A proper study of the problem of provincial autonomy requires consideration of some fundamental principles. Laws are the framework of society. Without them, relations between men would be governed by individual brute force. Any order of things means laws in one form or in another. Laws in turn imply an authority empowered to make and to enforce them. Under any form of government the power of this authority over individuals is of necessity very great, and very great also is its influence on their living conditions.

For any given group of humans the constitution of the civil authority by which they are governed is therefore of prime importance. Obviously this will cause any human group possessing special characteristics to desire an authority of its own. A group forming what is sociologically termed a “nation” normally aspires to independence. Small states are apt however to encounter very serious difficulties owing to their inherent military and economic weakness. Instead of precarious military alliances or trade agreements, a federation offers stability and permanency. The federal state is an attempt to reconcile the need of military, political and economic strength, which large units only can offer, with the desire for self-government that is inherent in any human group having distinct collective feelings.

Of course federation necessarily implies that some powers become vested in a central authority. The real problem is the definition of these powers or, its corollary, of the powers remaining in the federated states or provinces.

In the eyes of some men, a federal state is an instrument of unification, in other words, a means of bringing about the gradual disappearance of the segmental differences opposed to complete political unity. In the eyes of others, federation of itself implies

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this complete political unity, the component states or provinces being looked upon as mere administrative entities whose functions should be restricted to the application of general policies defined by the central authority. In the eyes of autonomists, federation implies a division of political authority so that the component states or provinces are free to define their general policy in their own sphere of activity, without being obliged to conform with any pattern set down by the central authority.

In the construction of the British North America Act the courts, and especially the Judicial Committee of the Privy Council, have fairly consistently adopted the autonomist conception of federation:

They [the Federal Government] maintained that the effect of the statute has been to sever all connections between the Crown and the provinces; to make the government of the Dominion the only government of Her Majesty in North America; and to reduce the provinces to the rank of independent municipal institutions. For these propositions, which contain the sum and substance of the arguments addressed to them in support of this appeal, their Lordships have been unable to find either principle or authority. . . . and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government.  

The scheme of the Act passed in 1867 was thus, not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head.

Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs.  

All the arguments advanced against these decisions by numerous writers are based either on the “Peace, Order and good Government” clause or on the so-called “historical construction” of the Act.

In support of the first argument it is contended that the courts have failed to give full effect to the opening words of sec-

tion 91 and that the authority thus conferred on the federal Parliament should be broadly construed. But it is significant that seldom do those who advance this contention quote the complete sentence. They speak of the importance of the grant of legislative authority for the "Peace, Order and good Government of Canada". They point out that such expressions were traditionally used to grant general legislative authority; but they pay slight attention to the fact that these pregnant words are immediately followed by the all-important restriction: "in relation to all Matters not coming within the classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces". If due attention is paid to these words, it becomes impossible to construe the grant of residuary power otherwise than as saving provincial authority instead of overriding it.

The "historical construction" is a pretended inquiry into the intentions of the framers of the Canadian constitution, otherwise than by a consideration of the meaning of the words used in the final document. The fallacy of this method lies not only in the fact that it runs counter to a fundamental rule of legal interpretation but also in the fact that it is most unreliable. The B.N.A. Act is not the expression of the intention of one man, whose ideas might perhaps be gathered from extrinsic evidence with a reasonable degree of certainty; it is the expression of a compromise between many men holding different and opposed viewpoints. When agreement was reached on a text, are we justified in assuming that agreement was also reached on intentions?

4 "It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces . . . ."

6 See, for example, Bora Laskin, "Peace, Order and Good Government" Re-examined (1947), 25 Can. Bar Rev. 1054, at p. 1085: "Some sixty years ago the Judicial Committee said in Riel v. The Queen that the words 'peace, order and good government' were words 'apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to'. The remark was not made in relation to sections 91 and 92 of the British North America Act and in the context of the Act it is undoubtedly too wide. But in its reference to legislative objects it indicates the type of problem which a court must face in interpreting sections 91 and 92. It is beside the point that the words of the introductory clause are too large and loose for comfortable adjudication. The Judicial Committee has not been reticent about its ability to give content to the large and loose provincial legislative power in relation to property and civil rights in the province, although it may be noted that it has done so largely in terms of thwarting exercises of federal legislative power, whether for the peace, order and good government of Canada or in relation to the regulation of trade and commerce."

6 "The question is, not what may be supposed to have been intended, but what has been said": Brophy v. A.-G. of Manitoba, [1895] A.C. 202, at p. 216. See also Ladore v. Bennett, [1939] A.C. 468. This is not a rule of interpretation of statutes but a general rule applicable to all legal documents, such as wills: Auger v. Beaudry, [1920], A.C. 1010, at p. 1014.
The Meaning of Provincial Autonomy

We know that the Fathers of Confederation were far from unanimous in their conception of the proposed federation. Some, like Sir Charles Tupper, held complete unification as their ideal, while others, like E. B. Chandler, favored a large measure of provincial autonomy. A compromise formula was finally devised to which both groups assented. Does this mean that their conflicting points of view had been reconciled?

Experience in the practice of law shows that it is extremely difficult to visualize all the implications of a complex statute. Taxation statutes, for example, are prepared by specialists and scrutinized by experienced parliamentary counsel. Even then amendments introduced for the express purpose of avoiding unintended and undesired results are far from uncommon. Obviously, the long-term consequences of constitutional enactments are much more difficult of exact appreciation than the immediate consequences of taxation statutes.

Another important and often overlooked factor contributing to the difficulty of interpreting the B.N.A. Act is the fact that words actually lose much precision of meaning when used to define broad and fundamental political conceptions. The meaning of words is conventional. In final analysis it rests on generally accepted usage. It is really precise only to the extent that the category of acts or things described by any given word is susceptible of exact and objective definition.

This is the kind of precision which is almost totally lacking in the definitions of legal categories and concepts. They are precise only when applied to a given existing system of laws. Within this existing framework, such words as civil, criminal, municipal, have a clear and unmistakable meaning. But when the same words are used to define fields of legislative activity, any great degree of precision disappears. This is because, to a certain extent, the distinction between classes of laws is not based on an objective classification of the activities which are their subject-matter, but on the technique used in regulating them. In fact, the same activ-

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7 See Pope's Confederation Documents, p. 84.
8 There are definite indications that Sir John A. Macdonald had yielded to the desire of the delegates of Lower Canada, who insisted on a definite measure of autonomy. He is reported to have said at the Quebec Conference (Pope's Confederation Documents, p. 86): "New Zealand constitution was a Legislative Union, ours Federal. Emigrants went out under different guarantees. Local charters jarred. In order to guard these, they gave the powers stated to Local Legislatures, but the General Government had power to sweep these away. That is just what we do not want. Lower Canada and the Lower Provinces would not have such a thing."
9 If a repressivetechnique is resorted to, the law is classified as "criminal" or "penal"; if a remedy by private lawsuit is created, the law is classified as "civil".
ities are the subject-matter of different classes of laws from different aspects. As an illustration of the many judicial pronouncements in which this is recognized, I should like to quote these words of the late Chief Justice Duff:10

The fallacy lies in failing to distinguish between legislation affecting civil rights and legislation "in relation to" civil rights. Most legislation of a repressive character does incidentally or consequentially affect civil rights. But if in its true character it is not legislation "in relation to" the subject matter of "property and civil rights" within the provinces, within the meaning of section 92 of the British North America Act, then that is no objection although it be passed in exercise of the residuary authority conferred by the introductory clause.

On what basis is the "true character" to be ascertained, once it is decided, as it should be, that "civil law" and "criminal law" are not to be confined to the content they had in 1867?11

When the question is critically examined it becomes apparent that human activities as a whole are the subject matter of legislation and that these activities are, in our modern society, so inter-related that, if every possible degree of connexity is explored, there is no limit to the permissible extension of any given field of legislation. For instance, in Australia, federal power over "national defence" has, in wartime, been construed as extending to any measure deemed necessary. In Canada, unlimited federal authority for emergency legislation was held to be implied in the Constitution:

It is proprietary and civil rights in new relations, which they do not present in normal times, that have to be dealt with . . . . In a sufficiently great emergency such as that arising out of war, there is implied the power to deal adequately with that emergency for the safety of the Dominion as a whole.13

It is thus seen that a most important distinction rests on the appreciation of a "degree" of necessity. If any degree were held sufficient, federal authority would be practically unlimited. As illustrations of this principle let me consider briefly the jurisprudence of the Supreme Court of the United States on the "Commerce clause" as contrasted with the decisions of the Privy Council and of the Supreme Court of Canada on the federal power to regulate "Trade and Commerce".

In the United States, pre-New-Deal decisions had established the principle that local activities could be regulated by Congress under the commerce clause only if they were "directly" related to

"interstate commerce". More recent decisions of the Supreme Court of the United States have brushed aside this distinction, however, with the result that the commerce clause has acquired practically unlimited meaning: "The federal commerce power is as broad as the economic needs of the nation".14

In Canada, on the other hand, federal authority over trade and commerce, although unlimited in its terms, was held to be strictly limited to the regulation of interprovincial operations, because to hold otherwise would have deprived provincial legislatures of powers they were clearly intended to possess:

The scope which might be ascribed to head 2, s. 91 (if the natural meaning of the words, divorced from their context, were alone to be considered), has necessarily been limited, in order to preserve from serious curtailment, if not from virtual extinction, the degree of autonomy which, as appears from the scheme of the Act as a whole, the provinces were intended to possess.16

I have italicized the word "degree" in this last quotation because I wish to stress the point that here again, as in the definition of the federal emergency power, it is a question of "degree", not a specific distinction. In my view it is wrong to read the generally accepted definition of legislative autonomy, ("that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs")16 as implying limits defined with mathematical accuracy. To do so is to conceive political science as an exact science ascertainable in the same manner as the natural sciences.

The government of men is essentially a moral problem. Moral problems are not solved by mathematical formulas but by the exercise of prudent judgment based on fundamental principles of morality. These principles rest on belief in God, and in this sense "Christianity is part and parcel of the law". Moral principles, by their very nature, imply concepts which, in their application to contingencies, cannot be divorced from a certain degree of subjective appreciation, a fact illustrated by the "prudent man"

13 "But even if ... [an] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect". Per Mr. Justice Jackson in Wickard v. Filburn (1942), 317 U.S. 111, at p. 125.
14 Per Mr. Justice Murphy in American Power and Light Co. v. SEC (1946), 67 S. Ct. 133.
referred to in negligence cases. The proper standard of conduct is not to be ascertained by statistical methods but by a consideration of the "proper" duty to be discharged. What is "proper" is a question to be decided according to conscience, not otherwise.

If any one doubts the correctness of the statement that words used to describe "degrees" in moral (including legal) questions are of necessity imprecise and open to subjective appreciation, let him consider, on the one hand, the meaning ascribed to the word "gross" in the construction of statutes restricting the right of action to "gross negligence" in gratuitous passenger or sidewalk accident cases and, on the other, the meaning ascribed to the same adjective in the application of the wartime wages orders restricting wage adjustments to cases of "gross injustice". In the former, anything short of murder or wilful maiming is held excluded; in the latter the slightest inequality is held included.

As a further illustration of the difficulty of precisely defining fundamental legal terms, let us consider the meaning of the word "free". It was discussed by the Privy Council in the construction of the "free trade" provision of the constitution of Australia and the following observations were then made:

'Free' in itself is vague and indeterminate. It must take its colour from the context. Compare, for instance, its use in free speech, free love, free dinner and free trade. Free speech does not mean free speech; it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law, as was pointed out in McArthur's case. Free love, on the contrary, means licence or libertinage, though, even so, there are limitations based on public decency and so forth. Free dinner generally means free of expense, and sometimes a meal open to any one who comes, subject, however, to his condition or behaviour not being objectionable. Free trade means, in ordinary parlance, freedom from tariffs.

The fundamental idea, the basic truth, expressed in those observations is that freedom is not something absolute. This is strikingly revealed by the practical consequence of the political regime that promises absolute freedom: communism. It yields freedom, but for one man: the dictator. It cannot be otherwise: total emancipation of any one man means total domination over all others. True freedom means freedom under the law. Autonomy is nothing else than freedom under the constitution.

The true concept of autonomy is thus like the true concept of freedom. It implies limitations, but it also implies free movement.

17 This observation is not meant as a criticism of the decisions; on the contrary it cannot be doubted that they carry out the intent of the enactments.
within the area bounded by the limitations: one no longer enjoys freedom when free to move in one direction only. It should therefore be realized that autonomy means the right of being different, of acting differently. This is what freedom means for the individual; it is also what it must mean for provincial legislatures and governments. There is no longer any real autonomy for them to the extent that they are actually compelled, economically or otherwise, to act according to a specified pattern. Just as freedom means for the individual the right of choosing his own objective so long as it is not illegal, autonomy means for a province the privilege of defining its own policies.

It must be conceded that autonomy thus understood allows the provinces on occasion to work at cross purposes. But it would be a grave mistake to assume that this is wrong in itself, or that it is necessarily against the national interest. Unfortunately this assumption is all too frequently made and it is also all too frequently the only argument invoked against autonomy (if it can be termed an argument). Here is a typical specimen:

The most serious specific threat to any orderly kind of future for Canada lies in the nature of our Constitution. The 'property and civil rights' clause of section 92 of the British North America Act will make short work of our war-time measures and will very quickly reduce us to the bedlam of provincialism again. Can any sane person believe that the competing authorities, mostly parochial, will give us anything but anarchy leading perhaps to revolution?\(^{19}\)

It will be noted that autonomy is deprecated here as a mark of insanity, but no other argument is advanced. Obviously the underlying assumption is that diversity in legislation concerning property and civil rights is against national interest. Implicit in this assumption is the belief that uniform legislation enacted by the federal Parliament would be better. Of course uniformity has its advantages, but it also has its disadvantages.

The framing of legislation, as already pointed out, is a political task.\(^{20}\) Hence it is not an exact science but a matter of prudent judgment, on which even popularly elected men may sometimes go wrong. Why should competition be assumed to be undesirable in this sphere of action, when it proves to be such a valuable force in the economic field? It should not be assumed that, in such matters, there is necessarily one right solution, all others being wrong. Human affairs are more complex than that and,

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\(^{19}\) From the introduction by A. R. M. Lower to "War and Reconstruction", a pamphlet published in 1943 by the Canadian Institute on Public Affairs.

\(^{20}\) In the aristotelian sense, not necessarily in the familiar sense of partisan politics.
very often, several possible courses of action are open among which one may choose. Such is the situation in individual life and such it is in collective action.

This is especially so when the characteristics of individuals or of collectivities are different. Educators have long ago recognized that human beings are not robots and that varying methods and different institutions are necessary to suit varying types of intelligence and differences in character. The same difficulty is met in devising legislation: it is wrong to assume that the same laws are suitable for all peoples. On the contrary, laws have a cultural aspect; hence due consideration should be given in framing them to the character, condition and beliefs of those for whom they are made. Autonomy is designed for the very purpose of meeting this requirement. The French-speaking population of the province of Quebec is obviously the group of Canadian citizens specially interested in it. For them autonomy is linked up with the preservation of their way of life.

Of course, it cannot be denied that the general welfare of a country requires that collective action be made uniform in some important fields, such as defence, tariff, currency. More than that, it must be conceded that the area of uniformity cannot be defined without allowing for extension in emergencies. But the increased need for uniformity in emergencies cannot be relied on as an argument against autonomy in normal times. It is already provided for.

All this means that tests of constitutional validity cannot be rigidly devised. Almost invariably they involve judgment on questions of "degree". The courts have therefore been compelled to rest their decisions touching constitutional issues on broad principles and on a general conception of what the B.N.A. Act intended to secure to the provinces and to the federal authority, respectively, rather than on an impossible technical construction:

Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies.\[21\]

On this basis the courts have consistently refused to allow

\[21\] In re The Regulation and Control of Aeronautics, [1932] A.C. 54, at p. 70.
any particular clause of the B.N.A. Act to be construed in a way that would enable the federal Parliament to invade the provincial sphere of action outside of emergencies. "Such a result would appear to undermine the constitutional safeguards of Provincial constitutional autonomy" was the main reason given by Lord Atkin for his refusal to construe section 132 as enabling the federal Parliament to encroach on provincial matters in order to implement labour conventions adhered to by Canada.

The same principle was applied in dealing with provincial legislation. For instance, the Supreme Court of Canada has invalidated an Alberta law interfering with the freedom of the press, because it would have jeopardized the working of federal parliamentary institutions:

Some degree of regulation of newspapers everybody would concede to the provinces. Indeed, there is a very wide field in which the provinces undoubtedly are invested with legislative authority over newspapers; but the limit, in our opinion, is reached when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada as contemplated by the provisions of The British North America Act and the statutes of the Dominion of Canada.

Let it be noted that, here again, it is a question of "degree". Undoubtedly the task of construing our constitution would be made lighter for our courts if provincial autonomy could be defined in more specific words, but that hardly appears possible. The great value of the numerous decisions rendered since 1867 lies in the illustrations they afford of the "degree" of autonomy secured to the provinces.

A great volume of criticism has been heaped upon the Privy Council and the Supreme Court on the ground that their decisions rest on a narrow and technical construction of the B.N.A. Act. This contention is ill-founded. The decisions on the whole proceed from a much higher view. As appears from passages I have quoted, they recognize the implicit fluidity of any constitution by allowing for emergencies and by resting distinctions on questions of degree. At the same time they firmly uphold the fundamental principle of provincial autonomy: they staunchly refuse to let our federal constitution be changed gradually, by one device or another, to a legislative union. In doing so they are preserving the essential condition of the Canadian confederation.

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