CORRESPONDENCE

Constitutional Remedies: A Constitution for a Changing World

THE EDITOR,
THE CANADIAN BAR REVIEW

The article by Dean Vincent C. MacDonald, K.C., which appeared in the recent Anniversary Number of the Canadian Bar Review, has provided, within the limits of a single article, probably the most exhaustive and satisfactory treatment of the Canadian constitutional problem that has yet appeared. The very title, The Constitution in a Changing World, contains within it the germ and essence of our constitutional problem, which is the achievement of a constitution adaptable to a changing world. With very much of hesitation and well remembering that fools will venture where angels fear to tread, the writer of this letter will seek to expand this concept of a constitution for a changing world confining attention to remedies only.

Dean MacDonald's article ends with a reference to an immediate solution, namely a plan of delegated powers, and it is this plan that will receive chief attention. Dean MacDonald describes this plan as one that would enable "the Dominion on the one hand, and any or all of the Provinces on the other hand, to delegate to the other or others its legislative power in relation to specific matters for defined periods". The periods of delegation could be renewed, but while any power remained so delegated to another government that government would have the exclusive use of the power delegated and it would for that period pass out of the control of the government delegating it.

Before however proceeding with a discussion of delegated powers, I wish to digress for the moment and to observe that in contrast to our need for constitutional amendment there has been since 1789 no amendment of the constitution of the United States that has altered federal and state powers as laid down in the constitution of 1789. This has been so because under the American constitutional system there has been achieved an equilibrium of powers that has produced a constitution for a changing world.

That constitution gave to the federal government certain powers specified in the constitution, the states receiving the residue. In the interpretation of that constitution by the United States Supreme Court the doctrine of implied powers has freed the federal government from the letter of defined powers and in the result that government has been enabled to deal very widely with matters of national concern not falling directly within the powers specified in the constitution.

Our experience has been almost exactly in reverse. Section 91 of the B.N.A. Act gave to Parliament the residue of matters of national concern, and thus was accomplished in substance for our constitution what the doctrine of implied powers has done for the extension of federal power in the United States. Privy Council interpretations have unhappily succeeded in locking Parliament within the 29 listed subject matters of section 91 in peacetime. But equilibrium in a federation may only be realized when federal and local (state or provincial) governments have freedom to deal with all national matters and local matters respectively and thus provide

in practice a constitution for a changing world. This has apparently been realized in the United States. It was realized for us at Confederation and the logical remedy is therefore to restore to the Dominion the residue of powers.

Delegation of Power

But that which is ideally desirable for our constitution and that which is politically possible in the Canada of today are rather far from being one and the same thing. For the present we shall have to seek a solution that will at least break through the doors of the prison house in which Parliament has been placed by Privy Council decisions and make possible progress in the direction of fuller cooperation between the Dominion and the provinces and provide for more adequate federal powers. In the plan of delegated powers we have that very kind of a solution.

However, before this plan will have much of attractiveness for the provinces one serious defect should be remedied. It seems that once a power is delegated it passes wholly away from the delegating government into the exclusive control of the government or governments to which it is delegated for as long as the delegation lasts. On this basis, how will it be possible to induce the provinces to delegate for a period sufficiently lengthy to make the delegation workable and over a wide enough area of powers to make the plan worthwhile? It may prove about as hard to obtain powers by this kind of delegation as by way of constitutional amendment.

The answer would seem to lie in combining the principle of concurrent powers with the plan of delegated powers. Powers would be delegated on the basis that the delegating government would continue to have concurrent use of them as long as they remained delegated. In this way powers delegated by the provinces to the Dominion would not pass out of the use and control of the provinces, but would remain available to them subject only to the extent of future Dominion legislation enacted under the plan.

Fundamental Defect

But at best the device of delegated powers can never be the final answer to our constitutional problem. The underlying weakness lies in the basic instability of the scheme because the period of delegation must sometime end, however long a period has been agreed upon. A failure to renew the delegation will cause the whole scheme to collapse and everything in the way of legislation created under it. All that may be hoped for is that somehow the delegation would be renewed, but, in the case of delegations from the provinces to the Dominion, any one province would be able to wreck the whole Dominion set-up by failing to renew.

Ultimate Goal

The ultimate goal must therefore be an amendment of the B.N.A. Act settling finally the respective powers of the Dominion and the provinces. The thesis of this letter is that we need an amendmant that will settle the question for the next century or more. As has already been pointed out, the doctrine of implied powers coupled with the gift of the residue to the states has made for the American people a constitution that has needed no amendment as regards federal and state powers for a century and a half. The underlying reason for this happy balance is that Americans have achieved a constitution for a changing world.

Proposed Amendment

Assuming that Canadians in due time become convinced generally that the balance of powers given us in 1867 was what we must have restored so that we too may have a constitution for a changing world, then by what kind of an amendment could that balance of powers be restored? We have the plan proposed by the late Mr. W. F. O'Connor, K.C. In certain articles that appeared in an issue of Toronto *Saturday Night* in July of 1939 and in two other issues in August and October of 1945, the writer of this letter proposed a certain amendment of the B.N.A. Act to this end.

The proposal was that the field of residuary powers that has been lost to Parliament by Privy Council decisions be restored by making of that field one of concurrent powers of the Dominion and the provinces. To this end an amendment of the B. N. A. Act was proposed in the article of October 1945 in form similar to section 95, which gives agriculture to the Dominion and the provinces, as concurrent powers. There would be a new section 95A, as follows:

> *95A.* Notwithstanding anything hereinbefore contained, it is hereby declared that the Parliament of Canada may from time to time make laws in relation to *all matters which according to their true meaning and effect transcend strictly provincial limits and are of national concern and which are not hereinbefore listed in section 91 of this Act*, and in each province the legislature may make laws in relation to the said matters, and any law of the legislature of a province relating to any such matters shall have effect in and for the said provinces as long and as far only as it is not repugnant to any act of the Dominion of Canada.

Such a new amendment would in effect "transplant" the residuary field of the Dominion into a new "plot" in the B.N.A. Act, where it would be free from the tangled growths that have grown up around section 91 since Confederation. By giving to the provinces concurrent use of this residuary field there would be preserved for the use of the provinces all of their present jurisdiction, which they have acquired by Privy Council decisions, subject of course to the paramountcy of whatever Dominion legislation would be enacted under the amendment. Under the Australian constitution most of the powers exercised by federal and state governments are used under the plan of concurrent powers.

Experiment Under Delegated Powers

If and when the Dominion and provincial governments are given power to delegate as already described, the above transfer of the residuary field to the Dominion and the provinces as a concurrent field could be brought into effect experimentally by agreement to delegate entered into between the Dominion and the provinces for a trial period. The delegation in this instance would have to take the form of a delegation by the provinces to the Dominion of power to legislate in the field of property and civil rights to whatever extent would necessarily be incidental to federal legislation in matters of national concern. Such a delegation, being given on a concurrent plan, would not deprive the provinces of any of their existing jurisdiction, while it would give to the Dominion full use of the residuary field for the period of the delegation.

Regulation of Trade and Commerce

There remains the problem of Dominion regulation of Trade and Commerce under number 2 of section 91. The problem here lies in this, that decisions of the Privy Council, and notably the decision on the Marketing Act of 1934, have deprived Parliament of all jurisdiction to enact any regulations covering commerce wholly within a province, that is, commerce that begins and ends within a province, even though such regulations are merely incidental to legislation of Parliament affecting the nation as a whole, such as was the Marketing Act of 1934.

Now, delegation would make it possible to cure for agreed periods of time this defect in the jurisdiction of Parliament. The provinces could, if so disposed, delegate to the Dominion power to regulate trade and commerce that begins and ends wholly within a province but only as incidental to federal legislation affecting the nation as a whole and therefore concerning interprovincial and foreign commerce. This would make possible a new marketing act good for the period of the delegation.

Another way out of the trade and commerce tangle, but not by way of delegation, would be to amend the B.N.A. Act so as to make regulation of trade and commerce wholly arising and ending within a province a concurrent field of the Dominion and the provinces. But in this instance Dominion laws should not be paramount but rather provincial laws, the usual paramountcy of Dominion laws in a concurrent field being put in reverse. This would supply the Dominion with the needed jurisdiction to include in a new marketing act, for instance, regulations concerning commerce within a province, but of course all such legislation would at all times be at the mercy of adverse provincial legislation. The other course described in the preceeding paragraph, by way of delegation, would be subject to the other defect, which lies inherent in delegated powers, that the powers delegated may not be renewed. But either course would supply the Dominion with the jurisdiction for the want of which federal regulation of trade and commerce in its interprovincial aspect is now almost non-existent.

Conclusion

Enough has been said to show the wide uses that may be made of the plan of delegation. It is hard to see why there should be any hesitation in at least procuring an amendment of the B.N.A. Act making possible delegation as advocated by the Sirois Report and the Federal Government, and Dean MacDonald. Such an amendment would not compel any province to delegate a single power. But with such an amendment and the resulting power to delegate given to our governments, it would be at least possible to see how far we could go in the way of providing Parliament with needed powers by way of agreement between the Dominion and the provinces.

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More on Copyright Confusion

THE EDITOR,

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I have read with interest Mr. H. E. Manning's article, "Copyright Confusion" Reconsidered,[1] in which he endeavours to show why my recom-

[1] (1948), 26 Can. Bar Rev. 671 (April).

mendations for the amendment of the Copyright Act and the International Convention should have scant consideration.

In my article I was not particularly concerned with the performing right except as incidental to the whole subject, but Mr. Manning seems to think that the purpose of my article was to get something for nothing for the music users in the performing right field. Nothing is further from the truth. If every amendment I have suggested became law not one cent would be saved to the broadcasting stations, theatres and other substantial users of music. The licence which Composers Authors and Publishers Association of Canada Limited offers to music users would be just as valuable as it now is. Nearly all my suggestions are now law in the United States and the very fact that the American Society of Composers Authors and Publishers collected performing right royalties of approximately $7,000,000 from United States broadcasting stations last year should afford a sufficient answer on this point. The American Society of Composers Authors and Publishers controls in the United States practically the same repertoire as Composers Authors and Publishers Association of Canada Limited controls in Canada.

I have no desire to abolish copyright nor are my suggestions designed to take the value out of copyright. I believe in adequate protection as a reward to the author for his genius but I cannot think there is any virtue in according protection to his assignee, usually a publisher, for fifty years after the author's death. Of course, the performing right societies have always opposed any suggested change in the law which might interfere with their operations. There would have been no Copyright Appeal Board to fix their charges had Parliament given effect to their strenuous opposition to this legislation.

I agree with a great deal of Mr. Manning's argument as it applies to the individual author, but when thousands of authors, composers and publishers band themselves together into performing right societies in nearly every civilized country and these societies inter-license each other, then you have what has been appropriately called a "super monopoly". The purpose of such societies is not to prevent the use of the author's work but to sell a licence to every music user and, as one of their representatives stated in the witness box in 1935, they charge "as much as they can conveniently collect".

Mr. Manning seems to think that copyright is an inherent right and should not be subject to any restriction, even by legislation, overlooking entirely that the right is a statutory one and that the author and composer have no protection apart from statute.

Mr. Manning states that not one of my recommendations is designed to protect the creator of the work and that they are all calculated to enable persons to make use of the ideas of the creators of works for their own profit or advantage. This is a very unfair statement nor could any such interpretation be placed on anything contained in my article. Responsible music users have always recognized their responsibility to pay for performing rights just as they pay for any other commodity or service used in their business.

The present Act is badly drawn; it is a mass of inconsistencies and anomalies, and the same thing is true of the International Convention. I am not alone in my criticism of the Act. In the Anniversary Number of the Canadian Bar Review (January 1948), Dr. Harold G. Fox, an eminent authority on the subject of Industrial Property, says at page 243, "The Act of 1921 is an excellent example of legislative plagiarism at its worst". He

then goes on to refer to the Act as "a topsy-turvy imitation of the Imperial Act" and adds that "the draftsmen of the Canadian statute evidently tried the shell-game, jumbling the sections into a mere hodge-podge arranged mainly according to whim".

The chief purpose of my article was to draw attention to many of these defects and offer suggestions as to the manner in which they might be corrected. The Act will have to be amended or a new Act passed after the forthcoming International Convention. At that time the whole subject should have exhaustive study by a competent impartial committee, which should hear witnesses representing all sides of the question. Any proposed legislation should be drafted by qualified experts on the basis of the Committee's report and be subject to careful examination before it is placed on the statute books.

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FUNCTIONS OF U.N.E.S.C.O.

To realize this purpose the Organization will:

(a) collaborate in the work of advancing the mutual knowledge and understanding of peoples, through all means of mass communication and to that end recommend such international agreements as may be necessary to promote the free flow of ideas by word and image;

(b) give fresh impulse to popular education and to the spread of culture; by collaborating with Members, at their request, in the development of educational activities; by instituting collaboration among the nations to advance the ideal of equality of educational opportunity without regard to race, sex or any distinctions, economic or social; by suggesting educational methods best suited to prepare the children of the world for the responsibilities of freedom;

(c) maintain, increase and diffuse knowledge; by assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions; by encouraging cooperation among the nations in all branches of intellectual activity, including the international exchange of persons active in the fields of education, science and culture and the exchange of publications, objects of artistic and scientific interest and other materials of information; by initiating methods of international cooperation calculated to give the people of all countries access to the printed and published materials produced by any of them.

(Paragraph 2, Article I, of the Constitution of the United Nations Educational, Scientific and Cultural Organization)