

# THE PRIVY COUNCIL AND THE CONSTITUTION

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**A**MONG the arguments most regularly presented at the sittings of the Royal Commission on Dominion-Provincial Relations by the advocates of stronger Provincial Governments were those that carried a moral appeal. To say this is not to underestimate the strength of the case presented by the provincialists on other grounds, nor is it a necessary inference that they were forced into this line of argument by the lack of another, more rational one. Certain Provincial Governments have for many years exploited to the full the political possibilities of the limitations placed on their activities by the Constitution. It was sound tactics to assert that their position was improperly restricted by the central authority, for nothing pleases an electorate more than an opportunity to take its stand on moral ground, and nothing excites it so much as the suggestion that there is interference from "outside". Federal politicians, on the other hand, and for equally good political reasons, have carefully refrained from too frankly discussing the question of Dominion-Provincial relations, or openly seeking wider powers for themselves. Thus the task of defending the authority of the Federal Government has fallen to a greater extent to disinterested persons, not compelled to seek the support of an electorate. That, in the result, the cases commonly heard for federalism have appeared more rational than those usually presented by the provincialists, is an unfortunate fact for the latter, for their strongest arguments are not the moral ones.

Perhaps the strangest of these arguments is the suggestion that to strengthen the Federal Parliament is to start Canada on the way to a dictatorship; while stronger provincial authorities ensure the survival of democracy. It is not difficult to persuade people of such an inference, for the word "centralisation" has a conveniently sinister suggestiveness. The idea illustrates an assumption of the provincialists—one that seems implicit in most of their discussions—that, since each Provincial Government represents the people of its Province, the Dominion Government is an "outside" body, representing no particular group. Dictator-

ships are, of course, just as easily established in small areas as in large countries. Indeed, since a dictatorial administration usually results from a particular interest obtaining control of the government, it might be argued that, as one Province is more likely to be dominated by one class or interest than the whole Dominion, so is its Government.

A somewhat similar claim is that the Provincial Governments are closer to the people and can interpret their wishes more accurately. The argument is scarcely borne out by the experience of the Rowell Commission. Of all the private organizations heard in evidence, none, except those in Quebec, supported the briefs of the Governments which sought to strengthen the Provinces. The vehement expostulations of British Columbia, the rather prolix arguments of Ontario, and the surprising claims of New Brunswick, failed to find any response in the submissions of the private persons of those Provinces. With the exception of Quebec, where conditions are unique, private representations almost invariably favoured a strong central authority.

But the most dangerous, and perhaps the most frequently used, of the moral arguments is that the provincialists are merely trying to preserve the Constitution as drawn up by the Fathers of Confederation; that in its present form it represents the compromise found necessary to persuade the different elements of the Provinces into a union; and that to change it in order to strengthen the central Government constitutes an assault on the contracted-for rights of the Provincial Legislatures. The argument is commonly used because it has a popular, emotional appeal, and is dangerous because it tends to prevent people from considering the fundamental economic and political bases of current constitutional problems. The reasoning outlined above might carry some weight if it could be assumed that the British North America Acts of 1867 and immediately subsequent years were synonymous with the Constitution as we know it to-day. But, since such statutes as these, intended to cover all possible activities of a state, can be kept alive only by continual interpretations to meet changing conditions, it is clear that at least as much of our Constitution has been written in the court rooms of the Judicial Committee of the Privy Council as in the legislative chambers of Westminster. That is to say, while the foundations of the Constitution represent the efforts of our forefathers to solve problems of whose local significance they were keenly aware, a large part of the super-structure is the

work of a group of English jurists, whose membership is continually changing and few of whom have ever even seen Canada.

A close examination of this phase of the Constitution will clear away much of the atmosphere of sanctity that tends to cling round the achievement of the Fathers of Confederation. The function of a court of law, apart from applying the common law, is to interpret the will of the legislative authority as expressed in Acts of Parliament; but in dealing with a constitution written many years ago and difficult to bring up to date by legislative action, the interpretation of the courts naturally becomes freer as time goes on, and an appearance of judicial objectivity is sometimes hard to maintain. Many of the decisions of the Privy Council regarding the distribution of jurisdiction between the Dominion and the Provinces are open to serious question on both legal and historical grounds. It seems clear that the intention of the original framers of the B.N.A. Act was not to join a conglomeration of states in a loose customs union, but to establish a united nation, with the protection of local autonomy for regional differences in race, religion, and education. Their speeches at the time that the first Act was passed almost invariably dwell on this basic unity as the central achievement, and the B.N.A. Act itself is liberally sprinkled with evidences of their purpose. While certain spheres of jurisdiction were given each to the Dominion and the Provincial Legislatures, as it could not be hoped that all possible future subjects of legislation would be covered, such general powers were given to the central Government as to make clear where the balance of authority lay. The Dominion was given the power to disallow any provincial legislation within a year; it was given authority to enact measures for the "peace, order, and good government" of the country; and it was given the right to place under its control "any works declared by the Parliament to be for the general advantage of Canada". A vigorous use of these powers could obviously reduce the Provincial Governments to a definitely inferior position very quickly. In addition, while the Provinces were limited for revenue to direct taxation and the issue of licenses, the Dominion was given the right to levy all types of taxation.

The Judicial Committee of the Privy Council, however, rather than emphasizing the primary position of the Federal Parliament in its interpretations of the Constitution, in so far as they have dealt with conflicts of jurisdiction between the Dominion and the Provinces, has generally concentrated its attention on maintaining as much independence for the Pro-

vinces as possible. Two quotations will be sufficient to illustrate the deliberateness of this inclination on the part of the Council. The first—a rather well-known one—is from an article written by Lord Haldane prior to his own appointment to the Judicial Committee, on the work of Lord Watson, one of his most distinguished predecessors:

Two views were being contended for. The one was that... a general principle ought to be recognized which would tend to make the Government at Ottawa paramount and the Governments of the Provinces subordinate. The other was that of federalism through and through... The Provincial Governments naturally pressed this latter view very strongly. The Supreme Court of Canada, however, took the other view. Lord Watson... completely altered the tendency of the decisions of the Supreme Court and established the real constitution of Canada.

The other quotation—less familiar, but in some ways more surprising—is from a recent decision by Lord Atkin. Referring to the distribution of powers between the Federal and Provincial Governments, he said:

No one can doubt that this distribution is one of the most essential conditions of the *inter-provincial compact* to which the B.N.A. Act gives effect. If the true position of Lower Canada alone were considered, the existence of her separate jurisdiction as to property and civil rights might be said to depend upon loyal adherence to her constitutional right to the exclusive competence of her own Legislature in these matters.

Continuing in reference to the question of the Dominion's power to over-ride the rights of the Provinces in order to implement treaties that might appear to impinge on matters in their control, he said that it would be "remarkable" if the Dominion could obtain jurisdiction over matters beyond her power by merely signing a treaty. "Such a result would appear to undermine the constitutional safeguards of provincial constitutional authority."

There are several things to be noticed about these quotations. In the first place, there can be no question that the Privy Council has regarded itself as the defender of provincial authority, although the reasons for this are difficult to determine. It may be that they have felt that a literal interpretation of the "general powers" of the Dominion Parliament might vest it with more authority than would be proper in the central body of a federation; or they may have been struck by the peculiar position of Quebec and the obvious difficulties in fitting it into a more closely knit unity: in all probability both reasons and many

corollaries influenced their decisions. But whatever the reason, it is safe to say that in the vast majority of cases where questions of jurisdiction went beyond the limits of legalistic distinction, the benefit of the doubt has been given to the Provinces. This is clearly illustrated in the latter part of the second quotation above. Starting from the assumption that the fundamental purpose of the B.N.A. Act is to be found in the "constitutional safeguards of provincial constitutional authority", the Council regards what would otherwise be a literal interpretation of one section of the Act as "remarkable", and is constrained to read a meaning into it that is consistent with its assumption.

In the second place, the quotations illustrate the extent to which their lordships have fallen before the wiles of the separatist spell-binders. To Canadians who have seen the so-called "compact theory" of Confederation exploded a dozen times and driven from practically every sphere of discussion except the political, the use of the words "inter-provincial compact to which the B.N.A. Act gives effect", by the highest court of the realm is nothing short of amazing, and can only arouse a certain amount of cynicism towards its decisions. It means that the Privy Council has based many of its conclusions on a theory that has no foundation in history and no connection with law.

As a result of this emphasis on provincial autonomy by the Privy Council, the general and residuary powers of the central Parliament have been neglected or reduced to meaningless generalities. For example, the Dominion's authority to legislate for "peace, order, and good government" was apparently intended to cover those cases of adjustment that were bound to arise with the passage of time and for which the Act could naturally not provide. But under the Council's interpretation, instead of providing a measure of elasticity in the Constitution, it has been of no practical value whatever. Some weight has been attached to the word "peace", less to "order", and "good government" has been completely ignored. As a result, the powers given under this section can be invoked only in case of some national disaster such as a plague or war.

Two examples will illustrate the ill effects of this tendency on the part of the Council, as well as the rather strained legal casuistry to which the latter has resorted in order to carry out its self-imposed task of supporting the Provinces. The first has to do with the question of government regulation of the marketing of natural products. Keen competition in foreign markets has made methods of grading, shipping and publicizing

such products as fruits, vegetables, and lumber of first importance in their sale, and has resulted in government supervision of these matters. The growing trend towards state interference in business has frequently combined these normal regulatory activities with attempts to control the production or marketing activities of the producers. The question has naturally arisen as to whether this sort of supervision belongs to the Dominion or to the Provinces. If there were no constitutional barriers in the way, it would appear that such matters should, in general, be under one central authority. The desirability of uniform grading standards for similar products marketed by different parts of the Dominion, and the over-lapping and confusion that would result from regulation by several provincial authorities in the export field, or from the separation of domestic from external trade supervision, seem to support the claims of the Dominion Government for the balance of control.

At first sight, the constitutional barriers to this do not appear very great. Among the subjects of legislation given the Federal authorities in section 91 of the B.N.A. Act is "trade and commerce", while among those given to the provincial legislatures in Section 92 are "property and civil rights within the Province." The Dominion urges that regulation of marketing falls under "trade and commerce", while certain Provinces suggest that the type of regulation necessary is such as to interfere with "property and civil rights". To the layman, the Dominion's argument seems reasonable to the point of obviousness, and any doubts that might linger could be easily dispelled by application of the general powers to legislate for "peace, order, and good government." The Privy Council, however, has not adopted this view; unable to ignore completely the Federal case, it has preferred to split the jurisdiction. So long as any part of the trade in a commodity is confined to a Province, the court has included the regulation of that part under "property and civil rights within the Province"; but trade between Provinces or with other countries has been held to come under "trade and commerce."

Numerous efforts have been made by both the Dominion and the Provinces to find some way by which this view can be made to work in practice. In 1926-27, British Columbia passed an act for the regulation of the marketing of natural products. In an attempt to avoid infringing on what the Privy Council held to be Federal territory, the act specifically stated that goods intended for sale outside Canada were not included. The

Supreme Court ruled, however, that, since the act apparently contemplated the regulation of trade with other Provinces, it was *ultra vires* the Provincial Legislature. In 1934, the Federal Parliament passed the Natural Products Marketing Act, providing for the regulation of export and inter-provincial trade. An effort was made to avoid interfering with provincial jurisdiction by a proviso that the Governor-in-Council must satisfy himself that the principal market for the product was outside the Province of origin, or that some part of the product might be exported. The device failed, however, and the Privy Council decided that the act was invalid, first, because it covered some transactions completed within the Province and, therefore, affected "property and civil rights"; and, secondly, because "trade and commerce" could not be interpreted to include trade and commerce confined to one Province. It is difficult to see how their Lordships arrived at the latter conclusion by any process of legal reasoning. Recently, British Columbia obtained the Council's approval for an act whose powers were strictly limited to trade within the Province, and rumours have followed of attempts to obtain similar laws in the other Provinces, with complementary Federal legislation, in order to cover the country.

The difficulties in framing effective legislation that would conform to the principles of the Privy Council are apparent. Few branches of trade in natural products are confined solely either to one Province or to the export market; and yet, in no other cases will it be possible legally for one governing body to regulate a particular trade. The possibility suggested in the last paragraph that legislation might be passed in all the Provinces and by the Dominion Parliament so as to dove-tail together to form a complete system of supervision, would appear sufficiently dim if political obstacles were the only ones to be contended with. But the uncompromising attitude of the Privy Council renders even that solution virtually impossible. In his decision in 1937 on the Dominion's Marketing Act, Lord Atkin said, "... It was said that as the Provinces and the Dominion between them possess a totality of complete legislative authority, it must be possible to combine the Dominion and Provincial legislation so that each within its own sphere could, in cooperation with the other, achieve the complete power of regulation desired. Unless and until a change is made in the respective legislative functions of the Dominion and Provinces, it may well be that satisfactory results can only be obtained

by cooperation. But the legislation will have to be carefully framed, and it will not be achieved by either party leaving its own sphere and encroaching upon that of the other." To regard a Constitution which imposes such conditions upon a country as inviolably sacred is surely the height of absurdity.

Another example of the effects of legal decisions on the Constitution is provided by the question of what Canadian Government has the power to implement treaties. This particular problem has arisen from the possibility that the Dominion might negotiate a treaty with some other country involving matters which the B.N.A. Act has placed under the jurisdiction of the Provinces. In such an event, has the Federal Parliament the power to legislate on such matters in order that its international obligations may be fulfilled, or must it depend on the good-will and cooperation of the Provinces to put into effect those parts of the treaty which deal with matters under their control?

As it is doubtful if the Fathers of Confederation foresaw Canada's present more or less independent status, they could scarcely be expected to provide all the apparatus of a separate state, such as machinery for negotiating and carrying out treaties with other countries. They did, however, insert one section, Section 132, into the act, dealing with the question of international obligations. "The Dominion shall have all powers necessary or proper for performing the obligations of Canada or of *any Province thereof*, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries." In view of the double reference to "Empire" treaties, it is possible that the authors of the act did not necessarily foresee treaties made by Canada herself, independent of the rest of the Empire; but at least it is clear that, with reference to such treaties as they were able to visualize, the section was intended generally to give the Dominion Parliament complete and exclusive powers for the purpose of carrying out the country's international obligations: to interpret it otherwise is to render it meaningless. In those cases where treaties dealt with matters normally under Provincial control, the Dominion would be able to assume jurisdiction for the purpose of carrying the treaty into effect; powers given to the Provinces by Section 92 of the B.N.A. Act could be temporarily assumed by the Dominion even though they were not included in the list given the latter in Section 91.

This was roughly the view of the situation that prevailed for many years, and in 1931 and 1932 it was, to all appearances,



confirmed by the Privy Council. In two cases known as the Aerial Navigation Case and the Radio Case, the court apparently settled the matter by awarding the Dominion supreme authority in implementing treaties and international conventions. In the first case, Lord Sankey said, with reference to the apparent invasion by the Federal authorities of Provincial rights, "... It is not necessary for the Dominion to piece together its powers under Section 91 in an endeavour to render them co-extensive with its duty under the (Aerial Navigation) Convention when Section 132 confers upon it full power to do all that is legislatively necessary for the purpose." In the Radio Case the court went even further. Not only was it convinced that the Dominion could, in implementing a treaty, legislate on matters placed under Provincial jurisdiction by Section 92, but it held that this was so because any matter proceeding from a treaty must, under Section 132, be a subject solely for Dominion legislation, and therefore could not be found among those subjects mentioned in Section 92, no matter how numerous they were.

The effect of these two decisions was summed up in a later judgment by the Supreme Court of Canada. "First, by the combined effects of the judgments in the Aeronautics Case and the Radio Case, the jurisdiction of the Dominion Parliament in relation to international obligations is exclusive; and, moreover, as such matters are embraced within the authority of Parliament in relation to peace, order and good government, its powers are plenary." That is, not only could the Dominion legislate on matters normally under the Provincial authorities if necessary to implement a treaty, but the Provinces were powerless to legislate for the performance of such international obligations. For once, full weight was given to the Dominion's general powers.

The triumph of Federal authority was, however, short-lived; in 1937, a judgment delivered by Lord Atkin upset all this, and the situation now appears to be more confused than ever. Two facts must be kept in mind in considering this decision. First it will be recalled that Section 132 of the B.N.A. Act, dealing with the Dominion's right to carry out treaties, specifically refers to "Empire" treaties. Secondly, as a result of the Imperial Conferences held since the War, it is no longer the custom for Imperial Cabinet Ministers to appear in the negotiations for a Canadian treaty as the advisers to the King; all treaties are negotiated by the Canadian Government and signed by Canadian plenipotentiaries. In the judgment of 1937, the

court held that the powers of Section 132 could be invoked only in the case of "Empire" treaties; that by this were meant treaties which had been signed by Imperial Ministers in behalf of the Crown; that, since the Dominion Ministers had replaced those of the United Kingdom, the new status of Canada could not be covered by Section 132; and that, therefore, the peculiar powers that were given to the Dominion by that section were no longer effective. The Dominion, by becoming a nation, had lost its nationhood; by achieving virtual independence in external affairs, it had rendered itself powerless to put into effect any treaties that dealt with matters under Provincial jurisdiction.

The result illustrates once more the present confusion of the Constitution. The Dominion is the only authority that can make treaties, but it is not the only one necessary to see that the conditions to which it has bound itself are carried out. In advance of a court decision, it cannot be sure that it will be competent to do so itself, nor can it always be certain that the Provinces will cooperate by passing the necessary legislation. The Fathers of Confederation must have had these difficulties in mind when they wrote Section 132 of the B.N.A. Act, but the Privy Council seem to take a less serious view of them. "It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers remain distributed, and if in the exercise of her new functions derived from her new international status, she incurs obligations, they must, so far as legislation is concerned, when they deal with Provincial classes of subjects, be dealt with by the totality of powers; in other words, by cooperation between the Dominion and the Provinces. While the ship of state now sails on larger ventures, she still retains the water-tight compartments which are an essential condition of her original structure."

The foregoing should be sufficient to indicate some of the factors that have shaped the Canadian Constitution to its present form. It has not been the purpose of this article to criticize the Privy Council for the part they have played in this, but merely to emphasize the fact that, to a large extent, the constitution is not so much a historical document as a series of legal decisions, many of them delivered with what would appear to be a certain bias. Canadian statesmen of the 1860's have been called the Fathers of Confederation, but the Privy Council have been aptly named the "step-fathers". While the former certainly intended to establish

a united nation, the latter, by supporting the Provinces on many critical points, have assisted the growth of forces that to-day seriously threaten the Confederation experiment. Many of the current views regarding the "sovereignty of the Provinces", and many of the so-called "Provincial rights", which it is argued in some quarters were guaranteed to the Provinces in 1867, have had their origin, not in the B.N.A. Act, but in the decisions of the Privy Council. There has been much talk lately of the need for national unity, but unless we are prepared to consider changes in the present Constitution, a national feeling will be of little practical value.