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THE BRITISH NORTH AMERICA ACT: PAST AND FUTURE

I

When the Editor of THE CANADIAN BAR REVIEW invited me to contribute to an issue devoted to the recent judgments of the Judicial Committee of the Privy Council, he requested me to write something prefatory to discussions by other contributors and to say something of the future. I cannot profess, then, to make any new observations or to add to the literature of the subject—to do what has recently been done so brilliantly by Dean Vincent MacDonald.[1] My aims must remain much more modest: to sum up shortly for the profession certain points of view as a background for the more detailed examination which others will provide, and to say something of the future in the light of that background.

First of all it is reasonably clear that, whatever the intentions of the "fathers" of Canadian federation may have been, the courts will seek those intentions from the British North America Act itself. On the vast balance of judicial method we submit that we may say of the Act what the High Court of Australia has said: the Act is to be expounded and given effect to according to the terms set out in it, finding the intention from its words, upholding it precisely as framed, ascertaining its true meaning within itself and clear of any qualifications which the Imperial Parliament has not expressed in it, and apart from any questions of expediency or of political exigency.[2] It is, of course, true that the courts have frequently listened to arguments based on the Quebec Resolutions of 1864 and on other external contemporary sources and have them-

[1] 1 University of Toronto Law Journal, at pp. 260 *ff.*

[2] *Cf. Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1920), 28 C.L.R. 129; *Commonwealth* v. *New South Wales* (1923), 32 C.L.R. 200.

selves referred to them; but a complete examination of all the cases in all the courts in which have arisen problems connected with the British North America Act discloses that, in the overwhelming majority of them, the *ratio decidendi* depended on reasoning entirely divorced from external sources or references, to which we cannot allow even a secure position as persuasive authorities. There has been much writing in this connection—for myself, *peccavi*—but it has only two values: to elucidate legal history and to illustrate in an emphatic manner that, even with the meticulous care given by the "fathers", it is one thing to have clear intentions—as they undoubtedly had—and another thing to convey this clarity into statutory form.

Secondly, it follows that, on the balance of the judgments, the strict rules of statutory interpretation have been applied to the British North America Act. I am not here concerned with the evils which seem to flow at times from this process of judicial self-limitation, with the absurdities which could be disclosed were judgments referred to in detail, with possible arguments that the rules in *Heydon's Case*[3] do not square with the procedure. The main point is that the courts have treated, as a most general rule, the British North America Act as a statute, not as a constitution. This is true beyond controversy up to 1930; and I submit that it is still true. References are hardly necessary as they have been piled one on another with wearisome iteration and doubtless they will appear, in their due setting, elsewhere in this number of THE CANADIAN BAR REVIEW. I wish, however, to draw attention to the approach in *Edwards* v. *The Attorney-General for Canada.*[4] Here appear signs of a "constitutional" process of interpretation. Lord Sankey L.C. said that the Judicial Committee did not desire to cut down the provisions of the British North America Act by a narrow or technical construction but rather to give it a large and liberal interpretation. He quoted with approval Judge Clement[5] to support a broad interpretation, while he accepted the argument along similar lines of Blake and Mowat in *St. Catherine's Milling and Lumber Company* v. *The Queen.*[6] He paid romantic tribute to the idea that "the B.N.A. Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant Canada a constitution". What are those "natural limits"?

[3] 3 Co. Rep. 7b.
[4] [1930] A.C. 124 at pp. 136 *ff.*
[5] THE LAW OF THE CANADIAN CONSTITUTION (3rd ed. Toronto, 1916), at p. 347.
[6] (1888), 14 App. Cas. 46 at p. 50.

The words, alas, have been overlooked too frequently; but when they are examined Lord Sankey does not appear as the John Marshall of the Canadian constitution—a position assigned to him even by some of the elect. The *Edward's Case*, has been submitted to careful and learned adverse legal criticism;[7] and I should like to repeat what I wrote in 1930 and again in 1934.[8] Lord Sankey's "natural limits" are what he calls "fixed limits"; and he is most careful to point out that his "constitutional" approach was not made in connection with

> the questions of the legislative competence either of the Dominion or its Provinces which arise under ss. 91 and 92 of the Act providing for the distribution of legislative powers and assigning to the Dominion and its Provinces their respective spheres of Government.[9]

This legislative competence, this distribution of legislative power is the central core of all our woe. The *Edward's Case* left it just where Strong J. left it in 1879,[10] or Lord Hobhouse in 1887:[11] construction as in other statutes. It may seem Gilbertian to have it appear that, of the 147 sections of the Act, four (covering legislative power) are to belong to the "statutory" family, while 143 are to belong to the "constitutional" family. A house divided against itself cannot stand, and neither can a statute; but the ways of the Judicial Committee are as hard to find out as those of a man with a maid, which apparently baffled Solomon even with all his wide experience.

It is true that Lord Sankey quoted himself in the *Edward's Case* in *British Coal Corporation* v. *The King*,[12] and this without the *caveat*, already referred to, of the *Edward's Case*. It would, however, be unwise, in the absence of the *caveat*, to form any wide conclusion that he meant to turn the whole Act into a "constitution". The quotation (unqualified as it is) in the *British Coal Corporation Case* has nothing whatever to do with the *ratio;* and even had it, his Lordship would doubtless reply (in some subsequent case, of course) that his *caveat* was carried over "by necessary implication", since the *British Coal Corporation Case* did not really turn on legislative powers. I do not think that it is possible to find any supposed "new canons" of construction in any other cases. I may, then, conclude this

[7] G. F. Henderson, *Eligibility of Women for the Senate*, in 9 Can. Bar Rev., at pp. 617 *ff*.
[8] 8 Can. Bar Rev., at pp. 707-8; Round Table (Sept. 1934), p. 812.
[9] *Edwards Case*, *supra*, at p. 137.
[10] *Severn* v. *The Queen* (1878), 2 S.C.R. 70 at p. 103.
[11] *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575 at p. 579.
[12] [1935] A.C. 500 at pp. 518-19.

aspect of my discussion with the words of McGillivray J.A. in a learned and penetrating judgment :

> It seems to me that none of the observations of Viscount Sankey can be said to provide legal justification for an attempt by Canadian Courts to mould and fashion the Canadian Constitution by judicial legislation so as to make it conform according to their views to the requirements of present day social and economic conditions.[13]

II

I should like at this point to suggest that the struggle between the so-called federal "general power", its power over "the regulation of trade and commerce" and the provincial power over "property and civil rights" is age-long. The difficulties have emerged because the British North America Act, while avoiding prolixity in detail, has proved too general in its terms. Doubtless these were more specific in meaning in 1867; but today they appear to lend too much space to the chance personnel of a court. On the other hand, there does run through the judgments a kind of common denominator of construction in relation to them, and I venture to submit that the Judicial Committee prefers this, in the recent judgments, to anything more "elastic" which the width of the terms might allow. Indeed, most of these decisions appeared inevitable to me, though I distinctly prefer the judgments of Sir Lyman Duff, C.J.C. and Davis J. on the ambit and scope of the federal taxing-power;[14] and I still believe that it is possible by properly framed legislation to provide for a federal scheme of unemployment insurance. To return however to this "common denominator": the "general power" received an early interpretation in *Russell* v. *The Queen.*[15] That interpretation was amplified—in a most extraordinary manner it is true—in *Toronto Hydro-Electric Commissioners* v. *Snider;*[16] but at least it was a professed amplification though it finally turned the Act backside foremost, and, as far as "intentions" are concerned, left to the provinces the residuum of undefined power.[17] Again, the "trade and commerce power" seemed to be delegated to the curious and almost metaphysical position of being merely a power ancillary to powers granted

[13] *Kazakewich* v. *Kazakewich,* [1937] 1 D.L.R. 548 at p. 567 (Alta.).

[14] *Reference re Employment and Social Insurance Act,* [1936] 3 D.L.R. 644. I made this suggestion, before the reference to the Supreme Court, in 48 Juridical Review, at pp. 61 *ff.*

[15] (1882), 7 App. Cas. 829, especially at p. 841.

[16] [1925] A. C. 396.

[17] W. P. M. KENNEDY, ESSAYS IN CONSTITUTIONAL LAW (Oxford, 1934), at pp. 91-2.

elsewhere to the federation—if language means anything; for Lord Haldane said in the *Snider Case* that :

> it is in their Lordships opinion now clear that, excepting so far as the power can be invoked in aid of capacity conferred independently under other words in s. 91, the power to regulate trade and commerce cannot be relied on as enabling the Dominion Parliament to regulate civil rights in the Provinces.[18]

Now, of course, we find out that those words do not mean what they say, for Lord Atkin has taught us in 1931 (*obiter* it is true, though we may be thankful for the correction of our errors) that the Judicial Committee never intended to treat the power to regulate trade and commerce in any such manner as Lord Haldane at least apparently did.[19] What the meaning is of the words in the power has not yet emerged; but at any rate they are to convey a distinct independent legislative authority, or rather—so we are now told—they always have held that position.

With regard to the "treaty-power" I refrain from discussion, except to make two remarks. First of all I do not know what *in law*, a "British Empire" treaty is, and it has been most unfortunate that the Judicial Committee should have tried to base any *ratio* on an obscure and meaningless phrase in the British North America Act. Treaties are made today for Canada, except for some conventional and extra-legal forms, in exactly the same way in law as they were in 1867—a point which will doubtless receive full consideration from others. Secondly, it was equally unfortunate that, in the *Radio Case*,[20] Lord Dunedin ever referred to treaties. The case in this connection has been submitted to perfectly valid criticism;[21] but it may not be entirely idle to point out once more, with due respect, that it is judgments of this nature which have complicated legislative action in Canada.

III

"To make it conform . . . . . to the requirements of present-day social and economic conditions." What of the future? *Res est magni laboris.* I submit that Mr. Justice McGillivray has laid down an unimpeachable position, and in this connection

[18] *Snider Case, supra,* at p. 410 *ff.*; *Board of Commerce Case,* [1922] 1 A.C. 191 at p. 198.

[19] *Proprietary Articles Trade Association* v. *Attorney-General for Canada,* [1931] A.C. 310 at p. 326.

[20] *In re Regulation and Control of Radio Communication in Canada,* [1932] A.C. 304, especially at p. 312.

[21] John S. Ewart, *The Radio Case,* in 10 Can. Bar Rev. at pp. 298 *ff.*

I should like to quote an illuminating statement by Dr. O. D. Skelton :

> Courts may modify, they cannot replace. They can revise earlier interpretations, as new arguments, new points of view are presented, they can shift the dividing line in marginal cases; but there are barriers they cannot pass, definite assignments of power they cannot reallocate. They can give a broadening construction of existing powers, but they cannot assign to one authority powers explicitly granted to another, or modify the provisions of the B.N.A. Act regarding the organization of the executive and legislative branches of the Dominion.[22]

Those are wise words and it is time that they were heeded. It is not the function of the courts to change a statute so as to bring it into line with modern demands; and too many Canadians have been deceived in argument and frustrated in hope because —wilfully or ignorantly—they looked on the Judicial Committee as though it possessed constituent powers—the stream of omnipotence flowing from the "footsteps of the throne"! Whatever the future, the recent judgments have made it abundantly clear that the British North America Act is not a "constitution". We must no longer live in the vain world of delusion that the Judicial Committee will do for the Act what the Supreme Court of the United States has been able to do, in a wide manner, since the days of John Marshall, for perhaps the most rigid formal constitution in the world. Whatever the difficulties in the United States today, it has been possible to see the constitution from the outside and to give to it a remarkable elasticity because it is not a statute. Had this not been so, we should have witnessed remarkable struggles for amendments, which as we know are singularly few over the decades. Such a process, however, is not for our courts and we have no right whatever to expect them to turn a mid-nineteenth century statute into an instrument of modern government. As we read the recent judgments we must be convinced that the Judicial Committee has no intention whatever, in any substantial or fundamental matter, of acting as a constituent assembly for Canada. We would have faced this issue long ago had we not too largely believed that constitutional and legal wisdom never really crossed the Atlantic.

For, I submit, we must now face issues. The federal "general power" is gone with the winds. It can be relied on at the best when the nation is intoxicated with alcohol, at worst when the nation is intoxicated with war; but in times of sober

[22] House of Commons: *Report of Special Committee on B.N.A. Act* (Ottawa, 1935), p. 24.

poverty, sober financial chaos, sober unemployment, sober exploitation, it cannot be used, for these, though in fact national in the totality of their incidents, must not be allowed to leave their legal water-tight provincial compartments; the social lines must not obliterate the legal lines of jurisdiction—at least this is the law, and it killeth. When, then, for example, the legislature of Canada thinks and provincial ministers (outside the law courts) think that unemployment is a national "evil"—and our taxes, and our social sorrow and our Christian charity would seem to point to a serious enought national situation—the Judicial Committee says it is not statutorily so—and they have the last word. Indeed, I welcome the judgments in relation to social issues; for they may bring us down to earth, clear the air and demand some national performance. The time has come to abandon tinkering with or twisting the British North America Act—a curiosity belonging to an elder age. At long last we can criticize it, as the stern demands of economic pressure have bitten into the bastard loyalty which gave to it the doubtful devotion of primitive ancestor worship. We must seek machinery to do in Canada certain things: (i) to repeal the B.N.A. Act *in toto;* (ii) to rewrite completely the constitution; (iii) to provide reasonable and sane and workable constituent machinery; (iv) to abolish all appeals to the Judicial Committee. I submit that every one of these things is necessary; and above all we must get rid of all the past decisions of the Judicial Committee, for they will hang round the necks of the judiciary, if appeals are abolished, in that uncanny stranglehold with which *stare decisis* seems doomed to rob the law of creative vitality.

Of course, if Canada is to remain a political entity, it will be as a federation. We are asked often to think "nationally" by orators, visitors, journalists, professors and such like. There is room for "national" thinking, but it must be within delicate balancings of centrifugal and centripetal forces. Elsewhere I have outlined certain practical processes of change and I do not wish to repeat them here except to lay stress on the hope that any new constitution should not be a statute.[23] In addition, whatever the future, we cannot hope for a frictionless and ideal constitution. No constituent powers can help us to avoid the courts or some defining tribunal. The "limitations" on our "nationhood" we can sweep away tomorrow if we wish. We can have, in this connection, as large a "nationhood" as has the United States or Australia, where in the former constitutional changes are rare, difficult, slow, and problematical, and in the latter almost impossible. Federalism is legalism. It is,

[23] *Ibid.*, pp. 75 *ff.*; 48 Juridical Review, at pp. 68 *ff.*

at best, a second best. Yet there are points of view which might well be pondered by that future Quebec Conference for which I hope and plead. They can best be expressed in the following quotation :

> Political systems are a complex of rights and duties resting ultimately on the question, to whom, or to what authority, does the citizen owe allegiance. In normal affairs the question is not present, for the law works smoothly, and a man goes about his business obeying one authority in this set of matters and another authority in that. But in a moment of crisis a conflict of claims may arise, and it is then apparent that ultimate allegiance cannot be divided. The issue of allegiance cannot be determined in the last resort by a juristic interpretation of statutes. The law must conform to the facts or so much the worse for the law. When all formalism is stripped away the bare question is, what authority commands the residual loyalty of the citizen. Is it the federation or the constituent state? If the answer is the federal government, as for the vast majority it must be, then an integration of powers, designed to meet the necessities of economic circumstances, accords with underlying realities, by whatever process it may be secured. If the answer is the constituent state, then such an integration merely lays in store a fresh and still more dangerous conflict. Whatever the constitutional laws may say, the ultimate arbiter of social duty is the residuary legatee of political power. . . . The solution of the federal problem rests ultimately on the capacity of men to work for a common end that is greater than their own individual interests. The federal power is bound to take into consideration the opinions of its constituent states; but the states too are bound to take into consideration, alongside their own local interests, the opinions and interests of the nation as a whole. If adjustment is impossible the fault does not lie in the particular character of the issue or the particular form of the constitution; it lies in the inevitable failure to make a nation out of a people who think of themselves in terms of a narrow loyalty. That is a soical, a spiritual problem, not a problem of constitutional law.[24]

"In terms of a narrow loyalty"—against that challenge we place provinces "sovereign within their ambit", ceaselessly defending their sovereign legislative powers and yet asking, and continuing to ask, the federal legislature to vote money to carry them out. In the far-off days of 1864 - 67, the men who made the Dominion of Canada had express vision that its peoples would forget that they were Lower Canadians, Upper Canadians, New Brunswickers, or Nova Scotians and would become Canadians in a new nation. The issues connected with the British North America Act still lie fundamentally with the realization of that vision—"a spiritual problem".

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[24] Round Table (December, 1935), pp. 114-15.