SOCIAL AND ECONOMIC PROBLEMS* IN CANADIAN FEDERALISM.

"There must be power in the States and the Nation to remould, through experimentation, our practices and institutions, to meet changing social and economic needs," declared Mr. Justice Brandeis, in a recent dissenting opinion.[1] The doubts as to the existence of such powers in the United States arise from the judicial interpretation of constitutional guarantees of personal liberties and protection of property rights, which, it is held, cannot be infringed upon without due process of law. Social legislation, in particular, has frequently been declared unconstitutional as constituting such an infringement. But a new trend in judicial decisions is already apparent consonant with the social and economic programme of the Roosevelt Administration.

In Canada there is no such limitation of powers. The Constitution contains no declarations on natural justice or rights of property or sanctity of contracts. It is founded, in part, upon the British doctrine of the sovereignty of Parliament. In conformity with the implications of this doctrine, the Courts hold that "the powers distributed between the Dominion and the Provinces by the British North America Act cover the whole area of self-government within the whole area of Canada."[2] In other words, the Dominion Parliament and the provincial legislatures may between them, generally speaking, legislate on all matters within Canada.

Experience based upon the working of the Canadian Constitution teaches, however, that the mere existence of powers to deal with all matters is in itself inadequate until such powers can be effectively and satisfactorily exercised. Since such effective exercise has not been possible in Canada, the economic crisis has given rise to the necessity for the redistribution of legislative powers in order that the constitution of 1867 be made to fit the needs of the people in 1934.

The Fathers of Confederation intended that the division of powers in the British North America Act should provide a flexible constitution. It was to be, said Sir John A. Macdonald,

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*Subject of a Paper read before the Canadian Political Science Association, May 1934. Mr. Goldenberg is a member of the Montreal Bar, and is a lecturer at McGill University on Economics and Political Science.

[1] *New State Ice Co.* v. *Liebmann* (1931) 285 U. S. 311.

[2] Earl Loreburn, L.C., in *Attorney-General for Canada* v. *Attorney-General for Ontario* (1912) A.C. 571.

"a mere skeleton and framework that would not bind us down."[3] It therefore conferred a general grant of power upon the Dominion Parliament in order to enable it to adapt itself to changing conditions in the life of the nation. "In other words," says Professor Kennedy, "the Constitution began with what appeared to the 'fathers' such sufficiently strong central control over the provinces as would render them in their executive and legislative capacities subordinate to the central Government; while the ambit itself of their legislative authority was intended to be such as to leave the vast undefined residuum to the Dominion. . . . . We now witness on the North American continent singular political developments. The American Republic began with a theory of State rights. To-day, we watch the ever-increasing growth of federal power. Canada began its political existence with the scales heavily weighted in favour of the central authority. To-day, the Canadian provinces enjoy powers greater than those of the States of the American union. In both federations the most cherished aims of the founders have been nullified."[4]

This change has been effected in Canada by the interpretations of the Judicial Committee of the Privy Council which have relegated the residuary powers of the Dominion Parliament to the position of a reserve power for use only in national emergencies.[5] One of the specified provincial powers—"property and civil rights in the province"—which is wide enough to cover nearly all legislation outside of pure criminal law, has been assimilated by the Courts to the tenth amendment of the United States Constitution, and has become the effective residuary clause of the British North America Act. "New subjects as they arose were put under property and civil rights rather than under the Dominion residuary clause. The whole field of social legislation, for example, such as old age pensions, minimum wage acts, laws respecting hours of labour, factory acts, unemployment insurance and relief, and the like, is considered to fall within property and civil rights, and hence is provincial. None of these subjects is specifically mentioned in the B.N.A. Act. Even the control of trade and commerce is now considered a matter of property and civil rights in so far as local trade within the province is concerned. Thus, co-operative institutions, liquor control, hydro-electric power production and dis-

[3] Sir Joseph Pope: Confederation Documents (Toronto: Carswell Co., 1895) p. 59.

[4] W. P. M. Kennedy: Law and Custom in the Canadian Constitution, in "The Round Table," London, December 1929, pp. 143-60.

[5] *Toronto Electric Commissioners* v. *Snider* (1925) A.C. 396.

tribution, insurance, and other unspecified subjects, belong primarily to the Provinces.

This is true, not only despite the Dominion residuary clause, but despite also the power to regulate trade and commerce, which is specified in the B.N.A. Act as belonging to the Dominion."[6]

The world of 1934 is vastly different from that of 1867—at least in matters political, social and economic. This fact is recognized in more recent federal constitutions. The Commonwealth of Australia Constitution Act (1900) gives to the Commonwealth Parliament jurisdiction over such matters as :

> Invalid and old-age pensions;
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> Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;
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> Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

The Weimar Constitution (1919) of the German Republic gave to the Reich the power of legislation in respect to :

> Poor Relief and vagrancy;
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> Public Health;
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> The right to work, insurance and protection of workers and other employees, and employment exchanges;
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> Socialization of natural resources, as well as the manufacture, production, distribution, and price-fixing of economic goods destined for public use;
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> Commerce;
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> Industry and mining;
>
> Insurance;

It is to be noted that the power to legislate on these matters was not to belong exclusively to the Federal Government. Article 9 of the Constitution added the provision that :

"In so far as it is necessary to issue uniform regulations, the Reich shall have the power of legislation in respect to:

> Social Welfare;
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> Protection of public order and safety."[7]

[6] F. R. Scott: Social Reconstruction and the B. N. A. Act (L.S.R. Pamphlet—Toronto: Thomas Nelson & Sons) pp. 6-7.

[7] McBain and Rogers: The New Constitutions of Europe (New York: Doubleday, Page and Co., 1922) pp. 177-178.

The trend has apparently been towards wider national powers consistent with the increasing functions of the national government. In Canada too there has been a rapid expansion of economic activities. Many of these are nation-wide in scope. Nevertheless, the emphasis on provincial autonomy, and the decisions of the Courts on the distribution of powers under the British North America Act have had the effect of impairing the capacity of the Federal Government to regulate these activities in the national interest. The control of insurance, which is not included in the constitutional distribution of powers, has been denied to the Dominion.[8] The control of combines under the Board of Commerce Act of 1919,[9] and of industrial disputes under the Industrial Disputes Investigation Act of 1907[10] has been declared ultra vires of the Dominion. The control of a national activity like the grain trade has, in part, been denied to the Dominion,[11] as also the control of through traffic from Dominion to provincial railways.[12] The control of labour in industrial undertakings, and social legislation generally, has been declared to be primarily within the competence of the provincial legislatures.[13] A similar decision was reached as to the control of liquor.[14] There is uncertainty in the matter of 'control of water-powers created or made available by navigation works.[15] While recent decisions appear to indicate a revived recognition of the general Dominion powers,[16] the outlook is uncertain. Hitherto the effect has been to restrict the federal jurisdiction to matters which were of national interest in 1867, when Canada's social, economic and political development was in its infancy. "Two forces have thus been operating in contrary directions. It has become apparent that to provide effectively for the well-being of the people of Canada as a whole it has become necessary to enlarge the sphere of federal jurisdiction. On the other hand, judicial interpretation of the British North America Act has actually effected a limitation of the powers of the federal govern-

[8] *Citizens Insurance Co.* v. *Parsons* (1881), 82 A.C., 96; *Attorney-General for Ontario* v. *Reciprocal Insurers*, (1924) A.C. 328.

[9] In re *Board of Commerce Act* (1922) 1 A.C. 191.

[10] *Toronto Electric Commissioners* v. *Snider*, (1925) A.C. 396.

[11] *The King* v. *Eastern Terminal Elevator Co.*, (1925) S.C.R. 434.

[12] *City of Montreal* v. *Montreal Street Railway Co.*, (1912) A.C. 333.

[13] In re *Legislative Jurisdiction over Hours of Labour*, (1925) S.C.R. 505.

[14] *Attorney-General of Ontario* v. *Attorney-General of Canada*, (1896) A.C. 348.

[15] *Reference in re Waters and Water-Powers*, (1929) S.C.R. 200.

[16] *Proprietary Articles Trade Association* v. *Attorney-General of Canada*, (1931) A.C. 310; *Re Aerial Navigation, Attorney-General of Canada* v. *Attorney-General of Ontario*, (1932) A.C. 54.

ment and has held to be invalid authority actually exercised for many years."[17]

The economic depression has raised anew the problem of the distribution of legislative powers. Unemployment is national in scope and has required the attention of both the Dominion and the provinces. It has served in fact, although not legally, to obliterate the boundary between their respective jurisdictions. "Yet both political parties agree that labour questions are a purely provincial matter. All that Ottawa does is to vote money for the provinces to spend; the unemployed have to wait until the same matter that was thrashed out in Ottawa gets thrashed out anew in the provincial legislatures and put into the form of a provincial statute. Another example of ten parliaments having to act before a matter of the utmost national importance can be done ! The present division of powers in regard to labour and social problems is particularly silly since tariffs, trade treaties, immigration, labour problems, unemployment and trade and commerce generally are so intimately connected that they cannot be divided up amongst ten legislatures without the certainty of delay, mismanagement and confusion".[18]

In this age of increasing social and economic unity a redistribution of Federal and provincial powers is essential, in order that the legal jurisdiction of the Federal government be made to conform with its wider functions, and, generally, to give flexibility to the constitution. The new division of powers should be brought about by way of amendment of the British North America Act. Reliance on concurrent legislation by the Dominion Parliament and the provincial legislatures is less satisfactory. A province cannot be compelled to legislate, nor can it be prevented from repealing legislation, on subjects within its sphere of jurisdiction.

There is the problem of social legislation, which is generally recognized as necessary in a modern industrial state. The redistribution of powers in Canada must give further recognition to the fact that such legislation cannot operate successfully in some provinces only. Unemployment insurance, maximum hours of work, and minimum rates of wages in some of the provinces will mean a relatively higher cost of production as compared with the others. The effect will be to drive producers to the provinces where costs are lower. Uniform legislation is essential to prevent

[17] D. McArthur: Revision of the Canadian Constitution, "Queen's Quarterly," Spring 1934, p. 126.

[18] F. R. Scott: Development of Canadian Federalism (Proceedings of the Canadian Political Science Association, vol. 3, pp. 243-244.)

unfair competition of this nature at the expense of the social services. Such uniform legislation can be made possible by including social legislation within the jurisdiction of the Dominion Parliament. It should not, however, be made an exclusively Federal power. Some provinces may desire certain forms of social legislation which other provinces, with a larger representation in the Dominion Parliament, may not approve. The larger provinces should not be placed in a position where they can prevent the others from introducing the desired legislation within their area. It is therefore recommended that social legislation be constituted a concurrent power of the Dominion and the provinces.

A serious problem has also arisen in the matter of the incorporation of companies. Charters of incorporation are granted by the Dominion and by each of the provinces. Since these charters confer special powers and rights, the State which grants them should be in a position to prevent their abuse to the detriment of the community at large. It is particularly necessary to regulate the flotation of securities. Uniform company legislation is essential to this end, but successive Dominion-Provincial Conferences have failed to agree upon a uniform Act. The Dominion cannot impose its own Act upon any province, which might take advantage of its inadequate legislation to become an "incorporation farm."

There are two possible solutions to the problem. There may be introduced a constitutional amendment of the provincial power of incorporation, in order to assure a minimum uniformity with Dominion legislation. On the other hand, advantage may be taken of the fact that the provincial interest in the incorporation of companies is primarily due to the revenues derived from this source. A compromise might be effected with the provinces whereby the powers of incorporation would be assigned exclusively to the Federal Government while the revenues would be apportioned between the Dominion and the provinces. It is suggested that a similar plan might be evolved in order that control of insurance be also assigned to the Federal authority. It is not in the public interest that jurisdiction over the all-important subject of insurance be divided amongst ten parliaments.

The British North America Act assigned "the regulation of trade and commerce" to the Dominion Parliament, and "property and civil rights in the province" to the provincial legislatures. The conflict between these two enumerated powers is largely responsible for the present constitutional difficulties in Canada. The Act was passed by the British Parliament in an age when

laissez-faire was the dominant political and economic philosophy; it did not envisage State regulation of economic activity. Such regulation is now necessary. As economic development becomes more complex, and as the welfare of the larger part of the population of Canada becomes more dependent upon economic activities of nation-wide scope, it is apparent that the failure of any one of these activities to function successfully would affect widespread groups of people in all the provinces—primary producers, employees and investors. In other words, such an economic activity becomes a matter of national concern. It may then be in the national interest to control production and marketing or to regulate competitive methods or to adjust prices or to prescribe minimum working conditions. It is in the public interest, therefore, that the Federal Government be given powers of regulation and control over these economic activities.

The Courts have allowed the exercise of such control by the Dominion in times of national emergency, in virtue of the general residuary power. They upheld legislation fixing prices and controlling industries during the War, as being legislation for the national safety, even if it encroached upon the jurisdiction of the provinces.[19] But in the absence of circumstances constituting a national emergency, the Dominion residuary power to legislate for the "peace, order and good government of Canada" has been rendered largely ineffective by the broad interpretation of "property and civil rights.[20]" This is contrary to the intentions of the Fathers of Confederation who did not seek to limit to periods of emergency the power of the Dominion Parliament to legislate generally on matters of national concern. Their view was enforced in the early decisions of the Judicial Committee of the Privy Council on the British North America Act.[21] There is now possibly a return to the older view.[22]

In normal times the Dominion Parliament sought to control certain phases of economic activity by means of its constitutional power to regulate trade and commerce. But the Combines and Fair Prices Act and the Board of Commerce Act, of 1919, were declared *ultra vires* on the ground that they infringed upon "property and civil rights."[23] The power to regulate trade and commerce was relegated to a subsidiary and auxiliary function—

[19] *Fort Frances Pulp & Paper Co.* v. *Manitoba Free Press Co. Ltd.*, (1923) A.C. 695.
[20] *Toronto Electric Commissioners* v. *Snider*, (1925) A.C. 396.
[21] *Russell* v. *The Queen*, 7 A.C. 829.
[22] *Re Aerial Navigation: Attorney-General of Canada* v. *Attorney-General of Ontario*, (1932) A.C. 54.
[23] *In re Board of Commerce Act*, (1922) 1 A.C. 191.

a view seriously questioned by Anglin, C. J., when the Dominion power to control Canada's export trade in grain was, in part, denied.[24] In a recent decision, their Lordships of the Privy Council likewise dissociated themselves from the construction which suggested "that the power to regulate trade and commerce could be invoked only in furtherance of a general power which Parliament possessed independently of it."[25] But they did not discuss the extent of the regulatory authority.

The denial to the Dominion Parliament of the effective power to regulate trade and commerce, on account of infringement of civil rights, imposed a severe limitation upon the exercise of the necessary functions of a national government. When provincial legislatures attempted to regulate economic activity, in the exercise of their jurisdiction over property and civil rights, new constitutional difficulties arose. The Produce Marketing Act of British Columbia (1926-27), which sought to control and regulate the marketing of tree fruits and vegetables, was declared *ultra vires* of the provincial legislature because it would affect the marketing of products outside of the province and therefore conflicted with the Federal power to regulate trade and commerce.[26] The Saskatchewan Grain Marketing Act (1931), aiming to establish a one hundred per cent. compulsory wheat pool, was declared *ultra vires* for a similar reason.[27] The recent decision declaring *ultra vires* the British Columbia Dairy Products Sales Adjustment Act (1929)—similar to the British legislation limiting competition among sellers of milk—was not based upon conflict with the "trade and commerce" clause, but upon the ground that it involved the imposition of an indirect tax.[28]

The uncertainty resulting from the interpretations of the "trade and commerce" and the "property and civil rights" clauses of the Constitution, renders difficult all attempts at regulating economic activity. It suggests "a domain in which Provincial and Dominion legislation may overlap."[29] While declaring the British Columbia Marketing Act *ultra vires*, Duff, J., did not think it necessary to answer the question whether the statute could, "in its entirety, be lawfully enacted by the Dominion

[24] *The King* v. *Eastern Terminal Elevator Co.*, (1925) S.C.R. 434.
[25] *Proprietary Articles Trade Assn.* v. *Attorney-General of Canada*, (1931) A.C. 310.
[26] *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction*, (1931) S.C.R. 357.
[27] *In re Grain Marketing Act*, (1931) 2 W.W.R. 146.
[28] *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.*, (1933) A.C. 168.
[29] *In re Fisheries Act: Attorney-General of Canada* v. *Attorney-General of British Columbia*, (1930) A.C. 111.

Parliament alone."[30] It follows that certain vital legislative powers in Canada can only be exercised through concurrent legislation by the Dominion Parliament and the provincial legislatures. The Natural Products Marketing Act (1934) will, therefore, probably be effective only in so far as it is supplemented by concurrent provincial enabling legislation.

Dependence upon such concurrent legislation for the enactment of important measures is inconvenient and unsatisfactory. The respective powers of the Dominion and the provinces should be clarified. In particular, the powers of the Dominion Parliament to legislate generally on matters of national concern should be specifically re-stated in terms which will make their effective exercise possible. It should be remembered, as Lord Sankey recently stated, that "the real object of the [British North America] Act was to give the central Government those high functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all the Provinces as members of a constituent whole."[31]

H. CARL GOLDENBERG.

Montreal

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[30] *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction*, (1931) S.C.R. at p. 371.

[31] *Re Aerial Navigation: Attorney-General of Canada* v. *Attorney-General of Ontario*, (1932) A.C. 54.