Uniformity of Legislation in Canada

By John Willis

The problem and the key to its solution

THE country that in real life is Canada is in law divided into nine separate compartments with nine separate legislatures, and nine separate sets of courts and has, as a necessary consequence, nine separate and potentially divergent systems of law. In 1867, when travel was restricted and business local it did not much matter if the law in one province differed from the law in another province, but in 1942 a diversity of laws that was once one of the main recommendations of a federal system has become just another of those inherent defects of our federalism that we try to mitigate as best we may. Now, no one even wants to undermine the traditions of French Canada by bringing the law of Quebec into line with the laws of the other eight common law provinces, but the ordinary layman who travels, does business, owns property or has any dealings outside his own province does expect the law in all the "English" provinces to be the same. To-day it is merely absurd that a motorist on a tour of the Maritimes changes the degree of his responsibility to his passengers directly he crosses the national border between Nova Scotia and New Brunswick, that a Montreal dealer in bakery ovens on credit is able to protect his security in Ontario but not in Nova Scotia, that an informal will made by a man in Saskatchewan passes his lands in Saskatchewan but not his lands in Nova Scotia. How then can we remove these absurd divergences between the laws of the common law provinces?

The key to uniformity is centralization; centralization in the making of law and centralization in the administration of law. Our common law, the judge-made law, is uniform throughout Canada. Why? Because it is made centrally and administered centrally. Our judges and lawyers are in the habit of treating the English common law as their own, and the common law of each of the eight provinces is therefore in effect made in England. No provincial court of appeal has the last word in applying this common law to the cases which arise in the province, for over it stand two courts of appeal common to all Canada, the Supreme Court in Ottawa and the Privy Council in London and the common law of each of the eight provinces is therefore in effect administered either in Ottawa or in London—in practice Ottawa, for the Privy Council only hears one or two common law cases a year from Canada while the Supreme Court hears about fifty. Administration from Ottawa is the product of deliberate design; the Supreme Court, "the General Court of Appeal for Canada" envisaged by Section 101 of the B.N.A. Act, was brought into being by a Dominion statute of 1875 for the express purpose of preserving uniformity of law and that court still regards the preservation of uniformity as its main function. That all the eight provinces look to England for their common law is, on the other hand, entirely unplanned; if you trace this habit to the fact that the Privy Council is their court of appeal and they are therefore legally bound to take their law from it, it is only a political accident that the Privy Council has always presumed to treat the law of England as if it were automatically also the law for the whole Empire; if you trace it to the fact that every Canadian lawyer relies more on English digests, English text books and English cases, than he does on his own, the explanation is economic—there is no money to be made in Canadian legal literature and so there are very few Canadian law books and what there are very often are neither helpful nor reliable. Whatever the explanation, the judges and lawyers of each of the eight common law provinces have in fact a habit of taking their common law from a single source, England, and the

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administration of that law is in fact supervised by a single authority, the Supreme Court of Canada. In matters of common law, therefore, the centralization is perfect and the result is perfect uniformity.

The ordinary law affecting the ordinary man in his every day life and business, by lawyers called "private law", used to consist almost entirely of common law and so, whether it remained stationary, or was developed by the courts to meet new conditions, it automatically continued to be uniform throughout Canada. Any lack of uniformity was—and still is—the product of legislation. For the past twenty or thirty years however the eight provincial legislatures have been pouring out statutes. They have been adapting the principles contained in the common law of nineteenth century England to the conditions of twentieth century Canada by means of such changes in private law as Workmen's Compensation Acts, Motor Vehicle Acts, Conditional Sales Acts, Landlord and Tenant Acts and the like. They have been regulating business by such measures as Public Utilities Acts, Securities Acts, Fair Wage Acts, Marketing Acts and so forth. They have been taxing by Income Tax Acts, Corporation Tax Acts and Succession Duty Acts. Because this vast increase in legislation threatens ordinary law with a host of provincial diversities, we must now consider how and to what extent uniformity of legislation has been secured in the past and how and to what extent it may be secured in the future.

The controls applicable to judge-made law have, of course, no relevance to the output of a legislature and yet uniformity of statute law in the topics just mentioned is no less desirable than uniformity of common law—indeed, to anyone but a lawyer the distinction between the two sorts of law is without meaning. To secure uniformity of statute law it is necessary to resort to deliberate controls.

Reservation of subjects to the Dominion Parliament

Once again, the key to uniformity is centralization. Translated into the language of the process of legislation in a federal system, this means that the wider you make the list of subjects reserved to the Federal legislature, the more uniformity you will have in your statute law. If the founding fathers of the Canadian constitution could have foreseen the growth of a national way of life and the development of national business, they would have made their federal list much wider than it is. Under the B.N.A. Act as it stands most of the law that affects the ordinary citizen is in the hands of the provincial legislatures. There are however exceptions and the list of federal subjects is much wider in Canada than it is in the United States. Criminal law, bankruptcy, banking and bills of exchange are Dominion subjects, have actually been dealt with by the Dominion, and so are uniform throughout Canada, even in the civil law province of Quebec. A company may incorporate either under Dominion charter or, if its business is to be purely within one province, under the laws of that province; in quantity of business done Dominion companies exceed the provincial; in number, however, provincial companies far exceed the Dominion and in practice it is with provincial companies that the average lawyer is concerned, but, sad to say, the provincial company statutes are far from uniform. Marriage and divorce is also a Dominion subject, but because the matter is controversial and regarded as one for local settlement the Dominion does not exercise its powers except upon the request of a province concerned, and the marriage laws are therefore diverse and confusing.

One can only regret that the founding fathers did not make the list wider, for to widen it now is to invite the charge of laying rude hands on the sacred constitution. Potentially an ideal method of securing uniformity over a larger range of topics, it is therefore in practice utterly useless and we must rest content with the list we have.

To preserve the pristine uniformity produced by federal statutes the courts have deliberately singled them out for

special treatment. Although a provincial court does not normally regard the decisions of a court of appeal in a sister province as binding on it, it recognises a duty to give a uniform interpretation to Dominion statutes and to that end follows the interpretation given to them by the highest courts of the other provinces even though there may be reasons for not agreeing with it—for "the law is in fact the same in all the Provinces and . . . it is unseemly for the Courts to declare it is not so, where there is a higher court that can correct any error with propriety and Parliament is equally able to do so," *Re Peters*, 1937 2 D.L.R. 786. This rule does not apply where the other decision is "clearly wrong" and there are therefore some sections in Dominion statutes on which provincial interpretations are not uniform; this is most noticeable in the much interpreted Criminal Code. Very little harm is done, however, for in criminal matters the provincial Attorney-General Departments and the Committee of the Canadian Bar Association on Criminal Law are in constant touch with the Department of Justice at Ottawa and serious conflicts are resolved by amending the Code.

Adopting statutes from some common source

A possible substitute for a wider federal list is a habit of adopting statutes from a common source. It has already been noted that we owe our uniformity of common law not merely to the centralized machinery of common courts of appeal but also to a habit of lawyers with an incidentally centralizing effect —the habit of looking to England for their law. In the field of common law this habit is so unconscious that it has acquired a binding force. A similar habit, though not a binding one, may be observed in the more self-conscious process of legislation. Many of the basic statutes dealing with private law have been taken over from England and enacted, almost word for word, into the law of most of the provinces; still more of them have been re-enacted in a consolidated form and in slightly changed language; there is even a marked tendency to copy contemporary English legislation. In the case of provincial legislation that has not any counterpart in England, e.g. mechanics' liens, testator's dependents' relief the provinces have borrowed freely from one another and in many instances every one of the provincial Acts can be traced ultimately to some common source, e.g. mechanics' liens (New York), testator's dependents' relief (New Zealand). The result has been that we have, in a certain limited sense, a "common law of legislation" in Canada. But "in a certain limited sense" only —for the sources are too diverse and the individual adaptations too extensive to result in any great degree of uniformity. Therein lies the difference between the common law habit and the legislative habit—the common law is taken over from one source only and taken over as it stands—and this difference is vital in any method of securing uniformity.

Adopting Model Uniform Acts

Why not take advantage of this existing habit, give it the precision it lacks and render it binding by agreement among the provinces? This is the underlying idea of the Conference of Commissioners on Uniformity of Legislation in Canada. The Conference exists for the purpose of securing uniformity of legislation relating to private, and in particular commercial law. It drafts model Acts in the hope that they will be adopted as they stand by every common law province in Canada and inserts in each model statute a clause requiring courts to give a uniform interpretation to its provisions. Once again crop up the two pre-requisites of uniformity—centralization in the making of law and centralization in the interpretation of law.

The Uniformity Commissioners consist of representatives from each of the common law provinces and representatives of the Dominion Government. They all have a legal training and are mostly lawyers in private practice. They are appointed by and receive their travelling expenses from the governments concerned but neither they nor the conference itself

have any official standing or any power to bind any of the provinces. From 1918 to 1939, the date of the outbreak of the present war they met in annual conference for five days each August; their main work, however, the selection of likely topics, the consultation with provincial Attorneys-General, practising lawyers and business men and the preparation of draft Acts for discussion by the Conference is carried on during the year by individual commissioners nominated by the Conference.

It is obvious enough that this machinery is only a second best. How much more satisfactory it would be to extend the list of Dominion subjects, or to use the Dominion's power of disallowance as a lever to secure the co-operation of the provinces—but these are pipe dreams that leave out history and practical politics. For there is one grave obstacle to the success of this device for securing uniformity. No province is obliged to adopt any of the model statutes drafted by it. Unless each of the eight provincial governments voluntarily co-operates, all the labour spent on a model Act has gone for nothing. This means, in practice, that a conference of experts must do its best at being politicians; before it begins work at all, it must induce each of eight governments to recognise in principle the desirability of replacing its present legislation with something devised and drafted by outsiders; after it has finished the Act, it must induce each of eight governments to enact the uniform Act into law without change. And remember that unless all of them do so, there is still no real uniformity.

This fundamental difficulty must always be borne in mind when assessing the success of the Conference. It explains the narrow range covered by the model Acts which the Conference has adopted; there is not a taxing or a regulatory Act among them. Of course tax laws ought to be uniform—if they are not, the inevitable result is complexity, discrimination and sometimes double taxation, but provincial governments are desperate for revenue and so far are they from being willing to co-operate that they actually compete with each other, the Dominion and the B.N.A. Act for shares in the taxpayer's dollar. Of course regulatory legislation ought to be uniform—if it is not, some of it cannot be put into force at all and the rest of it by its diversity gives unnecessary jobs and fees to the lawyers of every national business—but this is a matter of high policy upon which each province feels that it is entitled by the traditions of federalism to take its own independent line. It also explains why in the tiny and wholly non-controversial field to which the Conference has usually devoted itself—ironing out minor variations in statutes that are substantially common to all provinces—it has met with its greatest success, and why in its occasional incursions into a mild variety of law reform e.g. the model Acts dealing with contributory negligence and foreign judgments it has run into difficulties.

What then has the Conference achieved? Its greatest success is in insurance law—the Acts relating to fire and life insurance were drafted by it and are in force in all common law provinces; but here, and this is very significant, they acted in collaboration with the Association of Superintendents of Insurance of the Provinces of Canada, a semi-official body with persuasive powers over provincial governments, for it consists of the government insurance-supervising officials of the several provinces. The Automobile Insurance Act, another uniform Act, is the product of the Superintendents of Insurance alone. Outside the field of insurance the labours of the Conference have been out of all proportion to the amount of uniformity in fact achieved. During the twenty-one year period of its active existence the Conference has produced about twenty other model Acts of which the following have been adopted in four or more provinces;- Legitimation Act (seven provinces), Warehousemen's Lien Act (six provinces), Reciprocal Enforcement of Judgments Act (five provinces), Intestate Succession Act (five provinces), Assignment of Book Debts Act (seven provinces), Conditional Sales Act (four provinces), Bills of Sale Act (four provinces). The other statutes

have not been widely adopted, although it is often suggested that their effect on provincial legislation may have been greater than at first sight appears. At the present moment the Conference has run out of the wholly non-controversial material in which it has met with its greatest success and has before it a few measures of mild law reform viz. evidence, interpretation, central registration of liens on motor vehicles, the rights of the owner of a chattel after it has been affixed to land.

Conclusion

Of the two pre-requisites for the attainment of uniformity of legislation among the common law provinces of Canada, centralization in the making of law and centralization in the interpretation of the law so made, we already have one, a centralized court system. If we cannot somehow achieve the other, the flood of provincial taxing laws, regulatory laws and laws amending the common law by which our Society is trying to adjust itself to the conditions of to-day is going to turn our comparatively uniform laws into ever increasing diversity. How then are we going to achieve it? The technically easy way is to attack the problem head on and widen the list of subjects on which the Dominion has the exclusive power to make laws, but the technically easy is, as so often, the politically difficult. Short of changing the constitution the only other method is to attack the problem sideways by the method of agreement—to have the eight provinces, retaining formally unimpaired their power to legislate on a topic, agree to adopt legislation from some central source and enact it into law as it stands. Unfortunately we have the experience of the Uniformity Commissioners to shew us what an unsatisfactory method this is. They have found that even in their chosen and non-controversial field of private law—they have never touched tax law or regulatory law—they have been unable to secure any real agreement for the adoption of their Acts to eliminate verbal or trivial diversities, far less for the adoption of their mild Acts of reform. Somebody, someday, somehow is going to have to attempt the politically difficult.

Public Administration To-Day

By Lloyd M. Short

THE rapid expansion of governmental activities, the increased proportion of national incomes required to finance such activities, and the rapidly growing number of persons necessary to administer them, all attest to the truth of such observations as "administration has become the heart of the modern problem of government," made by Leonard White and "government today is largely a matter of expert administration," contributed by Pendleton Herring.[1]

A detailed analysis of the process of public administration in a democracy will reveal an almost unlimited number of specific problems that deserve and command attention, but for purposes of summary treatment we may group them under two main headings, namely, the conduct of the several activities with the greatest amount of satisfaction to the citizenry and with the least expenditure of human and material resources, and secondly, the achievement of efficiency and economy of operation without sacrificing the principle of responsibility. A concerted attack upon both of these problems is imperative and calls for the combined efforts of practicing administrators and students of public adminis-

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1. White, L.D., *Introduction to the Study of Public Administration*, (1st. ed.), p. 6; Herring, E.P., *Public Administration and the Public Interest*, p. 23.