Correspondence with and Opinion of Hon. R. L. Kellock, Q.C.* on Certain Questions of Interpretation

1. The Editor to Hon. R. L. Kellock

August 4, 1966.

Are you of opinion that the provisions of the B.N.A. Acts in the following categories:

(i) setting out the powers of the Parliament of Canada;

(ii) setting out the powers of the Government of Canada with respect to the appointment of judges, and those of the Senate and Commons with respect to their removal;

(iii) setting out the powers of the Government of Canada with respect to the appointment, instruction, and removal of Lieutenant-Governors;

(iv) setting out the powers of the Government of Canada with respect to the reservation of provincial bills and disallowance of provincial acts;

(v) setting out the powers of the Parliament of Canada with respect to the implementation of treaties,

are in each case provisions such that a law amending them would be a law "affecting any provision of the Constitution of Canada relating to (a) the powers of the legislature of a province to make laws,... (etc.)" and so falling within s. 2 of the Formula, being the unanimity rule?

2. Hon. R. L. Kellock to the Editor

August 19, 1966.

Before making any reply I think I would like to have some idea of what the argument is pro and con. Any opinion I might express might well be very inadequate without this.

3. The Editor to Hon. R. L. Kellock

October 4, 1966.

Without repeating the question as I put it formally in my letter of August 4th last, I should first say that the question whether amendments to decrease *federal* powers (executive, legislative, or judicial) fall under the unanimity rule — how they compare in this regard to amendments decreasing *provincial powers* — depends upon

(i) whether a provision setting out a federal power (executive, legislative, or judicial) is itself in each case a

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> "...2... provision of the Constitution of Canada relating to (a) the powers of the legislature of a province to make laws, (b) the rights or privileges granted or secured by the Constitution of Canada to the legislature or the government of a province..."

as a similar provision setting forth a *provincial* power would clearly be;

(ii) whether such a provision would be "affected" if it were amended, especially amended so as to reduce its scope.

I do not think that anyone will doubt that (ii) must be answered affirmatively; indeed, unless a provision is *"affected"* by being *amended,* there seems scarcely any point in the protection given by section 2 of the Formula to provincial powers.

In favour of an affirmative answer to (i), it can be argued that, as each federal power necessarily forms the outer limit of provincial power, legislative or other, therefore provisions setting out federal powers must of necessity relate directly to "the powers of the legislature of a province to make laws" etc.

This, in effect, is to say that any provision which *sets out* the power of either necessarily *relates to* the power of the other. In some cases, indeed, e.g. s. 92(10) B.N.A. Act, the same provision not only *relates to* both but also in terms *sets out* both; which serves to demonstrate the correlative character of the federal and provincial powers.

The *contrary argument* — answering question (i) negatively — would appear to be based on the premise that the words "any provision of the Constitution of Canada relating to ... (a) ... the powers of the legislature of a province..." etc. appear in the Formula by way of *contrast* to what one might call "any provision of the Constitution of Canada relating to the powers of the Parliament of Canada to make laws"; so that in principle a provision of the B.N.A. Act falls into one, but not both, of these categories. At least, those provisions which in terms deal only with the powers of one, and only by corollary with the other, would be said to relate to the one, and not to the other. On this basis it would be said that the provisions for example of section 91 are provision[s] "relating to the powers of the Parliament of Canada to make laws", but not provisions "relating to the powers of the legislature of a province to make laws". Likewise it would be said on this basis that the provisions, say, of s. 92 (with the possible exception of 92 (10)), would be said to relate to the powers of the legislature[s] of the provinces, but not to relate to the powers of the Parliament of Canada.

Perhaps the kernel of this position would be this: that a provision *relates to* those only whom it *mentions;* or, that it *relates to* nobody unless he is *primarily dealt with.* In sum, an extremely restrictive construction is given to the term "relating to". None but the most immediate of relations is any relation at all.

This position appears to me to be that of Me. Pigeon in the enclosed article; though I do not, I must confess, understand the point he is trying to make by use of *Mann* v. *The Queen*, which decision he in any case interprets rather more broadly perhaps than the actual holding.

The fallacy in this position appears to me to lie in the following: that while this theory would, in certain cases, produce consistent results (unfavourable to federal authority) expected by its proponents, namely

> (1) curtailment of *federal* power *could* be secured *without unanimity* by amending the wording of those provisions setting out federal powers; no unanimity would be needed since, on this theory, provisions setting out federal powers relate only to the "powers of Parliament" and not to the "powers of the provinces" and do not therefore fall within s. 2 of the *Formula*;
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> (2) curtailment of *provincial* powers could *not* be secured *without* unanimity whenever the amendment changed the words of any provision of setting out provincial powers, since such provisions would fall within s. 2 of the *Formula*;

yet nevertheless, on the same theory the following paradoxical results would seem to follow:

> (3) *increases* of *federal* power could be secured *even without* unanimity by amendments carefully confined to the wording of *provisions now setting out* federal powers, or amendments introducing *new provisions* conferring federal powers; for on this theory these provisions do not "relate to the powers of the legislature of a province", and so do not fall within s. 2 of the *Formula*;
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> (4) *increases* of *provincial* power could *not* be secured *without* unanimity unless the amendment in question carefully avoided touching the wording of the provisions now setting out provincial powers; for to touch those provisions in any way would be to affect them; and this, seeing that the provisions relate to the powers of the legislature of a province, etc., requires unanimity by s. 2 of the *Formula*. Hence, touching s. 92 in any way is to affect it, and this requires unanimity.

There is of course a response by which the hopelessly paradoxical consequences above can be avoided; but it is a response which seems to be suicidal to the theory. This response would consist in urging that, *whilst admitting* that the *provisions* themselves setting out federal powers do not "relate to" provincial powers — scarcely indeed an admission, for it is the basis of the whole theory — yet nevertheless AMENDMENTS to provisions setting out federal powers *do* affect provisions "relating to the powers of the legislature of a province" etc. In short, this response insists that s. 91 does not affect s. 92, but that *amendments to* s. 91 *do* affect s. 92.

That provisions setting forth provincial powers are provisions "relating to the powers of the provinces" no one need dispute. But

it is difficult to see how these provisions are any the more "affected" by *amendments* to provisions setting forth federal authority, than they are by such provisions themselves as they stood before they were changed. It is hard to see why s. 91 does *not*, but a change in s. 91 *does*, affect provisions relating to provincial powers.

But more than this; the response seems suicidal, for once admitting that *amendments* to provisions setting forth federal powers *do affect* "provisions relating to the powers of the legislature...", (by reason, apparently, of their legal impact thereon), there is really not much room for any distinction based on the desirability or *favourability* of the impact: the provision relating to the provincial power has, happily or not, been "affected", on their own showing. In sum, to admit that an *amendment* to s. 91 "affects" s. 92 is to admit this whatever be the *direction* of the amendment. Insistence that s. 91 *itself* does not "affect" or relate to s. 92 becomes quite irrelevant.

Me. Pigeon also appears to suggest that increases in provincial powers do not affect provincial powers because the powers affected are not yet provincial powers, until after the amendment, by which they are increased. He does not, in short, interpret "affecting provisions relating to the powers of the legislature" of a province, as meaning, "extent of powers", but rather "powers in being".

So much for close reasoning. The substance of the dispute is between those who interpret s. 2 of the Formula as a one-way street for reducing federal powers by two-thirds while requiring unanimity to reduce provincial powers; and those who insist that, so far as unanimity extends, it is a two-way street.

If there be any constitutional presumption against a primacy for provincial over federal authority, such a presumption would tend against the former construction.

If my recollection of Justice Laskin's article in 11 McGill L.J. be correct (I do not have it to hand), he tended against the idea of a one-way street. But it occurs to me that his analysis may be somewhat clouded by a tendency to read the Formula as if it spoke of "amendment affecting the powers of a province" rather than "amendment affecting a provision relating to the powers of a province". It therefore appeared to him, as it had to me perhaps (see Para. 3 of my enclosed Memorandum of September 8, 1964) that the critical issue was whether "affect provincial powers" meant "adversely affect provincial powers". Clearly, if unanimity depended on whether or not the provincial *power* were affected, that question would be decisive; for if "affect provincial powers" meant "adversely affect provincial powers", no increase of provincial powers, however much

at federal expense, could then be said to "affect provincial powers", and could never need unanimity. But if we follow the text more closely and observe that the Formula is concerned not with affecting *powers*, but rather with affecting *provisions relating to powers*, it no longer seems to make much sense to speak of adversely affecting *provisions*, however much sense it makes to speak about adversely affecting *powers*.

To section 132, the same considerations above apply, of course; but others perhaps also. For in some sense the power of treaty implementation is already vested in Parliament, and the long-sought modernization of this power would really involve merely the substitution of "Her Majesty" for "British Empire". It could thus be plausibly argued that the amendment would involve only a change in the reference to the treaty-making authority who brings into function the already-vested power of Parliament. On this view, amendment of the kind indicated to s. 132 would probably require a two-thirds majority under s. 5 of the Formula, though it seems arguable that s. 6 applies, in which case if the exception 6 (a) applies, the power is again subjected, apparently, by s. 5, to two-thirds — otherwise it is unilateral. Here again, nice questions are involved in whether you are really changing the functions of the Queen under 6 (a); or, if you are, whether this change, favourable (at least not unfavourable) to royal authority, cannot be said to be perfectly consistent with the vesting of Executive Government and authority in the Queen by the B.N.A. Act, so as not really to bring 6 (a) into play. If s. 6 applies, but not 6(a), then of course Parliament could amend s. 132 unilaterally under the *Formula*. This is startling, but even more startling are other consequences of accepting the above argument that the amendment of s. 132 involves no more than a recasting of the internal federal treaty-making authority which has power to bring s. 132 into operation (and involves no interference with provincial authority, implementation being a now-vested federal power.) To accept this would be to accept that Parliament can now make this change unilateraly under the B.N.A. (No. 2) Act, 1949.

I have tried to expose my thoughts above with as little obscurity as possible, and hope that you will find them readable. In order that you would not utterly lose track by distended sentences, I have often abbreviated the various parts of s. 2 of the *Formula*, even when I used quotation marks; e.g. instead of "the powers of the legislature of a province to make laws, (b) the rights and privileges granted or secured to the legislature or the government of a province" I have put "provincial powers", and so on, where it would not mislead.

I trust that this will serve as some stimulus; and am most anxious for the privilege of including you amongst our contributors.

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December 1, 1966.

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Editor,
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Dear Mr. Scott,

You have asked my opinion as to whether "the provisions of the B.N.A. Acts of the following categories of classes -

(i) those provisions which set out the powers of the Parliament of Canada;

(ii) those provisions which set out the powers of the Government of Canada with respect to the appointment and removal of judges, and those of the Senate and Commons of Canada with respect to their removal;

(iii) those provisions which set out the powers of the Government of Canada with respect to the appointment, instruction and removal of Lieutenant-Governors;

(iv) those provisions which set out the powers of the Government of Canada with respect to the reservation of provincial bills and disallowance of provincial acts;

(v) those provisions which set out the powers of the Parliament of Canada with respect to the implementation of treaties,

are provisions such that an Act of Parliament to amend the text of the B.N.A. Acts as regards those provisions would be, in the words of section 2 of the Fulton-Favreau formula,

"a law ... affecting any provision of the Constitution of Canada relating to

(a) the powers of the legislature of a province to make laws;

(b) the rights and privileges granted or secured by the Constitution of Canada to the legislature or the government of a province."

With respect to paragraph (i) of your question, I assume you are primarily concerned with the legislative powers of Parliament such as are set forth in section 91 of the B.N.A. Act, rather than with such sections as 18 and 105 which deal with matters quite foreign in every way to the provincial sphere.

Dealing then with paragraph (i), the principle which has been applied to the construction of sections 91 and 92 of the B.N.A. Acts

is that, while a law which is "in relation to" a particular subject matter, for example, one given by section 91 exclusively to Parliament, may "affect" the ambit of an exclusive legislative power given to a provincial legislature by section 92, it will be operative notwithstanding any such effect. A familiar illustration is afforded by the effect of the enactment of the Insolvency Acts of 1875 upon the operation of the Assignments and Preferences Acts of Ontario, and again by their repeal in 1880, and once more by the later enactment of the Bankruptcy Act.

In my opinion the word "affected" in section 2 of the formula is used in the sense of "affecting the operation of", the language employed in the *proviso* to section 94A of the B.N.A. Act, 14-15 Geo. VI, ch. 32, namely,

> "... no law made by the Parliament of Canada *in relation to* old age pension shall *affect the operation of* any law, present or future, of a provincial legislature *in relation to* old age pensions."

In my view the draftsman of section 2 of the formula is to be taken as having had in mind the same idea as had the draftsman and the Imperial Parliament in the framing of section 94A.

Whether, therefore, federal legislation under the formula, if enacted, be by way of express amendment of some head of section 92 or, while being directed solely to the amendment of some head of section 91, has an indirect effect upon provincial jurisdiction, such legislation would, in my opinion, be within section 2 and require the unanimous consent of the provinces, whether its effect be to increase or decrease the federal power.

With respect to paragraph (ii), it may well be that there is sufficient interrelation between section 92, head 14 and sections 96 to 100 that an abandonment of federal jurisdiction under the latter would enhance provincial jurisdiction. To the extent that this is so, I would be of opinion that section 2 would apply.

With respect to paragraphs (iii) and (iv), my opinion is that these are matters exclusively within the federal sphere and which, moreover, by virtue of section 7 of the formula, are continued as matters from which the provinces are expressly excluded. Accordingly they fall within section 5 rather than section 2.

With regard to paragraph (v), my view is that a federal amendment of section 132 of the B.N.A. Act, which would vest in Parliament the power to withdraw from the provinces matters at present within provincial jurisdiction by entering into a treaty with another country, would clearly come within section 2 of the formula.

Yours truly,

R. L. KELLOCK

III. — From The Provinces