THE DOMINION JURISDICTION IN RESPECT OF CRIMINAL LAW AS A BASIS FOR SOCIAL LEGISLATION IN CANADA

Current controversies as to the constitutionality of the Canadian "New Deal" seem likely to reopen discussion upon the scope of Dominion and Provincial powers in respect of each of the topics under which the various branches of social legislation could conceivably be grouped. In this article it is proposed to consider a head of Dominion jurisdiction, the criminal law, which does not yet appear to have been invoked in support of Mr. Bennett's programme, but the availability of which as a constitutional justification for possible developments in social legislation forms an interesting subject of study.

So long ago as 1922, the Canadian Government informed the International Labour Office, apropos of the Weekly Rest (Industry) Convention, 1921, that:

"So far as Canada is concerned, the Draft Convention and Recommendation look to securing the 24-hour rest period on the Lord's Day, which is customarily, and by law required to be, observed throughout the Dominion as a day of rest; and therefore they involve legislation relating to the criminal law, which is a subject within the exclusive legislative authority of the Parliament of Canada."

One is naturally led to enquire whether it is only the peculiar sanctity of the Lord's Day which entitles it to the protection of the criminal law or whether there are not other respects in which it would be proper to secure the application of social measures through the same medium. The tendency of the Privy Council in interpreting the scope of the powers of the Dominion under this head of jurisdiction has been modified to the advantage of the Dominion in recent decisions. Ten years ago it would have been rash to suggest that this head of jurisdiction could ever be resorted to for such a purpose with much hope of success. In *re The Board of Commerce Act, 1919*, the Judicial Committee had ruled that the Dominion Parliament was not entitled by enacting ancillary criminal provisions to subvert the distribution of authority laid down in the British North America Act, and had chosen to do so in a manner which appeared to restrict considerably the capacity of the Dominion to develop the criminal law into an instrument for the protection of newly developing social interests. Fortunately more recent decisions

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2 [*1922*] 1 A.C. 191.
have now made it clear that if the Dominion may not employ the criminal law as a ruse by which to acquire jurisdiction, it is at liberty to develop it to meet genuine new requirements even though this involves incidental trespassing upon subjects reserved to provincial jurisdiction.

The conditions under which the Dominion may create new crimes have been considered by the Privy Council in relation to three subjects, trade combinations, conduct of the business of insurance without Dominion licence, and failure to employ industrial conciliation machinery set up by Dominion legislation. In *re The Board of Commerce Act* (supra) the question before the Committee was the validity of two Dominion Acts, the Board of Commerce Act, 1919, and the Combines and Fair Prices Act of the same year. The second of these Acts authorized the Board of Commerce, created by the first: (1) to restrain and prohibit the formation and operation of such trade combinations for production and distribution in the Provinces as it might consider to be detrimental to the public interest; (2) to restrict the accumulation of food, clothing or fuel beyond the amount reasonably required, in the case of a private person for his household and in the case of a trader for his business, and to require the surplus to be offered for sale at fair prices; and (3) to attach criminal consequences to any breach of the Act which it determined to be improper. The Acts were held *ultra vires* for various reasons, but only the grounds for rejecting the plea that they were valid as an exercise of the jurisdiction of the Dominion under section 91, head 27 (Criminal Law) are here relevant. Viscount Haldane on behalf of the Board said at p. 198:

“For analogous reasons the words of head 27 of 91 do not assist the argument for the Dominion. It is one thing to construe the words ‘the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters’, as enabling the Dominion Parliament to exercise exclusive legislative power where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence. A general law, to take an example, making incest a crime, belongs to this class. It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law, which require a title to so interfere as basis of their application.”

Lord Haldane's choice of language is not altogether happy. It is understandable that the Judicial Committee should attempt in this way to guard against an abusive extension of the Dominion jurisdiction over criminal law, but a certain type of mind may
have some difficulty in appreciating why incest, which in Great Britain only became a crime in 1908, is a subject matter which by its very nature belongs to the domain of criminal jurisprudence, whereas evils which are of infinitely greater importance in modern times, say for instance the abuse of child labour, fall, as by his test they would seem to do, by their very nature and impliedly for all time, under some such heading as "Property and Civil Rights" or "Matters of a Purely Local and Private Character within the Province." Any such test so obviously implies the stratification of the content of the notions of "Criminal Law" and of "Property and Civil Rights" at a given stage of social development.

A concession to this objection was made in the next important judgment, that delivered by Duff, J., on behalf of the Board, in Attorney-General for Ontario v. Reciprocal Insurers. This case was an aftermath of Attorney-General for Canada v. Attorney-General for Alberta, in which it had been decided by the Judicial Committee that it was not competent to the Dominion to regulate generally the business of insurance in such a way as to interfere with the exercise of civil rights in the Provinces. The Act then under discussion was the Dominion Insurance Act, 1910, section 4 of which had prohibited various acts substantially covering the whole business of insurance unless "done by or on behalf of a company or under-writers holding a license from the Minister," and section 70 of which provided that any contravention of section 4 should be punishable for a first offence by fine and for a second or subsequent offence by imprisonment with hard labour. The Judicial Committee held this Act invalid on various grounds, and the Dominion Parliament thereupon passed a new Act, the Insurance Act, 1917, and at the same time made certain amendments in the Criminal Code of Canada. The Insurance Act empowered the Minister of Finance to grant insurance licenses and laid down in detail the requirements with which applicants for licenses must comply and the regulations which they must obey when licensed, but contained no enactment of general application requiring persons carrying on the business of insurance to become licensed under it. The scheme could only be partially effectual in the absence of any such compulsory enactment, which was accordingly brought into force in the form of an amendment to the Criminal Code designated as section 508C. This section provided that anyone performing

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4 [1916] I A.C. 588.
any of the various acts connected with the business of insurance, except on behalf of a company or person licensed under the Insurance Act, should be guilty of an indictable offence. Various exceptions were provided for, notably for acts done on behalf of a company incorporated under the laws of any Province of Canada for the purpose of carrying on the business of insurance and for acts solely in respect of marine insurance. Subject to these exceptions, the practical effect of the amendment to the Criminal Code if valid would be to make licensing under the Insurance Act compulsory. The validity of the amendment to the Criminal Code came before the Judicial Committee in Attorney-General for Canada v. Reciprocal Insurers (supra) at p. 336, in which it was held ultra vires as a subterfuge. The judgment delivered on behalf of the Board on this occasion is in places almost as uncompromising as that of Lord Haldane in re Board of Commerce Act (supra). Thus it is said in the judgment at p. 340 that:

"... the claim now advanced is nothing less than this, that the Parliament of Canada can assume exclusive control over the exercise of any class of civil rights within the Provinces, in respect of which exclusive jurisdiction is given to the Provinces under s. 92, by the device of declaring those persons to be guilty of a criminal offence who in the exercise of such rights do not observe the conditions imposed by the Dominion. Obviously the principle contended for ascribes to the Dominion the power, in execution of its authority under s. 91, head 27, to promulgate and to enforce regulations controlling such matters as, for example, the solemnization of marriage, the practice of the learned professions and other occupations, municipal institutions, the operation of local works and undertakings, the incorporation of companies with exclusively Provincial objects—and superseding Provincial authority in relation thereto. Indeed, it would be difficult to assign limits to the measure in which, by a procedure strictly analogous to that followed in this instance, the Dominion might dictate the working of Provincial institutions, and circumscribe or supersede the legislative and administrative authority of the Provinces.

"Such a procedure cannot, their Lordships think, be justified, consistently with the governing principles of the Canadian Constitution, as enunciated and established by the judgments of this Board."

And at p. 342 that:

"... their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid."
But towards the end of the judgment there appears an important qualification to the principle asserted in *re Board of Commerce Act (supra)*. Though he quotes from Lord Haldane’s judgment in that case, Duff J., does not repeat the unfortunate reference to “subject matters which by their very nature belong to the domain of criminal jurisprudence”, but substitutes a different criterion of validity which he formulates as follows at p. 343:

“...Their Lordships think it undesirable to attempt to define, however generally, the limits of Dominion jurisdiction under head 27 of s. 91; but they think it proper to observe, that what has been said above does not involve any denial of the authority of the Dominion Parliament to create offences merely because the legislation deals with matters which, in another aspect, may fall under one or more of the subdivisions of the jurisdiction entrusted to the Provinces. It is one thing, for example, to declare corruption in municipal elections, or negligence of a given order in the management of railway trains, to be a criminal offence and punishable under the Criminal Code; it is another thing to make use of the machinery of the criminal law for the purpose of assuming control of municipal corporations or of Provincial railways.”

The test ceases to be the nature of the subject matter and becomes the object of the legislation, whether this is the formulation of criminal law genuinely intended as such, or use of the machinery of the criminal law for the purpose of gathering in forbidden fruit.

*Toronto Electric Commissioners v. Snider* added little to this decision, but is of interest as a case in which Lord Haldane, while quoting the language which he had used in the Board of Commerce case, continued his reasoning in a manner which recalls that of Mr. Justice Duff. The point at issue was the validity of the Dominion Industrial Disputes Investigation Act, 1907. The Act empowered the Minister of Labour to establish in certain circumstances, either at the request of either of the parties to an industrial dispute or acting on his own initiative, a Board of Conciliation and Investigation the duty of which was to endeavour to effect a settlement of the dispute. If the parties came to a settlement, the Board was to embody it in a memorandum, which was to have the effect of an award and could be enforced. If no settlement was arrived at the Board was to make a recommendation for settlement to the Minister, who was to make it public. The Boards set up were given most of the powers of courts to take evidence and secure respect for their authority. By section 56 of the Act, in the event of a reference to the Board, it was made unlawful for the employer
to lock out or for the employees to strike on account of any dispute prior to or pending the reference, and any breach of this provision was made punishable by fine. By section 57, employers and employed were both bound to give at least 30 days' notice of an intended change affecting conditions of employment with respect to wages and hours, and in the event of a dispute arising over the intended change neither party was to alter the conditions or lock out or strike until the dispute had been finally dealt with by a Board and a report had been made. Sir John Simon, arguing for the validity of the enactment, raised points which are summarized as follows in the report (p. 399):

"The Act was not 'in relation to matters coming within the classes of subjects' enumerated in s. 92. An Act may interfere with property or civil rights without being 'in relation to' that subject within the meaning of s. 92; the real question is as to the 'aspect' in which an Act is to be regarded. The British North America Act, 1867, s. 91, assigns the subject of the criminal law to the Dominion. . . . . The Act now under discussion in its pith and substance is one dealing with the criminal law, and not one in relation to civil rights. Every Act dealing with the criminal law necessarily touches on civil rights."

Lord Haldane, after quoting passages from Attorney-General for Ontario v. Reciprocal Insurers and In Re Board of Commerce Act, dismissed these points in the following terms (pp. 407-8:)

"Their Lordships are of opinion that, on authority as well as on principle, they are to-day precluded from accepting the arguments that the Dominion Act in controversy can be justified as being an exercise of the Dominion power under s. 91 in relation to criminal law. What the Industrial Disputes Investigation Act, which the Dominion Parliament passed in 1907, aimed at accomplishing was to enable the Dominion Government to appoint anywhere in Canada a Board of Conciliation and Investigation to which the dispute between an employer and his employees might be referred. The Board was to have power to enforce the attendance of witnesses and to compel the production of documents. It could under the Act enter premises, interrogate the persons there, and inspect the work. It rendered it unlawful for an employer to lock-out or for a workman to strike, on account of the dispute, prior to or during the reference, and imposed an obligation on employees and employers to give thirty days' notice of any intended change affecting wages or hours. Until the reference was concluded neither were to alter the conditions with respect to these. It is obvious that these provisions dealt with civil rights, and it was not within the power of the Dominion Parliament to make this otherwise by imposing merely ancillary penalties. The penalties for breach of the restrictions did not render the statute the less an interference with civil rights in its pith and substance. The Act is not one which aims at making striking generally a new crime. Moreover, the employer retains under the general common law a right to lock-out, only slightly interfered with by the penalty. In this connection
their Lordships are therefore of opinion that the validity of the Act cannot be sustained."

The chief interest of the case is the partial acceptance by Lord Haldane of what we may describe as "the Duff test."

*Proprietary Articles Trade Association v. Attorney-General for Canada* was a second case upon trade combinations. After the decision in *re Board of Commerce Act (supra)*, in which the Board of Commerce and Combines and Fair Prices Acts had been held *ultra vires*, the Dominion Parliament passed new legislation also directed against trade combinations, the Combines Investigation Act, 1923, revised in 1927. This Act provided for the holding of enquiries into the existence of combines. By section 32 everyone "who is a party or privy to or knowingly assists in the formation or operation of a combine within the meaning of this Act" is guilty of an indictable offence but may only be prosecuted at the instance of the Solicitor-General of Canada or the Attorney-General of a Province. In *Proprietary Articles Trade Association v. Attorney-General for Canada (supra)* the Judicial Committee had to consider the validity of this Act and of section 498 of the Criminal Code, which provides by subsection (1) that everyone is guilty of an indictable offence, and liable to penalty or imprisonment, who conspires, combines, agrees or arranges with any other persons, or any railway, steamship or transportation company, unduly to limit transportation facilities, or restrain commerce, or unduly lessen manufacturing, or unduly prevent competition; by subsection (2) the section is not to apply to combinations of workmen or employees for their own reasonable protection. The substance of the section dates back to 1888, when it was enacted as an Act for the Prevention and Suppression of Combinations formed in Restraint of Trade. The Supreme Court of Canada upheld the Act and the section. Counsel for the Appellants, the Proprietary Articles Trade Association, argued before the Privy Council that the Dominion jurisdiction under the head "Criminal Law" could not be invoked since "the offences created did not, in the words of *re Board of Commerce Act*, 1919, belong to the domain of criminal jurisprudence and included acts and agreements which were not necessarily civilly unlawful". Mr. Newton Rowell, K.C., who appeared for the Attorney-General for Canada, replied to this suggestion on the following lines (pp. 313-314):

"Under the concluding paragraph of s. 91 legislation within one of its enumerated heads is not to be deemed to come within any of the

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heads of s. 92; Dominion legislation, including such provisions as are necessary to carry out its scheme, overrides the Provincial powers as to property and civil rights: Attorney-General of Ontario v. Attorney-General for Canada; Royal Bank of Canada v. Larue. The legislation now in question was in its 'pith and substance' (Union Colliery Co. v. Bryden) within s. 32, head 27 (criminal law and procedure), and, as to ss. 29 and 30 of the Act, within head 3 (and s. 122) and head 22. Under s. 91, head 27, the Dominion Parliament can bring any act within the domain of the criminal law if it deems it in the interest of Canada to do so, and the legislation overrides Provincial legislation: Lord's Day Alliance of Canada v. Attorney-General for Manitoba.

"A comparison of the legislation now in question with the two Acts considered in the Board of Commerce Case shows that all the features which were held to be objectionable have been omitted. There is moreover an essential distinction. The former legislation was held invalid as an interference with matters assigned to the Provincial legislatures sought to be brought within the Dominion powers by ancillary provisions imposing penalties. Here the primary intention and effect is to make certain acts, when they are to the public detriment, offences; the provisions as to investigations being reasonably necessary for carrying out that primary intention."

Lord Atkin, in giving judgment, indicated in the following sentences one of the factors which will be taken into consideration by the Board in attempting to determine the character of an enactment (p. 317):

"Both the Act and the section have a legislative history, which is relevant to the discussion. Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be ultra vires; nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment. But one of the questions to be considered is always whether in substance the legislation falls within an enumerated class of subject, or whether on the contrary in the guise of an enumerated class it is an encroachment on an excluded class. On this issue the legislative history may have evidential value."

He then reviewed in detail the legislative history and in due course arrived at conclusions which he stated as follows (pp. 323-325):

"In their Lordships' opinion s. 498 of the Criminal Code and the greater part of the provisions of the Combines Investigation Act fall within the power of the Dominion Parliament to legislate as to matters falling within the class of subjects, 'the criminal law including the procedure in criminal matters' (s. 91, head 27). The substance of the Act is by s. 2 to define, and by s. 32 to make criminal, combines which the legislature in the public interest intends to prohibit. The definition is wide, and may cover activities which have not hitherto

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10 [1925] A.C., 384, 394.
been considered to be criminal. But only those combines are affected 'which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers, or others'; and if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes. 'Criminal law' means 'the criminal law in its widest sense': Attorney-General for Ontario v. Hamilton Street Ry. Co.\textsuperscript{11} It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality—unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of 'criminal jurisprudence'; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished. Their Lordships agree with the view expressed in the judgment of Newcombe J.,\textsuperscript{12} that the passage in the judgment of the Board in the Board of Commerce Case\textsuperscript{13} to which allusion has been made, was not intended as a definition. In that case their Lordships appear to have been contrasting two matters—one obviously within the line, the other obviously outside it. For this purpose it was clearly legitimate to point to matters which are such serious breaches of any accepted code of morality as to be obviously crimes when they are prohibited under penalties. The contrast is with matters which are merely attempts to interfere with Provincial rights, and are sought to be justified under the head of 'criminal law' colourably and merely in aid of what is in substance an encroachment. The Board considered that the Combines and Fair Prices Act of 1919 came within the latter class, and was in substance an encroachment on the exclusive power of the Provinces to legislate on property and civil rights. The judgment of the Board arose in respect of an order under Part II of the Act. Their Lordships pointed out five respects in which the Act was subject to criticism. It empowered the Board of Commerce to prohibit accumulations in the case of non-traders; to compel surplus articles to be sold at prices fixed by the Board; to regulate profits; to exercise their powers over articles produced for his own use by the householder himself; to inquire into individual cases without applying any principles of general application. None of these powers exists in the provisions now under discussion.

\textsuperscript{11} [1903] A.C. 524.
\textsuperscript{12} [1929] S.C.R., 409, 422.
\textsuperscript{13} [1922] 1. A.C., 191, 198, 199.
There is a general definition, and a general condemnation; and if penal consequences follow, they can only follow from the determination by existing courts of an issue of fact defined in express words by the statute. The greater part of the statute is occupied in setting up and directing machinery for making preliminary inquiries whether the alleged offence has been committed. It is noteworthy that no penal consequences follow directly from a report of either commissioner or registrar that a combine exists. It is not even made evidence. The offender, if he is to be punished, must be tried on indictment, and the offence proved in due course of law. Penal consequences, no doubt, follow the breach of orders made for the discovery of evidence; but if the main object be intra vires, the enforcement of orders genuinely authorized and genuinely made to secure that object are not open to attack."

The effect of the decisions reviewed can be briefly summarized. Ancillary penal provisions will not validate legislation of which they are only a subordinate feature, but if the Dominion Parliament genuinely determines that certain activities which have not hitherto been considered to be criminal are to be suppressed in the public interest, then there is no reason why it should not make them crimes. The test would seem to be the relative importance and degree of directness of the penal provisions in relation to the rest of the enactment.

It is not proposed to consider here at length the range of topics which could suitably be dealt with by Dominion legislation conforming to this test, but as the prohibition of child labour is probably the most important of such topics a few words upon this subject may not be amiss. The protection of children is generally recognized to be a legitimate function of the criminal law, and forms the object of various provisions of the present Criminal Code of Canada.14 Historically, it is in respect of sexual offences and neglect of parental duty that the child is first given special protection by the criminal law, but this is not necessarily more than the first stage of an evolutionary process which is destined to be carried much further and may very properly result in the grant of similar protection against the exploitation of child labour. It is submitted that a competent draftsman would have no difficulty in drawing a Dominion Child Labour Act which would be of certain validity in view of the Dominion jurisdiction over the criminal law as that jurisdiction is explained in Proprietary Articles Trade Association v. Attorney-
General for Canada (supra). Should such an Act be passed, it would be natural for Canada to ratify one or more of the International Labour Conventions upon the subject, the Minimum Age (Industry) Convention, 1919, the Minimum Age (Agriculture) Convention, 1921, and the Minimum Age (Non-industrial Employment) Convention, 1932. In such an event, the validity of the legislation could be supported on the double ground of the Dominion jurisdiction over the criminal law and the Dominion jurisdiction to give effect to Treaty obligations.*

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*EDITOR'S NOTE—It is interesting to note in connection with Mr. Jenks' article that a child labour law was passed by the United States Congress in 1916 based upon the federal power to regulate interstate commerce. This was declared unconstitutional by the Supreme Court. In 1919 another federal law with a like object was enacted based on the taxing power of Congress. This was also declared to be unconstitutional. Thereupon the proponents of the legislation so frustrated decided to seek a constitutional amendment granting Congress specific authority to legislate on the subject. Such an amendment was passed in 1924, and sent to the several States for ratification. Up to the present time 24 of the total number of States have ratified the amendment.