

INTERPRETING THE B. N. A. ACT.

In *Bank of Toronto v. Lambe*,¹ the Judicial Committee of the Privy Council laid down the following rule for the construction of the provisions of the B.N.A. Act:

Questions of this class have been left for the decision of the ordinary Courts of law, which must treat the provisions of the Act in question by the same methods of construction and exposition which they apply to other statutes.

This rule of construction is binding on our Supreme Court and was followed by it in the reference as to the meaning of the word "persons" in sec. 24 of the B.N.A. Act.² Chief Justice Anglin speaking for the majority of the court on that occasion used these words:

Passed in the year 1867, the various provisions of the B.N.A. Act, (as in the case with other statutes, *Bank of Toronto v. Lambe*) (*supra*), bear to-day the same construction which the Courts would, if then required to pass upon them, have given to them when they were first enacted. If the phrase "qualified persons" in s. 24 includes women to-day, it has so included them since 1867.

So it would appear that notwithstanding the ever developing phases of business and social life and the demands of public policy we are to look back to 1867 to ascertain conditions at that time and be governed by them to the same extent as in construing other statutes.

The development of transportation due to the influence of innumerable discoveries and inventions that were unknown in 1867 now enters largely into our activities; a remarkable transformation from individual effort to nation-wide corporate and co-operative enterprise has taken place; responsibility for old age pensions, health and unemployment insurance so necessary to our present mode of living was unthought of in 1867. By no stretch of the imagination could the Fathers of Confederation while drafting the B.N.A. Act have visioned the development which has taken place in the intervening period of sixty-two years; nor could they possibly have looked into the long distant future and have even imagined the possibilities of development, much less to have provided for them.

A statute is usually intended to be comprehensive, covering in detail all matters dealt with. When enacting it Parliament is careful to draft it with a view to conditions existing at the moment,

¹ (1887) 12 A.C. 575 at p. 579.

² [1928] 1 S.C.R. 276 at p. 282.

since it may amend it from time to time to meet changing conditions.

On the other hand although the B.N.A. Act deals with some matters in considerable detail, most matters such as the division of authority between Canada and the provinces as set forth in secs. 91 and 92, which were the subject of interpretation in *Bank of Toronto v. Lambe* (*supra*) are in very general terms. The Act as a whole was designed to be a framework of government outlining the fundamental law of Canada and the provinces in a broad, comprehensive manner. It is a solemn compact between Canada and the provinces ordained by sovereign enactment. When the Fathers of Confederation drafted it they did not contemplate amending it from time to time. They drafted it so that it might endure for all time. They endowed it with capacity for expansion so that its principles might be adapted to new and developing conditions.

The principle that a national constitution should not like other statutes be strictly construed as of the date on which it came into existence but that it should be liberally construed as a living instrument always sufficiently up to date to serve those most advanced in science and in ever changing social conditions, is not new. More than a century ago the Supreme Court of the United States wisely laid down this principle in such cases as *McCulloch v. State of Maryland*³ and *Gibbons v. Ogden*.⁴

Mr. Justice Story speaking for the court in *Martin v. Hunter's Lessee*,⁵ used these words:

The constitution unavoidably deals in general language. It did not suit the purposes of the people in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mold and model the exercise of its powers, as its own wisdom and the public interests should require.

Mr. Justice Gray, speaking for the court in *Juilliard v. Greenman*,⁶ used these words:

³ 17 U.S. 316.

⁴ 22 U.S. 1.

⁵ 14 U.S. 304 at p. 326.

⁶ 110 U.S. 421 at p. 439.

A constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract. The Constitution of the United States, by apt words of designation or general description, marks the outlines of the powers granted to the national legislature; but it does not undertake, with the precision and detail of a code of laws, to enumerate the subdivisions of those powers, or to specify all the means by which they may be carried into execution. Chief Justice Marshall, after dwelling upon this view, as required by the very nature of the Constitution, by the language in which it is framed, by the limitations upon the general powers of Congress introduced in the ninth section of the first article, and by the omission to use any restrictive term which might prevent its receiving a fair and just interpretation, added these emphatic words: "In considering this question, then, we must never forget that it is *a constitution* we are expounding."

The public interests of the day should be of paramount importance in construing a national constitution if its objects are to be achieved. In the words of Story, J., in *Martin v. Hunter's Lessee* (*supra*) it should be construed as "the public interests should require."

Edward Blake in his argument before the Privy Council in *St. Catherine's Milling and Lumber Company v. R.*,⁷ stated the principle in these words:

We are bound, in attempting to ascertain the meaning of these clauses, (i.e. the clauses in the B.N.A. Act) to become very conversant with the surroundings, to allow due weight to the conditions, and to be thoroughly informed with the spirit of the law, in order that we may so read it as to accomplish its great intents.

If our constitution is to receive the narrow construction laid down by the Privy Council it would seem desirable from time to time carefully to reconsider the whole constitution with a view to meeting the changed and changing conditions of the day. Changes could only be made as a result of constitutional conferences representative not only of the Dominion but also of the different provinces comprising our federation. Perhaps this is the thought Lord Haldane had in mind when, in conversing with K.G.M. as reported in the REVIEW,⁸ he said: "This (*The Tiny Township School Case*), among other problems presented by the B.N.A. Act, could not be solved satisfactorily by decisions of the Courts. The best solution for these vexing questions could only be obtained by Canadians themselves working in harmony."

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⁷ [1889] 14 A.C. 46.

⁸ 7 C. B. Rev. p. 457.