to his "old Mistress, the Law". But Haldane did not dine at Lincoln's Inn the day after his appointment as Lord Chancellor. He dined there nearly *two weeks* later.[11]

That is a very small change, the sort of change which anyone might and everyone does make. But such changes form a pattern in Haldane's *Autobiography. All* the stories he tells are idealized. In some the facts have been changed, in some they have not, but in all of them the stress is on the meaning, rather than the facts.

In part, this quality of stressing the meaning rather than the facts is attributable to the age in which Haldane lived; all the Victorians were prone to invest reality with a heavy moral significance. But even among his contemporaries Haldane stood out. He was considered morally pretentious even by the elevated standards of his own time, and he himself thought enough of his propensity to look for the meaning of things to offer that quality as a summation of his character. Right near the beginning of his *Autobiography*, when he is talking about his life in a general way, Haldane says: "I have been throughout more absorbed and immersed in the study of the meaning of life taken as a whole than with its particular occurrences."[12]

What an extraordinary thing to say! To call what you actually do and what actually happens to you the "particular occurrences", as if they were *merely* the "particular occurrences", trivializes the physical world; it turns life into an accident. But that is precisely the way Haldane saw things. For him, the real things that actually happened were accidental and insignificant. There was a deeper meaning to life, a meaning *behind* the particular occurrences. Naturally, he saw himself as the sort of man who dwelt on and was able to appreciate the deeper or higher meaning of things.

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[10]*Ibid.*, 237-8.

[11]Haldane Papers, letters for 12 June 1912 and 25 June 1912.

[12]*Autobiography*, 1.

Haldane saw life this way because his own life was very painful. His beloved younger brother died when they were both in their teens, and that left a lasting scar. He was also terribly disappointed in love. When he was twenty-five he proposed to a woman he had loved for six years, and she refused him. He had an emotional and physical breakdown as a result and did not fully recover for another six years.[13] Then, at age thirty-three, he fell in love with and proposed to another woman. After some hesitation, he was accepted, but the engagement lasted only five weeks. Haldane and his fiancée went traveling to visit friends in Devonshire. He returned to London for the opening of the court term and received a letter telling him it was over.[14] Again he went through a period of great suffering and he seems never to have had much to do with women after that. He never married, and if he had any sex life at all it must have been shamefully clandestine.

On a less personal but perhaps deeper level, Haldane suffered great pain as an important member of the government that tried, but failed, to keep Britain out of World War I. During the War, he was dropped from the Cabinet and attacked widely for being a traitor. Assassination attempts were made on his life.[15]

Haldane did not see his life as a tragedy though. On the contrary, he thought he had had a good life, painful perhaps, but filled with growing understanding. He tried to make the best of things, to convert misfortune and pain into spiritual growth. That is what he advised others to do as well.

> I had also, towards the end of the 'nineties,' served on the Committee appointed by the Home Office to investigate the organisation of our prisons. As an aid to the discharge of my duties on this Committee I had a warrant which enabled me to go to any prison, at any hour, and call on the Governor to produce any prisoner. During the time of our work Oscar Wilde had been sentenced to a term of imprisonment under circumstances which are well remembered. I used to meet him in the days of his social success, and, although I had not known him well, was haunted by the idea of what this highly sensitive man was probably suffering under ordinary prison treatment. I went to Holloway Gaol, where I knew he was, and asked the Governor to let me see him. The Chaplain was called in, and he said that he was glad I had come, for with Wilde he had wholly failed to make any way. I then saw Wilde himself, alone in a cell. At first he refused to speak. I put my hand on his prison-dress-clad shoulder and said that I used to know him and that I had come to say something about himself. He had not fully used his great literary gift, and the reason was that he had lived a life of pleasure and had not made any great subject his own.

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[13]Haldane's first love is never even hinted at in his *Autobriography*. It is revealed only in his letters. Haldane Papers, vol. 5901, letters to his Aunt Jane for 17 February 1881, *et seq.*

[14]*Autobiography*, 117-9.

[15]*Autobiography*, 282-3; S. Koss, *Lord Haldane: Scapegoat for Liberalism* (1969); Haldane Papers, vol. 5993 *et seq.* See, for example, letter for 17 November 1916, in which Haldane mentions the detective who has been assigned to protect him.

> Now misfortune might prove a blessing for his career, for he had got a great subject. I would try to get for him books and pen and ink, and in eighteen months he would be free to produce. He burst into tears, and promised to make the attempt.... On his release there came to me anonymously a volume, *The Ballad of Reading Gaol.* It was the redemption of his promise to me.[16]

There is a self-righteous tone to this story which grates a little on the modern ear. Haldane is so smug and sanctimonious that you have to pity poor Oscar Wilde. But there is more to Haldane's tone than just self-righteousness. There is a heavy sense of *meaning* in his story, a sense of moral significance. In Haldane's hands, *The Ballad of Reading Gaol* is not just a book. It is not even a wonderful poem or a thank you from a grateful Wilde. No, by the time Haldane gets through with it, that anonymous volume is the "redemption of a promise", and while that is an appropriate way to talk about God, it is a very inflated way to talk about human beings. It blows them out of proportion and that more than anything is what characterizes Haldane's *Autobiography*; it blows *everything* out of proportion.

There is no better way to demonstrate this point than to examine one of the "particular occurrences" which Haldane recounts in his *Autobiography*: the story of the *Quebec Appeal.* In October 1877, Haldane left his home in Scotland and went up to London to begin studying for the English bar. He was twenty-one years old. His father had died five months before, leaving a large family, a wife who had never written a cheque or thought about money and an estate so complicated that it took several years to straighten it out.

As the eldest son of the family still at home, much of the difficulty of untangling his father's affairs fell on Haldane's shoulders. But this was not the worst of his problems. Until his father's complicated estate was unraveled, the Haldane family found itself possessed of a house in Edinburgh, a country home at Cloan (sometimes called "Cloanden") and very little income or ready cash. Because the estate was so confused, and even more because it consisted mostly of land, Haldane went up to London in slightly embarrassed circumstances.

> Of money I had not a great deal, but taking the view that to maintain a good appearance was important, I borrowed, on the credit of what would come to me after my mother's time, enough for all my purposes.[17]

Luckily, no one knew that his mother, who was then fifty-two, would live to be one hundred.

For the first two years in London, Haldane was a student in a lawyer's office, and for those two years, of course, he was either paid nothing at all,

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[16]*Autobiography*, 165-7.
[17]*Ibid.*, 31.

or so close to nothing as not to matter. He became a lawyer in November 1879, but that did not improve his financial situation — if anything it made it worse.

> One has to pay £101 for call fees, about £30 for furnishing one's chambers and about £20 for wigs, gowns and accoutrements, so that one's money gets eaten into. Going to the English Bar does not cost nothing.[18]

Maybe not — but it did bring in next to nothing; Haldane's fees in his first year of practice were only £31/10/-.[19]

It is important not to overdramatize things though, the Haldanes were nowhere near poverty. His father's estate was not settled for several years and that accounted for no end of financial problems, but when it was settled Mrs. Haldane seems to have had about £2,000 a year income, of which approximately £400 went to support Haldane in London. That was quite enough, but the Haldanes did not feel safe about money.

> You must not be depressed about our affairs [Haldane wrote to his mother in June 1880]. We shall pull through somehow. This year has been necessarily a very heavy one. Everybody else who has land is in just as bad a way as we are. It will be easy to retrench by parting with 17 C. Sq. [17 Charlotte Square, their home in Edinburgh] but I do not see that it is likely to be necessary.[20]

There was even talk of selling Cloan; talk to which Haldane, who loved the place, quickly put a stop everytime the matter came up.

> I am all against the idea of parting with Cloanden. We should lose status to an extent which we cannot while we possess it.[21]

This business of status is very important. The Haldanes seem to have been in circumstances strangely characteristic of late Victorian society: they had a great many luxuries, but they were nevertheless afraid that they were in danger of slipping down a peg — into a shabby, rather than a proper, gentility.

> I sent down the wine as we arranged only I sent more than we contemplated as really it is my friends who drink it up: 2 doz. of Champagne, 2 doz. of Sherry and 2 doz. of Claret all better and cheaper than Kirkhope's. I propose that you and I split the bill which amounts to apparently a good deal: eleven pounds nine. If we return the cases and bottles their full value is to be allowed. All these wines are excellent and as I said very modest in price. I paid the bill at the time so we can each take half. Only don't drink it *all* before I come.

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[18] 5 November 1879.

[19] Haldane's fee books, National Library of Scotland, uncatalogued accession number 5577 c. 1. Haldane also mentions this figure in *Autobiography*, 34.

[20] 7 June 1880.

[21] 15 November 1881.

> Everybody nearly that one knows is at the last gasp for money. There has not been such a bad time for long.[22]

So the Haldanes had Champagne to ease the "last gasp", but they did have to be careful to return the empties. This next letter, written at the time when Haldane was called to the bar, gives a very vivid and touching picture of Haldane's feelings.

> There is one thing which I shall be miserable if you do, that is carry out the idea of travelling [from Edinburgh to London] anything but first class. You only save 3.11/- by doing so; you arrive more tired and what is perhaps of more consequence you are sure to be seen by someone of the crowd of Edinburgh loafers who go to the start of each London train, and who will set reports abroad about it. A man may travel third or second if he likes, and he would never hesitate about it were it desirable; a lady never should, as she not only gives rise to talk, but loses caste by doing what she would rather not be seen doing. In my father's time when a family party went it was perhaps different, but a widow should never be seen travelling in a cheap way if she can help it, and it is not right that Bay [his sister] should. Forgive this long sermon, but a man sees more of what third class travelling to London implies than a woman can, and besides a son is always in a great state when his mother talks of depriving herself of any comfort for his sake or that of his brothers and sisters. I would rather go without anything and sell my books than that you and Bay should not travel first class for the sake of 3.11/-. So please don't think of doing so. I shall not be comfortable until you tell me that you are going to revert to the first class. If there is to be economy, let me bear the difference, not you and Bay. After all I hope to be making money very shortly, so there is at least a chance of your becoming gradually richer to the extent of £400 a year.[23]

There is Haldane at twenty-three or twenty-four, living in London, watching his mother pinch pennies, eating up his capital, writing philosophy for lack of law to do and wishing he could get on about earning a little something. The desire to earn a little money, blended with a sense that he is bound to succeed in time, comes through like a litany in the letters he wrote to his mother.

> 7 February 1880. It is sad that one's fees are as yet small in amount, but I hope they will begin to come in quicker soon.
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> 12 February 1880. A good chance might set one agoing which Barber [the lawyer with whom he studied Equity] says is all I want to get into large practice.
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> 9 July 1880. Not a brief for the last fortnight.
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> 26 October 1880. *No* briefs yet.
>
> 3 November 1880. One is getting known and briefs must come in before long now.

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[22]8 July 1880.

[23]11 November 1879.

10 November 1880. One has been having a good deal of unremunerative work lately.

1 December 1880. I am doing a great deal of law reading now, in the absence of briefs which one trusts will soon come in. It is really simply bad luck that they don't, as there are people who would send them if they had to send.

In 1881 Haldane did a little better: he earned 109.[24] But if business seemed a little better, it still was not what it should have been and the same refrain continues.

24 January 1881. I have had papers in my chambers since I came back to town. It is true one gets small fees as yet but still it is a satisfaction that one's clerk has taken more than 20 guineas for one lately. One begins to feel that one's foot has got into a *definite* practice however small as yet, and that it will so far as one can judge grow pretty rapidly as soon as trade revives.

8 March 1881. Business is still very scarce in the courts here. People have not recovered from the depression which is now passing off by slow degrees.

11 March 1881. [O]ne might dispose of some of the "Orient" shares. They are at a premium I believe of 2 per cent. I fear they will not pay more thant 5 per cent for some time, but will enquire as to this. This might be more convenient than the other ways of raising money.

14 March 1881. Sir H. Jackson's death has set a grcat deal of Company business afloat and I am struggling to get a bit of it, but of course it must take time. The lack of business shows signs of mending in the courts. This year I think I shall manage to get through with another 100 [that is, by taking another £100 from his mother] but as it will be a close mattcr I do not like to ask you to count absolutely on this.

18 March 1881. You and I must consider carefully the items in the expenditure questions.

21 March 1881. I wish very much our affairs were in better order. One thing is that everyone or nearly everyone is at present in a similar plight, living on capital ... I am cutting down all I can here.

30 April 1881. At present I am not briefless having had a couple of briefs from a city client. I wish business would grow more rapidly with me but believe it will so do ....

29 November 1881. We must just all of us keep up good spirits over our affairs. If I could only take a jump at the Bar I should make over all my surplus to you to keep up Cloanden, as I don't care very much about riches. Such a jump I believe will come to me although I find things at times depressing.

This last letter is striking and very unusual. As the other letters show, Haldane is generally quite careful to reassure his mother about his emotional state. He wrote more openly to his aunt, Jane Scott, the wife of his mother's brother.

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[24]*Supra*, note 19.

> At present the world does [not] seem very promising. Progress at the Bar seems so slow and uncertain that one's heart sinks particularly with the knowledge of the failure of so many brilliant men. Depression of this sort arising from circumstances which cannot be ignored or explained away one is too apt to laugh away to others when it seems to myself crushing.
> . . . I am at present feeling very much of the burden of the incessant resistance of the various circumstances against which I have to make headway . . . . What I allude to is the resistance of the surroundings to my progress at the Bar. No doubt I have succeeded in a sense unusually for anyone circumstanced as I am. But the fact is that I have no real backing or interest. Instead of giving one a helping hand people seem to be looking to me at present to help them, and I see solicitors' etc. sons and relations getting given to them much to which I have a fair claim, while there fall to me only occasional difficult and unremunerative cases. . . . Of course I should think but little of my strength if I allowed myself to feel overborne by it, and after all perhaps I am exaggerating. But it is hard to keep up a cheerful countenance when the way is not clear and this seems at present to be specially true of my vocation.[25]

In 1882 Haldane's fees rose, but only to £160,[26] and his letters for the year have the same tone as before. He talks again and again of his desire to make a success of his career, especially a financial success. He says that everyone keeps assuring him that his recognition is just around the corner and he does seem to have gained a reputation. Money, however, continued to elude him. Then in October, 1882, he took

> a very important step which may turn out very well. I have become assistant or technically "devil" to Horace Davey, Q.C. the leader of the English Bar and the great Chancery Counsel.
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> He is a very cynical and disagreeable but extremely clever man like the late Lord Westbury and never has been able to get on with anyone before, but as he did me the compliment of picking me out from the whole junior Bar and giving me the invitation I could not have done otherwise.[27]

Associating himself with so formidable a man as Davey was certainly a step forward, but initially at least it brought no financial rewards. Then, in August 1883, the *Quebec Appeal* came along. Until 1949, it was still possible to appeal to the Judicial Committee of the Privy Council from decisions of the Supreme Court of Canada. Davey, a prominent barrister in Canadian litigation before the Judicial Committee, had been retained by the province of Quebec to argue a motion for leave to appeal.[28] Late in the evening before the case was to be heard, Davey's clerk appeared at Haldane's chambers. He said Haldane would have to appear for Quebec the next morning. Davey had been summoned to continue an argument in the House

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[25]Vol. 5901, 7 December 1881.

[26] *Supra*, note 19.

[27]31 October 1882.

[28]*Autobiography*, 37-39. The *Quebec Appeal* was *A.G. Quebec* v. *Reed* (1884) 10 A.C. 141, (1884) 54 L.J.P.C. 12.

of Lords and "[n]o other leader of eminence could be got to take a brief at very short notice in a case involving a complicated question of Canadian constitutional law and, besides, a great responsibility".[29]

Haldane prepared himself all night and went in the next morning with Davey, who

> broke it to the agitated Solicitor-General and to Freshfields, the well-known solicitors, that he must leave at once for the House of Lords. He proposed that the Solicitor-General for Quebec should open the petition. The latter firmly replied that he was precluded by his orders from doing so. If he did, and the application was refused, the responsibility would be such that the Government of Quebec might fall. Davey then said that fortunately he had brought to the consultation his learned friend, Mr. Haldane, who knew the case thoroughly, and would conduct it, and he then seized his hat and disappeared. This did not comfort the unhappy clients.[30]

After some "idle lamentations", Haldane went in, argued the case and won. But apparently victory was not enough, since in his *Autobiography* Haldane says his clients, incensed at the risk they had been forced to run, "went away as persons aggrieved".[31]

> But a few days later who should climb up the narrow stairs to my garret at Lincoln's Inn but old Mr. Wiseman himself, the venerable representative of the great firm of Freshfields. He said that the partners had read the shorthand note of the brief argument at the Privy Council, and now sent me a brief for the Province of Ontario in a great case. There might, he said, be more to follow, and indeed it so turned out. This particular brief was marked 150 guineas, and it introduccd me to many Canadian cases over here.[32]

This is a very powerful story, but Haldane's account of it in his *Autobiography* is not accurate. Haldane made the *Quebec Appeal* more dramatic than it really was, and it is not just in the way he told the story, either. This time, he actually changed the facts. On the day of the appeal, Haldane wrote to his mother:

> I have just won single handed an important case of Davey's in the Privy Council which he handed over to me to argue on behalf of the Government of Quebec. I got through it excellently and the Solicitor-General of Quebec, who was there but too nervous to argue it — so important was the issue, was delighted as were the Freshfields, his agents.[33]

So there were no "persons aggrieved", and, what is more, the 150 guinea brief from Ontario did not come "a few days later". The 150 guinea brief

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[29]*Autobiography*, 37.
[30]*Ibid.*, 38.
[31]*Ibid.*
[32]*Ibid.*, 38-9.
[33]13 July 1883.

from Ontario did not come until *nearly a year after the Quebec Appeal.* There can be no doubt about this fact, because on the day it did come Haldane entered it in his fee book and wrote to his mother about it.[34]

Over the years, Haldane shortened the time between the *Quebec Appeal* and the arrival of the 150 guinea brief from Ontario. He did so to make the story more dramatic, to make it more expressive of the meaning he came to see in the event. This meaning, at least on one level, was decidedly financial. In the year from roughly August 1883 through July 1884, the year between the *Quebec Appeal* and the 150 guinea brief, Haldane took in about £1100.[35] That is quite a jump from the £169 in the six months before, and not suprisingly the change is reflected in Haldane's letters to his mother.

In October 1883, Mrs. Haldane was travelling abroad, and wrote to her son asking him to send her £20. He answered:

> I have sent you £30 to Marseilles . . . . You are better off with £30 than £20 and I can easily spare it.[36]

This is not an isolated example. The tone of Haldane's letters changes dramatically over the year.

> 3 November 1883. I am very busy with some tremendously heavy work which will occupy me for three weeks at least and out of which I shall make some money besides I hope make my position better.
>
> 22 November 1883. The present amount of business can hardly last. It is astonishing as soon as one set of papers goes out another comes in from all manner of solicitors.
> I have six fresh cases before me now waiting to be done and have sent out a lot finished.
>
> 14 June 1884. As regards accounts what I hope is to be able for the future to make such a substantial contribution as will meet any deficiencies [in the accounts of his father's estate] and get things into proper order.
> If things go with me as they have gone this year I certainly shall be able.
>
> 22 July 1884. You need have no hesitation on drawing on me if you want money, as I am making plenty at present. I am going to take over the wine bill altogether, I mean for Cloaden and here, and this will help a little as it is a tiresomely heavy article.

The year following Haldane's first Canadian constitutional case was a very important one for him. All the worries and frustrations of the past four years were gone. There was no more taking a back seat to mediocre lawyers with rich uncles; no more bitter fear about his mother travelling third class.

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[34]2 July 1884.
[35]*Supra*, note 19, entry for 1 July 1884.
[36]17 October 1883.

In that one year, Haldane stopped being a boy who had to worry about whether the louts at a public railway station were laughing at his mother and became a man who could protect her from that indignity.

Haldane recast the story of the *Quebec Appeal* in order to preserve the feeling of that wonderful year. The release from the tension of waiting for success and the rightness of his success when it finally came must have been very precious to him; it would be to anyone. But one cannot hang on to a disembodied feeling. Haldane needed an event around which to crystalize his sense of expectancy, rejection and triumph. The *Quebec Appeal*, of course, fit the bill to perfection. In retrospect, by virtue of the lifetime of Canadian cases that followed it, the *Quebec Appeal* became Haldane's *first* Canadian case. Over the years, the time between the argument of that case and the presentation to him of the reward for his efforts simply melted away. The year became a few days in his mind and the story, which he was undoubtedly very fond of telling, became idealized.

There is a sense in which the *Quebec Appeal* might even be taken for an "explanation" for the pro-provincial judgments Haldane later rendered as Lord Chancellor. In highly charged circumstances, Haldane argued the provincial side in his first Canadian case. He scored a great triumph which came to seem more and more significant to him as time went on. No one forgets that kind of success easily, and Haldane never had any cause to go back on the argument he made in the *Quebec Appeal*. For twenty years after that case, until he went into Asquith's Cabinet as War Secretary in 1906, Haldane argued Canadian constitutional cases, appearing for the most part on behalf of the provinces, particulary Ontario.[37]

One might say, therefore, that as a judge Haldane merely followed the line he had argued as a lawyer, and to some extent this is no doubt true. But there is more to it than that, as Haldane himself once hinted:

> In a long conversation I had with Lord Haldane after one of his lectures, he said: "I was offered both briefs in the first case and I often think what a difference it would have made if I had accepted the brief from the federal government in place of that from the provincial government. I'm in no doubt I'd have won it; and that might well have altered the whole subsequent constitutional evolution of authority in the Dominion." This was all said as a matter of fact and in no egocentric manner. Then he said, "Now I am sorry that I wasn't on the other side."[38]

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[37]Haldane appeared as counsel in a great many Canadian constitutional cases, including: *St. Catherines Milling and Lumber Co.* v. *A.G. Ontario* (1889) 14 A.C. 46 (P.C.); *A.G. Ontario* v. *A.G. Canada* (Liquor Licence Act) [1896] A.C. 348, (1888) 58 L.J.P.C. 54; *Union Colliery Co.* v. *Bryden* [1899] A.C. 580, (1899) 68 L.J.P.C. 118.

[38]J. Swittenham, *McNaughton* (1968), vol. 1, 232-3 as cited in R. Hamilton & D. Shields, *The Dictionary of Canadian Quotations and Phrases* (1979).

Striking as this is, it is another piece of romanticizing. Haldane did not have the choice of briefs in his first Canadian case. His chance to alter the "whole subsequent constitutional evolution of authority" in Canada came not when he was a young lawyer, but later when he was Lord Chancellor. He did not change the course of constitutional law at that point; indeed, he reinforced it, following the pro-provincial slant which Lord Watson had indicated. To understand why, it is necessary to pursue his urge to idealize.

II. The Origins of Haldane's Urge to Idealize

The origins of Haldane's urge to idealize things lie in his family life and early childhood. Judging by the little he does say about this period, it must have been very sweet, but two things combined to shatter Haldane's childhood paradise. When he was sixteen, he lost his religious faith and then, three years later, his beloved younger brother died.

> Perhaps most attractive among us children was my younger brother, George, who died of diphtheria when he was sixteen. He was deeply religious, untroubled by doubts. He had a passion for music, for which he was developing a great gift when he passed away. His touch on the piano, and his power of expressing the deep feeling of the best music, were remarkable. His was a beautiful nature too sensitive to have been able to encounter later on without unhappiness the rough side of life. His death was a terrible blow to his parents, and to the others of us it was a deep and lasting grief.[39]

Just how deep Haldane's grief was can be seen from the letter he wrote to his mother a short while after his brother's death.

> I have been looking at the grave where the earthly remains of our beloved Geordie lie. It is indeed hard to recognize that the laughing countenance which was so dear to us all is now laid under the sod; the thought seems at times too hard, too bitter, too piercing for weak creatures like ourselves to endure .... There come at times moments when one's heart feels as though it would break under the pressure ... feelings which seem as though they would uproot one's very existence.[40]

It is no insult to say that religion, for all that it is inspired by otherworldly concerns, serves at least one very valuable earthly function. It helps one manage feelings like those Haldane had, "feelings which seem as though they would uproot one's very existence". Religious faith certainly helped Haldane's father deal with the pain of losing a son.

> I remember well, just as his end was approaching, being sent by the doctor to summon my father from his room. He received the summons with profound

[39] *Autobiography*, 24-5.
[40] 13 July 1875.

> sorrow but without moving a muscle, and then, in a tone of deep solemnity, said, "Before the foundations of the world were laid it was so ordained".[41]

Religion was a dominating force in Haldane's family. Two generations before he was born, a wave of intense religious feeling had swept over all of Britain. Treated as a polite social convention in the late 1700s, religion came in the first years of the new century to be seen as THE TRUTH. Late in their lives, both of Haldane's grandfathers were caught up in this wave. They were both overwhelmed with religious feelings and both gave up good positions which promised wealth and social prominence, in order to follow God and His Truth on a more or less full time basis.

This religious fervor was passed on to Haldane's parents. His father, though he had a worldly profession as a Writer to the Signer (the Scottish equivalent of a solicitor, dealing mostly with land), was an extremely religious man.

> He was very devout, and had fitted up a barn where he used once a fortnight to preach to a considerable audience of old fashioned Scottish country folk who came to hear the Word of God in all its strictness. On alternate Sundays he used to ride miles to various villages and preach there, and I used to ride with him on a pony named "King Cole" which one of our many relatives had given me.[42]

Haldane's mother was no less devout; indeed, it was religion that brought Haldane's parents together. According to a short account his sister wrote of their mother's life, Mrs. Haldane had been in love with another man when she was a girl, but had given him up because he was not religious enough.

> He was, our mother used to say, one of the most attractive men she ever met, and the interests of the two were alike so far as art and literature were concerned, besides which he was full of the love of adventure such as was sure to appeal to a courageous high-spirited girl. In fact, there would appear to have been no hindrance to an alliance which on a worldly-side would have been advantageous. There was, however, one drawback, and this a very serious one. The young man was morally correct in every way, but he was not religious in the view of our grandparents, and our mother herself did not feel sure of his being a Child of God.[43]

Now this was obviously not a story which Haldane's mother told casually, as some kind of jolly reminiscence. This was a religious lesson, and just how well her children learned it can be seen from the easy way in which Haldane's sister assumes that there is a side other than the worldly one. Haldane's family life was built around that assumption and his mother's

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[41] *Autobiography*, 25.

[42] *Ibid.*, 9.

[43] E. Haldane, *Mary Elizabeth Haldane: A Record of A Hundred Years* (1925) 89.

letters to him (also daily for forty-eight years) consisted almost entirely of biblical quotations and uplifting religious messages.

Haldane's mother was a very interesting woman, a little like a heroine in a romantic fiction. For the last twenty years of her life she was an invalid, confined to her tower room at Cloan. She lay there in her bed, her long white hair plaited and tucked up under a frilly lace cap, while off in London, her son, the Lord Chancellor, conducted the affairs of state. Every day he wrote to her and he was not the only one who did so. She had a wide correspondence and many important literary and religious figures used to call on her for spiritual refreshment. People said they could see "The Truth shining in her eyes", and her hundredth birthday was something of a national celebration.

His mother was undoubtedly the source from which Haldane acquired the habit of idealizing things, of treating everything on the highest possible level. For Haldane's mother, this habit was intimately tied up with religion, but, as suggested, Haldane lost his religious faith relatively early in his life.

> My reading in my sixteenth and seventeenth years had begun to disturb my faith in what I then took to be the essential foundations of Christianity . . . . I was driven to look to the philosophers and I began the study of metaphysics.[44]

It will please neither philosophers nor religious people to call philosophy a "substitute" for religion, and yet that is precisely what it was for Haldane. He had acquired the habit of faith from his parents, the habit of believing both that there was a spiritual meaning to the physical world and that the spiritual meaning counted for more than the physical events. Though he gave up religion, Haldane was unwilling (or perhaps unable) to relinquish the belief that it was the non-physical, the spiritual meaning of things that really counted in life. Metaphysics became the expression of that belief.

On the recommendation of one of his teachers, Haldane went off to Germany, to Göttingen University, where Professor Lotze, "one of the greatest and most spiritual of modern German thinkers was then at the height of his fame."[45] In his studies with Lotze, Haldane found what he had lost when he lost his religious faith.

> I had broken away from the creeds of the churches at home, and I now seemed to be coming back to a larger outlook, which made the breaking away taken by itself seem less important than I had formerly thought it to be. When I returned to Scotland it was in much better spirits, and with the first steps taken towards the attainment of something like a settled outlook, which was to mean much to me.[46]

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[44]*Autobiography*, 11.
[45]*Ibid.*, 12.
[46]*Ibid.*, 17.

A "settled outlook", a perspective from which to view the world — before he lost his faith, Haldane had gotten that perspective from religion, and it was something he was used to having. He needed it, suffered from the loss of it and reacquired it through philosophy:

> I went to Gottingen in deep depression, uncertain in which direction to look. I left it with the conviction that the way to truth lay in the direction of idealism.[47]

Idealism *replaced* religion for Haldane, and when he returned to Scotland Haldane continued his philosophical studies at the University of Edinburgh. An excellent student, he took several important prizes, including the medal as the top philosophy student in the four Scottish universities. He even went so far as to write the thesis for his doctorate.

> The subject I chose was Immortality. The thesis was approved by the Professors of Philosophy. But technically it had to be approved also by the Professor of Botany, as Dean of the Faculty of Science. He was a very orthodox believer of the old school, and he firmly refused to sanction a thesis which contained what he considered to be a dangerous doctrine.[48]

So Haldane never got his doctorate, but of course, that was unimportant because, as he says in his *Autobiography*, "it was a tradition, derived from a sort of family agreement on the subject, that I should ultimately go to the English Bar."[49] In pursuit of this destiny Haldane went up to London, became a lawyer and began the career which ultimately took him to the highest judicial office in Britain. But he did not give up philosophy. All through his busy career in law and politics, he wrote philosophy as a kind of "sideline", publishing numerous books and articles on a wide variety of philosophical subjects.[50] His work was so well respected by professional philosophers that in 1904 he was asked to give the prestigious Gifford Lectures at St. Andrews University.

Haldane called his Gifford Lectures *The Pathway to Reality*. This is an instructive title because it sums up Haldane's idealist philosophy. For Haldane, reality was not right here for the touching, but rather, somewhere up the road. As he said in his lectures:

> The individual perception, the real, as we insist that it is, behaves in a way that is unsatisfactory when we try to keep it in the rigid bonds in which for everyday purposes we seek to bind it . . . . There unfolds itself a higher view

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[47]*Ibid.*, 19.

[48]*Ibid.*, 20.

[49]*Ibid.*, 25.

[50]See, for example *Essays in Philosophical Criticism* (1883), written with Andrew Seth; *Hegel* (1896) 67 Contemporary Rev. 232; "The Function of Metaphysics in Scientific Method" in Muirhead, ed., *Contemporary British Philosophy* (1924); and *Mind and Reality* (1928). Haldane's philosophy is discussed in Robinson, *Lord Haldane and the British North America Act* (1970) 20 U.T.L.J. 55.

> of things ... the truth shines through then ... the highest is not to be looked for in the world beyond. It is in the here and now, in just this world comprehended at a loftier plane.[51]

This philosophy of Haldane's is, of course, a perfect justification for his habit of idealizing everything. In changing the every day facts of his life to fit the meaning he saw in things, Haldane was merely raising them to a "loftier plane".

III. Later Life and First Principles

A. Imperialism

To some, it will seem odd to suggest that a personal trait like Haldane's tendency to idealize things could carry over into his public work, but it would not have seemed odd to Haldane. On the contrary, he prided himself in all of his activities on finding first principles and organizing his affairs around them. He remarked upon this in his *Autobiography.*

> [T]he kind of idealism that has throughout had hold of me ... led me to the belief in the possibility of finding rational principles underlying all forms of experience, and to a strong sense of the endeavour to find such principles as a first duty in every department of public life. That is the faith that prevailed with me at the Bar, when later I undertook the reform of the Army, when I was Lord Chancellor and when I sat on the Committee of Imperial Defence.[52]

Haldane gives the following example of how his idealist philosophy and inclination to idealize things affected his work as Army Secretary and especially his attempts to reorganize the British Army:

> At this time I knew but little of military affairs and of Army organization I was wholly ignorant. But from the beginning the work fascinated me. For I saw that here was an almost virgin field, to be operated on by applying first principles as soon as I discovered them.[53]

Haldane's political enemies called him "the Philosopher". It was a nickname he did everything he could to deserve.

> When the Army Council asked me one morning again for some notion of the army I had in my mind, my answer to them was: "A Hegelian Army". The conversation then fell off.[54]

The army men must have seen Haldane as a very strange duck indeed, but he did what he set out to do. He came into office a few years after the

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[51]"Lecture IV" *The Pathway to Reality* (1903) 90-1, 98.
[52]*Autobiography*, 352.
[53]*Autobiography*, 183.
[54]*Ibid.*, 185.

Boer War, a disastrous affair that split Britain the way Vietnam split America, and remade the British Army. It was not an easy task. The British had the advantage of having "won" their Vietnam, but they had not won it in a way that did credit to their country. Their army had done terribly against the Boers, losing battle after battle to a rag-tag bunch of farmers turned soldier. Badly beaten in every even encounter, the giant British Army had finally been forced to squash the Boers' revolt by applying massive amounts of force in the least elegant ways. Resorting to what some politicians at home called "methods of barbarism", the British Army had burned down the Boers' homes and put their women and children in beastly concentration camps where they sickened and died at an extraordinary rate.

After the war, the "victorious" army was a shambles. It was badly bloated and incredibly inefficient. Known in the streets as "the scum of the earth, led by the bastard of the family", the army Haldane took over had only recently stopped permitting its officers to purchase their commissions!

Haldane pared the fat off the British Army and made it into the best small army in Europe, the army that met the "Hun" in World War I and did not break. And he did it by finding and applying "first principles", in other words, by idealizing it. Haldane simply imagined how the British Army would look on "a loftier plane" and then remade it to conform to that image. His work was so successful that he is generally accounted one of the two best War Secretaries Britain ever had.

One principle Haldane used to re-organize his Hegelian Army was Imperialism. For Haldane, Britain was "the island centre of a scattered Empire", and his work with the Army was very decidedly Imperial work: a way to keep Britain at the dominating centre.

Haldane and his political associates were actually called "Liberal Imperialists". They believed that the way to preserve the Empire was not by force; the self-governing colonies would not stand for that. Britain's task was to woo her colonies, to avoid obstructions to Imperial unity and to build a set of Imperial institutions so good that no self-governing Dominion in its right mind would want to cut itself off from them. Haldane explained this in a speech to the Royal Colonial Institute in 1903.

> There was prevalent till lately a disposition to force the pace, which was, in reality, more perilous than Little Englandism. The constitution of the Empire resembles, not a machine, but a living and growing organism, and it is not possible to force the rate of growth of such an organism without danger of weakening its springs of life. The years from 1899 to 1902 witnessed a real development. The danger was that people should take steps to try to compel the years immediately succeeding to witness growth at no less a rate. The special environment had ceased to exist, and the Blue Book which recorded the proceedings at the Colonial Premiers' Conference contained a note of warning.

> Very slight mistakes might seriously affect the health of the body politic. It is the plan of a wise guardian not to exhibit stimulants, but rather to remove obstacles to the work of Nature itself.[55]

Removing "obstacles to the work of Nature itself". The natural inevitability of the British Empire was one of the ideals in which Haldane believed. Only remove the obstacles and the past would live on forever.

In fact, it is a bit surprising how long the past did live on. In both World Wars, from 1914 to 1917 and then again from 1939 to 1942, while the Americans sat home, the Canadians fell in loyally behind the British. Canada went to war as soon as Britain did; in fact, there was some sense that Canada went to war *when* Britain did, as part of it. This was more true in World War I than in World War II of course, and Canada's posture in World War I was at least in part Haldane's doing, since the point of his army reforms was distinctly Imperial. It was under his direction that the old army of Empire, the garrison army that ruled the colonies, became a small modern army, backed by colonial troops.

In 1907, while he was Army Secretary, Haldane told the colonial premiers about his plans. He spoke to them in London at the Imperial Conference and they released the text of his speech for publication to the whole Empire. Here is some of what he said.

> The practical point that we have to put before you is the desirability of a certain broad plan of military organization for the Empire. We know that you have all got your own difficulties and the idosyncrasies of your own people to deal with. No rigid model is, therefore, of use. But a common purpose or a common end may be very potent in furthering military organization. For ourselves we have over here worked out our organization quite definitely, and, indeed, the practical form of it is at present the subject of plans which are before Parliament. This conception of defence is that the Army should be divided into two parts with distinct functions. There is a part with defence as its primary main function, and it has no obligation to go over the sea. That is raised by the citizens of the particular dominion of the Crown concerned, simply for the purpose of home defence. There is the other part which exists, not for local defence, but for the service of the Empire as a whole, the expeditionary force, which, in a country like ours, must be naval as well as military, and I go further and say primarily naval. There is the Fleet, which, in order to make the defence of the Empire what we all hope and believe it is, and are convinced that it must remain if the Empire is to hold together, must have the complete command of the sea, and must be stronger than the fleet of any other Power, or, for that matter, of any other two Powers. And in conjunction with that there is an expeditionary force, consisting of Regular troops, which we have just reorganized at home. This expeditionary force, working in conjunction with the Navy, will be able to operate at a distance for the defence of the Empire as a whole. Behind that, which I call the first line, our conception is a second

[55]Haldane, "The Cabinet and The Empire", in (1902-03) 34 *Proceedings of the Royal Colonial Institute* 325.

> line consisting of those home defence troops of which I have spoken. The events of a few years ago showed that the Empire could act as a whole, and that in a supreme emergency those home defence forces would pour forth for the defence of something more than their own shores.[56]

Of course, this was a political speech, an effort to win the colonies over, and so the events of the past were "reconstructed" a bit. In actual fact, "the events of a few years ago" (namely, the Boer War) had shown neither "that the Empire could act as a whole" nor that the colonies would "pour forth for the defence of something more than their own shores." On the contrary, the Boer War had shown just how reluctant Canada was to support Imperial Britain. It is true that Canada had participated in the Boer War, but its participation had come very grudgingly, had, in fact, been squeezed out by the combined pressure of the extreme loyalists in Ontario and the Colonial Office in Britain. Troops were raised locally, *against the opposition of the federal government*, and the initial plan was to have them go independently to fight for their Queen. In the end they did go as representatives of Canada but that was only because the federal government was embarrassed into permitting it.[57]

Haldane was deeply involved in the effort to build an Imperial Army. He knew what had really happened in the Boer War; he knew that Canadians who wanted to send troops to fight for Britain were almost forbidden to do so by the federal government. He also knew that in 1897, Laurier, the first Quebecois Prime Minister, had made it clear that Canada would not necessarily fight for Britain's Empire.[58] In his years at the War Office and on the Committee of Imperial Defense, Haldane came to think that a great many *Canadians* would support Britain militarily, but that *Canada* might not. His judicial work on the Privy Council fits in very nicely with this military concern acquired before he became a judge. The major effect of Haldane's judgments was to deny sovereignty to the Canadian federal government, and undercutting the sovereign status of the federal government was a way to keep Canada from coming between Imperial Britain and the Canadian subjects of the Empire.

There is no question but that Haldane's Imperialism also extended to his work as Lord Chancellor. His notion of the Privy Council is especially striking in this respect.

> 3 July 1912. I am sitting as president of the Supreme Tribunal of the Empire at the Privy Council — carrying out as well as I can the principle I advocated years ago in my little book Education and Empire.

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[56]*The Times*, 24 April 1907, 12.

[57]N. Penlington, *Canada and Imperialism: 1896-1899* (1965) *passim.*

[58]*Ibid.*, 235.

> 10 July 1912. [I]n the afternoon [I] sit in the Privy Council again — *my favourite court*. I am doing everything I can to make the most of this Imperial institution.
>
> 9 June 1911. I spoke yesterday in the City on Imperial questions and in the evening worked hard at bringing the Dominion Premiers into line over a reform which I have designed for the Supreme Court of Appeal — an old question of mine.
>
> 13 June 1911. I had an important day yesterday, for I got through the Imperial Conference the proposals for a reconstitution of the Supreme Court of the Empire at which I have been working for years.

Haldane saw Canada's constitution as part of a network of Imperial constitutions, all maintaining the central place of Britain in colonial political life. The particular written constitutions had to be read in a way that fit them into the grand Imperial scheme of things, and the colonial Supreme Courts had to be subordinated to the Imperial Supreme Court. Thus, in Haldane's account of the early constitutional cases, the Supreme Court of Canada comes off, not as a court, but as one of the parties to the litigation.

To hear Haldane tell it, the Supreme Court of Canada took a view which "caused suspicion and friction in the Provinces", on its own motion and for no reason. It simply began to show this unfortunate tendency, like a disease.

> Soon after the *Act* passed, the Supreme Court of Canada — which was established with a view of obtaining an interpretation of the Constitution upon the spot, and which has done much valuable work of this kind — began to show a tendency in its judgments which caused suspicion and friction in the Provinces. This Court laid stress on those provisions in the Act which seemed to point to the principle of union of the Provinces, and they laid down principles which if accepted would have placed the provinces in the position of subordinate governments. A series of questions emerged sharply, of such delicacy that it was essential that they should be decided by an arbiter holding an absolutely even hand between the contending parties, and simply interpreting the words of the Dominion Act in the light of that British Constitution which its object was to reproduce. Such an arbiter was found in the Imperial Privy Council.[59]

It is really quite an amazing slur on the Canadian Supreme Court to say that it was necessary to go to England to find "an arbiter holding an absolutely even hand between the parties". That is tantamount to accusing the Supreme Court of being biased or unfair. The Supreme Court comes off as a villain in all Haldane's accounts of Canadian constitutional litigation.

> At one time, after the British North America Act of 1867 was passed, the conception took hold of the Canadian Courts that what was intended was to make the Dominion the centre of government in Canada, so that its statutes

[59]Haldane, *Education and Empire* (1902) 111-2.

> and its position should be superior to the statutes and provisions of the Provincial Legislatures.[60]

"The conception took hold of the Canadian Courts"! What a nasty way to talk, especially in light of the fact that the *Constitution Act, 1867 does* "make the Dominion the centre of government in Canada".

Just as Haldane told himself stories about his life, so he told himself stories about the *Constitution Act, 1867,* stories which demean the Canadian courts while they idealize Lord Watson and the Privy Council.

> There arose a great fight; and as a result of a long series of decisions, Lord Watson put clothing upon the bones of the Constitution, and so covered them over with living flesh that the Constitution of Canada took new form. The Provinces were recognized as of equal authority co-ordinate with the Dominion, and a long series of decisions were given by him which solved many problems and produced a new contentment in Canada with the Constitution they had got in 1867.[61]

Notice how much Haldane's account of the constitutional litigation resembles this next story. It is a story Haldane was very fond of telling.

> It is told of a traveller who had penetrated into a remote part of India that he found the natives offering up a sacrifice to a far-off but all-powerful god who had just restored to the tribe the land which the Government of the day had taken from it. He asked the name of the god. The reply was "We know nothing of him but that he is a good god, and this his name is the Judicial Committee of the Privy Council".[62]

In its gentle affection for the good, simple local people, its indignant contempt for the distant (read "federal") "government of the day" and its reverence for the still more distant, but nearly divine Privy Council, this story is a mirror for Haldane's vision of Canada.

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[60]Haldane, *The Work for the Empire of the Judicial Committee of the Privy Council,* (1921-3) 1 Camb. L.J. 143, 150.

[61]*Ibid.*

[62]I have lost the citation for this quotation and am unable to recover it. I do have the citation for a longer, somewhat less elegant version of the story, but I prefer to use the shorter quotation in the text.

> Many of you know how in remote parts of India they look to the Judicial Committee as a body which stands between the government and the subject. You know, I daresay, the tale of the traveler who went to a remote part of Northern India and found a tribe sacrificing to an unknown god. He asked who the god was, and they said: "We don't know, except that he is a very powerful god, because he interfered on our behalf against the Indian Government, and gave us back our land which the Government had taken, and the only other thing we know is the name of the god is the Judicial Committee of the Privy Council."

Supra, note 60, 153.

Haldane did the same thing to the *Constitution Act, 1867* that he did to the British Army: he remade it by idealizing it. Of course, this was not something he acknowledged. No judge can admit that he is refashioning a statute, and thus, while Haldane expressly said that he was consciously trying to remake the British Army, he never said anything even remotely like that about his work on the Canadian constitution. Quite the contrary, Haldane always insisted that he was just reading the *Constitution Act, 1867.*

But regardless of what Haldane said, his judgments, following Lord Watson's, dramatically changed the structure of government in Canada. Having two Crowns is not the same as having one. The effect of dividing sovereignty up between the federal and the provincial governments has been to leave Canada with *no* sovereign, with nobody who is responsible for Canada the way the British government is responsible for Britain. The way Haldane read the *Constitution Act, 1867* leaves the federal government responsible for twenty-nine things, the provinces responsible for sixteen other things and *nobody* responsible for the whole thing.

The effect of this is largely symbolic. In fact, it is black letter constitutional law to say that no actual powers were lost in the division between the federal and provincial governments. This was not Haldane's view, however. In *Attorney General of Canada* v. *Attorney General of Quebec*[63] Haldane says that before the *Constitution Act, 1867* was passed the government of the United Provinces of Upper and Lower Canada had the power to abrogate public fishing rights: "After confederation, neither the Dominion nor any Province possessed this power in its integrity."[64] If the old government of the United Provinces had exercised its power to abrogate the public's right to fish, it would have been

> fulfilling a double function, the disposal of property and the exercise of the power of regulation. The former of these functions has now fallen to the Province, but the latter to the Dominion; and accordingly the power which existed [prior to Confederation] no longer exists in its entirety.[65]

Of course, the power to abrogate public fishing rights is not terribly important, and anyway, a modern Canadian lawyer would say that while the power to abrogate public fishing rights may not exist "in its entirety", it still exists; neither Crown possesses such a power on its own, but the two Crowns acting together could do what they could not do separately. This is probably true as a matter of constitutional doctrine, but it is not what we mean when we talk of sovereignty. The powers set out in section 91 are expressly said to be examples of a greater, more general power: the power

[63][1921] 1 A.C. 401, (1920) 56 D.L.R. 358 (P.C.).
[64]*Ibid.*, 427.
[65]*Ibid.*, 431.

to legislate "for the peace, order and good government of Canada". That is sovereignty, and reading section 91 as though it were parallel to section 92 removes the sovereignty from the *Constitution Act, 1867.*

Haldane saw this result as desirable. He saw it as being in accordance with "first principles" and achieved it the way he achieved everything else, by ignoring the "particular occurrences" in favour of the deeper "meaning". Haldane looked on the black-and-white text of the *Constitution Act, 1867* as merely a "particular occurrence"; he saw himself as working on "a loftier plane", interpreting some great idealized Constitution-in-the-Sky.

That there was such a constitution, Haldane took for granted. You can see that in these comments he made about Lord Watson. Watson, Haldane said:

> found himself face to face with what threatened to be a critical period in the history of Canada. Lord Carnarvon's Confederation Act of 1867, which had given separate legislatures and executives to the Provinces, had by no means completely defined the relations of these legislatures and their Lieutenant-Governors to the Parliament and Governor-General of the Dominion. Two views were being contended for. The one was that, excepting in such cases as were specially provided for, a general principle ought to be recognized which would tend to make the Government at Ottawa paramount, and the Governments of the Provinces subordinate. The other was that of federalism through and through, in executive as well as legislative concerns, whenever the contrary had not been expressly said by the Imperial Parliament. The Provincial Governments naturally pressed this latter view very strongly. The Supreme Court of Canada, however, which had been established under the Confederation Act, and was originally intended by all parties to be the practically final Court of Appeal for Canada, took the other view. Great unrest was the result, followed by a series of appeals to the Privy Council, which it was discovered still had the power to give special leave for them, was commenced. I happened to be engaged in a number of these cases, and had to give such assistance as I could to the various Prime Minsters of the Provinces who came over to argue in person. Lord Watson made the business of laying down the new law that was necessary his own. He completely altered the tendency of the decisions of the Supreme Court, and established in the first place the sovereignty (subject to the power to interfere of the Imperial Parliament alone) of the legislatures of Ontario, Quebec and the other Provinces. . . . In a series of masterly judgments he expounded and established the real constitution of Canada.[66]

"The *real* constitution of Canada"! Haldane believed that there was such a thing, and he never made any bones about the fact that it was not the one that was written down in the *Constitution Act, 1867.*

> The Constitutions of our colonies are really in the main unwritten. The Acts which constitute them are but the skeletons which the practice of governors, ministers, parliament, and judges have to endow with flesh and blood before

[66]Haldane, *Lord Watson* (1899) 11 Jurid. Rev. 278, 280.

> the dry bones can live. The process of endowment may be gradual. The status of the living model is not attained at once. A set of constitutional and legal precedents has to be established in each case, and this takes time. Changes of view may and do occur; and this is because, be the Acts of the Imperial Parliament calling our Colonial Constitutions into life never so elaborate and precise, the true substance is unwritten.[67]

Of course, the notion of an unwritten constitution is a familiar one in British law and the very first words of the *Constitution Act, 1867* say that Canada is to have a constitution similar in principle to that in Britain. But the most fundamental tenet of Britain's unwritten constitution is that there is and can be only *one* Crown, *one* sovereign. To use the idea of Britain's unwritten constitution as a way to import into Canada a doctrine that would be anathema in Britain is hardly fair. More important, Britain's unwritten constitution really *is* unwritten and Canada's is *not*; Canada's constitution is embodied in a written document, a written document which Haldane minimized in much the same way and for much the same reason that he minimized the actual events of his life. He had a vision of Canada's constitution and he read the *Constitution Act, 1867* as if it conformed to that vision.

B. Irish Home Rule

There were two sources for Haldane's vision, two "first principles" which led him to see the *Constitution Act, 1867* as if it divided sovereignty up the way it divided up the power to govern. As is noted above, the first of these "first principles" was Imperialism. Haldane saw a strong national focus in Canada as a threat to Imperial loyalty and he was a devoted Imperialist. But British Imperialism was not the only "first principle" by whose light Haldane read the real constitution of Canada. Imperialism required a reduction in the status of the federal government. Haldane's other first principle required an inflation in the status of the provinces. This first principle was Irish Home Rule.

Haldane was very deeply involved in the struggle over Ireland. In the first place, he was politically associated with the movement. In 1885, he contested his first Parliamentary election, standing as a Liberal, and won what had up until then been considered a "safe" Conservative seat, East Lothian. The riding to the west, Midlothian, was won by Gladstone, who, at seventy-seven, had come out of retirement to lead the Liberal Party on a one-issue platform of Home Rule for Ireland.

The Liberals won the election of 1885, but the Home Rule Bill brought in by Gladstone in 1886 split the party. Lord Hartington took the Whigs

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[67]*Supra*, note 59, 98-9.

out on the right, and at the very last minute the Radical or left wing controlled by Chamberlain voted with the Conservatives and defeated the new government. That vote and the period surrounding it are among the most bitter chapters in British political history, and in the election that followed the Liberals were not only swept from power, they were broken as a political force.

The party was a shambles, so badly split over Ireland that it never really recovered. In the years before 1886, the Liberals appeared to be building a new political philosophy, a philosophy which Haldane and his associates hoped would sustain the momentum the party had been gathering ever since the *Reform Act* had broadened the electorate in 1832. The Liberals formed several more governments after 1886, but the party never recaptured its promise, and finally the Labour Party absorbed most of its working class constituency.

Haldane kept his seat in the election of 1886, as he was to do right through until he went to the Lords as Chancellor, but many of his friends, including his old mentor Sir Horace Davey, did not. A new "Unionist" government was formed, a coalition of Conservatives and Radicals with only one policy: the denial of Home Rule for Ireland. When that government "proclaimed" the Land League, declaring the Irish Nationalist Political Party to be an illegal organization, Haldane was nearly driven to turn his back on his "old Mistress, the Law".

He does not say a word about this in his *Autobiography*, but Haldane almost joined the Land League after it was made illegal, and he spoke at one of its rallies, even though doing so jeopardized his next step forward at the Bar.

> August 20, 1887
> My Dearest Mother,
>
> The league has been proclaimed as you will have seen. This, coupled with the refusal to keep the Land Bill in a form which can protect the Irish tenant, appears to me to be grossly unjust.
>
> I have therefore offered the Irish Leaders to join the League as an emphatic protest against its proclamation as a Criminal Conspiracy, and have agreed to go over to Dublin on Tuesday night to the Great Nationalist Meeting in the Rotunda with Dillon. I am sure I am right in this step.
>
> August 23, 1887
> My Dearest Mother,
>
> I will try to give you an account of a most eventful day. I arrived here with Jacob Bright (John's brother) and Mr. Cobb M.P. this morning. We were called on by the Lord Mayor and lunched with him at the Mansion House. The Lord Mayor then drove us in his Stuts carriage to Kilmainham prison

> where we went to see Moroney, who is there for refusing to pay an unjust rent although a rich man, unless his poor cotenants got abatements. We found even the Kilmainham officials in political sympathy with us. We then drove home through the Phoenix Park, and dined with the Lord Mayor—John Dillon—Tiliam O'Brien and some others of the Nationalist leaders. How different from the dinner party at the Castle where Arthur Balfour was at the very moment. After this we went to the great meeting in the Rotunda. There was the chief meeting, at which 4,000 were present and three overflow meetings — about 12,000 people there in all. I spoke at the main meeting and at one of the overflows. I was determined at all hazards to appeal in the very strongest language I could for moderation — not in resolve — but in action and language. I condemned the proclamation of the League of course in the strongest terms, but I carried out my purpose and was thoroughly well received. ...
>
> I am very glad I came here. I know I did right, though I know also that this night's work and the circular I enclose will probably cost me my silk gown. Still things come straight in the long run, and one cannot consider consequences at such a time. ...

Haldane was not the sort of man to do even improper things, let alone illegal ones. He built up a great deal of emotional energy over Ireland and was forced to swallow it. His autobiography contains no hint of this Irish passion, but strong feelings do not always dissolve; sometimes they are displaced. Haldane poured his feelings about Irish Home Rule into the struggle over Canada's constitution. He saw the provinces in Canada struggling to be free of the Canadian Parliament in the same way as Ireland had struggled to be free of the British Parliament, and he saw his work on the Privy Council as instrumental in that battle. He never said this in so many words. Indeed, at one point in his *Autobiography* he said exactly the opposite: he said it was a serious mistake to confuse Canada and Ireland.

> I wrote to the *Times* in criticism of Chamberlain in 1886. The latter had proposed, somewhat rashly, to offer to Ireland a Constitution resembling that of a Canadian Province. I had an easy task in demonstrating that such a Constitution could not satisfy Irish aspirations. The powers that alone fell within it under the terms of the act of 1867 which established the Constitution of Canada were limited and specific powers which a Provincial legislature could not seek to go beyond without infringing the principle of *ultra vires*. There was little in the proposal which could appeal to the sense that was at the root of the Irish demand, the sense of nationality. I think that my letter helped to prevent the idea from being persisted in, for it was known that I was familiar with the interpretation which had been put, by a series of judicial decisions of the Privy Coucil, on the Imperial Statute of 1867 which had set up the Provinces.[68]

There is something very odd about Haldane's account of this letter. Throughout his career, Haldane's name was associated with an *expanded* view of provincial powers. Yet he says that in his letter to the *Times* he argued that those powers were only "limited and specific". The fact is that

[68]*Autobiography*, 94-5.

Haldane idealized his letter to the *Times*; indeed, he turned it completely around. His letter does attack the parallel between Ireland and Canada suggested by Chamberlain, but the argument in the letter is exactly the opposite of the one Haldane says he used. Instead of arguing that the powers of the Canadian provinces were too "limited and specific" to satisfy the Irish Nationalists' demands for complete Home Rule, Haldane argued that the powers of the provinces were too "general" to satisfy conservative Englishmen who were willing to grant Ireland only very limited Home Rule.[69]

The letter Haldane wrote to the *Times* was a technical, legalistic snipe at Chamberlain. The letter he says he wrote, and no doubt wished he had written, was a clear, impassioned defense of Irish nationalism. The two letters are so different that they point to emotional confusion. Haldane said Ireland and Canada did not resemble each other. Deep down, he thought they did. The best evidence for this can be found in *Memories*, a short, typewritten autobiography which Haldane sent to his mother in 1917.[70]

In *Memories* the story of the *Quebec Appeal* is just as magical as it is in the formal *Autobiography* which Haldane wrote ten years later. Haldane receives the same unexpected summons, he makes the same difficult but successful argument, and when the argument is done he suffers the same rejection by his clients, cut short by the same ultimate triumph when the 150 guinea brief arrives. Finally, there is this conclusion:

> Before long I had a very large business as a Junior in the constitutional cases from Canada in the Privy Council. Ontario gave me its general retainer, and I appeared for the Prime Minister, Sir Oliver Mowat, throughout his struggles with Sir John MacDonald, the Prime Minister of Canada, for the right of the Province to pass its own legislation.[71]

For a Briton of Haldane's generation, and most especially for one with Haldane's experience, "the struggle of a Province for the right to pass its own legislation" could mean only one thing. Emotionally, that phrase is tied to the struggle for Irish Home Rule. Haldane's use of it to describe the situation in Canada indicates that he thought of the provinces, particularly Ontario, whose "champion" he was, as if they were struggling for freedom.

Imperialism and Home Rule are hard to reconcile as first principles, but Haldane believed in both, and they fit together very nicely in Haldane's

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[69]Actually, the letter to *The Times* was written 25 January 1887, not, as Haldane says, in 1886. The full text is reproduced in *Appendix, infra.*

[70]Haldane Papers, M.S. 5920.

[71]*Ibid.*, 29.

thinking. Writing of his political life shortly after the Gladstone defeat, Haldane notes:

> I was opposed to the rigid bonds of Imperial Federation and Imperial Preference. I believed that if we only gave the free rein to the Colonies they would rally to the Empire .... We were strong Home Rulers because we held that it was only by giving Ireland freedom to govern herself that we could hope to satisfy her. But we felt not less the necessity of studying how the sense of liberty might be made to reach Canada, Australasia, and even India.[72]

On the one side, Haldane saw the struggle of a province for the right to pass its own legislation; on the other, he saw the British Empire and the need to avoid obstructions to the natural flow of colonial energy home to the Mother Country. Between them there was no room for a strong national focus, and that is what Haldane took out of the *Constitution Act, 1867.*

IV. Haldane's Influence ou Canadian Constitutional Law

To appreciate fully his influence on Canadian constitutional law, it is important at the outset to note that Haldane misread the *Constitution Act, 1867* as regards sovereignty, not the division of powers. As far as the actual powers in sections 91 and 92 are concerned, Haldane's judgments are generally quite sensible, not only in terms of the *Act* but in terms of political reality. Thus, for instance, in his first Canadian constitutional judgment, *Re The Marriage Law of Canada,*[73] Haldane held that despite its power to legislate in regard to "Marriage and Divorce", the federal government could not enact the following statute:

> Every ceremony or form of marriage heretofore or hereafter performed by any person authorised to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, nothwithstanding any differences in the religious faith of the persons so married and without regard to the religion of the person performing the ceremony.[74]

In 1911, two Catholics, or a Catholic and a non-Catholic, still had to be married by a priest in Quebec and Haldane said the province had the right to retain that rule. In technical terms, he decided that the provincial power to make laws in regard to "the Solemnization of Marriage" went to validity, not just to "the formalities by which the contract is to be authenticated".

> [T]heir Lordships have arrived at the conclusion that the jurisdiction of the Dominion Parliament does not, on the true construction of ss. 91 and 92, cover the whole field of validity. They consider that the provision in s. 92 conferring on the provincial Legislature the exclusive power to make laws relating to the

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[72]*Autobiography*, 93-4.
[73][1912] A.C. 880, 11 E.L.R. 255, (1912) 7 D.L.R. 629 (P.C.).
[74]*Ibid.*, 884.

> solemnization of marriage in the province operates by way of exception to the powers conferred as regards marriage by s. 91, and enables the provincial Legislature to enact conditions as to solemnization which may affect the validity of the contract.[75]

Technically, there is some problem with this judgment because the federal statute, though worded in terms of validity, was obviously directed at solemnization. Haldane could thus have made the narrower holding that the federal government was not empowered to regulate solemnization under the guise of regulating validity. He did not take that tack because, as he says:

> In the course of the argument it became apparent that the real controversy between the parties was as to whether all questions relating to the validity of the contract of marriage, including the conditions of that validity, were within the exclusive jurisdiction conferred on the Dominion Parliament by s. 91.[76]

Instead of restricting himself, as he would have in his later judgments, to the narrowest possible question, Haldane reached out to decide "the real controversy between the parties". He took it upon himself to interpret the words "Solemnization of Marriage", and he gave them a broad reading.

The real force of Haldane's judgment, however, is not in the way he interpreted the words "Solemnization of Marriage"; it is in the fact that he felt called upon to interpret those words at all. Haldane was determining the validity of a *federal* statute, but he wound up interpreting a *provincial* power. This is critical. Haldane saw the provincial powers as carving exceptions out of the general federal power to legislate for the Peace, Order and Good Government of Canada. He says this excplicitly many times, not only in *Re The Marriage Law of Canada*, but in *Toronto Electric Commissioners* v. *Snider*,[77] where he gives what is undoubtedly the clearest statement of how he thinks the *Constitution Act, 1867* should be read.

> The Dominion Parliament has, under the initial words of s. 91, a general power to make laws for Canada. But these laws are not to relate to the classes of subjects assigned to the Provinces by s. 92, unless their enactment falls under the heads specifically assigned to the Dominion Parliament by the enumeration in s. 91. When there is a question as to which legislative authority has the power to pass an Act, the first question must therefore be whether the subject falls within s. 92. Even if it does, the further question must be answered, whether it falls also under an enumerated head in s. 91. If so, the Dominion has the paramount power of legislating in relation to it.[78]

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[75] *Ibid.*, 887.
[76] *Ibid.*, 886.
[77] *Supra*, note 3.
[78] *Supra*, note 3, 406.

Haldane read the section 92 powers as having been carved out of the general federal power and the section 91 powers as having been carved out of those in section 92. The problem with reading the *Act* this way is that it turns Peace, Order and Good Government into a power on the level of the others. Peace, Order and Good Government is not a power on a level with either those in section 92 or those in section 91. It is in conjunction with Peace, Order and Good Government, and with this power alone, that the Queen is linked to the legislative authority of the governments in Canada.

The power to legislate for the Peace, Order and Good Government of Canada *is* sovereignty. That is what one would say the British Parliament had: the power to legislate for the Peace, Order and Good Government of Britain, and if one were talking of the British Parliament, no assignment of powers, however extensive, to a subsidiary legislative body would be said to be an exception to its sovereignty.

The powers in section 92 are too extensive to be read as "exceptions" to Peace, Order and Good Government. If one reads the section 92 powers that way, as having been carved out of Peace, Order and Good Government, there is hardly anything left *in* Peace, Order and Good Government. The list of powers in section 91, instead of being illustrative, as it is expressly said to be, winds up being virtually exhaustive, and, of course, this is precisely what happened. Haldane's reading of the *Constitution Act, 1867* gave the provinces sixteen powers and the federal government twenty-nine other powers. Sovereignty was lost.

In a sense, the problem lies in the *Constitution Act, 1867* itself. There is some inherent inconsistency in the *Act*'s attempt to confer sovereignty on the federal government, while at the same time conferring most of the power on the provinces. That most of the power was conferred on the provinces is not disputable. Property and Civil Rights within the province is so broad that it can be, and indeed, has been read to cover nearly everything worth regulating. In the *Board of Commerce Case*,[79] Haldane held that the phrase covered clothing (and by implication, it covers all other personal property as well); in *Toronto Electric Commissioners*,[80] he held that it covered jobs; it obviously covers all real property. What else do most statutes deal with?

Even if "Property and Civil Rights" had not been read quite so broadly, the provinces would still have been given most of the real power to govern under "matters of a merely local and private nature". This power *sounds* small because of the word "merely", but in actual fact, much, if not most

[79]*Supra*, note 1.
[80]*Supra*, note 3.

of the business of government involves the regulation of matters of a local and private nature. This is particularly true in a country like Canada, where nearly all the population is concentrated in a few centres. The listed powers in section 91 have become more important as the world has shrunk, and, of course, since they cover the more "glamorous" areas of government, they have come to *seem* even more important than they are. But the real bread and butter of government is still mostly local and private.

Haldane was able to undercut the sovereignty of the federal government without misreading the powers in sections 91 and 92. This is important. Haldane's impact on Canadian constitutional law would not have been nearly as great if all he had done was to read the provincial powers broadly and the federal powers narrowly. Haldane read the two lists of powers more or less as they were written. In *Re The Marriage Law of Canada*, his first Canadian constitutional judgment, he read a provincial power broadly. But in his second Canadian constitutional judgment, *Royal Bank* v. *The King*,[81] Haldane read "Property and Civil Rights" narrowly, holding that a bank account in Alberta was not necessarily property within the province.

Alberta had guaranteed certain railroad bonds and, when the proposed railway had fallen through, a newly elected provincial government had passed legislation purporting to convert into general revenue the $6,000,000 raised under the bonds. These funds were credited to a bank account in the province. Haldane held that this was *ultra vires* and once again, he did not take the easy route in doing so. He did not rest his judgment on the federal power over banking; the fact that the money was in a bank played no part at all in his reasoning. Instead, he said the English bondholders had a right to their money back when the original railway scheme was cancelled, a right that arose in England, not Alberta. Presumably, if the money had all been raised in Alberta, the result would have been different.

Royal Bank shows a narrow reading of a provincial power. *The Marriage Reference* shows a broad reading of a provincial power. One way to reconcile the two cases is in terms of good political and moral sense. Both judgments were right on the merits. Quebec has long since passed the legislation the federal government sought to impose upon it in 1911. Haldane gave the province the right to change its own mind in its own time on a question which is clearly one where provincial interests are predominant. The same good sense is evident in *Royal Bank*. By ruling as he did, Haldane refused to allow an irresponsible provincial government to break a contract and coerce a loan on new terms. Even if you put aside the obvious moral point, his judgment makes good political sense. English bankers would not have been either too concerned with or too sophisticated about the finer

[81][1913] A.C. 283, (1913) 9 D.L.R. 337 (P.C.).

points of Canadian constitutional theory. It was Canada's credit abroad which would have suffered had Haldane not ruled as he did, and no province has the right to hurt the whole country.

But an explanation of Haldane's judgments in terms of their moral and political results is not only untenable, it points in exactly the wrong direction. Haldane did not go looking for the right result and then read the division of powers accordingly. He was right on the merits in the *Marriage Reference* and *Royal Bank*, but when the two lists of powers gave the wrong result, Haldane allowed them to do so. Thus in *Paquet* v. *Corp. of Pilots for the Harbour of Quebec*,[82] Haldane held that the federal government had control of the pilots who guided the ships into the harbour at Quebec City.

> Whether the words "trade and commerce", if these alone had been enumerated subjects, would have been sufficient to exclude the Provincial Legislature from dealing with pilotage, it is not necessary to consider, because, in their Lordships' opinion, the introduction into s. 91 of the words "navigation and shipping" puts the matter beyond question.[83]

This judgment does not make good sense because neither navigation nor shipping was really at stake in *Paquet*. The issue was how the pilots, all of whom would have been local men, were paid through their guild. This is obviously a local matter and it ought to have been left to local control.

Haldane did not look at the cases which came before him in terms of which level of government *ought* to have jurisdiction. He did exactly the opposite. He avoided the question of which level of government ought to have power as if it were the plague. This is the most striking thing about his judgments, and it has had the greatest impact on the law.

Haldane always insisted that there was *no* reason or principle underlying the division of powers.

> The language of these sections and of the various heads which they contain cannot be construed as having been intended to embody the exact disjunction of a perfect logical scheme. . . .
>
> The structure of ss. 91 and 92, and the degree to which the connotations of the expressions used overlaps, render it, in their Lordships' opinion, unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of these expressions. . . . It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them may in a different aspect and or a different purpose fall within another. . . . [I]t may well be impossible to give abstract answers

[82][1920] A.C. 1029, (1920) 89 L.J.P.C. 241.
[83]*Ibid.*, 1031.

> to general questions as to the meaning of the words, or to lay down any interpretation based on their literal scope apart from their context.[84]

The notion that there is no general or guiding principle behind the division of powers recurs like a refrain in Haldane's judgments. Thus, in *Great West Saddlery Co.* v. *The King*, Haldane reflected back on *John Deere* and said:

> It was held that laws which had been passed by the Legislature of [British Columbia], and which sought to compel a Dominion company to obtain *a certain kind* of Provincial license or to be registered *in the way* brought before the Judicial Committee ... were *ultra vires*.[85]

What this means is that the division of powers is so particular that certain *kinds* of provincial licenses and certain *ways* of being registered could be required of a federal company and Haldane was so insistent on this theme of the particularity of the division of powers, that in *Attorney General of British Columbia* v. *Attorney General of Canada (1924)*, after finding that a provincial statute which excluded Orientals from certain employment was *ultra vires*, he added, *obiter*:

> [I]t may be possible so to redraft it as to ... avoid the risk of conflict with s. 91, sub-s. 25. ... The question whether there has been success in the latter respect can only be answered when the terms of any fresh statute are known.[86]

In other words, it is impossible to make *any* general predictions based on the division of powers. Perhaps the province can redraft the legislation in a way that is *intra vires*, perhaps it cannot. Since no general principles can be laid down, every case must be taken on its own facts. In *Great West Saddlery*, Haldane commented on the problems this creates for judges:

> It is obvious that the question of construction may sometimes prove difficult. The only principle that can be laid down ... is that legislation the validity of which has to be tested must be scrutinized in its entirety in order to determine its true character.[87]

Haldane always treated the lists of powers in sections 91 and 92 as if they had been collected more or less at random, as if they were just so many phrases to be read out of context. This treatment was virtually required by the two-Crowns approach. For that approach to be plausible, the two lists of powers must be seen as roughly parallel, and if they are read for their sense, the two lists are most definitely not parallel. The list in section 91 is expressly said to be illustrative; that in section 92 is exhaustive. The list in

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[84] *John Deere Plow Co.* v. *Wharton* [1915] A.C. 330, 338-9, (1914) 18 D.L.R. 353, (1914) 7 W.W.R. 706 (P.C.).

[85] *Supra*, note 4.

[86] [1924] A.C. 203, 212, [1923] 4 D.L.R. 698, [1923] 3 W.W.R. 945 (P.C.).

[87] *Supra*, note 4, 117.

section 92 for the most part contains broad, general powers; that in section 91 for the most part contains narrow, specific powers. As a consequence, the two lists do not even *look* like each other. If you leave out subsection 29, which is obviously different from the others, the average number of words in each subsection of section 91 is a little over six. By contrast, no single subsection of section 92 has that few words and, if you leave out subsection 10, which has one hundred words on its own, the average number of words in each subsection in section 92 is nearly seventeen.

The only thing the lists of powers in sections 91 and 92 have in common is that they are both lists of powers and, with one remarkable exception, it was as lists of disembodied powers, rather than as a concerted division of powers, that Haldane always treated them. The one exception occurs not in a Canadian case, but in a case from Australia, *Attorney-General of Australia* v. *Colonial Sugar Refining Co.*, in which Haldane said:

> [A]s regards Canada ... what was in the minds of those who agreed on the resolutions was a general Government charged with matters of common interest, and new and merely local Governments for the Provinces. ... By the 91st section a general power was given to the new Parliament of Canada to make laws for the peace, order and good government of Canada without restriction as to specific subjects, and excepting only the subjects specifically assigned to the Provincial Legislatures by s. 92. There followed an enumeration of subjects which were to be dealt with by the Dominion Parliament, but this enumeration was not to restrict the generality of the power conferred on it.[88]

Haldane never talked this way in his Canadian cases. He always treated the powers in section 91 as if they stood alone, rather than as examples of the power to legislate for Peace, Order and Good Government, and he never talked of the provinces as either "new" or "merely local" governments. On the contrary, in many of his judgments Haldane harks back to the powers the provinces enjoyed prior to Confederation in order to interpret the powers given to them in section 92.

Haldane's statement in *Attorney-General of Australia* v. *Colonial Sugar Refining* stands alone as implying that there is some coherent logic or meaning in the division of powers. In every one of his Canadian constitutional cases, Haldane treated section 91 and section 92 as though they were disembodied lists; he read powers with and against each other indiscriminately as if every power were the same as every other power; he interpreted the *Constitution Act, 1867* as if each power stood alone and was merely a set of words; he firmly and repeatedly denied that there was any reason or principle underlying the division of powers.

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[88][1914] A.C. 237, 253, (1914) L.J.P.C. 154 (P.C.).

The two-Crowns approach, with the technique it requires of treating sections 91 and 92 as disembodied lists of powers, has had a tremendous influence on Canadian constitutional law. In the first place, it has given a totally technical cast to the subject so that issues of substance are always converted into linguistic problems. More important, perhaps, it has generated a unique theory of government.

The easiest way to examine this Canadian theory of government is to consider the recent Supreme Court of Canada decision upholding the power of the Anti-Inflation Board.[89] In essence the Court held that the federal government had the power to legislate about inflation because there was an emergency. Canada's constitution is supposed to be like Britain's in principle, but no one would ever say that the British Parliament had to wait until there was an emergency to legislate about inflation or anything else. Britain's Parliament is thought of as inherently omnipotent. In British constitutional theory, the Queen in Parliament can do anything, and is assumed to have a power, unless that power has been delegated.

In Canada the reverse is true. Far from being thought of as inherently omnipotent, Canadian government is treated as inherently limited. This is true for both levels of government; there is some vague talk about the federal government having a residual general power under Peace, Order and Good Government, but as the *Anti-Inflation Reference* shows, this power is very limited. Canadian constitutional litigation always boils down to whether some particular challenged action by one or the other level of government can be squeezed into a listed power. The energy Canadian courts invest in this process reveals that Canadian lawyers believe that neither the federal government nor the provincial governments can do anything unless it is listed in the *Constitution Act, 1867.*

This Canadian way of thinking about government is quite distinctive. It comes from the two-Crowns approach, not from having a written constitution or a federal, as opposed to a unitary, state. The United States has both a written constitution and two levels of government, but its idea of government is much closer to the British notion than to the Canadian. In America, government is not thought of as inherently or rightfully omnipotent the way it is in Britain; instead, government is thought of as having a natural tendency to become omnipotent. The American constitution is seen as a brake on that tendency, an irreducible list of things that government cannot do. Thanks to Haldane, the Canadian constitution is taken to be a list of the things that governments can do.

[89] *Re Anti-Inflation Act* [1976] 2 S.C.R. 373, (1976) 68 D.L.R. (3d) 452, (1976) 9 N.R. 541.

Canadian constitutional law has a special slant. In Britain, constitutional law is preoccupied with "status" and in America it is preoccupied with "rights". Those two notions are very different, but they have this much in common: they are both moral notions. The dominant, indeed very nearly the exclusive, theme of Canadian constitutional law has been determining whether a government was acting "intra" or "ultra" vires, and vires is *not* a moral notion. Vires is always treated in Canadian constitutional law as a technical matter rather than a moral one, a question about the language of the *Constitution Act, 1867*, rather than a question about which level of government ought to handle a particular matter.

This is Haldane's legacy. He was a morally pretentious man and he read Canada's constitution in terms of two of the most morally charged notions there ever were — British Imperialism and Irish Home Rule. It is ironic that he, more than anyone else, should be responsible for giving Canada a constitutional law which is singularly free of moral charge.

Appendix

Letter to *The Times*, 25 January 1887

MR. CHAMBERLAIN AND THE CONSTITUTION OF CANADA

TO THE EDITOR OF THE TIMES

Sir,—In his speech on Saturday at Hawick Mr. Chamberlain is reported to have used the following words:–

"I may refer to a speech which I made in the House of Commons on the second reading of the Home Rule Bill, when I pointed to the case of our own colony of Canada as presenting many striking analogies with the case of Ireland. I said then that the relations between the provinces of Canada and the Dominion Parliament offered most suggestive precedents for dealing with all the difficulties of this most difficult case. Every one of the conditions laid down by Lord Hartington would be met by the adoption or by the adaptation of the internal Constitution of Canada. The Constitution of Canada preserves to the Dominion Parliament which represents what the Imperial Parliament would represent in our case, its supreme authority. The subjects committed to the local Legislatures are strictly defined, are delegated and not surrendered, are subject in certain cases to revision and control. There is an analogy in the Constitutions of Canada for the separate treatment of provinces which are distinct in race and which differ in relation [sic]. And, lastly, the administration of justice in Canada is under the control of the Dominion authority, and is absolutely independent and free from local pressure and from local interference. It is quite true that when I made this suggestion in the House of Commons it was received with jeers and ridicule by persons who probably knew as little of the Constitution of Canada as they evidently knew of the provisions of the Home Rule Bill."

I was one, Sir, of a number of members of the House of Commons who received Mr. Chamberlain's statement upon the occasion to which he refers, not with jeers and ridicule, but with silent wonder and amazement. As one of the standing counsel for the province of Canada which has of late years been engaged in the most frequent conflicts with the Dominion on the bloodless battlefield of the Privy Council offices in Downing Street, I had come to imagine that the provisions of the British North America Act, 1867 as interpreted over and over again by the Judicial Committee, could not now be misunderstood at least in their most general features. This illusion was dispelled by Mr. Chamberlain's speech.

The conditions laid down, according to him, by Lord Hartington, as fundamental, were (1) "That the Imperial Parliament should continue to represent the whole, and not only a part, of the United Kingdom." (2) "That the powers given to any new local authority should be delegated and not

surrendered." (3) "That the subjects to be treated by the local authority should be clearly defined, and should be subject to revision and control." And (4) "That the administration of justice should remain with an authority responsible to the Imperial Parliament." The Canadian Constitution is inconsistent with and flagrantly violates every one of these conditions excepting the first. The powers conferred on the Provincial Legislature belong to them, not as "delegated", but, to quote the judgment of Lord Selborne in the great constitutional case of "L'Union St. Jacques v. Belisle" (L.J.6, P.C., 31), "assigned to the exclusive power and competency of the Provincial Legislature", the Dominion Parliament not having the smallest power of interference, either by legislation or otherwise. The words of section 92 of the Act are that "in each province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects" enumerated. These quotations dispose of the second and third of the "conditions" in question, excepting, in the case of the latter, the reference to clear definition of the subjects of provincial legislation. Here, again, Mr. Chamberlain is wrong. The legislation on these matters is not only not subject to "revision and control", but the matters themselves are defined in the most general terms. It is true that 16 topics are enumerated in section 92, but these include such matters as (13) "property and civil rights in the province;" (14) "the administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure on civil matters in those courts;" and (16) "generally all matters of a merely local or private nature in the province," a definition which extends, among other things, to direct taxation. The administration of justice, referred to in the fourth of Lord Hartington's conditions, belongs, as appears above, exclusively to the provinces, excepting insofar as the criminal law and procedure in criminal matters are reserved by section 91, subsection 27, to the Dominion Parliament, and the appointment of the Judges to the Governor-General — important, but by no means, exhaustive, exceptions. Each province has an independent Executive. "The Privy Council," to quote the judgment of the Quebec Court of Queen's Bench in "Regina v. Homer," "recognizes the powers of the local Legislatures to create new courts for the execution of the criminal law, and also the power to nominate magistrates to sit in such courts," and "the general principle that the executive power is derived from the legislative power, unless there be some restraining enactment." The result is that the only one of the statements by Mr. Chamberlain above quoted that is not wholly inaccurate is the comparatively unimportant suggestion of an analogy for the separate treatment of the provinces. It is important that this should be understood. Recent events appear to me to show that, whatever policy is adopted with regard to Ireland, those who frame it will need a courage

of their opinions greater than that possessed either by the present Government or by Mr. Chamberlain. To take hesitating steps in the direction of trusting the people of Ireland with Home Rule, is almost as dangerous as to take hesitating steps in the direction of removing all control of their own concerns out of their hands.

I am, Sir, yours obediently,

Lincoln's-inn, Jan. 24. R.B. Haldane