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The Presidential Address*

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In January last I delivered an address to the Alberta Bar on the subject of appointments to the bench, which was subsequently published in the Canadian Bar Review[1] and has been favourably commented upon by the press. I have been much encouraged by a statement made in the House of Commons in May last by the Honourable the Minister of Justice that the government would welcome greater interest in this matter by the Canadian Bar Association, providing, of course, that the constitutional responsibility for the appointment of judges is not abdicated. As President of the Association I gladly accept the Minister's invitation to discuss the matter further. The invitation is gratifying particularly because a judiciary selected from those possessing the best brains and the highest judicial qualifications is a matter of vital concern to members of the Canadian Bar Association as well as the public generally. It is my firm conviction, which I know is shared by many others, that a strong judiciary can make a greater contribution to the public welfare than any other group in our social structure.

In my travels during the past year I found the bar of each province very much concerned about public relations. Much has been done. Schemes for providing legal aid have become general, indemnity funds have been established in a number of provinces,

* Delivered by J. A. Clark, C.M.G., D.S.O., Q.C., to the Canadian Bar Association at the opening session of its Thirty-fourth Annual Meeting on September 3rd, 1952.

[1] (1952), 30 Can. Bar Rev. 28.

and in others are under consideration. Advertisements are being published in the press bringing to public notice the advantages of consulting lawyers. In some provinces excellent press relations have been established and, in at least one, interviews are given on legal topics over the radio. These steps are important and will doubtless have a good effect. All of them combined, however, will not produce anything comparable to the respect and prestige the bar will gain from a judiciary chosen on the basis of merit only, divorced from political considerations. But may I repeat with emphasis what I have already said, that I do not believe that public service should disqualify a man for an appointment to the bench. On the contrary, public service can be a most important qualification, but there is a distinction between public service and party loyalty, and party loyalty should not be the principal, or indeed a qualification at all. The respect in which a man is held by bench and bar for his integrity, his legal attainments and judicial qualities should be the principal measure of his qualifications. If it happens that he has also given public service, so much the better.

Today I make my approach to the subject of judicial appointments from the constitutional side. You will recall that the first recital in the preamble to the British North America Act expressed the desire for a federal union into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom. Unless, therefore, there are good reasons for adopting other customs and conventions, we should follow the customs and conventions around which the constitution of the United Kingdom is built. Under one of these conventions the Crown appointed and still appoints the judges in the United Kingdom, but the prerogative was exercised at the time of Confederation and is still exercised in a manner different from the practice followed in Canada. In Canada the judges are appointed by the Governor-General-in-Council, which in practice means Cabinet approval, whereas in the United Kingdom the Prime Minister advises upon the appointment of the Lords of Appeal in Ordinary, the Lord Chief Justice, the Master of the Rolls, the President of the Probate, Divorce and Admiralty Division, the Lord Justices of Appeal and members of the Judicial Committee of the Privy Council; and the Lord Chancellor advises upon the appointment of High Court judges. The Prime Minister invariably seeks the advice of the Lord Chancellor before making his submission to the Sovereign, but the matter is never referred to the Cabinet

itself. The Lord Chancellor does not seek the Prime Minister's approval before making his submission and his recommendations are not referred to the Cabinet.

I have examined the authorities and have been unable to find an explanation for the Canadian practice of appointing judges by order in council. I submit that the practice of having the Cabinet consider each appointment to the judiciary is objectionable and unnecessary. That the procedure is unnecessary is clearly indicated by section 96 of the British North America Act and the letters patent creating the office of Governor-General. Section 96 reads:

> The Governor-General shall appoint the judges of the Superior, District, and County Courts in each Province, except those of the Courts of Pro bate in Nova Scotia and New Brunswick.

Sections II and III of the first letters patent creating the office of Governor-General read:

> II. And We do hereby authorize and empower Our said Governor-General to keep and use the Great Seal of our said Dominion for sealing all things whatsoever that shall pass the said Great Seal.
>
> III. And We do further authorize and empower Our said Governor-General to constitute and appoint, in Our name and on Our behalf, all such Judges, Commissioners, Justices of the Peace, and other necessary Officers and Ministers of Our said Dominion, as may be lawfully constituted or appointed by Us.

True, the original letters patent constituting the office of Governor-General have been amended from time to time. The amendments, however, do not relevantly alter the effect of the sections.

I find support for my belief that no order in council is necessary in appointing the judges mentioned in section 96 of the British North America Act in the fact that a clear distinction is made in the statute between acts performed by the Governor-General and acts performed by the Governor-General-in-Council. Section 10 deals with the provisions of the Act that relate to the Governor-General alone and section 13 with the provisions that relate to the Governor-General-in-Council. Section 12 recognizes the distinction in that it vests powers enjoyed under pre-Confederation statutes in the Governor-General with authority to act with the advice of his Privy Council, or any members thereof, or by the Governor-General individually as the case requires.

No section of the British North America Act requires an order in council in the appointment of judges. On the contrary the Act expressly authorizes the Governor-General to appoint them. To complete an appointment he may, under the authority of the letters patent creating the office of Governor-General,

affix the great seal to the judge's patent. In each appointment, if the United Kingdom custom or convention is followed, he will act upon the advice of the appropriate Minister, namely, the Prime Minister or Minister of Justice.

I am, of course, conscious that in Canada a series of orders in council, commencing in May 1st, 1896, have established the practice that the recommendation for the appointment of chief justices is made to Council by the Prime Minister. Other appointments are recommended to Council by the Minister of Justice. Despite these recommendations, and particularly those of the Minister of Justice, the voices of the other ministers can still be heard. If that were not so, it would be useless to refer appointments to Council. I am also conscious that the Supreme Court of Canada Act and the Exchequer Court Act require orders in council leading to the appointment of the judges of those courts. Why this distinction is made between the Supreme Court and Exchequer Court Acts, on the one hand, and section 96 of the British North America Act, on the other, is not clear. No reason is given by any authority for changing the phraseology contained in section 96 of the British North America Act.

As distinguished from the section dealing with judges, section 58 of the Act provides that Lieutenant-Governors shall be appointed by the Governor-General-in-Council by instrument under the Great Seal of Canada. An order in council is necessary in this instance. This seems logical because the qualifications of a Lieutenant-Governor are much more general in their nature than the specialist qualifications of a judge. It is natural, therefore, that all ministers should be consulted about such an appointment.

Todd's *Parliamentary Government*[1] records an interesting controversy between the Colonial Secretary and the Canadian government of the day (1873-1876) on the significance of the terms "Governor-General", and "Governor-General-in-Council", as used in the British North America Act. The question at issue was whether the Governor-General had power to assent to or disallow provincial legislation on his own initiative or was bound to take the advice of his ministers. The Earl of Kimberley, the Colonial Secretary, contended that it was a matter for the individual discretion of the Governor-General. The Canadian Privy Council, guided by a report of Mr. Edward Blake, the Minister of Justice, expressed the opinion that the Governor-General was required to exercise the power of assent or disallowance on the advice of his

[2] Todd, Parliamentary Government in the British Colonies (1880), pp. 331 et seq.

ministers. The Colonial Secretary pointed out that the distinction between Governor-General and Governor-General-in-Council, which occurs in sections 10 and 13, is observed throughout the British North America Act. Mr. Blake held the view that the Governor-General must act upon the advice of his responsible ministers and that it is more reasonable to suppose that the words "in Council" were omitted, in the sections where they do not appear, for the sake of brevity and to avoid unnecessary repetition. Though the correspondence continued for three years, neither side gave way, except that the Colonial Secretary did admit that the Governor-General should invariably have recourse to the advice of his ministers before deciding such questions, although he might not be willing to act according to their advice. In this admission the Colonial Secretary failed to recognize the custom or convention prevailing in the United Kingdom that the Crown not only has recourse to the advice of the ministers or the appropriate minister but, with certain constitutional exceptions, acts upon advice. Todd concluded that the Colonial Secretary's contention that the Governor-General had power to assent to or disallow legislation on his own initiative was untenable because section 56 of the British North America Act uses the phrase, "Queen-in-Council", and should be read with section 90, which deals with assent to bills and disallowance of acts. In other words the statute in this instance required an order in council. Todd also expressed the opinion that the term "Governor-General" was not used simply for the sake of brevity and to avoid needless repetition as contended by Mr. Blake. His view was that it would be an unwarrantable excuse for obscure phraseology in such an important and authoritative document as the British North America Act.

An official memorandum of Sir John Macdonald quoted[3] by Todd throws additional light upon the significance of the terms "Governor-General" and "Governor-General-in-Council". It indicates that the Governor-General performs certain acts on the advice of his council and other acts upon the advice of a responsible minister. The memorandum follows:

> Long before confederation, the principle of what is known as 'responsible government' had been conceded to the colonies now united in the dominion. . . . Whether, therefore, in any case, power is given to the governor-general to act individually or with the aid of his council, the act, as one within the scope of the Canadian Constitution, must be on the advice of a responsible minister. The distinction drawn in the statute between an act of the governor and an act of the governor in council is a technical

[3] P. 342, and see Commons Papers 1878-79, s. 2445, p. 109.

> one, and arose from the fact that in Canada, for a long period before confederation, certain acts of administration were required by law to be done under the sanction of an order in council, while others did not require that formality. In both cases, however, since responsible government has been conceded, such acts have always been performed under the advice of a responsible ministry or minister.

Thus section 96 of the British North America Act, the letters patent creating the office of Governor-General and Todd's discussion of the use of the terms "Governor-General" and "Governor-General-in-Council" make it clear that in the appointment of certain judges the Governor-General has power to act upon the advice of a responsible minister as distinguished from the Cabinet as a whole.

It is interesting to note that before and some time after Confederation political opponents collaborated upon appointments to the bench. For example in 1855 Sir John Macdonald invited Robert Baldwin, a former Premier and a political opponent who had fought valiantly for the principles of responsible government, to accept the Chief Justiceship of Upper Canada. Years afterwards, in 1868, Macdonald discussed with Mr. Edward Blake, a formidable political opponent, and later Minister of Justice, the general re-organization of the bench in Ontario, and in the following year he offered Mr. Blake the Chancellorship. Political considerations were secondary in those days and men with special knowledge of judicial qualifications were consulted, even though they were political opponents of the responsible minister.

It appears to me a logical conclusion that the convention in the United Kingdom of excluding those ministers whose direct concern is not with the law from an equal voice with the Prime Minister or the Lord Chancellor in the selection of judges was designed to avoid discussions and possible disagreements within the Cabinet upon the political merits of different candidates for the judiciary. As stated by Lord Schuster, former Secretary to the Lord Chancellor:

> This business of the appointment of judges is one of the most responsible and most difficult of the duties which the Lord Chancellor has to discharge. He alone is responsible for the advice which he gives to Her Majesty and he must expect, if he should make appointments from any other motive than a desire to get the best man, to incur criticism of informed professional opinion.

He adds:

> There is a popular belief that service to the political party at the moment in power is a strong influence upon the advice tendered to the Crown. This is a profound error.

Lord Schuster's statement is borne out by the appointments made by the Labour Government between 1945 and 1951. Lord Jowitt appointed 25 out of 37 High Court judges; only one was known to be a Socialist. The Prime Minister, Mr. Attlee, appointed 17 persons to judicial office, none of whom had ever had any connection with Socialism or the Labour Party. The question arises, if the Minister of Justice advised the Governor-General upon the appointment of Superior Court judges without reference to the Prime Minister or the Cabinet, would appointments be different from those made in the past? To my mind the answer is obvious. The public and the bar, realizing that the judiciary is the most important group in our society, would hold the Minister of Justice personally responsible for any appointment that had the appearance of a reward for party service, and subject him to serious personal criticism. He escapes personal criticism now because each minister has an equal right to express his opinion before an order in council is approved. If a minister from a particular province or area exercises his full influence with his fellow ministers he may well win an appointment for one who has been a valued supporter in past campaigns, and this notwithstanding that his candidate does not possess the judicial qualifications the public and the bar are entitled to expect.

Recommendations have been made by the bar from time to time with the object of ensuring that those best qualified for judicial appointments are selected as vacancies occur. Mr. Eugene Lafleur, K.C., in his day one of the most eminent counsel in Canada, or for that matter the Empire, gave interesting evidence in 1928 before a special committee of the House of Commons on judges salaries.[4] He suggested that benefit would result from the appointment of judges on the recommendation or approval of the bar associations throughout the Dominion. In answer to a suggestion that this procedure would make the bar association a close corporation he answered:

> Well, I assure you that, as far as the Bar is concerned, they are only too anxious to get good judicial appointments, quite independent of politics, or favour or anything of that kind, and I am sure that some good would result from unofficial conferences between the Government and the Bar Associations.

He also made some pointed remarks upon the evil resulting from the man seeking the position rather than the position the man. In this connection I tell you that even I, as president of the Canadian Bar Association, have been asked to write the Minister

[4] Dawson, Constitutional Issues in Canada 1900 to 1931, p. 330.

of Justice supporting the candidature of certain men for judicial appointment. Needless to say, I have declined.

In my address to the Alberta Bar I suggested that the bar should persist in its demand for a formula that will enable the Minister of Justice to select those best qualified for judicial vacancies. I cited at that time the Banff resolution of the Canadian Bar Association, which requested the government of Canada to consult with a committee consisting of the chief justice of the province, the chief justice of the trial division, and representatives of the benchers of the law society, before making appointments to the bench in a particular province.

I believe that there is merit in the Banff resolution. We in British Columbia have had practical experience with a similar formula for the appointment of King's Counsel, now Queen's Counsel. In 1950 an amendment was enacted to the King's Counsel Act, which requires the Attorney-General to consult with the Chief Justice of British Columbia, the Chief Justice of the Supreme Court and two members of the Law Society of British Columbia before he makes an appointment. This system has worked well in British Columbia. On the only occasion that King's Counsel have been appointed since the Act took effect few knew that the committee was at work. The names of the two benchers were not disclosed and consequently there was no opportunity for lobbying. The result was most gratifying.

Although I believe this procedure has had the effect of abolishing patronage in the appointment of Queen's Counsel in British Columbia, and would be most helpful to the Minister of Justice and government of Canada if adopted for appointments to the judiciary, I do not consider it the only effective formula. I believe the convention that existed in the United Kingdom at the time of Confederation of making appointments on the recommendation of the Prime Minister in certain instances, and of the Lord Chancellor in others, without reference to the Cabinet, could be equally effective, and would meet the Minister's very proper condition that the constitutional responsibility of appointing judges should not be abdicated. Quite consistently with this convention the Minister could ask a committee, such as the one suggested by the Banff resolution or by Mr. Lafleur, or a committee similar to the one used in British Columbia for the appointment of Queen's Counsel, to make recommendations. From these recommendations he could make his selection. By so doing he would not abdicate his constitutional responsibility; on the contrary he would be resuming a constitutional responsibility that at some time or other

has been abdicated by a Minister of Justice to the Cabinet as a whole. This, I submit, would be a great improvement over the practice of receiving representations about appointments from colleagues and others who may be quite ignorant of the qualities required. Such informal conferences would enable the Minister to compile lists of men qualified for appointment, from which the judges could be appointed, before there is an opportunity for candidates to submit material in support of their claims.

The simple fact is that the present system is wrong. As put by Dawson:[5]

> Party affiliations play a varied part; but they are not entirely absent from an appointment, and at times actually prevent the choice falling on those with more desirable qualities.

Canada has developed a bi-partisan foreign policy. A Civil Service Commission was created to eradicate political patronage. Does it not seem an anomaly therefore that the patronage system should govern the most solemn function of the Sovereign's representative under section 96 of the British North America Act and the letters patent that create the office of Governor-General?

We in Canada are not alone in our anxiety for the abolition of political patronage in judicial appointments. The American Bar Association has concerned itself with this problem for some years and is making progress. In the United States judges were originally appointed. It was not until 1846 that the State of New York set the precedent for an elective judiciary and other States followed suit. Today there are several methods of selecting judges in the United States: first, the elective system; secondly, the appointive system; thirdly, the appointive-elective system.

The battle for reform, in which the American Bar Association is taking the lead, is on. A constitutional amendment was submitted to the voters in the State of Missouri in 1940 and the elective method of selection was abolished there. Now when a vacancy occurs in the judiciary, a seven man commission submits a list of three names to the Governor. The Governor chooses one of these to fill the vacancy. After the appointee serves for one year, he is required to go to the people on a separate judicial ballot, which asks the simple question: "Shall Judge So-and-So be retained in office?" He is not permitted to campaign and he may not contribute to or hold office in any political party. The Missouri voters adopted the amendment in 1940 by a majority of 90,000 votes. In 1942, an attempt was made to scrap the plan by a constitutional amendment; this time there was a majority

[5] The Government of Canada, (1947), p. 484.

of 180,000 in favour of keeping the scheme in operation. It is generally accepted that in Missouri partisan political considerations have been effectively removed. Several States have followed the precedent and the State of Pennsylvania is at present considering a similar plan.

The American Bar Association at its last annual meeting approved a resolution introduced by the Honourable John W. Davis, pointing to the need for the selection of only the best qualified persons available for appointment to judicial offices and asking that the President, before nominating, and the Senate before confirming request the report and recommendations of the Judiciary Committee of the Association. That the efforts of the American Bar Association have the support of prominent members of the judiciary is evidenced by a speech before the members of the Pennsylvania Bar by Harold R. Medina, judge of the United States Court of Appeals, widely known for his conduct at the trial of the Communist leaders in 1950, and now chairman of the Section of Judicial Administration of the Association. He said in part:

> The American public is sick and tired of waste and inefficiency and it never did see why there should be any tie-up whatsoever between the administration of justice and partisan politics. Those who have the responsibility of selecting and appointing Judges may be sure that the present temper of public opinion is such as to demand that Judges be appointed on the merits and not rewarded for past services as political stooges.

I refer to the action of the American Bar Association not with a view to recommending the adoption in detail of their suggestions, but to indicate the outspoken denunciation by both judges and lawyers in the United States of the use of political influence in connection with judicial appointments, and also as an indication that public opinion has forced the adoption of the recommendations of the bar in a substantial number of the states of the Union.

Summarizing, the theme of my remarks is that, although we honour and revere our judges, we cannot subscribe to the method of their appointment. There are excellent reasons for following the United Kingdom convention, which existed before 1867, and still exists, a convention under which chief justices would be appointed on the advice of the Prime Minister, and certain other judges on the advice of the Minister of Justice, without reference to the Cabinet. I know of no good reason why the Minister of Agriculture, of National Defence, of Indian Affairs, and a dozen others, should have an equal voice with the Minister of Justice

in the appointment of judges. If the Minister of Justice were confronted with a legal problem, which threatened the loss of his property or involved his life, he would not turn to the Minister of Agriculture, the Minister of Trade and Commence, or any other layman in the Cabinet, to name a good lawyer to act for him. There is every good reason why the Minister of Justice should consult with committees, such as were suggested by Mr. Lafleur, and this Association in the Banff resolution.

The confidence of litigants whose lives and property are at stake is not heightened by the fact that the judge appointed to adjudicate has rendered party service. It is a sign of immaturity that we have not yet shaken off patronage in appointments to the judiciary. The few exceptions to which attention has been drawn only point up the fact that as a general rule men from a party out of office are not appointed.

If by any chance I am wrong in saying that the law does not require appointees to the bench to be passed on by the Cabinet, a very simple amendment will accomplish the purpose I have in mind. An ordinary Dominion Act will amend any relevant statute, and since the passage of the British North America (No. 2) Act, 1949, an ordinary Dominion Act could also amend or repeal any relevant United Kingdom Act. If I am right, however, all that is necessary is a simple announcement by the government of the day that henceforth it is proposed to adopt the practice followed in the United Kingdom for the past century or more. No abdication of constitutional responsibility would be involved.

I repeat what I said in Edmonton, that the responsibility for the system of appointment of judges rests squarely upon the Bar of Canada. In democracies, governments and parliaments cannot resist public opinion. Governments and parliaments exist to interpret and to serve public opinion. That opinion, so far as this subject is concerned, should originate within the Bar. I leave this problem with you, trusting that you will set an example and give the lead that lawyers can and should give.