

ASPECTS OF CANADIAN FEDERALISM

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THE Supreme Court has recently reminded us that Canada is a federal country with a federal constitution. There are tasks which the Dominion government cannot undertake, even if those tasks are in the national interest and even if it can perform them better than the provinces. As Justice Kerwin puts it in his recent decision on the *Employment and Social Insurance Act*:

Even if the object arrived at by Part III (dealing with unemployment insurance) may be praiseworthy, and if the desired result might better be obtained by the Dominion than all or some of the provinces acting within their constitutional limitations might accomplish, the matter is not translated from the jurisdiction of the provincial Legislatures to that of Parliament.

It is more than a coincidence that Chief Justice Taft, giving a comparable decision in another federal country, said:

The good sought in unconstitutional legislation is an insidious feature, because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, and the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half. Out of a proper respect for the acts of a coordinate branch of the government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But in the act before us the presumption of validity cannot prevail, because the proof of the contrary is found in the very face of its provisions.¹

Certain issues, most of them old, are raised by such opinions. Are individuals, perhaps the most needy and insecure in our population, to be deprived of desirable government services because of a conflict over federal-provincial jurisdiction? Surely the answer must be "No". Social security ought not to depend upon the niceties of constitutional law. It would be neither wise nor tolerable to have a constitution which put up a permanent barrier against the best solutions of our social problems. A constitution

1. *Bailey v. Drexel Furniture Co.*, 259 U. S., 20.

should be a road, not a gate. But it should not be forgotten—as it is likely to be by those in whom the humanitarian temper is strong—that, wholly apart from constitutional reasons, federal agencies ought not to handle all of these tasks. A federal act, administered by federal officials, would not be a desirable approach to remedial action about some of our maladies, even when these are nation-wide in scope. Such a step might be a mistaken shortcut, bound to lead to defective achievement. And the fact that the Dominion has, while the provincial governments lack, the financial resources, is not decisive. It will, indeed, be argued later that financial superiority ought not to determine the allotment of government functions.

Possibly some of our impatience with the constitution is premature². Our constitution is certainly inflexible, and serious needs for change may at times be delayed or thwarted. But a written constitution with the judges as its guardians is necessary for a federal country, and Canada in the foreseeable future can be nothing else.

An essential feature of federalism is the division of powers between the federal government and the provinces (or states). The general aim behind this division has been to give the latter control

of all the subject-matter of law, of private rights of every kind, of local interests and of everything that directly concerns their people as communities—free choice with regard to all matters of local regulation and development...³

When at Quebec in 1864 the Fathers of Confederation were framing the Canadian constitution, some there were who wished a “legislative union” which would make the central government predominant, and there were some who wished to preserve provincial authority. In between stood the trimmers, who framed a scheme which struck a balance and enabled progress to be made. But the Quebec scheme had certainly a unitary bias, and two years later at London the federalists lost more ground.

When, therefore, in 1867 the Dominion began, it seemed that the federal government had the big jobs⁴. And the actual jobs done by government for many years were federal. The federal government helped to construct a transcontinental railway; it built and operated the Intercolonial, a line of 800 miles, and

2. The need of securing some *method* of amendment is, however, imperative.

3. Woodrow Wilson, *Constitutional Government in the United States*, p. 175

4. But even Sir John A. Macdonald, when explaining the strength of the federal government, said significantly that “the guarantees for local institutions and for local laws, which are insisted upon by so many in the provinces”, had been secured. *Debates on Confederation*, p. 33.

some hundreds of miles of canals. In a period when social legislation was insignificant in scope—and when what was done often fell to the municipalities—it might seem that the provincial Legislatures had become merely superior county councils. The financial statements indicate the situation most emphatically. During the whole period up to the close of the 19th century, the federal government was spending *per capita* more than 3-1/3 times as much on ordinary account as the provincial governments together⁵. The greatest source of provincial revenue (about 40%) was federal subsidies, with Crown lands next in importance. Provincial taxation hardly existed, although toward the end of the century succession duties and a few minor levies were imposed. For years Sir John kept most of the provincial governments dangling about his heels. For him Premier Norquay of Manitoba fought against Oliver Mowat at Rat Portage in 1881, and Premier Sullivan of Prince Edward Island and Premier Davie of British Columbia stayed away from the provincial conference of 1887. Quebec, which in our time has led in resisting federal interference, took orders from Ottawa until Mercier became premier, and so did New Brunswick until the rise of Blair. In Nova Scotia, indeed, the provincial government was unfriendly, and in Ontario “that little tyrant”, Oliver Mowat, was a relentless foe. Elsewhere Sir John was dominant until the late 1880's.

The provinces first began to make up ground through the pertinacious and successful appeals of Mowat to the Privy Council. But behind these lay factors more important than the will of an individual and the decisions of a court⁶. There was a genuine resurgence of feeling against the centralizing bias of the federal government which had, so many people thought, engendered discord in the provinces and impeded the material progress of the Dominion.

Evidence in support of this opinion is not hard to find. In Nova Scotia, as a protest against the policy of protection, secession was openly avowed by the government in 1886; in Manitoba,

5. In 1891 the figures were \$7.52 for the Dominion and \$2.21 for the provinces.

6. The importance of the decisions of the Privy Council in strengthening the hands of the provinces has been emphasized by many writers (See Scott, F. R., *The Development of Canadian Federalism, Proceedings of the Canadian Political Science Association*, III, pp. 231-47; Goldenberg, H. C., *Social and Economic Problems in Canadian Federalism, Canadian Bar Review*, 1934, p. 422 ff.; MacDonal, V. C., *Judicial Interpretation of the Canadian Constitution, University of Toronto Law Journal*, 1936, p. 260 ff.), and it would be presumptuous for a layman to deny this interpretation. But I do suggest that it should not be over-emphasized. The view of the Privy Council in most of the decisions coincided with that of a substantial body of public opinion in Canada. The leaders of the Liberal party—Blake and Mowat are examples—were reassured by the attitude of the Privy Council. Moreover, a number of the Canadian decisions, which the Privy Council upset, were divided, indicating a cleavage of judicial opinion about constitutional issues in Canada. The influence of the Privy Council upon the distribution of powers between the Dominion and the provinces was, indeed, contrary to the intentions of Sir John A. Macdonald, but not to important developments in Canada. The provincial conference of 1887 was in touch with Canadian opinion when it declared that “the preservation of provincial autonomy is essential to the future well-being of Canada”.

Premier Norquay, long a henchman of Sir John, had rebelled in 1887 because of federal disallowance of provincial measures; in Quebec, Mercier had gained power in the same year by appealing to racial and religious feeling; in Ontario, Mowat was the leader of those who demanded restrictions upon the federal and safeguards for the provincial authority. And in the late 1880's the Dominion was not prosperous; the hopes of Confederation had not been realized. Population in the decade 1881-91 was growing significantly only in the West. The National Policy seemed not to have brought successful industrialism, and its cost in sectional discord was heavy. Fear of the United States, dominant in men's minds in 1867, had subsided. Thus the movement for provincial rights had real vitality. More moderation in exercise of the federal authority—more realization of the federal character of Canada—seemed to be the wisest course.

But with the 20th century it came to be realized that the provincial governments had a vast potentiality of powers in their exclusive jurisdiction over property and civil rights, education, welfare institutions, local works and undertakings. Slowly at first, but with growing force, expenditure for welfare purposes and for provincial works grew, and because of expansion under these heads, provincial expenditure grew faster than did federal. This was the more remarkable because during these years federal expenditure rose at an unprecedented rate. The point to be emphasized is that the governmental duties which increased in relative importance belonged to the provinces, and there can be no doubt that if, in 1867, the Fathers of Confederation could have imagined the performance of these duties by *any* government, that government would have been provincial (or municipal). The duties were not of a sort which could have been assumed by the federal government.

Inevitably the provinces needed more revenue, and here again they found themselves in possession of potential sources which had hardly been tapped. They had the power of direct taxation, and this they used sparingly to levy corporation taxes and to extend the succession duties.

Then came the war, and the needs of the federal government became paramount. It entered—with apologies—upon direct taxation by enactment of an income tax, and the balance of fiscal superiority passed to it. After the peace its fiscal needs slowly eased, but those of the provinces did not. The trends of expenditure which had emerged before 1914 were continued. Provincial expenditure, particularly for social welfare purposes and for high-

ways, grew enormously. Despite the lift given to federal expenditure by the war and its aftermath of debt, provincial expenditure gained relatively and the provinces piled up a debt equal to half that of the federal government⁷. Some new sources of provincial revenue appeared and were utilized, notably the gasoline tax and taxes on automobiles; but the fiscal position of the provinces was precarious even before the depression. Their desperate position since then is well known.

It is beyond dispute that, for the foreseeable future, the provincial governments will have a plethora of duties and a paucity of revenues with which to finance them. The duties are the consequence of a shift in social philosophy, coupled with the new problems raised by our changing economic life; the lack of revenues goes back to the war which forced the federal government into direct taxation. How should this disequilibrium be remedied?

It has sometimes been suggested that the federal government should give over certain revenues to the provincial governments. The outright grant of larger unconditional subsidies ought not to be considered. As a fiscal device, such subsidies have a discreditable record in every country in which they have been tried, and the record in Canada is no exception. Nor is it possible to approve the suggestion that the federal government should withdraw from income taxation, leaving this field to the provinces. This tax can be administered much more efficiently on a national than on a provincial basis, and it is, besides, a source of revenue which no national government can afford to be without. Modern developments have also greatly enlarged the sphere in which national, rather than provincial or local, governments can administer many other taxes. The criterion of administrative efficiency by itself would require that more, rather than fewer, sources of revenue should be nationally handled. Federal-provincial cooperation in this field is, of course, a middle course which ought to be explored. But it would be a backward step, costly to taxpayers, to transfer important taxes into provincial hands.

What of the proposal that certain provincial functions be transferred to the federal government? The case for this step rests upon the vast economic changes which have taken place since 1867. "As a result of the increased facility of communication, the rise of our international status, and the general spread of what may be called our national consciousness, we have grown more united."⁸ The conclusion is drawn that the federal government

7. Federal ordinary expenditure *per capita* in 1929 was \$35.06; that of the provinces \$17.70.

8. Scott, F. R., *The Development of Canadian Federalism*, *op. cit.*, p. 247.

can perform wider functions, notably in the field of social legislation.

One can hardly question that the economic and commercial developments of the past half-century have had certain centripetal effects. There is more uniformity in the mode of life of individual Canadians from coast to coast. Communities have been drawn closer, and provincial boundaries, except where they coincide with a physical or racial barrier, have been blurred. But vital *regional* differences have not been eradicated, and some of them have been increased by economic developments. Manufacturing is as concentrated in Central Canada as ever it was; raising cereals for export has not become less important to Saskatchewan; the Maritimes are not yet assimilated in the economic life of Canada. Population is still spread unevenly over a vast area, here crowded into large cities and there dotted across the country-side. British Columbia has a density of population of 1.93 per square mile, Manitoba of 3.19, Quebec of 5.49; yet 47%, 36% and 35% respectively of their population is crowded into the three cities of Vancouver, Winnipeg and Montreal. Two provinces, Ontario and Quebec, contain 80% of the employees and the capital engaged in our manufacturing establishments. The striking diversity from province to province in the racial origins of our people is manifest. There are, of course, historical influences which reinforce our heterogeneity. The West, free from tradition and peopled by settlers who came to live in Canada, rather than in a province, are ready to pioneer in governmental experiments. The Maritimes, cherishing tradition, are suspicious of the rest of the Dominion. Ontario, aware of its wealth and convinced of its virtue, is jealous of the federal power. The particularist attitude of Quebec needs no elaboration. In short, our country still has characteristics—incongruities and abnormalities—which stamp it as innately federal. These have affected the nature and form of the governmental machinery which we have devised: they have made the Dominion Cabinet a body in which, without constitutional authority, a provincial, religious and territorial basis is recognized⁹, and they have modified the unitary bias given to our constitution by its framers. They still stand in the way of centralization.

Those who propose to have social legislation handled by the federal government tend to forget the differences that exist in provincial attitudes and outlook. If the federal government attempted to discharge functions upon which there was no *national*

9. Rogers, N. McL., Federal Influences on the Canadian Cabinet, *Canadian Bar Review*, Feb., 1933, p. 121.

outlook, only dissatisfaction and conflict could result. Uniform regulation and administration from a central source of matters which affect the diverse daily life of the people might be mischievous as well as impracticable. Federal administration would tend to be bureaucratic because of the enormity of the task. Rules would be made—probably as good rules as possible—but these would be irresponsive to the variety of provincial need. Part of the reason why we get along as well as we do is that the different provincial governments have the right and the freedom to handle their problems in their own way¹⁰.

There is one other advantage which springs from the maintenance of vigorous provincial (or state) governments. It is that they provide laboratories in which democracy can train itself in the art of government by carrying on political and economic experiments. In the United States the late Justice Holmes repeatedly emphasized this point. In a famous dissenting opinion he said:

There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.¹¹

The Australian Royal Commission on the Constitution expressed the same opinion while endorsing the maintenance of federalism in Australia:

Where there are adequate powers of self-government, there is scope for public spirit, local patriotism and local knowledge, which would be lost if all legislative and administrative functions in Australia were absorbed in the central government. Again, the existence of self-governing states does, we believe, provide the best means of supervising development and the best safeguard against a disastrous experiment. The importance of confining economic and industrial experiments to limited areas was emphasized by several witnesses.¹²

This doctrine would not substitute judges' wisdom for the foolishness of ordinary men. It would uphold the right of the provinces

10. Felix Frankfurter, not an opponent of social and economic legislation, has written: "Logically there is no limit to the interrelation of national commerce and the activities of men in the separate states. But the purposes of federalism must be observed and adjustments struck between states and nation." *Mr. Justice Holmes* (New York, 1931), p. 76.

11. Dissenting in *Truax v. Corrigan*, 257 U. S. 312 at 344.

12. *Royal Commission on the Constitution* (Canberra, 1929), p. 241. Mr Lyons recently declared: "There are many difficulties in Federation. . . . There are, however, also difficulties much more serious in the way of unification. The introduction of a system of unitary government would not abolish any of the principal difficulties to which the Premiers have devoted most of their attention." *Conference of Commonwealth and State Ministers on Constitutional Matters*, February 16-28, 1934 (Canberra, 1935), p. 42.

(or states) to make mistakes. Lessons are learned from mistakes for which there is full provincial responsibility; while only resentment will be raised where the federal government thrusts its wisdom upon an erring province. Such a philosophy could, perhaps, find tolerance for Mr. Aberhart.

These, then, are the considerations which ought to weigh against hasty steps toward centralization. But they do not mean that governmental action to meet vital social needs should not be taken. They suggest that this action should conform to our federal status and institutions. Social legislation proper for a unitary country may not be suitable for Canada, because Canada is not and cannot be made unitary. Someone has said: "Historical continuity with the past is not a duty, it is only a necessity."

How are we to secure, within a reasonable period, those social services which the times demand? Broadly put, they should be provided by the cooperative action of the federal government and the provinces¹³. Unemployment, relief for the aged, improvement and safeguarding of health, construction of highways—such matters have a national as well as a provincial aspect and, under agreed conditions, governmental responsibility about them should be joint. As an illustration, suppose that action was to be taken about public health. A federal act might be passed which outlined the aims to be achieved and which, under specified conditions, held out grants-in-aid—conditional subsidies—to those provincial governments which would join in providing the service¹⁴. Besides bearing a part of the cost, the provincial governments would undertake virtually the whole task of administration, not merely for constitutional reasons, but also because, in touch with provincial needs, they could avoid bureaucracy and delay. The federal government would, however, exercise a careful supervision in the national interest to see that the provincial agencies performed their tasks. Detailed oversight and minute guidance should be avoided; moderate flexibility in standards ought to be allowed. But laxity in provincial administration ought to be penalized even to the extent of withholding the grants-in-aid.

It will be seen at once that this scheme involves *some* centralization, because the federal government would secure a voice in matters which lie within provincial jurisdiction. But this centralization would rest upon an assured basis of national needs about which there was a reasonable uniformity of attitude from

13. In a forthcoming monograph to be published by the Harvard University Press, the author has examined in some detail the subject of federal aid in Canada.

14. The grants should not go merely toward provision of *new* services. In order to provide relief for the provincial budgets, grants should be used to lift part of the burden of services which are already being provided.

province to province; and it would be founded upon provincial consent and cooperation. Some provincial governments might, perhaps, be laggard in bringing themselves under certain measures. A long delay would be unfortunate, because provinces would be inhibited from social legislation for fear of being put at a disadvantage with their neighbours. But this is not to be feared. Experience shows that the offer of grants-in-aid brings a prompt response. The scheme may also be criticized as circuitous, and this must be admitted. Some circuitousness is inevitable in federalism.

Conditional subsidies may be the prelude to a further increase in federal power. Experience in federal-provincial cooperation may show that a given activity is suitable for complete assumption by the federal government, or perhaps for the exercise of concurrent power. But it may sometimes disclose that, in certain fields, even federal-provincial cooperation is unsatisfactory. In such case the federal government can gradually withdraw.

The difficulties which arise out of an imperfect adjustment of finance to function are, of course, only a part of the troubles which beset a federal state. Another type of difficulty of frequent occurrence arises out of the tariff. Here the constitutional authority of the federal government is secure, but the wisdom shown in the exercise of that authority has often been questioned. The tariff has stirred up much regional friction.

Some use of protection as a developmental policy to speed the growth of secondary industries in Canada was inevitable and probably desirable. But this meant increased costs for the primary producers, and it stimulated regional specialization. There was an uneven incidence of cost and benefit from province to province. Ontario and Quebec gained; the Maritimes and the prairie provinces did not. If, however, there was a *net* national benefit, the step was defensible. But surely moderation in the pursuit of this policy is expedient. The tariff should not be pushed too high, and it should not cover too wide a range of commodities, both because the possibility of a net gain decreases when protection is extended into the less desirable areas, and because regional animosities are provoked¹⁵.

An excessive tariff has, in a federal country, another consequence of great significance. This is the stimulus given to the principle of "compensating advantage". To quiet protest against an increased tariff, provinces A and B are given some sort of allowance. This is almost certain to involve a clear loss. It serves to wipe out the net national gain which might have accrued from

15. Other development policies must be passed over. Our amazing railway mileage was constructed, and agricultural settlement was pushed into semi-arid areas, for developmental purposes.

moderate use of the tariff as a developmental policy. And one such grant leads to another. Any concession of this sort brings a crop of new demands from provinces which have not shared. To sanction this policy is to regard government as concerned with a futile adjustment of sectional conflicts. It must be recognized that any single application of the principle of compensating advantage is unsound, and operates to decrease the national income, and that multiple application would be suicidal. Federalism is a hard system to operate. It requires variety in unity. The surest guide to success at the task is moderation in the pursuit of any policy and complete avoidance of the pernicious principle of compensating advantage.