THE PRIVY COUNCIL DECISIONS: A COMMENT FROM GREAT BRITAIN

The view which is taken of the judgments of the Privy Council in the six cases of the highest importance regarding the constitutional powers of the Canadian Federation must inevitably depend very largely on the direct interest of the commentator in Canadian affairs. To those who reside in Canada the problems dealt with are of fundamental practical importance, and it is unavoidable that their opinions should be deeply coloured by considerations affecting the practical operation of the constitution under which they live. We see in the United States at the present time the influence of practical issues on legal opinion in connection with the proposed vital changes affecting the position of the Supreme Court of the United States. In legal comments on that question there is obvious the effect on the minds of some of the writers of the enormous importance of assigning to the Federation extraordinary powers to deal with the grave difficulties which have been experienced in America. It is natural that, when circumstances arise which obviously are very difficult, if not impossible, to deal with under the terms of a constitution on the basis of the traditional interpretation, there should be a strong feeling that it is the duty of the courts to adapt the interpretation to accord with the new circumstances.

On the other hand, those who are remote from the immediate pressure of actual difficulties are necessarily prone to lay greater stress on the maintenance of the traditional interpretation of a constitution, and to hold the view that it is not the part of the judiciary to remedy the defects of a constitution, and that that work should be left to the legislature or to whatever other body possesses the necessary authority for constitutional change. From this point of view the fact that constitutional change is difficult, and that judicial interpretation is a comparatively simple method of remedying defects, is not a consideration proper to be taken into account.

Having regard to the wholly unexpected development of social, economic, and financial affairs since 1867, it is most natural that the constitution of the Dominion of Canada should prove inadequate to serve fully the present needs of the people. But the question is whether this inadequacy justifies the judiciary in giving an interpretation to the constitution which runs counter to the established understanding. The matter, of course, is complicated to a certain extent by the fact that the

present interpretation of the Canadian constitution restricts the powers of the Federation far more narrowly than they were ever restricted in the contemplation of Sir John Macdonald and the other fathers of federation. It is quite possible to argue that the views which were taken of the constitution in the early days of its existence by the Privy Council were a distortion of its real intention.[1] But the fact remains that these views were taken by the authority with which the fathers of confederation themselves intended the decision to lie, and therefore to overthrow these principles would be at the present day a revolutionary step which could be taken only by a judiciary, sitting in Canada, with the general approval of the Canadian people. To expect such action from the Judicial Committee of the Privy Council would be unfair. It would introduce a measure of uncertainty into the judicial character of the pronouncements of that authority, which would run entirely counter to the British legal conception of the judicial function. It is open to contend that that function is not correctly interpreted by British opinion and that, as in Germany, Italy and the U.S.S.R. under their present constitutions, judges should be charged with the duty of framing their judgments with a view to the fundamental interests of the State; but this is not the English view. It seems, therefore, that the decisions of the Privy Council in all the cases in question were the inevitable result of the previous jurisprudence of the Judicial Committee, and that to expect any other result was impossible. It is true that in one decision, perhaps an unfortunate one, the Judicial Committee took a view which even its admirers have found difficult to reconcile with their conception of the judicial function. The decision in *Edwards* v. *Attorney-General for Canada*[2] which holds that the Governor General may summon a woman as a Senator, was very ably motived in the judgment, but it has never carried much conviction for those who hold that the convenience of avoiding an amendment of the Canadian constitution should not have been allowed to produce an interpretation which created a situation wholly foreign to the minds of those who framed the constitution of Canada. Nothing can be more certain than that the framers of the constitution never dreamt of including women as possible Senators, and no decision of the Privy Council is probably harder to defend as sound in law. But we need not regret that that unfortunate precedent has not been followed.

[1] For a moderate statement, see Professor W. P. M. Kennedy's summary in *Round Table*, No. 77, December 1929, pp. 146 - 153.

[2] [1930] A.C. 124.

There seems no possible answer to the objections of the Privy Council to the attempt to establish the validity of the legislation of Canada as to weekly rest in industrial undertaking, minimum wages, and limitation of hours of work, by reference to the general authority of the Federation under sec. 91. The Chief Justice of Canada in his judgment in the case of *The Natural Products Marketing Act* proved beyond all possible doubt that the Privy Council could not, without reversing all its decisions, give any value to this contention. If the view of the Privy Council is an error, it is at least a fundamental error which cannot now be eradicated. At the same time it must be pointed out that it is very difficult to see how the constitutional position of the provinces could ever have been safeguarded, had not the Privy Council drastically limited the operation of the general power of the Federation.

The only serious argument, therefore, which was presented in support of the validity of the Canadian Acts, was that which rested upon the power of Canada to conclude treaties and to give legislative effect to their provisions. Put in the most favourable light, the position was that sec. 132 of the British North America Act gave the Federation power to pass legislation "necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries". This must mean that, if any treaty was made between the Empire and a foreign country, the Federation would have power to give legal effect to it, even though it were necessary for that purpose to over-ride the otherwise exclusive powers of the provinces to deal with property and civil rights. Admitting that the conventions in question were not in form conventions between the British Empire and foreign countries, surely the principle remained unaffected. Through the passage of time Canada had become possessed of the power to make, in the name of the Crown, treaties with foreign countries, and no logical reason existed why it should not have as a necessary consequence the power to enforce these treaties by appropriate legislation. Plausible as this contention may appear, its plausibility is much reduced when the actual operation of the power conferred by the British North America Act is borne in mind. During the period when the British Government was still vitally concerned with negotiation of treaties for Canada, it was never contemplated that any treaty should be concluded which was essentially on a matter within provincial authority, unless the provinces had been consulted

and had agreed to legislate.[3] The doctrines which then prevailed, as they were summed up by the writer in 1927,[4] were in effect those which seem now to have been re-established by the judgment of the Privy Council. (1) Where a matter was normally and fully under provincial jurisdiction, and it was proposed to conclude a treaty affecting it, the proper course was for the Federal Government to accept the treaty only after ascertaining that it was acceptable to the provinces and that they had legislated, or were prepared to legislate, to give it effect. It was admitted that this rule might cause difficulty, should some of the provinces object, since it was held that Canada ought not to accede to any convention except in respect to the whole of the Dominion, but it was felt that respect for provincial rights must be the dominant consideration. (2) When a convention was generally within the scope of Canadian authority, it was proper that it should be concluded even though it would involve legislation by the Federation to give it effect which might impinge upon provincial rights. Thus Canada was clearly justified, not merely in strict law, but constitutionally, in passing the Act to give effect to the Boundary Waters Treaty with the United States of January 11, 1909.[5] In the same way it fell to the Federation to pass the legislation necessitated by the treaties of peace in their application to Canada. (3) On the other hand the Federation could claim no right under the labour clauses of the treaties of peace to secure legislative power over provincial subjects by ratifying draft conventions arrived at under the procedure therein indicated. No doubt the peace treaties were Empire treaties in the technical sense, but the obligation imposed on Canada under them was merely, as the Supreme Court had ruled *In the Matter of Legislative Jurisdiction over Hours of Labour*,[6] to bring the proposals before the appropriate legislatures, those of the provinces. (4) Thus legislative authority to deal with treaty matters was shared between provinces and Federation in accordance with the principles of the federal constitution.

It must be admitted that confusion in this matter was caused by the decisions in the *Aeronautics*[7] and the *Radio Cases*,[8]

[3] *Cf.* the procedure in the case of the convention of 1899 with the United States regarding the disposal of real and personal property.

[4] KEITH, RESPONSIBLE GOVERNMENT IN THE DOMINIONS (1928), 1,579,580.

[5] An Act relating to the establishment and expenses of the International Joint Commission under the Waterways Treaty of January the eleventh, 1909. 1 & 2 Geo. V, c. 28 (Dom.).

[6] [1925] S.C.R. 505.

[7] *In re The Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54.

[8] *In re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304.

for it was natural to read the dicta of the Privy Council as assigning to the Federation alone power of legislating to implement treaties. But, as is now made clear by the Privy Council, its remarks in the *Aeronautics Case* must be regarded as obiter, and those in the *Radio Case* are now shown to have depended on the fact that power to deal with it falls under no head of sec. 92 unless it be inter-provincial telegraphs, which is expressly excluded from provincial authority. Frankly, it must be admitted that the Privy Council by its unguarded phraseology encouraged encroachment by the Federation,[9] which may reasonably feel that much trouble would have been avoided, had the Judicial Committee shown more caution.

On the merits the arguments for the result achieved seem strong. To interpret the constitution in the sense that the treaty power could be exercised so as to justify deliberate invasion of a purely provincial sphere would mean the introduction of a serious degree of confusion into the constitution. The Federation would only be able to legislate to the extent of the treaty, and the subject matter would be controlled by two legislatures with different degrees of interest and responsibility. A provincial ministry would find its authority hampered and its responsibility diminished in a manner which might often be capricious. The Australian constitution with its conflict between the legislative powers of the States and awards made under the authority of federal legislation by the Court of Conciliation and Arbitration illustrates rather too obviously the dangers of a division of authority in these social and economic issues. A further difficulty is suggested by the fact that in many cases the outcome of the work of the Labour Organisation is not a draft convention but a mere recommendation. It would indeed be anomalous if the Federation had been held to have power to give effect to conventions, if ratified, but not to recommendations, the difference being essentially an unimportant and technical one. It must be noted that a slightly inconvenient position has been created by the action of the Canadian Government in ratifying a convention, now that it turns out that it has no legislative power in the matter. The question arises, what is the international position of Canada in the matter? Can she argue that her ratification is a mere nullity,[10] and that other powers are not entitled to accuse her of failure to carry out her obligations? Or is the position that she is bound internationally

[9] Journal of Comparative Legislation, xiii, 122 - 4; xiv, 114, 265 - 7.

[10] As is well known, this issue is not definitely covered by existing rules of international law.

by her ratification, and that it is her duty, in order to avoid the possibility of proceedings against her, under the terms of Part 13 of the Treaty of Versailles, to bring pressure to bear on the provinces to enact the necessary legislation to give effect to the treaties which she has ratified? There would, of course, be the ultimate possibility, if the case were sufficiently serious, of Imperial legislation, which could override provincial objections. It may, however, be assumed that the powers interested would not be so ill-advised as to press Canada on the matter.

The question, of course, involves a point which was deliberately left undecided by the Judicial Committee, namely, the contention of the provinces that the Canadian Government had no executive authority to make a treaty on the subject matter which was dealt with in the treaties whose validity became the object of the legal proceedings in question. This contention seems to involve the supposition that the executive authority of the Federal Government is limited to matters which fall within the sphere of its legislative authority and is therefore excluded in all matters in which the provinces have exclusive legislative power. It seems impossible to accept this doctrine as compatible with the nature of a federation. It was understood from the first in Canada that, so far as Canada had external relations, their conduct passed necessarily from the provinces to the Federation when union took effect. There is no necessary connection between legislative and executive power. It is quite true that in Canada there is no specific grant to the Federation of authority over external affairs, such as there is in the Australian constitution,[11] but the general principles which were so clearly set forth by the Secretary of State in the *Vondel Case*[12] apply quite properly to Canada. Indeed the case for the right of the Federation in Canada to deal with these matters is even clearer than it was in Australia, for relations between the Crown in the United Kingdom and the provincial governments have always fallen to be conducted through the Federal Government, while the British Government remains in direct communication with the governments of the Australian States.

The decision of the Privy Council in regard to *The Natural Products Marketing Act* was inevitable, though it may be admitted that the position as declared remains unsatisfactory. Nor is any criticism possible of their ruling on the *Employment and Social Insurance Act*. It is clear that the scheme of federation

[11] Constitution, s. 51 (xxix). *Cf.* KEITH, CONSTITUTIONAL LAW OF THE BRITISH DOMINIONS, p. 339.

[12] KEITH, IMPERIAL UNITY AND THE DOMINIONS (1916), pp. 423, 424.

could easily be destroyed, had the Dominion been permitted to encroach on the field of civil rights, under the plea that it had power to tax and dispose of the proceeds of taxation on any object which it thought proper.[13] Equally unassailable is the ruling which holds valid the *Farmers' Creditors Arrangement Act.* Acceptance of the contention of British Columbia would quite unreasonably have limited the authority of the Federal Parliament to deal with bankruptcy and insolvency. Rather more open to argument is the view which was expressed with regard to the Dominion legislation, defining a national trade mark. It is interesting to note the emphatic—if erroneous—assertion of the Judicial Committee that no one has questioned the competence of the Dominion to pass the Trade Mark legislation now found in R.S.C. 1927, c. 201, amended by 1928, c. 10. The validity of this enactment is assigned to the obvious source of authority of regulation of trade and commerce, which is made federal by sec. 91 (2) of the British North America Act. The reason which, in the view of the Chief Justice, was fatal to the national trade mark was that the Federation was creating a civil right of a novel character. The Judicial Committee admitted this but laid it down that there was no reason why the legislative competence of the Dominion Parliament should not extend to the creation of juristic rights in novel fields, if they can be brought fairly within the classes of subjects confided to Parliament by the Act. It is interesting to contrast the decision of the High Court of the Commonwealth of Australia in the *Union Label Case,*[14] where it was held by a majority that the so called Workers' Trade Mark created by the Trade Marks Act, 1905 was invalid. Though the judgments in that case depended on various circumstances, the Chief Justice and Barton J. thought that the proprietors of a trade mark must have some dominion over the goods. In the Canadian case the Privy Council point out that it was obviously not contemplated that the Crown should have any proprietary interest in the goods to which the national trade mark, vested in the Crown, was to be applied. We have again the contrasting points of view of the Privy Council and of the High Court of the Commonwealth brought out very clearly. It must be remembered that the jurisprudence of the High Court is still fluid, and that there is at least a possibility that, if the same issue were now to arise, it would be decided in a different way.

[13] The Australian Constitution, sec. 96, allowing the grant of assistance to the States, covers the Federal Aid Roads Act, 1926: *Victoria* v. *The Commonwealth* (1926), 38 C.L.R. 399.

[14] (1908), 6 C.L.R. 469.

From a juristic point of view, therefore, it seems possible to accord cordial appreciation of the decisions of the Privy Council. It is, of course, a completely different question whether the terms of the Canadian constitution are now consonant with the promotion of the best interests of the people of the Dominion. Prime facie it would seem that some alteration is requisite to meet the emergence of new conditions which could not be conceived by the framers of the constitution, but that is a work for the statesmen and people of the Dominion, and not for any court.

While the Privy Council's judgment does not conclude the issue as to the power of the Commonwealth Parliament in respect of external affairs, it does not support the view that it enables invasion on this plea of the sphere of the States, despite the opinion to this effect of a minority of the High Court on the aviation issue.[15] The advantage of Australia in having a regular mode of constitutional change is clearly exhibited in the submission forthwith to the people of the issue of the grant to the federation of full authority on this head.

A. BERRIEDALE KEITH.

University of Edinburgh.

[15] *Cf.* Keith, Journal of Comparative Legislation, xix, 113, 114.