THE SOCIAL LEGISLATION REFERENCES

It is probably fair to say that to most lawyers these decisions of the Judicial Committee were inevitable. This is particularly true of what must be regarded as the principal reference, viz., the reference regarding The Weekly Rest in Industrial Undertakings Act, 1935, The Minimum Wages Act, 1935, and the Limitation of Hours of Work Act, 1935, hereinafter referred to as the Minimum Wage Reference.[1] As remarked above, the judgment of the Judicial Committee on this reference seemed inevitable to most lawyers. But just here an interesting observation might be made: many of these same lawyers after reading the judgment are prepared to pronounce it reactionary, unfortunate and unsound. Apparently we were not prepared to believe that legal recognition could be given to our constitutional development. Apparently, although willing to talk about advanced social legislation it just did not seem possible that it could find its way into the positive law.

This note will be confined to a consideration of the judgment in the Minimum Wage reference. With the other judgments the writer sees no particular reason for disagreement — with certain reservations as to The Employment and Social Insurance Act reference, which presents unusual difficulties. As to the minimum wage reference it will be submitted that the attitude of the Judicial Committee is not only reactionary but positively unsound as a legal proposition. Within the limits suggested for the length of this note the reasons for the above submission can be given only in outline.

No good purpose would be served by a consideration of the Treaty of Versailles, the League of Nations and the General Conference of the International Labour Organization. It will suffice to say that the present legislation was based upon an international convention ratified on behalf of Canada by authorization of the Governor-General in Council. In the light of the actual judgment certain peculiarities of the convention, as for instance whether it was a "recommendation only",[2] become unimportant.

On behalf of Canada it was contended that authority to implement this treaty by legislation was to be found in section 132 of the British North America Act. With this contention the Judicial Committee was unable to agree. The convention

[1] [1937] A.C. 326; [1937] 1 D.L.R. 673; [1937] 1 W. W. R. 299.
[2] See Cannon J., [1936] S. C. R. 461 at p. 520.

in question was found not to be an "Empire" treaty within the meaning assigned to section 132. It is submitted that in this respect the decision is entirely correct.

Whether the convention in question may properly be described as a treaty is of no significance on this point, for it is submitted that the same considerations would apply to a treaty made by His Majesty on the advice of his Canadian Government. It seems perfectly clear that in 1867 the British Empire was, to borrow the words of Mr. Justice Crocket, "visualized only as a single unit".[3] There can be no doubt as to the source of advice tendered to His Majesty in relation to that single unit and there can be no doubt as to the identity of the Parliament that was supreme.[4] Local self-government in a "colony" was for long after 1867 conceived of in terms pretty narrowly domestic.[5] Of course it is not suggested that the meaning assigned to words in 1867 should indefinitely persist. The difficulty is that the language of section 132 seems to restrict us to the earlier situation. The language clearly contemplates that the obligation shall have been created before there shall be executive or legislative capacity in Canada to deal with treaties. It will be noted that it was necessary to endow the "Government of Canada" with powers to perform the "obligations" of Canada consequent to "Empire" treaties. In other words an entirely different situation was being dealt with — a colony without treaty-making powers.

Now a very devoted adherence to the "living tree" doctrine of Lord Sankey[6] is hereby declared. The difficulty is that in section 132 there seems to be no tree at all. One may adhere to the view that a statute embracing a constitution should be more liberally construed than an ordinary statute, without empowering the judges to write a new constitution. After all, we still pride ourselves as living according to the rule of law, and it would seem that growth must take place under those words and phrases which suggest a variable content. While it may be quite true that words rarely possess a fixed and invariable meaning, and likewise of words that define words, yet reasonable men can sometimes agree, as for instance that the words black and white connote different things. There seems to be an equally bright line between "Empire" treaty as used in section 132 and the present convention. The very fact that

[3] [1936] S. C. R. 461 at p. 524.
[4] See *Routledge* v. *Low* (1868), L. R. 3 H. L. 100.
[5] See, *MacLeod* v. *Attorney-General for N. S. Wales*, [1891] A. C. 455.
[6] *Edwards* v. *Attorney-General for Canada*, [1930] A. C. 124 at p. 136.

the present situation was not contemplated in 1867 merely serves to emphasize the point. It is submitted that the law on this question was correctly stated in the *Radio Case*[7] as well as on the present reference. Capacity, therefore, to enact the disputed legislation cannot be found in section 132 of the British North America Act.[8]

It is submitted, nevertheless, that the decision is unsound: that it is not merely reactionary but shows a departure from strict legal principles. It is suggested that the judgment as delivered by Lord Atkin shows either a complete unfamiliarity with the situation in Canada or an unwillingness to admit that Canada is no longer a "colony". In the opinion of the writer the legislation was validly enacted under powers given to the Parliament of Canada by the introductory portion of section 91 of the British North America Act, *i.e.*, a power to make laws for the "Peace, Order, and good Government of Canada".

(1) That the Governor-General in Council may conclude a treaty with a foreign state — a treaty which creates a diplomatic obligation binding on Canada — has been authoritatively established. This proposition was definitely recognized in the *Radio Case*.[9] When the present reference was before the Supreme Court of Canada, four of the six judges were of like opinion. In the judgment rendered by the Chief Justice, Davis and Kerwin JJ. concurring, this position was very definitely taken,[10] and formed the foundation for the conclusion that the legislation was validly enacted. Crocket J., who was unable to support the legislation, nevertheless agreed on this point,[11] in a judgment which seems to have been closely followed by the Judicial Committee. The treatment of this matter by the Chief Justice of Canada,[12] the consideration of "the crystallization of constitutional usage into a rule of constitutional law to which the courts will give effect", is extremely lucid and convincing. The question was not categorically answered in the Judicial Committee, but the judgment of Lord Atkin seems to have assumed the treaty-making power of Canada throughout.

(2) Once the proposition enunciated above is accepted, an argument supporting the validity of the legislation as being for

[7] [1932] A. C. 304 at p. 312.

[8] For a contrary opinion see V. C. MacDonald, 11 Can. Bar Rev. 581 at p. 599. See also the speech of Hon. C. H. Cahan in House of Commons on Apr. 5, 1937, unrevised Hansard, p. 2773 *et seq.*

[9] [1932] A. C. 304.

[10] [1936] S. C. R. 461 at p. 477.

[11] *Ibid.*, at p. 535.

[12] *Ibid.*, at pp. 476 - 77.

Peace, Order, and good Government of Canada, seems almost unanswerable. Without legislative ratification of such a treaty the situation is worse than anomalous. Without legislative action such a treaty is incompetent to affect the rights of the subject.[13] Normally the state will be in default,[14] a very serious matter indeed. Surely, to use the words of Lord Watson,[15] the situation "has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada". To Lord Atkin, while such treaties "bind the state as against the other contracting parties",[16] the possibility of default is apparently of no great significance. This seems strange doctrine, especially in view of the declaration of autonomy contained in the Statute of Westminster, 1931. Moreover, the very fact that a given matter has become the subject of international agreement would seem to stamp it as having national significance. To state the situation seems to prove the case. In this connection it is interesting to note that Mr. Justice Rinfret, while denying the validity of the legislation, said this: "When once the convention has been properly adopted and ratified, it is, no doubt, transferred to the federal field for the enactment of laws necessary or proper for performing the obligations arising under the convention."[17]

(3) It is submitted that the matter was concluded by the authority of the *Radio Case*[18] where a convention was considered which differed in no essential particular from that involved in the present reference. Lord Atkin, however, disposed of the *Radio Case* in these words: "When that case is examined it will be found that the true ground of the decision was that the convention in that case dealt with classes of matters which did not fall within the enumerated classes of subjects in sec. 92 or even within the enumerated classes in sec. 91."[19] This statement deserves careful consideration.

It should be noted that the *Radio* reference concerned not only the International Radiotelegraph Convention, 1927, but the wider question "has the Parliament of Canada jurisdiction to regulate and control radio communication?"[20] In the judg-

[13] *Walker* v. *Baird*, [1892] A. C. 491.
[14] As Lord Atkin himself states, [1937] A.C. at p. 348; [1937] 1 W.W.R. at p. 307.
[15] *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1896] A. C. 348 at p. 361.
[16] [1937] A. C. at p. 348.
[17] [1936] S. C. R. 461 at p. 511.
[18] [1932] A. C. 304.
[19] [1937] A.C. at p. 351; [1937] 1 W. W. R. 299 at p. 309.
[20] [1932] A. C. 304 at p. 305.

ment, however, Viscount Dunedin first deals with the convention. It is pointed out that counsel for the province had contended that the matters covered by the convention should be divided between Canada and the provinces according to the enumerations of sections 91 and 92.[21] In reply to this contention Lord Dunedin uses the following language[22] :

> Their Lordships cannot agree that the matter should be so dealt with. Canada as a Dominion is one of the signatories to the convention. In a question with foreign powers the persons who might infringe some of the stipulations in the convention would not be the Dominion of Canada as a whole but would be individual persons residing in Canada. These persons must, so to speak, be kept in order by legislation and the only legislation that can deal with them all at once is Dominion legislation. . . . . Being, therefore, not mentioned explicitly in either s. 91 or s. 92, such legislation falls within the general words at the opening of s. 91. . . . .

Viscount Dunedin, concluding the discussion of the convention, said :[23]

> The result is in their Lordships' opinion clear. It is Canada as a whole which is amenable to the other powers for the proper carrying out of the convention; and to prevent individuals in Canada infringing the stipulations of the convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada.

In the next paragraph the wider issue under the reference is approached and a consideration of the same is introduced by the following language :[24]

> At the same time, while this view is destructive of the view urged by the Province as to how the observance of the international convention should be secured, it does not, they say, dispose of the whole of the question. They say it does not touch the consideration of inter-provincial broadcasting.

Then, and then only, does the judgment look to the enumerated heads of s. 91.

It is respectfully submitted that Lord Atkin has entirely misapplied the *Radio Case*. That portion of Viscount Dunedin's judgment which deals with the introductory portion of section 91 is more than a dictum, it is more than an alternative ground of decision, it is the decision itself so far as the convention was concerned. In the result, then, the principle behind the decision

[21] *Ibid.*, at pp. 311 - 12.
[22] *Ibid.*, at p. 312.
[23] *Ibid.*, at p. 313.
[24] *Ibid.*

of the *Radio Case* is ignored as well as the strong dictum regarding Dominion powers in the *Aeronautics Case*.[25]

(4) In the consideration of this question the Judicial Committee presumably endeavoured to find the legislative intent behind the British North America Act and other enactments. Even on this rather narrow basis it might be pointed out that legislatures are not to be deemed to have intended absurd things. But what an absurdity we have: a community supposedly autonomous and on a par with the United Kingdom in the British Commonwealth of Nations, yet without means of making her diplomatic engagements effective; an autonomous community, rich in the tradition of parliamentary supremacy in which the executive outruns parliament. Perhaps their Lordships would permit Parliament to deprive the executive of this treaty-making power. It seems like an absurdity, suggestive of a Gilbertian flavour.

(5) It may also be observed that the position taken by Lord Atkin goes far in the direction of rendering nugatory the introductory portion of section 91. Apparently if civil rights are "affected" the legislation must be *ultra vires*. It is difficult to conceive of any legislation that would not affect civil rights in some measure; otherwise what would be its utility? That the introductory clause has never been so regarded is evident from many cases cited in the judgment itself. The enumeration in section 91 is specifically stated to have been made "not so as to restrict the generality of the foregoing terms of this section".

In conclusion the opinion may be expressed that a situation has been created which will prove acutely embarrassing. It is not unthinkable that a different result might be reached on the argument of another reference before the Judicial Committee —the case under review being distinguished, perhaps on the ground that the convention amounted to a "recommendation only". Otherwise, a simple amendment of section 132 would go a long way in the direction of correcting the present difficulty. The solution of the question of social legislation will probably await the pressure of events. The judges of the future may be convinced that unemployment insurance, even without the aid of the treaty, is for the peace, order and good government of Canada. And is it not within the realm of possibility that constitutional appeals of the future will not be heard in England?

[25] [1932] A. C. 54 at p. 77.

On reading the judgments in the Supreme Court of Canada one is conscious that the learned judges who found the legislation *ultra vires* feared a loss of liberty to the subject as a result of the apparent enlargement of Dominion powers. But we have to go through life depending on the good sense of others. Parliamentary sovereignty is a basic principle of our jurisprudence. Under a principle of parliamentary absolutism Great Britain has been regarded as the defender of liberties.

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