

## PROVINCIAL RIGHTS—THE PEOPLE'S WRONGS

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WE appear to be on the edge of another battle over provincial rights. The Premier of Ontario has challenged the Dominion on control of "social services". The Premier of Quebec has challenged the federal authorities in the same field, and also in regard to radio. The Premier of Ontario has, in addition, again and again, asked for the calling of a Dominion-Provincial Conference. What does it all mean? Are we to have another fiasco like the Conference that met in 1941 to consider the report of the Sirois Commission on relations between the Dominion and the Provinces?

In my "green and salad days", to use an expression beloved of Sir Wilfrid Laurier, I waxed enthusiastic over the victories scored by Sir Oliver Mowatt in his battles with Sir John Macdonald in regard to the rights of the Provinces. As the years have passed, with their repeated visits by provincial premiers to Ottawa for "better terms"—and later under the impact of the depression—this enthusiasm has waned. I have begun to suspect that the victories of provincial governments have contributed, not so much to establishing the rights of the Provinces, as to inflicting wrongs on the people who live in those Provinces.

A romantic clash of personalities marked the early stages of this battle over provincial rights. In the late thirties of the last century—during the first year he practised as a barrister—John A. Macdonald received into his office as a young student, Oliver Mowatt. Perhaps "John A." taught the young "Oliver" too well. At any rate, forty years later they locked horns repeatedly in battles royal in the courts—even to the Privy Council—and the student invariably worsted the teacher. To keep the record straight, the Liberal Premier of Ontario issued his first challenge to the Dominion while a Liberal Prime Minister, Hon. Alexander Mackenzie, was still in office at Ottawa; but the greater part of Sir Oliver's victories were scored over Sir John Macdonald.

It was a long series of engagements, and the story is told in detail in Biggar's *Life of Sir Oliver*. Some of the issues over which the two gladiators fought were of minor importance. The outstanding battle was, of course, that over the boundaries of Ontario, in which the Ontario Premier added 144,000 square

miles to the area of that Province. But, for our present purpose, the significant contest was over the control of insurance. In order, it was the third on which issue was joined. But it started only two years after the long struggle began; and its latest repercussion came as late as 1932 in a decision by the Privy Council. Both protagonists had, by then, for three decades been gathered to the Valhalla of Canadian history; but the echoes of their spears and shields were ringing still.

The battle over insurance was joined in 1876, some three years after Sir Oliver Mowatt became Premier of Ontario. In that year the Ontario Legislature passed an act which set up "statutory conditions" for insurance policies. The act was challenged by the Dominion; but five years later the Privy Council held that the provincial statute was valid. In the fifty years which followed, the Dominion authorities sought again and again to assert their jurisdiction; but on each occasion the highest judicial authorities in the Empire widened the scope of provincial control. It was not till after the decision of Lord Dunedin in 1932 that the Dominion Government accepted the inevitable, and the whole federal insurance law was remodelled in the light of this decision.

Now, let us look at what was accomplished in this long litigation. What is the present situation? Lord Dunedin had been very emphatic in his language. In fact, he asserted that as long previously as 1916 it had been "conclusively and finally settled"—in a decision growing out of an Alberta case—"that regulations as to the carrying on of insurance business were a Provincial and not a Dominion matter." What this dictum of Lord Dunedin means, I am not going to try to guess. I am told that insurance lawyers are not quite certain themselves. What I am interested in is the present set of facts as to the supervision of insurance companies by government agencies.

There are now ten governments in Canada which exercise control over insurance. Ten governments may require reports from all insurance companies doing business within their confines. Fortunately it is not so bad as in the United States, where the big companies have to make out forty-eight separate reports. On paper it had been a glorious victory for the Provinces. But in actual fact the picture is quite otherwise.

In fraternal insurance the Provinces do license a considerable part of the business—approximately a third. In fire insurance they license about one-eighth of the business; and in



casualty insurance about one-sixteenth. But in life insurance provincial licenses control less than two per cent of the business done. Why all this bother about such a small piece of mutton? It doesn't seem worth while. Doubtless the Provinces have obtained a modicum of revenue from their licenses. Doubtless the provincial officials have added to their sense of importance. It can hardly have benefitted the policy-holders. It has necessarily increased the expenses of the companies; and certainly the policy-holders have had to pay for it. This victory for provincial rights has had to be paid for by the people who live in the Provinces—and who are also citizens of the Dominion.

Of course, this confusion has all arisen over the interpretation of those troublesome words in our constitution—"property and civil rights". Those words in Lord Dunedin's language include "the carrying on of insurance business". By virtue of them, mainly though perhaps not entirely, the Provinces have the right to license insurance companies and to set the conditions on which policies may be issued. But the Dominion—by virtue of its powers over "bankruptcy and insolvency"—still controls the vital matter of the solvency of the companies, and there lies the root of the matter. That is why, essentially, the Dominion Department of Insurance still exercises supervision over the bulk of insurance business carried on in Canada.

I am not trying to argue a case at law. The law is, undoubtedly, at present, just as it has been laid down by the Privy Council. Doubtless, then, the Provinces are only exercising their legal rights. But it is not always necessary to insist on legal rights. A better way was, in fact, shown by the action of the federal authorities quite early in Sir Oliver Mowatt's series of battles with Sir John Macdonald. The Dominion unquestionably has jurisdiction in matters of insolvency. Yet in 1880 there was no Dominion bankruptcy legislation. Sir Oliver, finding that some legislation of the kind was needed in his Province, had the Legislature pass the Creditors' Relief Act.

Hon. James Macdonald was then Minister of Justice in Sir John's Cabinet. He wrote in a memorandum for the Governor-General: "Taking this Act section by section, much may be said in favour of the view that its provisions are within the legislative authority of the provincial legislature; but, taking its effect as a whole, much can be said in support of the contention that it trenches upon the subject of bankruptcy and insolvency, over which the Parliament of Canada has exclusive jurisdiction."

In view of the fact that the Dominion bankruptcy legislation had been repealed, and that the Ontario Act was declared by itself to be subject to Dominion insolvency legislation, the Minister did not recommend its disallowance, and a similar Act remained in the Ontario Revised Statutes as late as 1937.

That was a statesmanlike course of procedure. It might well have been taken to heart by the advisers of the provincial governments.

This story of insurance has been told here because it is the most persistent example of the assertion of their rights by the Provinces. The recent depression, however, brought to light a much greater weakness in the distribution of powers between the Provinces and the Dominion. It would have been reasonable to suppose that the provincial leaders had learned a lesson since then. Yet at the present time Premier Drew and Premier Duplessis are both insisting on right to control the "social services". In this case the Provincial Premiers seem to have the constitution on their side. But Premier Duplessis is going far beyond this; he is challenging the right of the Dominion to control radio—directly in the face of a decision of the Privy Council that jurisdiction in this field belongs exclusively to the Dominion.

Moreover, right in the middle of the depression and again within a few years of it, we had further evidence that the Provinces were determined to stand on their rights, with little regard to the welfare of the people who are citizens of the Dominion as well as of the Provinces. We had first the opposition to the efforts of Mr. Bennett to solve a number of problems growing out of the depression. Now I am not going to say that there was not federal as well as provincial politics behind the campaign against the Bennett legislation. Nor am I going to argue that Mr. Bennett's remedies were adequate. The fact remains that at the root of the opposition was the old question of provincial rights.

Again the old spirit of provincial assertiveness came to the front in connection with the Sirois Commission. That body had grappled with the problem posed by the depression as it bore on the financial relations within the Confederation. The proposals of the Commission were not radical; they were ostentatiously a compromise. But did the Provinces accept them? They were not willing even to consider them. When a Dominion-Provincial Conference was called to deal with the problem,



three Provinces—Ontario, Alberta and British Columbia—interposed an absolute refusal to discuss the Commission report; and only three—Prince Edward Island, Manitoba and Saskatchewan—expressed approval of the “principle” underlying its recommendations.

This report was an attempt to place on a sound basis the provincial finances which had absolutely broken down during the depression. This break-down was caused by a Dominion-wide wave of unemployment. Now the relief of unemployment is surely one of the “social services”. Yet the Premiers of both Ontario and Quebec still resent “invasion” of this field by the Dominion. It is true that the Dominion has since been given power to set up an unemployment insurance plan. But what assurance is there that the Canadian plan will be any more effective in the face of a major depression than was the similar fund in England? The present assertion of provincial control over “social services” has to do with family allowances. But what chance would the smaller Provinces have of financing such a plan?

In the light of this attitude it is necessary to recall what happened when the Provinces were faced with the job of financing the “social services” during the depression. In less than five years—up to the end of 1934—the Dominion Government had spent no less than \$154,000,000 in this field which is forthwith, under the “exclusive jurisdiction” of the Provinces. Moreover, within approximately the same period, the Dominion had made loans of \$74,000,000 to the four westernmost Provinces for the same purpose—including, of course, farm relief, which surely is also one of the “social services”. And two of the Provinces which refused to consider the Sirois Report were among these four.

I do not wish to overburden this article with figures; but perhaps a few more will not be amiss. Shortly before the outbreak of the war these loans to the four westernmost Provinces had risen to \$163,000,000. Saskatchewan was the largest borrower—over \$79,000,000—which was perhaps why Premier Patterson of that Province was ready to discuss the Commission report. It might be supposed that the two big Provinces would have been able to finance their own “social services”. But not even they were equal to the burden. In the years 1930-34, the Dominion spent in Quebec under relief legislation no less than \$26,000,000; while in Ontario the Dominion outlay was \$45,000,000.

It is clear, then, that the division of powers under the B.N.A. Act has broken down. This is emphasized in the report of the Sirois Commission. The obvious break-down has occurred in finance; and it might be argued that a solution could be found in a redistribution of the taxing powers. One cogent reason, however, makes such a solution impracticable. The distribution of business in the Dominion is such that, under any practicable division of the taxing powers, the smaller Provinces would still be unable to meet their present responsibilities under the constitution. Broader taxing powers for the Provinces would result simply in increasing the strength of Ontario and Quebec; the other Provinces would still be left with inadequate revenues.

But the present distribution of powers has broken down in other fields as well as in finance. This was made abundantly evident during the sittings of the Prices Committee in 1934. Canadian business is organized on national lines, and adequate controls must be exercised by the central government. For this purpose the federal authorities need broader powers—powers which are now lodged in the Provinces. Wider federal powers are needed also in the labour field and for the purposes of social security. In the last field this has already been partially recognized by the amendment of the constitution to give the Dominion authority over unemployment insurance.

I do not propose to discuss the proposals of the Sirois Commission here; but I wish to call attention to an incident which occurred at the Dominion-Provincial Conference called to consider them. Premier Bracken of Manitoba—now Dominion leader of the Progressive-Conservative party—had made an appeal to Premier Hepburn to emulate George Brown's co-operation with Sir John Macdonald at the time of Confederation, presumably under the impression that there was some sort of identity between the clear Grits of the 1860's and the Liberal party of to-day. This challenge was later taken up by Hon. D. B. McQueston, then Provincial Treasurer for Ontario. Mr. McQueston replied in this fashion:

I consider it rather an unfortunate choice of argument to ask that the Premier of Ontario emulate Brown. I hold that in taking the attitude he has, Hon. Mr. Hepburn has been living up to the traditions of Brown, and has defended and upheld all that Brown stood for, and is safeguarding *the rights and responsibilities vested in the separate provinces by confederation*. I prefer to support and adopt the material structure which was created by Brown, rather than attempt to interpret its spirit, as Mr. Bracken



*has purported to do. If Mr. Bracken's argument were to prevail, history would be degraded, our ideals shattered, and the remains of our public men cast into the ossuary of time.*

A negative to change could hardly be stronger. (The italics are, of course, mine.) If we are to accept the attitude of Mr. McQuesten, Canada must for all time be hampered by the strait jacket of 1867. Few people would be found to argue that the Fathers of Confederation would have held that the B.N.A. Act was as the laws of the Medes and Persians—"which altereth not". They were dealing with an existing situation, and their honour remaineth forever. But they would have been surprised if the lusty young infant they set out on its way would not some day outgrow its swaddling clothes.

It is unfortunate that such a declaration as that of Mr. McQuesten should come from a representative of the banner Province of Ontario. Fortunately not all the spokesmen for the Provinces assumed the same "stand-pat" attitude. I do not know whether Mr. Drew would take so extreme a stand. I trust not. But his recent utterances are not encouraging. He has not only re-asserted the "exclusive jurisdiction" of the Province over "social services"; he has also tried to draw a red herring over the trail by accusing the Dominion of seeking to interfere with provincial control of education. Now, no one wants to interfere with provincial control of education; that is one of the provincial rights we all want to preserve. But already it is evident that, however adequate the finances of Ontario and Quebec may be to provide for the expansion of educational facilities, other Provinces are already handicapped in comparison with their needs. Moreover, in the course of the last twenty years the Dominion has made grants to all the Provinces to help to provide technical education. Education is a field in which policy must continue to be controlled by the Provinces; but even here the assistance of Dominion finance will be needed more and more.

The Canadian constitution needs to be brought up to date. And Canada should have the power to amend her own constitution. But there is no need to tear up the foundations of Confederation. Language, religion and education are subjects on which there are sharp differences of opinion within the Dominion. The provisions of the constitution on these subjects should provide indubitably for the maintenance of existing rights, and might well be put under such protective controls that they

could not be altered unless the people were overwhelmingly in favour of change. But the rest of the constitution should be subject to revision without difficulty, so that our legislative institutions may keep pace with the growth and change of our Canadian economy.

It is obvious that if the necessary revision is to be brought about, there is need for much greater willingness to compromise on the part of the provincial governments. Provincial Premiers and their advisers need to remember that the assertion of their authority and importance is not necessarily for the good of the citizens of the Province. If Canada is to remain tied down to the "Brown" constitution, as Mr. McQuesten suggested, the power of the Provinces to serve their citizens would be reduced to narrow lines. For it is to be remembered that, under the existing constitution, the Dominion enjoys unlimited powers of taxation. Moreover, the logic of events will force the Dominion to use these powers in an increasing degree. The Provinces might have what Mr. Bracken, when Premier of Manitoba, called "theoretical autonomy"; but it would not be of much practical use to them. If the Provinces as well as the Dominion used their taxing powers to the full, the burden on the citizens—of both Dominion and Provinces—would be unbearable. The Premiers and officials of the Provinces might preserve their autonomy and dignity; but their citizens would not "rise up and call them blessed".

It is necessary that, if we are to solve this problem, the Provincial Premiers and their advisers should keep in mind that Provincial Rights may well be—and already have been—the People's Wrongs.