ARE THE PROVINCIAL LEGISLATURES PARLIAMENTS?

In the British America Act, provincial legislative authorities are called "Legislatures", while the word "Parliament" is used for the Federal. In his introduction to the third edition of his Parliamentary Rules and Forms, Dr. Arthur Beauchesne comments at some length upon this distinction. He does not deny that the word "Legislature" is equally appropriate as the word "Parliament" to designate a sovereign legislative body, but he contends that in the general scheme of the British North America Act, the Provincial Legislatures are given such an inferior legal status that it would be inappropriate to refer to them as being Parliaments. It is hardly necessary to state that this is a far-reaching contention which would in fact, reduce the provincial administrations to the rank of independent municipal institutions, as will later become apparent.

I need hardly point out that Dr. Beauchesne's contention uns contrary to the well established jurisprudence of the Privy Council. In *Hodge* v. *The Queen* 9 App. Cas. 117 at p. 132 Lord Fitzgerald said:

> It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its powers possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.

In the *Initiative and Referendum Act Case* [1919] A.C. 935 at p. 942, Viscount Haldane said:

> The scheme of the Act passed in 1867 was not to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to establish a central government in which these provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this, each Province was to retain its independence and autonomy and to be directly under the Crown as its head.

As a matter of fact, this jurisprudence is now so firmly established that the Privy Council has stated it to be a rule of construction of the British North America Act" that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs" (per Lord Sankey, *"Persons Case,* [1930] A.C. 124 at p. 136). It is not, therefore, surprising to find that the Privy Council does not hesitate to call the Provincial Legislatures "Parliaments". Thus in *British Coal Corporation* v. *The King,* Viscount Sankey referred to "the Dominion and Provincial Parliaments" and "the Parliaments of Quebec and Ontario," ([1935] A.C. 500 at p. 520-521.)

Proceeding now to discuss Dr. Beauchesne's reasoning apart from this consideration of authorities, we find that he opens his remarks by these sentences: "The authority of Parliament in the Dominion of Canada does not spring from the Canadian people. It originated in a statute passed by the Parliament of the United Kingdom of Great Britain and Ireland intituled the 'British North America Act, 1867'," While it is true that without the intervention of the British Parliament, the wishes of the Canadian people expressed in addresses voted by its elected representatives in each of the old provinces would not have been effective, it is as inaccurate, in a constitutional sense, to say that the authority of our Parliament does not spring from the people as it would be to say that, because in law the Prime Minister is selected by the Governor-General, his authority is not derived from popular vote.

One should not forget that the British North America Act opens by a recital of the expressed desire of the provinces. This preamble clearly gives to the Act a special character which has been recognized not only politically, but judicially as well, Thus, in the *Aviation Case,* ([1932] A.C. 54 at p. 70), Lord Sankey said:

> Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies.

A few years later, in the *Labour Conventions Case* Lord Atkin referred to "the interprovincial compact to which the British North America gives effect."

Proceeding to consider the British North America Act, not as expressing the view of the Fathers of Confederation but those of the Lords and Commons of the United Kingdom, Dr. Beauchesne says: "When they vested the Federal Cabinet with the power of disallowing provincial statutes, they *ipso facto* authorized the Dominion Parliament to pass judgment on those statutes and they curtailed to that extent the autonomy of the provinces. . . . It cannot be said therefore that these two public bodies are on equal footing." After reading this, it comes somewhat as a surprise to find at page 112 of Dr. Beauchesne's book that "'the adoption of a resolution calling upon the Government to disallow a provincial act would be an encroachment by the House of Commons on the Powers of the Legislative Assemblies as set forth in section 92 of the British North America Act."

The peremptory answer to the contention that Legislatures are not Parliaments because their enactments are subject to disallowance by the Governor-General in Council is that the laws of the federal Parliament are similarly subject to disallowance by the King in Council. It is true that since 1931, it would not be consistent with established practice for the King to make use of this right on the advice of his British ministers, but the legal power remains. Anyway, it can hardly be contended that from 1867 to 1931, the federal legislature was not a Parliament on account of the royal right of disallowance, although during that period, the British Parliament, it should be observed, enjoyed much greater authority over the laws of the federal Parliament than the Dominion Parliament over provincial legislation. The British Parliament could, at any time, nullify Canadian legislation by overriding Imperial legislation applying to Canada while the Canadian Parliament could not obviously do the same towards provincial legislation.

According to Dr. Beauchesne, "the word 'one' before the word 'Parliament', in section 17 of the British North America Act, puts an end to the theory that provincial assemblies are Parliaments and shows the difference between dominion and provincial law-making bodies". The section referred to reads: "There shall be One Parliament for Canada. . . ." At first sight, this wording would appear to declare expressly that in Canada, there shall be only one Parliament because, in ordinary parlance, Canada means the geographical unit. But other provisions of the British North America Act show that, in this section, the word "Canada" does not have this meaning. The word *"Canada" in the Act, usually refers not to the geographical unit but to the juristic federal unit.* It is so used in more than

ten different sections: for instance, in section 111: "Canada shall be liable for the debts and liabilities of each province existing at the union"; so in section 125: "No lands or property belonging to Canada or a province shall be liable to taxation.' Geographically, the provinces are part of Canada and consequently it is apparent that, in these sections, the word "Canada" is not used to designate the country but the federal unit of government.

The word "Canada" is also used in the same sense in the section concerning the consolidated revenue fund. If we were to construe section 102 in the same manner as Dr. Beauchesne would have us construe section 17, we would have to conclude not only that the provinces have no parliament, but that they have no consolidated revenue fund either, because section 102 enacts that all public revenue, except the portions reserved to the provinces, shall form "One Consolidated Revenue Fund to be appropriated for the Public Service of Canada." As may be noted, we find here again the word "one" upon which Dr. Beauchesne has laid so much stress in his construction of section 17. However, we would be sadly mistaken in reaching the conclusion that there is in Canada but one consolidated revenue fund, because section 126 expressly provides that, for each province, there shall also be one consolidated revenue fund.

But even more conclusive is the fact that the word "Canada" is used to designate the federal unit of government in the very section preceding that which is relied on by Dr. Beauchesne. Section 16 of the British North America Act reads: "Until the Queen otherwise directs, the seat of Government of Canada shall be Ottawa". If we were to construe this section as Dr. Beauchesne would have us construe section 17 it would mean that in Canada there is but one seat of government, namely Ottawa. Bot other seats of government being provided for in each province by section 68, it is obvious that section 16 does not mean that Ottawa is the only seat of Government in Canada, but that it is the only seat of government for federal matters. Is it not manifest that the section relating to the Parliament of Canada must be construed in the same manner as the preceding section relating to the Government of Canada?

The Federal Government, it should be noted, did raise and submit to the Privy Council the contention that it was the only Government of His Majesty in Canada, but the Privy Council found no difficulty in rejecting this claim: "They maintained," said Lord Watson in the *Maritime Bank Case*, [1892] A.C. 437 at p. 441, "that the effect of the statute has been to sever all

connections between the Crown and the provinces; to make the Government of the Dominion the only Government of Her Majesty in North America; and to reduce the provinces to the rank of independent municipal institutions. For these propositions, which contain the sum and substance of the arguments addressed to them in support of this appeal, their Lordships have been unable to find either principle or authority."

Of no less far reaching importance is another contention advanced by Dr. Beauchesne concerning the legal status of provincial Legislatures which would also reduce them to the rank of municipal councils. He points out that section 18 of the British North America Act dealing with the privileges, immunities and powers of the Dominion Parliament is not made applicable to the Legislatures of the provinces and concludes that the "authors of the British North America Act refused to give to these legislatures the immunities, privileges and powers of the Commons House of the Parliament of the United Kingdom." It is quite true that section 18 is not applicable to provincial Legislatures but the inference is unwarranted. In the case of the Dominion Parliament, a special provision is necessary in order to give it power to define its own privileges and immunities because it does not have the general power of amending its own constitution, but for the provincial Legislatures, no special text is required because cl. 1 of sec. 92 gives them the power, in general terms, to amend their constitution, except as regards the office of Lieutenant-Governor. This situation is in all respects similar to that which obtains with respect to redistribution. Special provisions are found in sections 51 and 52 applicable only to the representation in the House of Commons, while no provision whatever is made for the alteration of provincial constituencies except in the case of the Province of Quebec. Would anyone contend that this means that the Legislature of Ontario does not have, under cl. 1 of sec. 92, full power to alter its constituencies? It is interesting to note that it appears from the minutes of the proceedings in conference of the delegates from the provinces in London, published in Pope's Confederation Documents, that the resolution dealing with the readjustment of representation in the Legislatures was eliminated as superfluous on account of the general power conferred upon them to amend their own constitutions.

Dr. Beauchesne has not overlooked the power of the provincial Legislatures to amend their constitutions, but he argues "that they cannot include in their amendments any kind of provision on the mere ground that it may be described as part

of constitutional law and they must remain within the sphere of action laid down for them in the scheme of the British North America Act." This is admittedly true, but how it may be deduced therefrom that the provincial Legislatures are not authorized to define their own privileges and immunities, I cannot understand. It is difficult to imagine on what ground it might be contended that the subject of the privileges, immunities and powers of provincial Legislatures is within the competence of the federal Parliament under sect. 91 of the British North America Act, and, as Earl Loreburn said in the *Companies Reference,* [1912] A.C. 571 at p. 581, "There can be no doubt that under this organic instrument (the British North America Act) the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada."

It is hardly necessary to observe that as a matter of fact, all our provincial Legislatures have continously enjoyed the privileges and immunities of a Parliament and the exercise by them of the right to define these privileges and immunities has been invariably upheld by the Courts, Very recently in *The King ex rel. Tolfree* v. *Clarke,* [1943] 2 D.L.R. 554, affirmed on appeal [1943] 3 D.L.R. 684 a motion to strike out as frivolous and vexatious a quo warranto proceeding against a member of the Ontario Legislature was granted by the judge upon a consideration of the immunities of the Legislature of Ontario. This summary disposition of a case involving a constitutional issue was supported on many authorities, especially on Lord Halsbury's pronouncement in *Fielding* v. *Thomas,* [1896] A.C. 600 at pp. 610-611:

> Their Lordships are, however, of the opinion that the British North America Act itself confers the power (if it did not already exist) to pass Acts for defining the powers and privileges of the provincial legislature. By s. 92 of that Act the provincial legislature may exclusively make laws in relation to matters coming within the classes of subjects enumerated (inter alia), the amendment from time to time of the constitution of the province, with but one exception, namely, as regards the office of Lieutenant-Governor.
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> It surely cannot be contended that the independence of the provincial legislatures from outside interference, its protection, and the protection of its members from insult while in the discharge of their duties, are not matters which may be classed as part of the constitution of the province, or that legislation on such matters would not be aptly and properly described as part of the constitutional law of the province.

Of course, it is true that Lord Halsbury added later on (at p. 612) that if the provisions of the Nova Scotia Act were to be "taken as a power to try or punish criminal offences otherwise than as incident to the protection of members in their proceedings, they could not be supported", but this does not at all mean, as Dr. Beauchesne contends, that the Privy Council had any doubt respecting the right of the Nova Scotia Legislature, under the British North America Act, to exercise this power as incident to the protection of members in its proceedings. On the contrary, Lord Halsbury emphasized in the conclusion of his judgment the decisive nature of the above quoted pronouncement by saying (p. 613): "The only arguable question is that which their Lordships have dealt with, namely, whether it was within the power of the provincial legislature to make such laws."

Respecting the contention that Legislatures are not Parliaments because they have jurisdiction over a limited field, it should suffice to observe that on this basis, the Dominion legislature would not be a Parliament. If it is true that the provinces cannot pass laws with respect to a number of important subjects, it is also true that the Dominion Parliament cannot pass laws respecting such important subjects as civil rights, education, municipal institutions, etc. The relative importance of the classes of subjects assigned to the federal Parliament on the one hand and to the Legislatures on the other is no more a criterion of their sovereign authority in their own field of jurisdiction than the extent of a nation's possessions is a criterion of its sovereignty over its territory: "Within its appointed field, the Provincial Legislature is as supreme as any other Parliament," says Lord Atkin in *Shannon* v. *Lower Mainland Dairy Products Board*, [1938] A.C. 708 at p. 722.

Finally, Dr. Beauchesne contends that a comparison between the constitution of the executive authority in the provinces with the constitution of the Dominion executive shows "that a real parliamentary system does not exist in the provinces." The basis on which he proceeds is not at all demonstrated. Dr. Beauchesne says that there is, in the provinces, a statute under which the ministers are appointed by the Lieutenant-Governor direct; that in the Dominion, the Governor-General is not authorized to make the choice of ministers, his main function consisting of calling upon the Prime Minister to form a Cabinet. We should be careful to distinguish between law and usage. The actual process for the formation of a Cabinet is controlled solely by usage. The practice would appear to be the same for the Provinces and for the Dominion. The legal situation is also sub-

stantially the same. The members of the Executive Council are appointed by the Lieutenant-Governor at will and ministers are appointed by commission during pleasure in the same manner as the ministers are appointed under Federal Department Acts. In the Provinces, as in the Dominion, the official lives of the ministers depend on the Prime Minister because such is the usage, not because such is the law and this British doctrine is in force in the provinces as well as in Ottawa. In law, the Dominion ministers are appointees of the Governor-General, just as provincial ministers are the appointees of the Lieutenant-Governor. In both cases, ministerial responsibility depends upon usages safeguarded mainly by the legal control of Parliament over supplies.

In conclusion, attention should be drawn to a detail which shows how carefully, in the British North America Act, the autonomy and independence of the Provinces towards the federal Government has been safeguarded in the provisions respecting provincial Great Seals. In British constitutional law, Great Seals are of the utmost importance as emblems of authority. The use of the Great Seal is essential for the most important acts of government, such as the summoning of Parliament. Consistently with the retention by His Majesty of executive authority over Canada, no provision has been inserted in the British North America Act for the constitution of the Great Seal of Canada so that this Great Seal has been constituted by virtue of the royal prerogative, But, so that the provinces should be independent of the federal executive, Great Seals have been assigned to them by the constitution. As a result, while the Governor-General in Council can no more alter the Great Seal of Canada than the Canadian Parliament can itself amend its constitution, the Lieutenant-Governor of the Province of Quebec may, under section 136 of the British North America Act, alter the Great Seal of the Province just as, under section 92, the Parliament of the Province may amend its constitution.

LOUIS PHILLIPPE PIGEON.

Quebec.