THE PROBLEM OF THE LEMIEUX ACT

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NOT from the opposition of employers or employees, not from mal-administration or neglect, nor from decision of the Government or people of the injustice or futility of its provisions, did the Lemieux Act receive its quietus,—but from a constitutional defect. The Judicial Committee of the Privy Council has declared it *ultra vires*. We turn to consider, therefore, the social and economic significance of the Lemieux Act, with the problems of constitutional law involved in its demise and possible resurrection.

I.

The activity of the Dominion Government in Labour matters began with the Conciliation Act of 1900. Its most fruitful feature was the establishment of a Labour Department, "to disseminate accurate statistical and other information relating to the conditions of labour." The Department was to promote the establishment of permanent conciliation machinery wherever possible. Whenever disputes arose in industries which had no such machinery, it became the duty of the Minister to enquire into the causes of the dispute, to offer his services as mediator or arbitrator, and generally to try in every way to promote an amicable settlement. It was realized that strikes and lockouts were natural incidents in the competitive determination of wages; but it was also obvious from English experience that adequate conciliation reduced their number. This new Department of Labour, with Mr. W. L. MacKenzie King as Deputy Minister, began to enquire seriously into methods of avoiding industrial disputes; very soon a dispute on the Canadian Pacific Railway drew attention to the special importance of continuous service on the railroads. The Railway Labour Disputes Act of 1903 provided that where a difference was threatened which was likely to occasion a strike or lockout, and thereby endanger the lives of passengers or persons employed, or interrupt the regular and safe transportation of mails, passengers, or freight, power should be given to appoint a Committee of Conciliation, and—failing settlement—a Board of Arbitration. The former was limited

to friendly offices; the latter had power to compel the attendance of witnesses and the production of documents, but the information obtained could not be made public. The award of the Arbitrators was to declare "what would be reasonable and proper to be done by both parties with a view to putting an end to the difference." Such award was to be published in *The Labour Gazette* and sent to the papers, but was to be in no sense binding. This Act was a considerable advance upon the earlier one; the Minister did not offer his services for voluntary acceptance, but intervened of right to voice the interest of the public, and the opinion of the public as to what constituted a fair settlement. This involved some formulation of standards of fairness and reasonableness in wages, but the final determination was still left to free competition, and the right to strike was unaffected. The Act worked well, because of the moderate attitude of the Railway Unions which realized that the holding up of the railway system of the country is justifiable only as a last resort, and applied for Boards as a matter of course.

Encouraged by the success of this measure, Mr. Mackenzie King looked for new worlds to conquer. A great coal strike in Lethbridge threatened the people of the prairie provinces with a winter of real hardship; the provincial government seemed powerless to interfere, so the Deputy Minister of Labour was sent to offer his services as mediator. On his return he reported: "Until brought face to face with the serious situation which the long continuance of the dispute had produced, the public does not seem to have come in for any consideration whatever....Legislation can be devised which, without encroaching upon the recognized rights of employers and employees, will at the same time protect the public." In accordance with this report, the Industrial Disputes Investigation Act of 1907 was drafted. This Act is a natural development from the earlier policy. Its machinery is similar to that under the Railway Labour Disputes Act, but simplified by the elimination of the preliminary Conciliation Committee. The Board of Arbitration consists of three members, one appointed by the employers, one by the employees, and the third appointed by these two; if there is a delay in appointing any one of the three, the Minister of Labour is to make the appointment. The Board has the powers of a court of record in civil cases, may enforce the attendance of witnesses, take evidence on oath, and call for the production of documents.

In two ways the Act is an advance from the earlier position. Firstly, the scope is widened to include all industries where uninterrupted continuance is of high national importance; these include transport communication, mines, and public utilities. The definition

of these industries does not seem quite to fall in line with the intention; the inclusion of all mining properties is strange, apparently justified by the frequent lawlessness of mining strikes, and the absence of any conciliation machinery; most public utilities, though of very great social importance, serve a very narrow area. For example, is it the business of the Dominion Government at Ottawa to guarantee the uninterrupted supply of water in Victoria? Secondly, and in this consists the originality of the Act, the right to strike or lockout is limited; a stoppage prior to the investigation and the award of the Board is made a criminal offence. This, however, does not mean that it is a compulsory arbitration Act, for the award when made is not binding, and has no sanction but public opinion. Further, if the parties do not accept the award, then a strike may take place. What the Act attempts to ensure is recognition of the interest of the public as a third party in industrial disputes, and to give the public a voice in the dispute before stoppage takes place. It leaves, however, the final settlement to the process of collective bargaining. A few years later, Mr. Mackenzie King applied the same technique to the Trust problem in the Combines Investigation Act,—investigation, publicity, and a minimum of interference with, free enterprise in industry. "Light is the sovereign antiseptic, and the best of all policemen."

Any Act for dealing with industrial disputes should be considered from two points of view, its success in reducing the number and intensity of strikes, and its effect for better or worse on the standard of living and the conditions of work of the many thousands of men working under agreements resulting from the Act. Neither question can be satisfactorily answered, for each involves an estimate of what might have been if the Act had not been passed. These questions do, however, point to the two great difficulties of compulsory arbitration and in a less degree of the Lemieux Act. Any prohibition of strikes and lockouts, whether absolute or only delay pending investigation, must prove impossible of enforcement. You cannot make men work against their will; this is a piece of common sense realized by the Courts of Equity when they refused to grant specific performance of personal service contracts. The success of the Lemieux Act cannot depend on the fines which it authorizes for illegal strikes and lockouts.

In 1918, Mr. Benjamin Squires wrote a report on the working of the Lemieux Act for the United States Department of Labour. His chief interest lay in the penal clauses, and he was disappointed with their working. He found that to date there had been 222 strikes and lockouts within the scope of the Act, of which 204 were

illegal. On the other hand, 173 disputes had been referred under the Act and settled. It is impossible to say whether all of these would have resulted in strikes. More discouraging were his data showing the increasing violation of the Act as time passed. There had been only nine petty prosecutions under it. Anyone who had just read this report would not shed many tears over the Privy Council decision. One notices that the railways provide the greatest percentage of disputes settled, the mines the greatest percentage of illegal strikes. In the one case there was consent, in the other case there was not. Many people seem to think the Government ought to proceed in the same way against thousands of strikers as against a single pickpocket, and those who see the impossibility of doing so usually fail to see that it would not be equitable. We leave wage rates to be determined by bargaining between employers and employees, and the latter by organization have made the bargaining more nearly equal. The last resort, however, is the strike. Can society equitably take the edge off the worker's weapon? Surely only if society is prepared consciously to formulate standards of living for large classes of labour. And suppose, having formulated a wage rate, the workers are dissatisfied. We may take it, I think, that Canada is too individualistic to contemplate such socialistic measures. The framers of the Lemieux Act seem to skate successfully on very thin ice; the order delaying the strike may be taken as pointing to what is socially desirable, but the penal clauses have scarcely ever been invoked; similarly, the award only adds to one party the weight of public sympathy. This sympathy is, on the whole, conservative, so that the tendency of the Boards seems to have been towards mitigating the fall of wages in time of depression, and curbing their rise in time of prosperity. The popularity of the Act has accordingly waxed and waned with trade conditions.

Those who lay stress on the restrictive clauses, who examine their failure to prevent strikes, who look on this as a step towards compulsory arbitration, miss the real value of the Act. A more reasonable valuation is that of Sir George Ashworth:—"The pith of the Act lies in permitting the public to obtain full knowledge of the real cause of the dispute, and in causing suggestions to be made as impartially as possible for dealing with the existing difficulties... Everyone who has had any experience of strikes or lockouts knows how very often the main difficulty consists in bringing the parties together, or in examining the case of each party. Neither is there any express power of making recommendations nor of informing the public on the rights and wrongs of the dispute....Forwarding

the spirit and intention of conciliation is the most valuable part of the Canadian Act." Sir George recommended a similar Act without the penal clauses for England, and the Whitley Commission endorsed his recommendation. This valuation of the Act appears sound. It has not been a spectacular success in preventing strikes, but it has forwarded the cause of conciliation. One would regret to lose the machinery, which might even be widened with profit to cover all industries of Dominion extent. Certainly a Dominion Department of Labour must continue to exist; if the Constitution were being drawn up now, "Labour" would surely be one of the specified heads for Dominion legislation, as in Australia. This department must, as one of its activities, promote the formation of voluntary machinery as recommended by the Conference on Industrial Relations. But a new Act should give powers of investigation similar to the Lemieux Act, though the penal clauses might well be dropped, and the scope extended. The great distances in this country suggest that provincial measures would be more expeditious; but most important strikes would affect more than one province, and the Dominion can probably command men of greater ability and prestige to act as mediators. Though welcoming any developments for conciliation in the provinces, like the Council of Industry in Manitoba, one feels the necessity for Dominion activity in this field. The question remains, what can the Dominion government legally do?

II.

The operation of any federal system is bound to involve settlement of many questions of legislative competence which must arise between the federal legislature and the legislatures of the component States or provinces. In federal States at the present time, legislative competence is determined by the terms of a written Constitution. This Constitution may either be in the nature of a written compact between States, embodying the terms of the federation: or it may be in the form of a statute enacted by the parliament having jurisdiction over these separate States or colonies. The first type of Constitution is that adopted by the United States of America. The second type is the form generally adopted by the Dominions in the British Commonwealth of Nations, such as Australia and Canada. This second type is actually the product of an agreement entered into by the component States, and given legal sanction by enactment of the Imperial Parliament. In Canada the terms of the agreement are embodied in the British North America Act of 1867 and amending Acts. These Acts and the

judicial interpretation thereof make it fairly clear at the present time which of the competing legislatures, federal or provincial, has legislative capacity in any given case. From time to time, however, we are still troubled by unsuccessful attempts by Dominion legislation to invade the field of the provincial legislatures. The Judicial Committee of the Privy Council, before which all important cases are heard, has been very keen to protect the legal rights of the provinces, so that it has often been accused of blind partisanship or of a perverse ignorance of Canadian affairs and conditions. In the recent decision on the constitutionality of the Lemieux Act the members of the Committee have again sustained provincial rights, so that many people who had believed the Act *intra vires* during the seventeen years of its existence have become very bitter against the Privy Council and the intricacies of their interpretation of the British North America Act. Amendment and simplification of the British North America Act are again suggested as a remedy. An old decision of the Judicial Committee would have led to the opposite result, if it had been strictly followed. It is, however, admittedly bad in its own results, although the principle it stands for is very valuable in some cases. The Privy Council distinguished it by its peculiar facts. While in the present case many tempting and interesting points are, as usual, left unsolved, the decision as a whole seems quite sound and in accord with the recent decisions of the Judicial Committee.

The problem came into prominence in June, 1923, owing to a dispute between the Toronto Electric Commissioners and a number of their employees. Representatives of the employees applied to the Minister of Labour for the appointment of a Board of Conciliation and Investigation under the Lemieux Act (I. D. I. Act, 1907). The Minister established a Board; and when the Electric Commissioners refused to select any one for the Board as their nominee, the Minister appointed one for them. The Commissioners at once objected to the appointment of the Board, and challenged its competence to deal with the case in hand. They maintained that, as a department of a municipality managing a public provincial utility, they were protected from Dominion interference and were subject only to provincial regulation. The Board refused to listen to these objections, and proceeded with the enquiry. The Electric Commissioners then started an action to have the Lemieux Act declared unconstitutional, and the appointment of the Board invalid. They sought an interim injunction to restrain the Board from going further. Mr. Justice Orde, before whom these proceedings were held, granted this injunction, and expressed the opinion that the Act was *ultra vires* of the Dominion Parliament.

The action came on before Mr. Justice Mowat, who disagreed with Mr. Justice Orde as to the constitutionality of the Act. By the Ontario Judicature Act he was required to refer the case to one of the Appellate Divisions, which he did. The Appellate Division decided that the Act was constitutional, Mr. Justice Hodgins dissenting. The matter was then taken before the Judicial Committee of the Privy Council, which advised his Majesty, on January 20th, 1925, that the Act was *ultra vires* of the Dominion Parliament.

By Section 91 of the British North America Act of 1867, the Dominion Parliament is authorized to make laws for the peace, order, and good government of Canada. The Section mentions 29 classes of subjects for Dominion legislation, which are suggestive of the content of the opening phrase, but must not be taken as any restriction on its generality. Two of these classes were suggested as being sufficient to sustain the power of the Dominion Parliament to pass the Lemieux Act, namely Trade and Commerce, and the Criminal Law. There is also the power to be found in the opening words of Section 91, "the peace, order and good government of Canada." By Section 92 of the B. N. A. Act, power is given to the legislatures of the various provinces to legislate for the provinces, and 16 classes of subjects are therein enumerated. The scheme of division is such, that if a thing falls within one of the classes of subjects in Section 92, it will not be competent for the Dominion Parliament to legislate in respect thereto, unless it falls also within one of the classes of subjects in Section 91. If, however, it does not fall at all within Section 92, it is subject to Dominion legislation under the general power conferred at the beginning of Section 91, or perhaps under one of the 29 enumerated subjects also. The difficulty is in dealing with a matter such as contained in the Lemieux Act, which is definitely within the scope of provincial legislation, and also appears to come within some of the classes of Section 91.

Lord Haldane, in delivering the opinion of their Lordships in the present case, said: "Whatever else may be the effect of this enactment, it is clear that it is one which could have been passed, so far as any province is concerned, by the provincial legislature under the powers conferred by Section 92 of the British North America Act.... It does not appear that there is anything in the Dominion Act which could not have been enacted by the legislature of Ontario, except for one provision. The field for the operation of the Act was made the whole of Canada". The Ontario legislature had, in 1914, passed an Act which contains provisions similar to those of the Lemieux Act.

Trade and Commerce, one of the suggested headings under which the power of the Dominion Parliament to pass the Lemieux Act might have been found, is too well known as merely an anaemic prop for other powers for any lawyer seriously to expect much help there. The Criminal Law was a possibility, if some obscure history of conspiracy could be cleared up. (It was urged that a strike is a conspiracy at Common Law.) The general power itself is not helpful, because in the *Board of Commerce* case (1922 A. C. 191) their Lordships had held that, while the Dominion had the powers to add to the list of crimes, "it is quite another thing, first, to attempt to interfere with a class of subject committed exclusively to the provincial legislatures, and then to justify this by enacting ancillary provisions designated as new phases of Dominion Criminal Law, which require a title to so interfere as the basis of their application."

As Lord Haldane says in the *Toronto Electric* case, "A more difficult question arises with reference to the initial words of Section 91, which enable the Parliament of Canada to make laws for the peace, order and good government of Canada in matters falling outside the provincial powers specifically conferred by Section 92." In *Russell v. the Queen*, and in the more recent *Board of Commerce* case, it is laid down that a matter ordinarily subject to provincial legislation may attain such great importance as to be a matter of Dominion-wide concern, and so would come under the general words of Section 91, overriding any enumerated classes of Section 92. Illustrations are, control over prices and sale of food stuffs in great national emergencies, such as famine, or during a great war when there is a risk of invasion. The earlier *Russell* case and a very recent case, the *Fort Francis Pulp Co.* case (1923 A. C., p. 695) recognize that this emergency may exist also in time of peace. The latter case deals with the peace following the Great War of 1914, but the principle of the *Russell* case and the *Board of Commerce* case is recognized as applying to emergencies in both peace and war. It was argued in the *Toronto Electric* case, the present one, that strikes and lockouts may easily become of national importance, especially in the case of coal mines and other public utilities, so that the Dominion Parliament, under the general words in Section 91, has power to pass an Act of the type under dispute. The Lemieux Act did not deal merely with these emergencies, but with all strikes and lockouts in the industries within its scope. In the present case their Lordships were unable to find any emergency existing either at the time of the passing of the Act or in the case in dispute, which could justify them in holding the Act *intra vires* of the Dominion Parliament.

It is not a surprising decision. The fundamental principle of the Common Law is merely to work out a decision for the case in hand, which shall be based on the traditional materials, achieve justice for the case in dispute, and will not be a harmful precedent for future cases. Their Lordships, moreover, will never anticipate anything which is not connected with the dispute before them, or attempt to prevent its coming about. The principle is recognized that in emergencies the Dominion may act, but their Lordships will wait until the emergency before expressing their opinion. To do otherwise would cause Viscount Haldane to remark, "Surely we cannot be so rash!"

Instead of amending the British North America Act so as to give the Dominion express powers of legislation on labour matters, as in Australia, some solutions of the problem under the present B. N. A. Act might be considered. One of the reasons urged for retaining the provisions of the Lemieux Act is that a strike which, at first, is only a matter of local concern, may in time become of Dominion-wide consequence, especially strikes of coal miners or of railway employees. So great can be the effect of such a strike that there will be an emergency creating grave national peril, unless the dispute can be settled by some form of arbitration or conciliation with, at least, semi-compulsory effect. In all probability, the most effective means of dealing with such a situation is a Dominion statute with the provisions of the Lemieux Act. The special power of the Dominion to legislate on similar matters in a great emergency is, as already noted, well recognized by the opinions of the Judicial Committee, but the existence of an emergency sufficient to justify the exercise of this power has been a rare thing. In this particular problem, to wait for the emergency to arise and then to hold a hurried session of Parliament to pass the requisite Act would be a cumbersome, expensive, and singularly inept solution. An alternative is some executive legislation, a type with which the Dominion became familiar during the Great War, i. e., by Order-in-Council. The delegation of legislative powers to an executive or administrative body is definitively recognized by the decisions of the Privy Council on Colonial Constitutions. It is therefore possible to empower the Dominion Executive to bring into effect, in cases of great national emergency, rules and regulations for the settling of strikes. These rules and regulations may be contained in the empowering Act or merely outlined therein, and may, if desirable, be the same as those of the defunct Lemieux Act.

Again, in the case of railways, steamship lines, and other public utilities, such as telephones and telegraphs, by 10 (a) and

10 (b) of Section 92 the Dominion Parliament is empowered to legislate, and would it not be part of a general Act relating to any one of these utilities to include rules for the settling of strikes and lockouts? It is well established that the Dominion Parliament, in passing laws for the regulation of the subjects of its jurisdiction, has power to make ancillary provisions for their more effective operation, even if these provisions by themselves might be considered a direct infringement of provincial rights. Thus cases, less than emergencies, may come under Dominion control, within a certain class of subjects.

It is also possible that the list of subjects given to the Dominion by 10 (a) and 10 (b) of Section 92 can be extended by exercise of the powers contained in 10 (c) of Section 92 and by declaring works which are of national importance to be "for the benefit of Canada." This question is soon to be before the Supreme Court as to whether the Dominion may declare certain industries, which are purely provincial in their scope, to be—in this aspect of strike regulation—for the benefit of Canada.

One of the most useful functions of an Investigation Act is the collection of statistics which will be the basis of information given to the public in such matters, telling the true state of affairs: the aim being to direct public opinion to an intelligent appreciation of the issues involved in each case. Surely if the Dominion has power to legislate in respect of those industries mentioned in the next preceding paragraph, it can enact provisions for the compulsory obtaining of evidence. Indeed, the Judicial Committee have suggested in the *Board of Commerce* case, that one of the functions contained in the nebulous phrase, Trade and Commerce, (No. 2. of Section 91), is the collection of statistics for the basis of future Dominion legislation, in those matters over which the Dominion has jurisdiction.

Coal mines already mentioned, and other purely provincial industries, may be of importance to provinces other than the one province in which they are situated, when a strike or lockout developes. If, as seems probable, the Dominion only has capacity to legislate in great emergencies, it is not improbable that provincial legislatures will display sufficient wisdom and initiative to pass Acts of the type of the Lemieux Act dealing with these cases. It is certainly within the legislative capacity of the provinces to pass such Acts; and uniform Acts, while difficult to draft, are becoming quite a regular feature of modern legislation.

It is not to be assumed that because a particular statute has been first hailed as perfect and then declared unconstitutional,

none of its most desirable provisions can be re-enacted in another form and yet still be *intra vires*. The ends aimed at may often be secured in another manner by careful scrutiny of the defective Act and the decisions against it, rather than by abuse of the Privy Council, or threats of abolishing appeals to it and of a complete revision of the B. N. A. Act.

On the whole, the scheme of division laid down in the B. N. A. Act, as interpreted by the Privy Council decisions, has worked very well. During the past two decades the student in constitutional law has looked to its unanimous and fairly clear opinions for instruction, rather than to the multiple confusion of the seven conflicting opinions of the Supreme Court of Canada; all due respect is, however, to be given to the most eminent lawyers who sit in the Supreme Court. In Manitoba legislative persistence has had a reward after three attempts to find a Stamp Act which would be constitutional. The legislative persistence of British Columbia is leading to the gradual disfranchisement and commercial boycotting of Oriental labourers. While these results may be of doubtful ethical quality, they offer a most suggestive parallel.

Constant amendment of the B. N. A. Act will be quite as productive of instability as the decisions of the Privy Council are alleged to be, and probably much less intelligent, since it will be done under the stress of political controversy. As a remedy, then, let us rather take the traditional flexible materials of our Common Law technique, and by patient and skilful drafting adapt them to the desired social and economic ends. A Constitution, even if embodied in a mere statute, should be a stable thing, and popular amendments will never be wholly wise or rational.