

A Canadian Broadcasting Corporation Publication

# THE CANADIAN CONSTITUTION

Being a series of broadcasts  
sponsored by the Canadian  
Broadcasting Corporation

*discussed by*

*The Kelsey Club of Winnipeg  
The Constitutional Club of Vancouver  
The Citadel Club of Halifax*

*with an appendix by*

*Professor A. G. Bailey of New Brunswick*

NELSON

# The Canadian Constitution

*A Series of Broadcast  
Discussions sponsored*

*by*

*The Canadian Broadcasting  
Corporation*

TORONTO

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## PREFATORY NOTE

So well received by listeners were the broadcast discussions given last spring by the Kelsey Club of Winnipeg on 'Canadian Defence' problems, that the Canadian Broadcasting Corporation was encouraged to embark in September, 1937, upon a much more ambitious series of programmes on the problems of the Canadian Constitution. This time three discussion clubs participated—the Constitutional Club of Vancouver, the Citadel Club of Halifax, and the Kelsey Club of Winnipeg.

The same method of presentation was followed by each group, and, in order to ensure balanced argument, all major points of view were represented. The Kelsey Club gave the first broadcast in the series on September 26, the Constitutional Club of Vancouver followed the next Sunday evening, and then the third group, the Citadel Club of Halifax was heard on October 10. This order was continued thereafter. By request, on January 12th, 1938, a talk, incorporating the official point of view of the Government of the Province of New Brunswick on these questions, was given by A. G. Bailey, Professor of British North America History, University of New Brunswick.

In Winnipeg the Kelsey Club had as its chairman, Rev. John MacKay, D.D., Principal, Manitoba College. W. H. Darracott was secretary and the other members were Sidney E. Smith, President of the University of Manitoba, R. E. McWilliams, K.C., Marcus Hyman, K.C., M.L.A., W. J. Waines, M.A., Department of Economics, University of Manitoba, and R. O. MacFarlane, Ph.D., Department of History, University of Manitoba.

The Citadel Club of Halifax was under the chairmanship of Rev. A. Stanley Walker, President of King's College. The other members were E. E. Kelley of the Halifax Herald, George Farquhar of the Halifax Chronicle, J. E. Rutledge,



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K.C., Charles J. Burchell, K.C., Ralph Marven, and G. F. Curtis, Faculty of Law, Dalhousie University.

In Vancouver, the chairman of the Constitutional Club was William Murphy. The other members were Leon J. Ladner, K.C., M.L.A., Dorothy G. Steeves, M.L.A., F. H. Soward, Professor of History, University of British Columbia, D. A. McGregor of the Vancouver Province and B. A. McKelvie, Managing Director of the Victoria Colonist.

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THE CANADIAN CONSTITUTION

# THE CONSTITUTION APPROACHED HISTORICALLY

BY R. O. MACFARLANE

*Discussed by the Kelsey Club, Winnipeg, September 26, 1937*

MACFARLANE: The Constitution of Canada fulfils the definition of a classic—'Something that everyone talks about and no one reads.' In fact, the Constitution of Canada is not an easy thing to read. If it were merely a matter of being familiar with the British North America Act the task would be relatively simple, but if anyone thinks that Canada is governed solely by the terms of that statute, he is very sadly misinformed. For example, in the Act there is no mention of either a Cabinet or a Prime Minister. To understand how Canada is governed, one must be familiar with the heritage of English law and customs which were introduced at the Conquest; familiar with local usage introduced since that date, and with the 'practical politics' of the country, as well as with the British North America Act and its amendments since 1867.

Sir Robert Borden, lecturing at the University of Toronto in 1921, defined the objects of government as follows, and with him one readily agrees:

'The reasonable essential of government in a modern democracy may be regarded as embracing order, security, equality before the law, opportunity and liberty. The King's (that is, the People's) peace must be kept. The right to labour and to enjoy the fruits of labour in the form of property must be assured. All men must be equal before the law. Opportunity for the many must be established by the denial of special privilege to the few. Conscience must be respected; and finally there must be such individual liberty as is consistent with the maintenance of these principles. . . We may reasonably claim that in this Dominion these essentials have been as fully

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realized as in any nation, but I do not suggest that existing conditions cannot be improved.'

WAINES: Dr. MacFarlane, for the benefit of those who are not lawyers, perhaps an illustration or two of the manner in which English law and British and Canadian usage have been introduced into the Canadian Constitution would be helpful.

MACFARLANE: Certainly, Professor Waines. Following the surrender of Quebec in 1759 and of Montreal in the next year, military law was automatically introduced into Canada. By the Peace of Paris it was determined that Canada should remain British, and consequently English civil law, with certain exceptions, became part of the constitution of Canada. In order that the situation should be made clear, Governor Murray issued a proclamation formally establishing the British regime and its law. From that day to this, English law, especially the common law, has been a very important part of our constitution.

The constitutional usage of Great Britain was introduced in the same fashion as the function of government grew in this country. For example, there was no mention in either the law or the written constitution of political parties or factions: nevertheless, these soon became very important elements in the constitutional machine.

The situation which confronted Great Britain in 1763 was a novel one. Never before had an alien people other than natives, been taken over as part of the Empire. There were only about 500 English-speaking subjects in the colony, apart from the army, while there were about 65,000 French. It was obvious that English law and British constitutional usage would have to be modified to meet the exigencies of the particular local situation. For example, Roman Catholics did not enjoy political rights in England until 1829, but as the vast majority of the population of Canada was Catholic, it was unthinkable that those Roman Catholics should be subjected to the political control of the small, Protestant, English-speaking minority. From that day to this, local usages, not British, but Canadian, have found a place in our constitution.

Now a constitution does not develop in a vacuum. It is but

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one phase of the development of a country, and must be considered as such. Constitutional history has little meaning if it is isolated from other aspects of the story, such as the political, social, economic, religious and intellectual. Constitutional changes or reforms have seldom been sought for their own sake in Canada. In almost every instance they have been a means to an end rather than an end in themselves.

MCWILLIAMS: Could you give us an illustration of that?

MACFARLANE: Yes, Mr. McWilliams. Take an immigration movement, for example. We have already stated that, at the conquest, Canada was overwhelmingly French and, to use an expression of Governor Carleton, it must remain so 'barring a catastrophe shocking to think of.' However, the catastrophe occurred in the American revolution, and almost overnight more English-speaking citizens arrived in Canada than Carleton had ever contemplated in his wildest dreams. While the coming of these Loyalists was not the sole reason for the granting of an elected assembly in the Constitutional Act, there can be no doubt that it was an important reason. In any case, their removal hastened the passage of that Statute.

The desire for social and economic reform has been one of the most potent stimulants to constitutional change in Canada. The so-called struggle for responsible government which led to the Rebellion of 1837 cannot be regarded as merely a constitutional struggle in the narrow sense. In Quebec the reform movement was really reactionary, if that is not too paradoxical. The so-called reformers, Papineau et cie., wished to preserve the French race, language, laws and religion. This could only be done by making the Executive responsible to the Assembly, which was under the control of the French.

SMITH: That may be plausible for Lower Canada, Professor MacFarlane, although I think there were people there who were interested in constitutional reform for its own sake. In any case, the movement in Upper Canada was for genuine reform.

MACFARLANE: In the Lower Province it is true, Mr. Smith, there were a few people, some French but mostly English-

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speaking reformers like John Neilson, who were interested in the constitutional question for its own sake. But this group was not large and it parted company with Papineau before the Rebellion. When Papineau became radical, after the ninety-two resolutions of 1834, he could no longer speak for the whole French Canadian people, and certainly he lost the support of the church.

In the Upper Province, the reformers desired changes in the land system, such as curtailment of speculation and of clergy reserve grants, establishment of registry offices, and more accurate surveys. They sought the removal of religious disabilities, and improvement in transportation facilities, especially more roads, bridges and canals. They realized that the only way these ends could be attained was by first obtaining an Executive pledged to carry out the wishes of the Assembly, which could be dominated by men with these aspirations. Here then, it was that one of the most significant changes in the system of government of British colonies, the introduction of responsible government, was brought about, not as an end in itself, but as a means of securing social and economic ends.

As we draw closer to our own day, we still have the desire for social and economic reform as a stimulus to constitutional change, but in addition we now have the Constitution assuming an importance for its own sake. Canada is not only a country of several Provinces, but also of several economic sections.

MACKAY: Just what do you mean by 'economic sections,' Professor MacFarlane?

MACFARLANE: Well, Professor Waines might answer that question for you, Dr. MacKay.

WAINES: Different parts of Canada are mainly dependent on different kinds of productive activity. This arises principally out of geographical differences. For instance, the people of the Prairie Provinces are largely dependent on agriculture, while those resident in Ontario are much more dependent on manufacturing, distributing and finance. The fact of 'economic sections' is important in many ways, in that it gives rise to diverse and frequently conflicting economic interests in dif-



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ferent parts of the country. These differences are often registered in politics, as for example, in the tariff issue.

MACFARLANE: From what Professor Waines has said, you see that economic sectionalism is constitutional dynamite.

Canada is a federal state. Every federation is a compromise, an attempt to reconcile national unity with local autonomy. The pendulum may swing to one side or to the other, as force of circumstances dictates. We have now reached the point in our constitutional history where we must make up our minds whether we want to be one state or nine. The question immediately arises, whether national sentiment in Canada has as yet reached the point where it is strong enough to surmount the obstacles of provincialism and sectionalism.

MCWILLIAMS: Is that a quite fair statement of the alternatives? I agree that we should not permit either provincialism or sectionalism to dominate our Constitution. But the demands being made so often nowadays for greatly increased power for the central government are equally unsound. They are part of the authoritarian tendency of the time which leads to Fascism. Our Constitution, as wisely interpreted by the courts, calls for a balanced distribution of powers between the Dominion and the Provinces.

HYMAN: I for one cannot refrain from voicing a serious warning. You both use the words 'provincialism' and 'sectionalism' in terms of reproach. In a sense you are right, in so far as they interfere with the welfare of the country as a whole and the interests of the great majority of the people. But there are some who, in language of national statesmanship, are consciously or otherwise, hiding mere sectional interests and it would be dangerous, for example, for us Westerners to be inveigled into the surrender of our interests and needs, to find only that the privileged, the financiers, the industrialists, had become even more deeply entrenched under the disguise of nationally-thinking patriots.

MACFARLANE: I am afraid both Mr. McWilliams and Mr. Hyman are just conjuring up bogey men to frighten us. The former, one of Fascism; the latter, one of vested interests.



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Personally, I do not feel that there is any greater danger from either of these repressive forces in a national state than there is in a collection of Provinces. In fact, if I were a resident of some Provinces of Canada, I should say there is even less danger. The real issue, it seems to me, is whether or not Canada is to develop into a nation or whether she is to remain merely a collection of Provinces, and we must not allow ourselves to be diverted from this real issue by red herrings drawn across our trail.

McWILLIAMS: You may call Hyman a 'red herring', but you cannot call me one.

HYMAN: You flatter me by attaching importance to my political complexion, and if you will pardon me, Professor, your method of getting rid of the evil is that of the middle ages. You superficially exorcise it by solemnly dubbing it 'a red herring'. If you could do that successfully, you would be assured of immortality.

MACFARLANE: Well, gentlemen, have your fish as you will. Our Constitution has grown through several distinct changes. It began as an unrepresentative form of government; that is, an administration of a Governor appointed by the Crown, who was assisted by a Council of his own selection. These men were responsible, not to the population that they governed, but to Westminster.

The second stage in our Constitutional development was the introduction of representative government by the Constitutional Act of 1791. This can be regarded as the thin edge of the wedge of self-government. Under this system, the Governor was still appointed, as was his Council, but the Assembly was elected on a reasonably broad franchise. This system of government lasted for almost fifty years, but long before the end of that time its weaknesses had become apparent. The Assembly, having control of most of the public funds, could block the projects of the Executive, but it did not have the power to compel the Executive to institute policies to its liking. This situation led eventually to armed outbreaks. The results of these rebellions have generally been under-estimated. What-

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ever their futility, there is no doubt that armed force made an impression on Westminster which no requests or petitions had ever done.

SMITH: Armed force! But surely you aren't advocating rebellion? What do you think, Mr. McWilliams?

MCWILLIAMS: On the contrary, President Smith, in my student days I took a very active part in a rebellion against the President of the University.

HYMAN: I would like to return good for evil. I will admit you have become respectable.

MACFARLANE: In any case, the immediate result was Lord Durham's mission to Canada to investigate and report on the whole question of government in the British North American Provinces.

Lord Durham, in his famous Report, suggested a solution for what, up to this time, had been the chief obstacle in the path of colonial self-government. The dilemma was this: How could a Governor and his Council, acting under instructions from Britain, carry out the express wishes of the popular representatives, if and when these two were at cross purposes. Lord Durham suggested a very neat escape. Jurisdiction was to be divided between the Imperial and the Colonial Governments.

HYMAN: On what subjects did Lord Durham think the Governor should follow his instructions from London, rather than the advice of his responsible ministers?

MACFARLANE: Foreign relations, public lands, immigration, and constitutional change, he reserved for Imperial jurisdiction. Other subjects he thought should be under Colonial jurisdiction. In the former, the Governor was to follow his instructions from London. In the latter, he was to take his advice from ministers responsible to the Assembly.

This is what has been called responsible government, but it is scarcely responsible government as we understand it to-day. It invoked only two aspects of the concept of responsibility, namely, that of the members of the Legislature to their constituents at every general election; and that of the Executive to

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the Legislature. Since that time two additional principles have been accepted, namely, the responsibility of each member of the Executive to the Prime Minister, and of each member of the Executive to every other member.

One of the ironies of Canadian history is that this co-called responsible government, for which Canadian statesmen had fought for over half a century, was in operation only about fifteen years, when it collapsed. That is, a deadlock occurred from which there seemed to be no escape within the Constitution as it existed. The federation of the Provinces of British North America became the accepted solution.

WAINES: Why was there a deadlock, Professor MacFarlane?

MACFARLANE: Upper and Lower Canada had equal representation in the Assembly. Interprovincial, or more accurately, racial jealousies, became so acute that no legislation could be passed. Every ministry was a nicely balanced affair between French and English. As soon as controversial legislation was attempted the ministry would lose the support of the house and would have to resign. Its successor would shortly encounter the same fate. There were eight administrations between 1848 and 1864. As a result, public business came to a standstill. The real reason for this situation was that there was no party system which could transcend provincial boundaries. Only when Macdonald formed his great coalition in 1864, to bring about confederation, was an organization achieved that was adequate to solve the problem. Following confederation, national political parties developed which made responsible government workable.

SMITH: I am bound to point out to you that there were, to say the least, constitutional developments of equal significance in the Maritime Provinces. Don't forget that.

MACFARLANE: One is not allowed to forget the Maritimes or their problems. Still, confederation was something more than an escape from a difficult political situation: it created the framework of a new nation. Canadian history since 1867 is the story of a national development within that framework,

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but with this development of the nation we cannot deal here.

The formation of the Dominion created two sets of relations which have been the essence of our constitutional history since that date. The first of these concerns the relations between Canada and the Imperial Government. The second, the relations of the Dominion with the Provinces.

Since 1867 there has been a steady growth of Canadian autonomy. On no occasion has the mother country sought to retard this development. Such opposition as has occurred has come from Canadians themselves rather than from England. The powers of the Governor-General, such as his pardoning power and his instructions from London for disallowance of legislation, have vanished. The jurisdiction of the Supreme Court of Canada has become final in criminal cases. Canada has gradually assumed control over her foreign relations, as, for example, in the negotiation of commercial treaties. The Halibut Treaty of 1923 with the United States was signed by a Canadian alone. British troops have been completely withdrawn from Canada, although Canada agreed to maintain two naval stations for the use of the British fleet.

HYMAN: Isn't it generally understood that the war greatly changed our constitutional relationship in the Empire?

MACFARLANE: In 1914 Canada was legally a belligerent as soon as Great Britain declared war. The important question was the degree of Canada's participation, which rested in her own hands. The decision to participate fully was made by the Government, and was approved in a special session of Parliament in August, 1914. The Imperial War Cabinet, made up of the Dominion Premiers and presided over by the Prime Minister of Great Britain, illustrates the relationship.

Furthermore, while the war brought into relief the legal limitations of Canada's position in the Empire, it also emphasized the extent to which she had become an autonomous state. The treaty of Versailles was signed by Canadian representatives of the King for the Dominion of Canada. Canada has assumed international responsibilities through her membership in the League of Nations. She has legations in Washington, Paris and

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Tokyo, in addition to a High Commissioner in London. These and corresponding developments in the other Dominions, led to the Balfour Declaration at the Imperial Conference of 1926, which states that the Dominions, 'are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations.' These principles were incorporated in law by the Statute of Westminster in 1931.

WAINES: Would you say, Professor MacFarlane, that Canada was a sovereign state?

MACFARLANE: No. There are still limitations to Canadian sovereignty: (1) the appointment of the Governor-General, and (2) appeals to the Privy Council, (3) amendment of the constitution, and (4) a Crown, common to the whole Commonwealth of Nations. Throughout all this growth, Canadians as a whole have sought all the privileges, frequently without weighing the responsibilities attached thereto, but whether these responsibilities have been accepted or not, there can be no doubt that in law and in practice, Canada is to-day not a completely independent state, but an autonomous community within the British Commonwealth of Nations.

The relationship between the Dominion and the Provinces, while as important as the relations with the Empire, is not nearly so well known in Canada. In 1867, the Fathers of Confederation, particularly Sir John Macdonald, desired to set up the strongest central government which they thought would be approved by the various Provinces.

MCWILLIAMS: I would question the correctness of that statement. It is quite true that Sir John Macdonald was in favour of the strongest possible central government, and probably a majority of the Fathers held the same view. But there were others who did not, and the constitution, as settled, was largely determined by the latter view. Clearly Mowat and Brown, who represented at least half of the people of Upper Canada, did not agree with Sir John. Nor did Cartier, who

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was careful to protect the provincial rights of Quebec. These men supported federation but not a centralized government.

MACFARLANE: I admit what you say, Mr. McWilliams, with regard to Mowat and Brown, and, with some reservations, to what you say of Cartier, but what of Galt, Tilley, Tupper and McGee? I think one could make quite as imposing a list from the Fathers of Confederation of the men who were in favour of a strong central government as of those supporting local autonomy. I would not deny that there was some dissent. Men like Dorion, Howe, Malcolm Cameron, offered vigorous opposition to the whole scheme. Others, like Mowat, while favouring confederation, had no desire to see the sovereign powers of the Provinces wiped out. In any case, the result was a compromise—the British North America Act, which divided sovereignty in much the same way as Durham had done at an earlier date, between central and local legislatures. This division is set forth in the two famous sections, 91 and 92 of the B.N.A. Act.

DARRACOTT: Which do you think received the larger sphere of jurisdiction, the Dominion or the Provinces?

MACFARLANE: Let me quote from the Act. The Dominion has power to 'make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the legislatures of the Provinces.' Then, 'for greater certainty, but not so as to restrict the generality of the foregoing,' the Act lists twenty-nine groups of subjects for exclusive Dominion jurisdiction, including regulations of trade and commerce, postal service, military and naval service and defence, currency and coinage, incorporation of banks, the issue of paper money, interest, naturalization of aliens, etc.

The Provinces have power to make laws only within the classes of subjects, of which there are sixteen, named in section 92 of the Act. They include, amendment of the constitution of the Province, except as it affects the office of Lieutenant-Governor, property and civil rights, municipal institutions, licensing for provincial purposes, local works and undertakings, etc., and



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'generally all matters of a merely local or private nature in the Province.'

Thus it is seen that the framers of the Act specified certain spheres of legislative jurisdiction for the Provinces, and all else went to the Dominion.

The intention of the framers of the act is shown further in section 95, which places two subjects, agriculture and immigration, under concurrent jurisdiction. In this section the Act provides, 'any law of the legislature of a Province . . . shall have effect in and so far only as it is not repugnant to any act of the Parliament of Canada.'

Obviously the Fathers of Confederation could not foresee the history of Canada for the next seventy years. They set up what they thought was the best form of government for their day, and no one will deny that they did a good job. They created a government for four Provinces just emerging from a pioneer stage of their development. Canada to-day, socially and economically, is very different from the country for which the Act was drafted. It might be argued that, had the intentions of the Fathers been more rigidly carried out, especially their desires for a strong central government, many of our later constitutional problems would never have occurred. But, for better or for worse, the Privy Council, by judicial process, has whittled away the powers of the Dominion, and built up those of the Provinces.

For example, in the highly controversial field of taxation, the Dominion was given power to raise money by any mode or system of taxation; the Provinces, to raise money by direct taxation for provincial purposes within the Province. Because of the increasing expense of social services, the Provinces all found themselves unable to carry the load within the orbit of their taxing powers. The Privy Council obliged by accepting the doctrine of agency which, when inserted in a provincial statute, conveniently turns an indirect tax, such as the gasoline tax, into a direct tax, in the eyes of the law.

McWILLIAMS: Was that not a very fortunate decision from the point of view of public policy, as well as being sound in

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law? Surely no one would advocate the transference of the administration of the social services from the local authorities who are familiar with the conditions to a centralized bureaucracy at Ottawa. Even a highly centralized country like Great Britain does not do that.

MACFARLANE: I agree with you only in part, Mr. Mc-Williams. There are many people who would advocate the transference of the administration of social services from the local authorities to what you call, unjustly, I think, a centralized bureaucracy at Ottawa. They would even do it on the grounds of efficiency. There are others who, while admitting the value of local knowledge in the detail of administration, believe that control of policy should be from a central office. Even the system of Great Britain, to which you have referred, comes within this last mentioned category.

To-day, it is obvious that one of two things has to happen: either the taxing powers of the Provinces must be broadened to enable them to meet the evergrowing demands on provincial treasuries, or else the Dominion must assume the burden of carrying on certain services which the British North America Act placed within provincial jurisdiction. We must decide whether the pendulum is to swing towards national unity or towards local autonomy. We must make up our minds whether we are a national state with all the responsibilities appertaining thereto, or whether we are merely a collection of nine provinces.

We have come a long way from a population of 60,000 people engaged in the fur trade, a primitive form of agriculture, and a little commerce, with no powers of self-government, to a nation of ten million people, extending from the Atlantic to the Pacific, with all the social and economic problems that beset a mature society, and with practically complete powers of self-government. We have come a long way. But where do we go from here?



## COMPARATIVE TREATMENT

By F. H. SOWARD

*Discussed by the Constitutional Club, Vancouver,  
October 3, 1937*

MURPHY: This evening, in this, the first broadcast by the Constitutional Club of Vancouver, we intend to discuss other federal constitutions and compare them with our own. No such discussion would be beneficial unless those taking part were able to present different viewpoints on the subject in hand. Our members by no means represent the official viewpoint of any political party, but possibly some of them may reflect the general ideas of a party to the political views of which they subscribe.

Mrs. Dorothy Steeves, M.L.A. for Vancouver North since 1934, is associated with the Co-operative Commonwealth Federation, and, as we in British Columbia well know, is fully qualified to discuss the problems in hand.

Mr. Leon Ladner represented Vancouver South in the Federal house from 1921 to 1930, sitting as a Conservative, and his legal practice has afforded him the opportunity of furthering his deep interest in constitutional matters. At this point might I be permitted to mention that I have been affiliated with the Liberal Party in Canada for some years, so that we have represented in our group, at least three of the major political parties.

Professor Soward of the history department of the University of British Columbia is well known as a keen analyst of world events, and we look to him for the viewpoint of the independent observer.

No group of this nature would be complete without adequate representation from the Fourth Estate. Mr. Bruce McKelvie, formerly managing editor of the *Victoria Daily Colonist*, and Mr. D. A. McGregor, chief editorial writer of the *Vancouver Daily Province*, are well known in the news-

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paper world, and reflect the opinions of this most important factor in the moulding of public opinion.

This is the group, known as the Constitutional Club of Vancouver, which will to-day discuss other federal constitutions in the light of our own.

Professor Soward, I know you have made a study of the organization of both the American and Australian systems of government, and are very familiar with our own. In your opinion what are the most important points of difference in the three?

SOWARD: I should say first of all, Mr. Chairman, that although the constitutions of these three democracies are all federal and rigid, they differ in the extent of power which they are willing to entrust to the central government. Our Constitution was drafted during the American civil war by a group of men who saw in it an object lesson on the warning of letting local governments have too much power. Some of them, like Sir John A. Macdonald, accepted federal government with reluctance and strove to make the provincial assemblies glorified county councils. That is why in the B.N.A. Act, after the respective powers of the Dominion and the Provinces are listed, the Dominion is empowered 'to make laws for the peace, order, and good government of Canada in relation to all subjects not coming within the class of subjects by this Act assigned exclusively to the Legislature of the Provinces'.

The American and Australian Constitutions tried the very opposite policy. The American States with their long tradition of separate existence as colonies were jealous of their sovereign rights and would never have been brought into union, if it had not been expressly agreed that the new government should receive certain powers only and the residue remain with the State. Thus, in the Tenth Amendment which came into effect almost as soon as the Constitution functioned, it is stated that 'the powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively or to the people'. When the Australians drew up their Constitution in the nineties, they also

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had a very strong sense of State's rights, and viewed the United States after success in the Spanish-American war of 1898 when it emerged as a world power. Consequently, they were less dubious about the survival of the United States of America than our Fathers of Confederation, with the result that they copied the American example. After enumerating thirty-nine powers as federal and certain others as concurrent, they declared that 'every power not exclusively invested in the Commonwealth or withdrawn from the State shall continue as at the establishment of the Commonwealth'. But in practice the Australian courts have broadened the federal powers by their interpretation of the Commonwealth Act, so that we are not as different in reality as we appear on paper.

McKELVIE: Does that mean that the Australian courts have given more power to the Commonwealth at the expense of the States?

SOWARD: Yes, Mr. McKelvie, especially in the field of social legislation.

STEEVES: That is the same as in the United States is it not, Professor Soward? Has not the Supreme Court tended to broaden out the powers of the Federal Government?

SOWARD: Yes, absolutely, though not continuously. In fact the decisions of John Marshall, the Chief Justice of the Supreme Court for thirty years, almost transformed the Constitution from its original intent.

MURPHY: Is there anything in the Australian Act that is common to our own?

SOWARD: Yes, both are based upon the principles of responsible government for which our ancestors were groping a hundred years ago. That principle is only casually referred to in the B.N.A. Act which provided in the preamble for 'A Constitution similar in principle to that of the United Kingdom'. Yet as Edward Blake once said: 'A single line imported into the system that mighty and complex and somewhat indefinite aggregate called the British Constitution.'

In other words, our executive head, though legally the Governor-General, is constitutionally the Prime Minister. He

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and his Cabinet are drawn from the party which has a majority in the House of Commons. So long as the Prime Minister has a majority in the House of Commons he retains power, and may, as in the case of Sir Wilfrid Laurier, hold office continuously for fifteen years.

Let us now examine the American system. The American Cabinet is simply a group of heads of departments appointed by the President and responsible only to him. They may not sit in Congress, and only appear by request before its committees to testify. The President may ignore them entirely if he wishes and the Cabinet has only one vote, the President's.

The American Congress has its duration fixed by law, and no President can dissolve it before that time. It may block a President completely, as happened to President Hoover, but he has no redress. No President can force Congress to pass his proposed legislation as the recent fate of the Supreme Court bill shows. On the other hand, he has a veto power over legislation which may only be overridden by a two-thirds majority. Congress may upset a President's budget as it did in 1936 when it insisted upon the Soldiers' Bonus. If our House of Commons upset the Minister of Finance's budget there would be a first-class crisis.

LADNER: In other words, Professor Soward, in the United States the people are in the hands of the government for four years, but in Canada, under a system of responsible government, the government is actually in the hands of the people through its representatives for its term of office.

STEEVES: I rather disagree with you when you say the government is in the hands of the people, Mr. Ladner. The net result of the Canadian and the United States system, to my mind, is exactly the same. The people are no better off here, either in general welfare or in happiness. It is true that here, if a government, through a political realignment is divided in the House, it must retire, but that is a very exceptional circumstance, and even if that happens there is no difference for better or for worse in the material condition of the people.

The point I want to make is that the condition of the people

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is dominated by economic forces over which they have absolutely no control, and the political democracy under those circumstances is simply an outward form which has no inward substance.

McKELVIE: I think we should remind our listeners that this discussion is based mainly on the mechanical functions of government rather than on the economics of administration and that governments haven't after all so much to do with the welfare and happiness of the people. If we have a machine that is largely run and kept running to the benefit and advantage of the people, well and good. That is what democracy is for, and it is a democratic machine. It would make no difference what party happened to be in power. It would have to run with the same machine, wouldn't it? They would have to have the machinery of government.

LADNER: Mr. McKelvie, won't you agree that the real point of responsible government is the effective means by which the will of the majority of the people can be expressed in governmental legislation and policies?

Under a system of responsible government requiring majority in the House, the people through their representatives do, from day to day, as circumstances develop, exercise a control over the government either in caucus or in the House; therefore, the Canadian system is far more democratic than the American system.

McKELVIE: Certainly it is, Mr. Ladner, because our government must at all times be observant of the will of the people as expressed through their elected representatives.

STEEVES: So they must be in the United States.

McKELVIE: In the United States they are in office for a definite period.

SOWARD: A term of only two years in the Lower House, Mr. McKelvie.

STEEVES: I think in both countries, the real truth is that the people, in their wisdom or blissful unwisdom vote in a government and are delivered over to the tender mercies of that government for a few years—whatever it may be.

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SOWARD: Let us now turn for a moment to the actual working of one branch of each federal government, the Upper House. Our Senate is nominated by the Governor-General on the advice of the Prime Minister, for life or good behaviour, and does not represent the Provinces equally, although it does divide its membership fairly equally by sections, i.e. twenty-four for the Maritimes, twenty-four for Ontario, twenty-four for Quebec, and twenty-four for the West. It is definitely a secondary factor in legislation although it may, as in the last session, defeat a government bill which had passed the House of Commons. It does not touch money bills.

The American Senate is the most powerful second chamber in the world. It also has ninety-six members, but represents the equality of the States regardless of population. Nevada equals New York, there being two members from each State. A Senator holds office for only six years. In this case custom does not bar a long tenure of office, and Senator Borah, for instance, has been elected from Idaho for thirty years. The Senate must approve treaties by two-thirds majority,—a rule which defeated both the Peace Treaty and the World Court. It must approve the major appointments of the President as to the Supreme Court. It has equal powers of legislation with the Lower House and may amend money bills.

Our third Senate, the Australian, stands halfway between the other two. It is also elected and also represents the equality of the six States. Its members also have a six year term, and one-half retires every three years. (The American practice is for one-third to retire every two years). As in Canada, the Senate is the weaker legislative body, and the leading statesmen of the country prefer to sit in the Lower House.

STEEVES: To my mind those differences are more or less superficial, and the point which I want to make here, that whether the Senate is elective or whether it is appointed, whether it has special duties or not, the existence of an upper



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chamber to-day in any country, I think is a feature of obsolescence.

LADNER: But, Mrs. Steeves, you will agree with me that in Canada we have a balance of authority between the Upper and Lower Houses, while in the United States and Australia, where the Senate is an elected body as is the Lower House, one political party is in control of both Houses. In Canada one political party controls the House of Commons by popular election and the Senate may be under the control of another party. Secondly, any hasty legislation that might be passed on the moment of an emotional outburst of the people, would be given a more balanced consideration in the Senate. A greater stability is bound to follow.

STEEVES: When I took constitutional law at University twenty years ago I was told that very same thing, that the Senate was a guard against the precipitancy of a Lower Chamber. Possibly that argument might have held good in the early days of democracy, but to-day I don't see any evidence on the part of the Lower Chamber to rip up everything with such youthful energy that they would need that bridle. You might as well put a bridle on a tortoise.

SOWARD: The right of the Federal Government to disallow laws passed by the Provinces is a very live subject at present, especially in Alberta. That right which the Dominion exercises infrequently—only on three occasions in the past twenty years—was established in the B.N.A. Act as one more method of weakening Provincial authority. It does not exist at all in the American system. The restraint there upon State Legislatures is found in the grant of powers under the Constitution, and the Declaration that is the supreme law of the land. Federal disallowance also does not exist in Australia.

STEEVES: I certainly think that Australia and the United States have a big advantage over us. To my mind the trouble with the power of disallowance given to a central government is the fact that it can be used arbitrarily and for political purposes.

Isn't it exercised after all by a political party in control?

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I hold no brief for the policies of Mr. Aberhart which have been disallowed—far from it—but there is other recent legislation, such as the Quebec Padlock Act, which many people think should have been disallowed too, because it encroaches on criminal jurisdiction which belongs to the Federal Government.

MCKELVIE: Isn't the Quebec Padlock Act peculiarly a local Act, whereas Mr. Aberhart's legislation affects not only Alberta but the other Provinces too?

STEEVES: Supposing for the sake of argument that that is true, Mr. McKelvie, it is something which should be tested by an impartial body. By the Courts, if we may call them impartial.

LADNER: The principle of disallowance is one based primarily upon the question in respect of jurisdiction, and secondly on national interest. In the legislation which you referred to in Alberta it purported, according to the understanding of the federal authorities, to encroach upon the jurisdiction of the Dominion.

STEEVES: It would have been brought before the Court in due course of time, would it not?

LADNER: Quite so, Mrs. Steeves. But suppose it was beyond the powers of the Province? It would have done a great injury, perhaps an irreparable injury, to the national interests, and it is better to have it settled before that damage is done.

STEEVES: There is a great difference of opinion as to how disallowance can be used. I believe, Professor Soward, I am right in saying there have been Ministers of Justice in Canada who have declared disallowance should only be used when the legislation is definitely illegal, but other governments have held the opinion that it can be utilized when property rights, or other private privileges have been encroached upon.

SOWARD: I quite agree. In the past the Conservative party has been more prepared to use disallowance and the Liberal party more cautious. I might add that for the same purpose, the strengthening of federal authority, our Constitution makes the Lieutenant-Governors of the Provinces appointees of the



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Federal Government, and in two instances Lieutenant-Governors have been dismissed by it. In Australia the Governors of States are appointed directly by the British Government in consultation with the State authorities, and the Governor-General of Australia and his advisors have no jurisdiction over them. The States also have their own agents-general who have the right of direct access to the British Government. Our Provincial agent must approach the British Government through the High Commissioner for Canada.

Our Constitution paid very little attention to the judicial powers of government and left it to Parliament to provide 'For the constitution, maintenance, and organization of a general Court of Appeal for Canada'. In fact not until 1875 was our Supreme Court established. Appeals may be made from it to the Privy Council, which thus becomes the final arbiter on legal and constitutional questions. The effect of its decisions this year on the Bennett legislation, and the blow dealt then to a liberal interpretation of federal powers, are proof of its importance to our Constitution. The Australian Constitution permits appeal in ordinary cases but deliberately requires that appeals in constitutional cases involving the Federal Government and a State or two States, must be agreed to by the Australian High Court. I think I am right in saying that only one such appeal has been permitted. The Australian High Court does not give advisory opinions as does our Supreme Court. Of course, in the United States, the Supreme Court is the final seat of judgment, and once it decides an act of Congress is unconstitutional nothing can be done until the constitution is amended.

Naturally President Roosevelt was irritated when so much of his New Deal Legislation was blocked by the Supreme Court and hence the outcry against the 'nine old men'. Both Canada and Australia appoint their judges. In the United States this is only true of federal judges, and the contrast is undoubtedly in our favour. Lastly, our Constitution has no provision for its amendment. This is because it was passed by the British Parliament, and, of course, what one Parliament does the next

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can readily undo. That is one of the advantages of a flexible constitution. In practice, of course, the British Parliament has only amended the B.N.A. Act after a request from the Canadian Government. Under the Statute of Westminster we may take steps to secure the right to amend the Constitution ourselves, but until we can decide upon whether the consent of all the Provinces or, two-thirds of them, or of a simple majority is necessary, we will move cautiously. There is a real danger that unless we can develop a broader national outlook our Constitution may become a strait-jacket. The American Constitution expressly provides for its own amendment by two-thirds majority of Congress and a three-fourths majority of the States. This is not easy to secure and there have been only twenty-one amendments in one hundred and fifty years. But at least there is a definitely outlined medium. The Australians have been equally explicit in their Commonwealth Act, and a little more liberal. Their amendments must pass both the Federal Houses and be approved by a majority of the votes in each State and by a majority of the votes cast.

LADNER: After all, when you have compared the federal constitutions of every country so far as an individual's welfare, happiness and liberty are concerned, is one any different from the other?

SOWARD: I cannot see any serious difference.

STEEVES: I am glad I can agree with Mr. Ladner on that point of view. I think we are all in the doldrums, and for that reason this discussion is only interesting from the historical point of view. It has no practical value on the question of how we are going to go forward and improve our own constitution.

SOWARD: I think it is time, Mr. Chairman, for a quotation from Burke: 'Constitute government how you please, the greater part of it must depend upon the exercise of powers which are left at large to the prudence and uprightness of the Ministers of State'.

McKELVIE: The constitution of a nation is of too great importance to be endangered by too great haste in its reconstruction. I would suggest that the differences and apparent

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difficulties that exist at the moment, which are largely financial and social be composed by conference, and amendments be secured by existing means through appeal to Westminster. When that is done an arrangement should be made for the re-drafting of the entire Constitution upon an equitable and representative basis. In the meantime every effort should be made to enlarge the understanding by the Canadian people of their own country and its problems. It is worth the time and the expense.

## THE NATURE OF THE PROBLEM

BY G. F. CURTIS

*Discussed by the Citadel Club, Halifax, October 10, 1937*

Our subject is the nature of our constitutional problem, that is, whether the British North America Act is suited to the conditions of to-day. Many people say that it is not, that we have outgrown it, and that if we want to continue to progress in this country we must take steps to bring it up to date. This clearly is a large issue, and perhaps we can best approach it by asking, 'Why have we a problem?' 'What are the difficulties that have arisen from the fact that we live under a federal system with its sharp division between federal power and provincial power?'

In a general way an answer to these questions is not hard to come by. The British North America Act was passed in 1867, and in seventy years immense changes have taken place in our national life. Take the aeroplane and the radio—they are ready examples of material change. Their invention was unthought of in 1867, and the Act accordingly made no specific reference to them. It happens, in these two instances, that the Courts have been able to settle whether jurisdiction over them is Dominion or Provincial, but they illustrate the problem which in other forms is still with us. There is an impression that the finding in the radio case was based more upon considerations of high policy than upon strictly legal interpretation. Would you care to comment on that, Professor Curtis?

CURTIS: Yes, Mr. Kelley—policy in the sense that the Privy Council was impressed by the need of making it a national matter. It was able to do so, consistent with legal principles, because the Act already gave control of telegraphs to the Dominion, and radio is not primarily a matter of property rights, which is a Provincial concern. However, the courts have not

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always such clear means of giving effect to considerations of policy. What, for example, is to be done about interprovincial motor transport, which, like aerial transport, is not mentioned in the British North America Act, though railways are?

No less striking than material changes, have been the changes in man's ideas about government. Social services—education, health, relief, pensions and a multitude of others—are provided on a scale unknown in 1867. There are acute differences of opinion over details—over what services should or should not be furnished by the State—but, within these limits, everyone accepts them as a part of modern life and their financing has become a prime concern of governments everywhere. In Canada, it is the provincial governments who must find the money because social legislation is legally a provincial matter. In this respect, however, the Provinces encounter constitutional obstacles of a forbidding nature. The scheme of the British North America Act is that the Dominion has power to impose taxes of any kind, but the Provinces are limited to 'direct taxation within the Province'. This means that the Provinces can get their revenue only by means of taxes, like property and income taxes, which are paid by the taxpayer out of his own pocket without reimbursement, and not taxes which are passed on to others.

MARVEN: Oh, come now! All taxes are passed on to others. For example, if this Province had an income tax, it would be reasonable to suppose that the only persons directly subject to it would be employers—so low is Nova Scotia's per capita wealth.

If he adhered to the ethics of bigger and better business the tax-paying employer would immediately pass on his tax either by cutting the wages of his employees, or by increasing their hours of labour. In fact, if he did not attempt to recover in this manner his money expended for taxes, he would be attacking Canadian business methods, and should be jailed for being a revolutionary and heretic.

CURTIS: But as you appreciate, of course, Mr. Marven, the

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Courts in attempting to draw a distinction between direct and indirect taxation could not take such flights. They stuck to John Stuart Mill, and in general terms the distinction is as stated. The constitutional problem for the Provinces in this connection, therefore, is that, while they have had to assume responsibilities which were not foreseen in 1867, they are confined to sources of revenue which were given to them when they were not called upon to do much else than to keep law and order. They have new obligations thrust on them without the means of meeting them. Consequently expenditure has outgrown revenue, and the load has become too heavy for them to bear. Here are some figures from the Canada Year Book, which bring this out: 'Since 1916, while total revenues of all Provinces show an increase of 251%, ordinary expenditures have increased by 304%.' The situation would be bad enough for the Provinces if it was only that they had to look to direct taxes for their income, but to make matters worse the right of direct taxation itself is not as valuable as it used to be. One factor which has brought this about is a change in federal policy. From Confederation to 1914 the Dominion got the bulk of its revenue from the tariff, which is, of course, indirect taxation. During the War, however, it began imposing direct taxes in competition with the Provinces, and these taxes have remained.

WALKER: Could we have an example, please?

CURTIS: The Income Tax. That is only too familiar to us all.

MARVEN: And the Stamp Tax on commercial paper?

CURTIS: Yes, quite so, Mr. Marven. There is, therefore, that much less wealth left for the Provinces to tax.

FARQUHAR: Would it be fair, Professor Curtis, to suggest that it was the intention in 1867 that the Dominion should impose only indirect taxation? The fact that for nearly fifty years the Dominion followed this course would seem to bear this out.

CURTIS: Yes, perhaps that may be so, Mr. Farquhar; whatever the original intention, it is a fact that as a result of this

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action by the Dominion the field has been made less valuable at a time when the burdens have grown. The burdens were certainly not contemplated in 1867.

Another factor which has affected the Provinces adversely is the shift of individual wealth to newer forms of property, such as stocks and bonds. These, unlike real property which was the chief item of wealth seventy years ago, may be taken outside the Province.

FARQUHAR: Would you give us an instance? Do you mean the case of a man, say, living most of his life in Nova Scotia and investing his monies in stocks and bonds in Ontario or Montreal, receiving his income here, and dying abroad leaving this property to somebody in Ontario or Quebec, outside Nova Scotia?

CURTIS: Yes, Mr. Farquhar, that works hardship on Nova Scotia, though Ontario and Quebec could in your instance get something. The worst cases for the Provinces are when the person has gone to a foreign country in his last years and leaves his property to people abroad. The Provinces, having the power to tax only 'within the Province' cannot reach this property in many cases, and the yield from death duties, which is an important source of Provincial revenue to-day, is thereby curtailed.

The current demand for social legislation creates problems of another nature. Economic reasons often forbid action by individual Provinces. If social security measures are adopted, it means increased taxation and a rise in the cost of production. The case of unemployment insurance is well known. No one Province can institute such a scheme because the effect at once would be to cripple its industries. Its producers and manufacturers would have higher costs and be unable to compete with goods produced more cheaply in other Provinces. If for no other reason than this—and it hardly needs to be added that there are others—a scheme of unemployment insurance must be, of necessity, Dominion-wide in scope. The same is true of such matters as the setting of minimum wages, the requirement of a weekly day of rest, and limitation of hours



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of work in industry. But constitutionally the Dominion is powerless. Legislation of this kind is the product of an age of new ideas and new conditions: accordingly nothing is specifically said about it in the British North America Act, and last winter the Privy Council put the matter beyond doubt by ruling that legislation of this kind is a provincial concern. The result is that in point of fact the question is national, but in point of jurisdiction it is provincial.

Our economic activities are also carried on in a very different way from what they were seventy years ago. The typical business unit of those days was a local affair owned by an individual or a small group, employing few workmen and doing business over a small area. Conditions are the opposite of that to-day. The village blacksmith has been replaced by 'Colossus Ltd.', and the change has brought entirely new problems of regulation and control. One of these concerns the business of insurance. For a time the Dominion Government assumed jurisdiction over the insurance business on the basis that it was Dominion-wide in scope. A few years ago, however, the Act was challenged and the Courts held that it was outside the powers of the Dominion. It is clearly desirable, however, that insurance companies and contracts should be treated uniformly in Canada and a pressing question of to-day is how this object may be attained.

WALKER: Could the achievement of uniformity of legislation gain this point?

CURTIS: In this respect—that is, control of insurance contracts—a very great deal has been done by uniform legislation. Uniformity is definitely one of the solutions of our constitutional problem.

The protection of investors is another current problem. The plain need is for company legislation which will be stringent enough to prevent manipulation and fraud. This reform has been impeded because we have ten legislative bodies in Canada, who have the constitutional power to create and control companies. The Dominion has the power as also has each of the Provinces. But here again action by one parliament alone is,



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for practical reasons, largely useless. If its Companies Act is tightened up, promoters will seek incorporation in jurisdictions where the requirements are not so strict. There has, consequently, grown up a demand for uniform company legislation. Unlike the case of insurance, however, very little progress along these lines has been made. We have yet to work out a method of bringing those responsible for policies of this kind together in conference; and there are jealousies between the various governing bodies because the fees charged for the incorporation of companies are a valuable source of revenue.

FARQUHAR: Then you can't blame all our troubles on the British North America Act. Some part of it is due to the cussedness of human nature.

CURTIS: Unhappily, Mr. Farquhar, that is only too true. Then again, constitutional difficulties have arisen to complicate the solution of problems of production and marketing. A national industry, we will say, has to meet the twin scourges of over-expansion and loss of foreign markets. This, for example, is what happened to the pulp and paper industry some years ago. The situation may call for a national policy. If it is a question of restriction of output or regulation of prices, it would be useless for the Provinces individually to act.

FARQUHAR: Do you think, Professor Curtis, that restriction of output and regulation of prices, is either desirable or even economically possible? Is it not a fact that restriction has proved a flop, while regulation of prices has proved to be a practical impossibility?

CURTIS: My point, Mr. Farquhar, is rather that, assuming the majority of the people want to pass such legislation, it would certainly be a 'flop' in Canada because in Canada it would be tried on too small a scale. The ramifications of an industry of the type mentioned touch every branch of the national economy. Only a Dominion-wide cure could do away with a Dominion-wide evil. It may again be the case of unsound business practices prevalent throughout the length and breadth of the Dominion and experience has shown provincial action to be ineffective. In these and like cases, however, the

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constitutional position is clear. The only body having the actual power to control, has not the legal power to do so.

KELLEY: Perhaps that statement of the situation may be clarified by an illustration. The case of the fisheries, for example. Constitutionally, fisheries is a matter of Federal concern. Actually, the Dominion has not the authority to give effect to the recommendations of one of its own commissions proposing regulations of the fishing industry.

CURTIS: The law is that the regulation of trades and industries is exclusively for the Provinces. The Dominion can legislate concerning export and interprovincial trade only. The only exception is in time of war or a catastrophe of like nature.

WALKER: Could there not be such a thing as a declaration of a 'state of emergency' in peace time?

CURTIS: A world depression is not within the exception, notwithstanding its agonizing impact on a country so largely dependent on foreign trade as this country is.

WALKER: Is it not desirable that a state of depression should be a 'state of emergency' though such a declaration may not now be legal?

CURTIS: Well, however desirable it may be, Professor Walker, the existing law is that, war-time conditions apart, it is not for the Dominion to control output, regulate prices and business and marketing methods.

What makes the position doubly unsatisfactory is that even if the Provinces want to adopt measures along these lines they do not enjoy full powers to act. Provincial regulation may be possible in a business sense, but the constitution may stand in the way. Just as the Dominion cannot deal with trade in the Provinces, so the Provinces must not invade the Dominion's sphere of action. On their part, they may not legislate with respect to articles which enter into the stream of interprovincial or export trade. They may only control transactions having their beginning and end within the Province. Therefore an impasse is reached when an attempt is made to regulate trade which in part is local and in part inter-

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provincial or foreign; and a great deal of the business done in Canada is of that nature. Nor has the solution of joint legislation by the Dominion and the Provinces met with much success. In the first place, it is not always possible to get co-operation and then, even when this has been achieved, constitutional pitfalls remain. Many Acts passed by the Dominion and the Provinces acting together with the greatest of goodwill have not successfully withstood attack in the courts. This is because it is a plain requirement of a federal constitution that each legislative body should keep strictly within the field of its own power, and in the absence of clear words indicating where that power is, it is inevitable that serious doubts should arise.

KELLEY: I suppose, Professor Curtis, you refer to such cases as that of the Lemieux Act, providing for conciliation in industrial disputes. Actually, is it constitutionally possible for the Provinces to delegate their authority to the Dominion?

CURTIS: No, Mr. Kelley, it is not. The weight of legal opinion certainly is that provincial legislation which attempts to do so by 'adopting' the provisions of the Federal Act is bad. The Lemieux Act you cite is an example of what I had in mind.

The growth of Canada from the position of a Colony to full national stature is a change having great bearing on our subject. A mark of nationhood is the ability to make treaties with other nations. The Statute of Westminster in 1931 set the seal to a development that had been going on since 1867, and now the Canadian Cabinet may advise His Majesty to enter into a treaty for Canada without the intervention of the Cabinet of Great Britain. Not all treaties require legislation to carry out their terms, but some do. In a country like Great Britain which has but one Parliament, there is no doubt about the appropriate body to pass the legislation. In a country with a federal system, however, a question of constitutional law is raised at once. So far as we in Canada are concerned we have to inquire, 'Is the power a Dominion one or a Provincial one?' The only express provision concerning this is a section in the British North America Act which reads, 'The Parliament . . .

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of Canada shall have all the powers necessary or proper for performing the obligations of Canada, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.' The language is the language of 1867. 'The obligations of Canada as part of the . . . Empire' and 'treaties between the Empire and . . . foreign countries.' It was so worded for the clear reason that when the section was drafted it was only that kind of a treaty that could affect Canada, i.e. a treaty made by the Imperial Government. But what of these new treaties which impose obligations on Canada alone and are made between Canada and foreign countries directly?

Is it also the Dominion that may legislate to carry these out? Can it be said that the words of the section should be extended to cover the new circumstances that have arisen since they were penned; or, can it be said that the performance of a treaty, being a matter of international importance, is one affecting the peace, order and good government of Canada, which is a subject about which the Dominion may legislate?

WALKER: Can this be looked upon as a means of meeting the problem?

CURTIS: For a time it was hoped that this was so, but last winter the answer was given by the Privy Council and was in the negative. The ruling was that the question of legislative power to carry out the terms of a treaty depends on what subject the treaty deals with. It belongs to the Dominion if the subject is already a federal one, and to the Provinces if the subject is one assigned to them by the British North America Act. If it is partly one and partly the other, it must be shared by the Dominion and the Provinces passing joint legislation.

KELLEY: So, apparently, it comes down to this: that whereas Canada has all the attributes of a nation, and can make treaties, it has not, in fact, the power to give effect to the terms of certain of those treaties once they are signed. I have in mind particularly the labour conventions growing out of the Treaty of Versailles.

CURTIS: Agreed.

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FARQUHAR: Notwithstanding what Mr. Kelley has said, is the ruling of the Privy Council not reasonable, Professor Curtis? If the Federal Government has no authority over a certain subject, if it could make a treaty and secure that power, it could override the constitution at any point and shoot the British North America Act to smithereens. Why should not the Federal Government, like any other body, act only within powers it possesses? If it was in more detail, all well and good, but when it goes to the heart of the matter, then it is different. Would not this seem to cover the situation, Professor? Dominion and Province agreeing by joint legislation could secure the desired end?

CURTIS: This does not seem satisfactory, Mr. Farquhar. It is unreal to leave the duty of carrying out treaty provisions to the Provinces. It is a solution that does not fit Canadian conditions. The result, judging from past experience, will be that nothing is done about the matter at all. Those treaties that have been referred to the Provinces seem never to have got any further than the nearest pigeon-hole.

FARQUHAR: Could you give us a concrete example, Professor Curtis?

CURTIS: The Labour Conventions of the Treaty of Versailles which Mr. Kelley has mentioned: The Provinces have never done anything about them in nearly twenty years.

The fact is that Provincial Government in this country is not organized to take care of such questions. Our international affairs are, in practice, left to the Federal Government which is equipped to handle them, and it would seem to follow that the same Government should have the legal power to meet the obligations it incurs in its dealings with other countries. It can, be it noted, do so if these obligations arise out of the old type of treaty which is a legacy of colonial days, but it cannot do so if they arise out of the new type of treaty and deal—as a great many of them inevitably must—with Provincial subjects. The result seems clearly to be that if matters are left where they are, our newly gained right of treaty-making will add little to the rights we had in colonial days.

## THE PROBLEM OF SUBSIDIES, A WESTERN VIEW

BY W. J. WAINES

*Discussed by the Kelsey Club, Winnipeg, October 17, 1937*

SMITH: Three weeks ago Professor MacFarlane gave us, in outline, the development of the Canadian Constitution from the acquisition of Canada in 1763. For the purposes of our discussion this evening, perhaps we may take the Constitution as given in the British North America Act of 1867, and I am going to ask Mr. Waines to outline briefly the provisions of this Act in its financial aspects.

WAINES: Federalism implies a distribution of powers and functions between the federal and provincial authorities. As these functions involve the spending of money it is also necessary to distribute the powers of raising revenue in such a way that it is possible for each authority to finance its obligations. It is obvious that a financial adjustment which meets the requirements of a given situation will not continue to do so as the situation changes. The Dominion was formed on the eve of a very rapid economic expansion. Since 1867, advanced industrialism has given rise to problems which did not then exist, and our ideas concerning the proper services which governments might perform have changed. A rigid distribution of sources of revenue is ill-suited to such extensive changes. The establishment in Canada of a Federal Government together with the four original Provincial Governments, each with 'full and plenary' powers within its sphere, made it necessary to define the respective jurisdictions and obligations of Dominion and Provinces. Under this arrangement the provincial authority was given jurisdiction over and, therefore, became responsible for the costs of education, health and sanitation, relief of destitution, roads, bridges and certain other public works, as well as the general costs of government



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and the costs of administration of unorganized territory within the Province. The Provinces were also empowered to create municipal organizations and delegate to them such obligations as they saw fit. Municipal organizations were in existence in Ontario at the time of Confederation, but not in New Brunswick and Nova Scotia. In practice to-day a large part of the financial obligation involved in providing the services assigned to the Provinces has been placed upon municipal shoulders. The Dominion Government, on the other hand, was made responsible for such expenditures as those of defence, public works for Dominion purposes, and the maintenance of extensive administration departments. You see, for some time now, it has been characteristic of the types of expenditure assigned to the Provinces that most of them increase more rapidly with the development of the community than do those assigned to the Dominion, though on occasion Dominion expenditures may increase very rapidly as in the case of war or unemployment. During the decade 1919-1929 Dominion expenditure and debt decreased while Provincial expenditure and debt increased sharply.

So much for the distribution of financial obligations. Now let us turn to the division of revenue-raising powers. The Dominion Government was given, in 1867, the power of raising money 'by any mode or system of taxation' (s. 91, ss. 3) and by 'the borrowing of money on the public credit' (s. 91, ss. 4), while the Provincial Governments were allowed the privilege of 'direct taxation within the Province in order to the raising of a revenue for provincial purposes' (s. 92, ss. 2) 'the borrowing of money on the sole credit of the Province' (s. 92, ss. 3) and licenses to raise a revenue for provincial, local, or municipal purposes.

It should be noted that there is no conflict between the Dominion's power to raise money by any mode or system of taxation, and the provincial power of direct taxation within the Province for provincial purposes. In the field of direct taxation the distinction is one of purpose. The provincial tax



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must be levied to raise revenue for provincial purposes; the Dominion tax, for Dominion purposes.

Since there has been no amendment to the B.N.A. Act affecting obligations to spend money, and powers to raise a revenue, it appears that the Constitution provides a governmental set-up which fixes the responsibility for expenditures regardless of changing circumstances. Notwithstanding growth of population, changes in our economic life, and changes in the attitude toward government expenditures, the functions, obligations and taxing powers of the various governments have remained unaltered since 1867. The constitutional framework has forced onerous financial obligations upon the Provinces.

There have been certain elements of flexibility in the financial set-up, in spite of the apparent rigidity imposed by the Constitution. In the first place, as Professor MacFarlane pointed out, the Privy Council has obliged by agreeing that so long as a statute be drawn up in a certain form, a tax, which from the standpoint of economics is indirect, is in the eyes of the law, direct, and consequently within the power of the Provincial Legislature to levy. The case cited by Professor MacFarlane, you will recall, was the gasoline tax. In the same way there seems to be no reason why a sales tax could not be legally levied by a province, as is being done this year by the Province of Saskatchewan. In the second place, the Dominion Government has from time to time since 1913 established grants in aid of certain specific services such as technical education, highway construction, old-age pensions, and unemployment relief. Flexibility has been provided by varying the amounts of those grants from time to time. And again, the constitutional provisions respecting the grants of subsidies by the Dominion to the Provinces have been varied without the delay of constitutional amendments.

In view of the variety of bases upon which later adjustments have been made it may be well to state briefly the bases upon which the arrangements of 1867 were made. The arrangement with respect to debts suggests that equality of treatment was the main principle involved, but the handling of the sub-

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sidies suggests that some other principle was equally important. It must be remembered that while the Provinces were given the right to levy direct taxes, for political reasons they were loath to do so. They had lost the use of customs duties, and, at the same time the financial obligations, especially of New Brunswick and Nova Scotia were heavy and likely to increase. It was to satisfy the criteria of both equality and need that the subsidies were established on a per capita basis and were to increase with population in the cases of Nova Scotia and New Brunswick. Similarly the lump sum grants favoured the smaller Provinces.

McWILLIAMS: That is a very important point because it touches directly on the question of the principle that should be followed in any readjustment now.

WAINES: Manitoba came into the picture, prematurely according to some in 1870. The financial arrangements provided for a subsidy of eighty cents per head and a lump sum grant as well as an allowance for a debt which did not exist. These items provided Manitoba with a larger per capita grant than any of the other Provinces were receiving. On the other hand reasonable costs of government were not only higher in Manitoba than in the Eastern Provinces but also their rate of increase would naturally be much greater. Manitoba was not given beneficial control over her public domain, nor was a subsidy in lieu of land granted until 1882. Alberta and Saskatchewan, given provincial status in 1905, started out with a financial set-up similar to that in Manitoba with the usual debt allowances, per capita and lump sum subsidies and the retention of the public domain for the purposes of the Dominion. In the case of Alberta and Saskatchewan a grant was given in lieu of lands, the concession to Manitoba I mentioned before and a special grant for the construction of public buildings. It should be added that there was an additional source of revenue for all three Western Provinces in the interest on the school land fund which arose out of the sale of lands set aside by the Dominion Government for educational purposes.

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The existing grants from the Dominion Government to the Prairie Provinces now include: (1) interest on the difference between an actual debt and an assumed debt; (2) a subsidy consisting of a per capita allowance and a lump sum payment and (3) a continuation of the old annual land subsidy, notwithstanding the fact that the unalienated portions of these lands were restored to the Provinces in 1930. The Dominion having no further use for the natural resources of the Prairie Provinces restored the unalienated portion and, in the case of Manitoba, made cash restitution for past exploitation. The matter of compensation for the portions of the public domain alienated by the Dominion is not yet settled with respect to Alberta and Saskatchewan.

It seems to me that the idea of a final and unalterable financial adjustment as between Dominion and Provinces is unworkable, but that some adjustment is overdue. This has undoubtedly been the case in the so-called 'final adjustments' that have several times been made between the Dominion and the Provinces in the past. Many people seem to think that the recently constituted Royal Commission will recommend a rearrangement which will make future financial adjustments unnecessary. With that point of view I cannot agree, and those who support it, I fear, are doomed to disappointment. While past adjustments have been made on grounds of equality of treatment as between Provinces, and as compensation for disabilities, it nevertheless appears to be true that in connection with many of the rearrangements, financial necessity was the guiding principle in the readjustment. Fiscal need is still the predominant consideration underlying the demands of the Prairie Provinces for further revision of Dominion-Provincial financial arrangements. Let me develop this line of argument:

To begin with I accept as a premise the proposition that financial rearrangements should attempt, using the words of a well-known Canadian economist, 'to guarantee the financial ability of the Government of each of the Provinces to perform adequately the functions which are required of it, with reason-

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able standards of efficiency and economy'. Let us see what this implies with respect to the Prairie Provinces.

Developments in provincial expenditure in the Prairie Provinces have been determined by many factors—economic, geographical and political. In the early stages of development, it was possible to relegate to the municipalities a considerable proportion of the expenditures. Education, social services and roads were locally supported. As the total burden of these services increased, as local communities became less isolated and motor transportation more general, demands for highway building were met by the provincial authorities. Developmental projects associated with growth in population increased the public debt and interest charges. Demands for modern facilities involved hydro-electric developments, and attempts to lower marketing costs resulted in expenditures on such items as grain elevators and co-operative creameries. The Western Provinces, like the rest of the Dominion have not escaped the financial burdens of a changing concept of the functions of government, intensified in their case, by decreased mobility associated with a decline in the rate of development, the occupation of most of the available land, and the mechanization of farming operations. The prairie economy has become less flexible than it was during the period of rapid growth. 'Exposed groups' are extremely vulnerable in depression and this has led to government expenditure to ease their situation.

MACFARLANE: Just what do you mean by 'exposed groups'?

WAINES: By 'exposed groups' I mean those people who are in occupations which are mainly dependent on markets outside Canada and consequently must sell their products at prices over which they have no control. The contrast between agriculture and industry in Canada will serve to illustrate the point. When the depression hit this country the tariff was used to shelter industry against the full force of the depression, and to the extent that industry is dependent on the home market, the plan worked; but it is impossible to use the tariff to shelter the Western wheat-grower; consequently the Gov-

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ernments of the Prairie Provinces have frequently found it necessary to ease the burdens of agriculture, by such things as by, say, farm loans.

The population of the region is engaged in highly specialized occupations, and is to a large extent dependent directly or indirectly upon agricultural progress and prosperity. Income is extremely variable, difficult to reach by taxation with respect to large numbers of people, and in a general way too low to yield large revenues. Manitoba's experience with the income tax demonstrates these difficulties. The wage tax in this Province proves clearly that income tax exemptions must be very low to yield a large return, and even so the income tax is less serviceable in an agricultural than in an industrial community and the Dominion Government through its income tax, has reduced the yield available for the Provinces. Canadian wealth and income are not distributed favourably to the Prairies. The region is less able than the industrialized sections to support the normal functions that are expected of its Governments. There has been a constant search for new sources of revenue as obligations have grown until, as even the Bank of Canada has admitted, taxation cannot be increased. We must, therefore, proceed to consider ways and means of providing a solution. But before I suggest the possible solution, there is one other point I want to make.

Many of the services now undertaken by the Provinces and municipalities are of general benefit not only to the Provinces but to the nation as a whole. In so far as such is the case, it provides a justification for support of these services on a wider basis than the municipality or the Province, and more nearly in proportion to capacity to pay. To make such a distribution of costs is difficult, but there seems to be justification for the claim that too large a proportion of the costs of elementary education, social services, and possibly highway expenditures is borne by taxpayers in their capacity as contributors to municipal and provincial revenues, and not enough in their capacity as contributors to Dominion revenues.

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MCWILLIAMS: But that means taxing the residents of certain Provinces to maintain services in others.

WAINES: Of course it does, but only because the contributing Provinces have a greater capacity to pay. Since the Prairie Provinces are unable to maintain, out of their own resources, the standards of government appropriate in Canada, the alternative solutions appear to be, (1) to reduce the fixed charges of the Provinces and municipalities by reduction of debt or, (2) to tax wealth where it is found and use the proceeds to finance services in the poorer regions.

Now, to consider the possibilities of readjustment as between Provinces and Dominion in order to ensure the financial ability of the Provinces to perform the functions required of them. Since the Provincial Governments are limited in their direct taxation, it has been suggested that the Dominion should relinquish to the Provinces the sole right to levy such a direct tax as that on incomes. Suggestions have also been made that the Dominion relinquish some of its power of indirect taxation, such as the sales tax. Apart from the effect of such relinquishment upon the revenues of the Dominion, an examination of the Provincial yields of such taxes makes it clear that the Provinces whose need is least would benefit most by such a transfer. The point is that the poorer Provinces require assistance which must be obtained by taxing wherever the capacity to pay may be located. The circumstances of geography and economic development, have distributed the wealth of the country very unevenly, and federal policy has contributed to this condition. The demand of the poorer Provinces is not for charity, but for the support of governmental functions to which they are entitled as members of the Canadian Federation and from which Canadians benefit, wherever they may reside. As the Australian Grants Commission has pointed out 'in a group of States operating under a federal constitution, it is impossible to adjust the financial scheme so that the financial resources available to each would be exactly apportioned to the expense of the functions it has to perform'. It follows that federal assistance is inevitable.



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MCWILLIAMS: I do not like your emphasis on need as the basis for any readjustment. That puts the Western Provinces in the position of suppliants for a hand-out from our rich uncles in the East.

HYMAN: Where did the uncles get it?

MCWILLIAMS: I think we can make a much stronger case on a basis of justice and fair play.

WAINES: What do you mean by justice and fair play?

MCWILLIAMS: For nearly sixty years Canada has maintained a protective tariff of higher or lower degree which has resulted in concentrating the industry and the wealth of the country in the two central Provinces. Now clearly a tariff has both advantages and disadvantages. Presumably the majority of the people of Canada are of the opinion that the advantages outweigh the disadvantages and that policy is likely to be continued as long as Ontario and Quebec retain the dominant position in the Canadian Federation. But the advantages of a tariff accrue primarily to those sections of the country in which the industries are established, while the disadvantages are borne by the consumers of the whole country and by the producers of natural products who bear a double burden. The present Minister of Labour when a Professor of Political Science prepared a brief for Nova Scotia in which he calculated that the people of the Eastern and Western Provinces are contributing \$80,000,000 a year for the support of the manufacturing industries of Ontario and Quebec. If those figures are anywhere near correct the smaller Provinces both East and West have an unanswerable claim for compensation. It is impossible to measure and apportion that burden as applied to individual items of need and, therefore, it seems to me that the soundest course is to readjust the scale of subsidies to the extent necessary to make up this compensation and then leave the Provinces free to manage their own services with whatever additional levies on their own people they think wise.

WAINES: In my opinion, the unconditional subsidy is not a suitable instrument for compensating the disabilities of a particular region arising out of tariff policy, because these



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disabilities are registered more particularly in their effects upon standards of living of the people of the regions affected. There is no reason to suppose that a subsidy paid to a Provincial Government will counterbalance the lower standards of living. Therefore it seems to me that the only adequate compensation can be made through an adjustment of the various phases of federal policy so that the ill effects of all of them will not fall wholly upon the exposed regions. To take a case in point. Assuming that tariff policy will be determined mainly in terms of the needs of the industrial East, it follows that the compensation for the disabilities of the people of the Prairie Provinces arising therefrom might be achieved roughly through a monetary policy determined in the light of the needs of the West.

Moreover, I challenge your argument in another respect, Mr. McWilliams. Tariff is not the only aspect of federal policy which has unequal effects on different sections of the country. Mr. Rogers' figures are by no means final. There are counterbalancing items, as Ontario and Quebec will not hesitate to point out. A political dog-fight will likely result, and I've never known one to be profitable. My point is that assistance should be given to Provinces in financial difficulties sufficient to enable them to maintain Canadian standards of government, standards of elementary education and public welfare, for example, which are susceptible of fairly accurate objective determination. Surely our case is stronger for assistance to maintain these common standards, than it is as a damage suit against our neighbours. And I maintain that the conditional grant is a better instrument than the unconditional grant for achieving this objective.

MACFARLANE: Perhaps a word of explanation as to what is meant by unconditional subsidies might help.

WAINES: This can best be done by contrasting unconditional and conditional subsidies. The unconditional subsidy is paid to the Province to be used by it as it sees fit, whereas the conditional subsidy, or grant-in-aid, is paid to the Province to be used for specific purposes, agreed to beforehand.

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Although the scale of subsidies has been revised from time to time, it is doubtful whether adjustments of this sort can be made quickly and accurately enough to meet rapidly changing conditions. In fact, in Canadian experience when quick adjustment becomes necessary, as in depression, the grant-in-aid, the loan, and the direct expenditure of federal money have taken the place of revision of the subsidies. This suggests that the device of conditional subsidies, which is not new in Canadian experience, would be the best method of injecting the necessary flexibility into Federal-Provincial financial relations, and at the same time of distributing the financial burden more nearly in proportion to capacity to pay. They would give central support for general services, the funds being provided by taxpayers in relation to ability to pay. It would be possible to arrange for central levy and collection of taxes, such as the income tax, which is more equitably and economically levied on a broad geographical base. Careful selection of services from a list including construction and maintenance of certain highways, education, old-age pensions, mothers' allowances, which could be most adequately financed in this way would have to be made. National standards of service and expenditure could be determined and grants accordingly distributed and effective federal supervision of expenditures should be possible, combined with local administration and responsibility. Greater flexibility to meet changing needs would be possible, and permanent machinery of administration could be established.

# THE PROBLEM OF SUBSIDIES, THE MARITIME VIEW

BY G. FARQUHAR

*Discussed by the Citadel Club, Halifax, October 24, 1937*

WALKER: I understand our subject for discussion is the 'Problem of Subsidies from the Maritime Point of View'.

FARQUHAR: Yes, President Walker, but I would ask you particularly to note we are to discuss them 'from the Maritime Point of View'. The western view was discussed last week by the Kelsey Club of Winnipeg.

WALKER: But just exactly what do you mean by the word 'subsidies'?

FARQUHAR: What is really meant are the grants made by the Dominion to the Provinces, grants which were intended in 1867 to cover their costs of government. Perhaps it would be better to speak rather of the financial arrangements between the Dominion and the Provinces, for that is really what we are discussing. To do that we must go back to the beginning.

MACDONALD: Before you do that, Mr. Farquhar, would you tell us what the main point of your argument is?

FARQUHAR: My main argument, Dean Macdonald, is that the subsidy arrangements were unsatisfactory from the beginning, that later arrangements and adjustments followed no uniform principle, and that the real basis on which they were made was financial necessity.

In 1864 the three Maritime Provinces met at Charlottetown to discuss union among themselves. There was Civil War in the United States; feeling ran high between the United States and Britain; there was anxiety for the defence of Canada, and in the Dominion of Canada (now Quebec and Ontario) matters had drifted to a political deadlock. The Charlottetown

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Conference had hardly met when Canada came to its door proposing the larger union. Out of it came the union of 1867.

KELLEY: But why was Canada anxious for union?

FARQUHAR: Canada wished to escape her own political difficulties through Confederation, to get access to the sea when the St. Lawrence was frozen over, should the bonding privilege through Portland be withdrawn by the United States, and to gain entrance to Maritime markets should the Reciprocity Treaty come to an end. The Imperial Government was anxious for it, too, for defence reasons, so the British North America Act became law.

MACDONALD: And what were the Maritimes to get?

FARQUHAR: They were to get the Intercolonial Railway. It was really built as a military road for national defence, and not as a commercial road, built as far away from the American border as it could get, making it hundreds of miles longer. The Maritimes by means of the railway were to share in the inland market of Canada, while the trade of Canada was to flow through Maritime ports, and, as it was put at the time, the route between Halifax and Liverpool was to become an 'ocean ferry'.

CURTIS: But what were the financial arrangements?

FARQUHAR: I am coming to that. But first think of the position before Union. Take Nova Scotia. Till 1867 she had control of her own tariff, her own post office, the fisheries, her wharves, lighthouses and her own services generally. Her finances were healthy, her tariff low. Her revenues came from customs almost wholly. She had no direct taxation. She had about nine millions of debt, but had assets to offset it in the form of railways, the St. Peters Canal, public buildings and other properties.

In 1867 control of customs and excise duties went to the Dominion, as did control of the fisheries and many other powers, and as the Maritimes were dependent upon customs and excise for their main revenue, provision had to be made to carry on their Governments.

Government was very simple then compared with now, and

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in 1867 they had the idea that it would remain so. They never dreamed of Provincial Governments doing the hundred and one things they do to-day. They set out to provide for the minimum of government without thought of expansion. Indeed, they believed that since the Dominion had taken over certain powers, the responsibilities of the Provinces would be less, and their necessary cost of government in consequence would be less also. Of course, this turned out to be entirely wrong.

WALKER: But how did they work out what should be given to the Provinces?

FARQUHAR: They found this difficult because the functions of government in the Maritimes were not comparable with those in Canada. The Maritime Governments were carrying on work which in Canada was left to town, city and county councils—just as, for example, to-day Nova Scotia is responsible for all its roads, while in Ontario the Province is responsible for its main trunk highways only. Had each Province been given a uniform amount per head for government, Ontario and Quebec would have found themselves with a surplus, while New Brunswick would not have been able to balance her budget. In the end the result was a compromise. An annual subsidy of eighty cents a head, based on population, till it rose to 400,000 in the Maritimes, was fixed. Small grants were given to each of the Provinces to support their legislatures, and a special grant was given to New Brunswick for ten years. If these sums were not enough, the Provinces would have to pare their services to the bone or find new revenue from some other source.

MARVEN: But how did they deal with the debts of the Provinces?

FARQUHAR: The Dominion was to assume all Provincial debt. But here, also, they found themselves in deep water. The debts of the different Provinces were not uniform. Had the Dominion assumed the whole debt of Canada, and allowed the same amount per head to the Maritimes, it would have wiped out the debts of the Maritimes, and the Dominion would

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have had to pay them an additional sum as well, so they worked out a compromise and met the situation with what was called a Debt Allowance. They lumped the debts of New Brunswick and Nova Scotia together, found it averaged about twenty-five dollars per head, and then allowed a Debt Allowance to each Province approximating, and I stress the word approximating, to this rule of thumb. If the debt of a Province was less than this amount it drew interest on the balance from the Dominion. If it was greater, it paid interest on the balance to the Dominion.

KELLEY: Were all the Provinces dealt with alike?

FARQUHAR: No. That was why I used the word 'approximately'. Nova Scotia was given \$300,000 less and New Brunswick was given \$700,000 more than this worked out at. You ask why? The only answer I can find is that Nova Scotia was then in a good financial position, while New Brunswick was badly in need of money. But what I wish to point out is the inequality of treatment apparent in the very beginning.

MACDONALD: Were there any other unequal factors at the start, Mr. Farquhar?

FARQUHAR: Yes, when the Dominion assumed the debts of the Provinces, it took over the assets represented by these debts. In Canada (Ontario and Quebec) its Government had made grants to railways. It had paid out these grants to roads privately owned, and so had no assets to show for the monies it had borrowed to pay these railway grants. In the Maritimes, on the other hand, the Governments themselves built the railways, and they had the railways as assets to offset this part of their debt. The Dominion took over the railway debts of Canada without any assets, but in the case of the Maritimes took over the debts and took over the railways as well. The fact is that the original terms were fixed more or less on a rough and ready basis, and the Maritimes felt they were given the heavy end of the load.

CURTIS: We realize it was a compromise, but, Mr. Farquhar, were not the representatives of the Maritimes in London satisfied at the time?



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FARQUHAR: That may be so, Professor Curtis, but the Provinces themselves were far from satisfied. The terms were drawn up in London, and turned into law before they were known on this side of the water. Nova Scotia in particular was dissatisfied. The Provincial Government which adopted its terms was defeated thirty-six to two, and in the Federal election, held at the same time, only one member in favour was sent to Ottawa, while eighteen who opposed were sent. Nova Scotia immediately demanded better terms. The story is long, but it comes to this: the terms to New Brunswick had been more favourable than to Nova Scotia, and so in 1869 Nova Scotia was placed on the same footing as New Brunswick.

WALKER: But how did the situation work out, Mr. Farquhar?

FARQUHAR: It did not work well. Nova Scotia had had the lowest tariff in the world. The Dominion had immediately doubled the tariff and prices rose; the factory products of Quebec and Ontario entered the Maritimes free, and this put Maritime industries out of business as time went on. The Maritimes had to pay higher prices, and as they did not get the promised inland market, they had to pay these higher prices in cash. I mention this because it had a direct bearing on the financial position for it immediately affected the well-being and financial capacity of the Maritime people. Be it remembered also, that in the case of Nova Scotia ninety-five per cent of her revenue had been taken away by the Dominion, and only fifty-five per cent of her expenditures.

WALKER: Where do you get these figures, Mr. Farquhar?

FARQUHAR: They are taken from a computation at the time.

MARVEN: When the new Provinces were created were they received on the same terms as the Maritimes?

FARQUHAR: Not at all. On the face of the terms they appeared to be, in reality, no. When the Prairie Provinces were created they had no debts. They could not have. Any debt the Dominion incurred for the West before the Provinces were created, the Dominion still had to carry. When the Western



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Provinces were created, they were, of course, given subsidies for government just as were the original Provinces, and they were given a Debt Allowance when they had no debts. The debt taken over by the Dominion from the Maritimes represented assets which passed to the Dominion, but the Prairie Provinces had no assets, yet were given Debt Allowance on the same basis, or apparently on the same basis, as the original Provinces.

KELLEY: Would you give us an example?

FARQUHAR: Yet, let us take the case of Manitoba as an example. I know I will not be misunderstood by our friends in the West. Manitoba probably needed all the aid it received. But what I am pointing out is the curious method used to give this aid, which looked as if it were receiving uniform treatment with the original Provinces, but which in reality was entirely different. Manitoba in 1870 was given the eighty cents per capita grant for government, but with this difference—her population was estimated at 17,000 when in point of fact it was actually only a little over 12,000, and by this device she was given different and more favourable terms.

She was also given a debt allowance on which she drew annual interest but unlike the Maritimes she had no debt, and she had no assets to give the Dominion to offset it. In 1882 her grants were doubled. They were calculated on a population of 150,000, when her actual population at the time was only 70,000. She was paid eighty cents per head on 80,000 people who did not exist. A few years later her Debt Allowance too was scaled up. It was now calculated on a population of 125,000 instead of 17,000. That is to say she not only got Debt Allowance without any debt, but she now got Debt Allowance on 45,000 people when she did not have these people. It sounds thoroughly incredible but I assure you it is a simple historical fact.

MACDONALD: You have given Manitoba as an example, but was Manitoba any different from other Western Provinces?

FARQUHAR: Not at all. They were all pretty much in the same boat. All alike received special consideration, looking

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like uniform treatment, in reality not so. Saskatchewan and Alberta had no debts and no assets. Both were given a Debt Allowance. To the Prairie Provinces, Debt Allowance was a free gift. To the Maritimes, it was a hard and fast quid pro quo.

CURTIS: Did the Western Provinces then receive other special consideration?

FARQUHAR: Indeed they did. I suppose you refer to the much debated question of the natural resources. When the new Provinces were created, the Dominion retained their lands in its possession. Most of these it gave away for homesteads, which, of course, benefited the Provinces. Some of it was given to railways, and some of it was sold. These lands were never really a source of revenue to the Dominion at all.

WALKER: But you said some of the lands were sold.

FARQUHAR: Yes, that is so. But the Dominion spent eleven million dollars more upon these lands than it received from them. While the Dominion kept the lands it paid the Western Provinces an annual grant instead of the lands. Later, the Provinces asked that the remaining lands—the lands the Dominion had not parted with—be transferred to them. But here was the astounding thing. They asked not only for the remaining lands, but asked that the grants they were getting instead of the lands, be continued exactly as before. But stranger still, at least to the Maritimes, this was agreed to. In the case of Manitoba, which had not been given a grant for lands on its creation, it was given back its remaining lands, and an annual grant instead of lands, which was dated back to 1870. The grant is still paid as if the remaining lands were yet in the possession of the Dominion. It sounds like a fairy tale, but I assure you it is not. It is history as we have been making it in Canada.

WALKER: Is there any reason why we have been making history in this way?

FARQUHAR: I will come to that later on. Of course, when this was done, the other Prairie Provinces asked for the same

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consideration, and got it. They were given the remaining lands, and their grant still goes on like Tennyson's brook.

CURTIS: But is it not true, Mr. Farquhar, that these lands contributed to the national advantage while they were in the possession of the Dominion?

FARQUHAR: Undoubtedly, Professor Curtis, but let us be perfectly frank about it. The real truth which underlies the matter is that the basis of these grants was not really what it appeared to be at all. Its real basis was financial need. The Provinces were hard up; they needed the money, and needed it badly, and this was the way that was taken to give it to them.

WALKER: You have been speaking about the Prairie Provinces. But what about British Columbia?

FARQUHAR: I don't think we have time to discuss British Columbia, whose story in some respects parallels that of the Prairie Provinces; nor will time allow for discussion of the many times the financial relations of the different Provinces have been changed. They were supposed to be fixed and final, but changes have been made no less than twenty-five times since 1867.

WALKER: Did these changes effect all the Provinces alike?

FARQUHAR: Not by any means. It was sometimes one, and then another, and in some cases all. The Maritimes received some minor concessions, readjustments of matters in dispute, which amounted to little until the Duncan Report of 1926. By the Duncan Report, the Maritimes were judged to have been unevenly dealt with and additional grants were made to each of them. Here be it noted that while the grant for lands to Manitoba was dated back to 1870, the additional amounts paid to the Maritimes were not dated back but dated from 1927 only, though the matters complained of extended over a long period of years. Again when the White Commission in 1934 finally determined the additional amounts which the Duncan Commission had left indefinite, these amounts were not dated back even to 1927, but were given only from 1934. To a Maritimer, at least, this looks like entirely different treatment to that given to other Provinces of the Dominion.

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MARVEN: What conclusions do you draw from the facts as you have given them?

FARQUHAR: I would say that no clear principle is evident anywhere running through the whole series of financial agreements and adjustments made. Let us again repeat that I am not finding fault with the special consideration shown to particular Provinces. The real truth is that they were badly in need of money, but we in the Maritimes were, too, but we did not get the same consideration.

MACDONALD: Would you say that periodic revision would be one way of dealing with the matter?

FARQUHAR: Yes, of course, that would be one method, but it is borne in upon one with irresistible force that the financial arrangements made at the beginning, have proved entirely unsatisfactory. The Provinces have too many things they must do, and too little money to do it with.

MACDONALD: Mr. Farquhar, would you agree that one great reason for this is that, though, at an early date, we abandoned the principle that the direct subsidies payable under the Act were final, we developed no procedure whereby those amounts could be adjusted from time to time according to some fixed principle?

FARQUHAR: Yes, Dean Macdonald, I agree.

MACDONALD: Would you then be in favour of inserting in the Act a provision that such direct subsidies should be capable of change in amount, upon evidence of Provincial need being produced to the satisfaction of a permanent Board, set up for this purpose and acting when called upon or at stated intervals?

FARQUHAR: That is a possible solution. The functions of government have changed. The Provinces have been forced to assume all kinds of new responsibilities; social services are clamouring for attention and the Provinces have not the necessary revenue. The situation calls either for a shift of governmental responsibilities, or for a more just division of revenue or taxing power, or subsidies, conditional or otherwise, or some combination of any or all of them.

## PROBLEM OF SUBSIDIES, THE MARITIME VIEW

KELLEY: Has there been any evidence from any quarter that the Dominion has realized the inability of the Provinces to finance?

FARQUHAR: Yes, there has. The Dominion Government has in recent years given 'grants-in-aid' or conditional grants to the Provinces, grants conditional on the Provinces paying certain sums to match the Dominion grants. It has given grants for a period of ten years to encourage agricultural education. It has given grants for technical education over a period of ten years, again conditional on certain sums being spent. Let us add that in this case Nova Scotia was penalized, since it was the first Province to embark on technical education, and had already spent considerable sums upon it. It was unable to spend the sums required to get the whole of the available grant. The Province which had done work in this field was thus penalized, while the Provinces which had done nothing could start their work from the foundation and receive the full benefit of the grant. But perhaps the most important and in many respects the most equitable grant was that for Old Age Pensions. The Maritimes have more old people proportionately than the other Provinces. The grants here were made on the actual basis of the number of pensioners and not on the population of the Provinces. But all these examples show that the Dominion itself has realized the insufficiency of the present financial arrangements and has stepped outside them, because the necessities of the case demand that something be done, and without the grants this work would have been left untouched. I have not mentioned the grants to highways which was another example of the Dominion coming to the aid of the Provinces.

MARVEN: Are we to understand that you regard the Dominion as a sort of fairy godmother, with an unlimited purse, from which the Provinces may draw, and it only remains for the Dominion to treat the Provinces with wide liberality, and all will come right?

FARQUHAR: Not at all. I have no illusions on that score whatever. Every cent the Dominion gets, comes from the same people who pay the Provincial taxes, for after all, all the people

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live in Provinces. The taxpayer pays taxes in two capacities that is all and if a disproportionate amount is paid to the Dominion, the Province suffers.

CURTIS: Would you say an increase of subsidies is a cure?

FARQUHAR: No, I would not. From many causes the economic life of the Maritimes has suffered harshly. Maritime wealth per head to-day is the lowest in all Canada. If Dominion policies bear harshly on Provincial economic life, a subsidy will not remove the cause, and so will not effect a cure. Dominion policies have concentrated and tend to concentrate wealth in Ontario and Quebec at the expense of both East and West. All parties in the Maritimes agree that 'no reasonable defence, no consideration based on equality or sound policy, can be advanced in support of a system by which the Provinces are compelled to buy what they consume in a substantially protected market, and to sell what they produce in a virtually unprotected market.' Here East and West join hands for a policy which concentrates wealth at the centre, at the expense of the extremities both East and West, is unhealthy to the Dominion, while it makes the burden on the impoverished Provinces the heavier to carry, and, in the present stage of development, while the burdens on the Provinces have become vastly heavier, the sources of revenue in later years have been lessened by the direct action of the Dominion in imposing new and direct taxes.

WALKER: Now just exactly what do you mean by that?

FARQUHAR: I mean this. Since the turn of the century the Provinces have all been compelled to make expenditures in many fields they never made before. Since the Great War these expenditures have been rapidly widened. The Provinces pay Mothers' Allowances. They pay their share of Old Age Pensions. Health services are expanding; the demands for hospitals are increasing, and the expenditure for highways is climbing. And when I say their sources of revenue have been depleted, I would call your attention to the action of the Dominion.

Up until 1914 out of a total revenue of one hundred and



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twenty-seven millions, one hundred and twenty-six millions was raised by the Dominion from customs and excise. Customs and excise were the main source of Dominion revenue. With the demands arising from the war, and after, the revenues from customs and excise have now become a minor source of revenue. The Dominion imposed direct taxes, many of them for the first time, taxes on income, stamp taxes, and sales taxes, and every tax of this nature lessened the capacity of the Province to raise revenues from these sources.

MACDONALD: I should like to put explicitly a cardinal point which you have not stressed, Mr. Farquhar. This point is that the inadequacy of subsidy payments and grants-in-aid made to the Provinces is definitely connected with Provincial powers of taxation. It is exactly because of the alleged insufficiency of their powers to raise money by taxation that the Provinces require increased sums from the Dominion to meet increasing burdens of government. Confined as they are to direct taxation they find even that field relatively barren because it also is exploited by the Dominion. Therefore an increase in Provincial powers of taxation will decrease the amounts the Provinces will need from the Dominion Treasury. Do you agree?

FARQUHAR: Certainly. Provincial taxing powers must be enlarged, and to that extent the support required from the Dominion will be decreased, though, of course, not eliminated.

I would sum up by saying that the present set-up is entirely unsatisfactory. It is unequal in its differing arrangements with the Provinces, and the necessity is urgent for a thorough study of the entire position and for a new set-up in the financial relations between the Dominion and the Provinces. Hand in hand with this must go the devising of some truly national policy which will not work to the ever increasing advantage of any one area and the detriment of another.

MACDONALD: By a 'National Policy', Mr. Farquhar, do you mean the tariff policy of this country?

FARQUHAR: Yes, certainly.

MACDONALD: It strikes me, Mr. Farquhar, that your reliance upon the national tariff as a cure for the inadequacy



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of the present fiscal disabilities of the Provinces is a bit on the Utopian side. By this I mean that you are predicting your solution on the bottom that is possible to devise a Canadian tariff policy which will bear equally on all the Provinces of Canada, and be of equal benefit to each of them.

FARQUHAR: Not at all, Mr. Macdonald. Do not misunderstand me. I spoke of the need of a policy which would not work to the ever increasing advantage of any one area and to the detriment of another. I do not for a moment rely on a tariff policy as a cure for anything, but I am convinced it can be changed so that it will not create conditions which in turn demand cure.

But going back to the main argument of the necessity of readjusting the relations between the Dominion and the Provinces, let me say that economic life is progressive, not static, and any new arrangement must take this into consideration. It cannot be fixed and absolute. It must be framed to accommodate itself to changing conditions. The past system by which one Province secured special treatment, next another, and then another, and so on round the circle, with always the suspicion of political pressure, is satisfactory to nobody. To make necessary changes, and to effect an arrangement more just and fair to the whole nation, is surely not beyond the wisdom of our people.

## GENERAL SURVEY OF TAXATION PROBLEMS

BY B. A. MCKELVIE

*Discussed by the Constitutional Club, Vancouver,  
October 31, 1937*

MURPHY: I feel it will be of assistance to all groups taking part in these discussions if, to-day, we examine the problems of taxation in Canada, and endeavour to ascertain their particular place in the constitutional picture.

Mr. McKelvie, this is a question which you have taken a great deal of interest in during the past few years, and we would all like to have your views on the problem.

MCKELVIE: I am convinced that if Canadians really appreciated how much they, individually, pay each year in various forms of taxes there would be fewer calls on governmental bodies for expenditures. So cleverly have many of these imposts been disguised that there is but little realization of personal contribution. That may be a good thing in one way, but it has a tendency to create in the mind of the taxpayer the impression of detachment from the State. This is not a healthy condition in any country. Taxes are so cunningly hidden and so cleverly distributed throughout our whole national economy that hardly a transaction, involving exchange of money, can take place without making some contribution to a Municipal, Provincial or Federal treasury.

The sales tax illustrates the point. People pay for merchandise without realizing that included in the price they pay for a product is an eight per cent tax. Ever since the day when Mother Eve took an apple from the serpent as his occupancy tax in the Garden of Eden, mankind has been devising new imposts; and the higher we set the standard of living, the more money governments must have to maintain that standard.

As to our present condition in Canada, we have three recog-

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nized taxation authorities, Federal, Provincial and Municipal. In addition to these three forms of constitutional government recognized by the British North America Act, we have, in late years, created numerous subsidiary agencies to which taxing powers have been given, such as Workmen's Compensation Boards, marketing systems, the Canadian Broadcasting Corporation, school boards and harbour authorities, to mention but a few of them.

All of these boards and commissions obtain their operating revenue from public levies. None is satisfied. Each Government, each board, each commission is continually seeking ways and means of augmenting its income; each is yearning to broaden its own particular field of taxation, and in the light of circumstances, each is more or less justified in that desire, for the public is insistent on more and better services.

At the time of Confederation, the framers of the British North America Act imagined that they had devised a fair and equitable distribution of taxation powers. The Provinces were to be confined to the imposition of direct taxation and the issuance of licenses; while the Central Government reserved to itself the field of indirect collection of revenue. Briefly, John Stuart Mill's definition of these respective powers is worth noting, for such has been accepted by the Privy Council as the basis of its judgments in respect of Canadian appeals in taxation matters:—'A direct tax is one which is demanded from the very persons who it is intended or desired should pay it', and 'an indirect tax is one demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another'.

MCGREGOR: Mill, of course, was an authority in his day, but do you think, Mr. McKelvie, that his characterization of taxes as direct and indirect is any longer very useful? There are too many complications. The gasoline tax which is direct when paid by you or me, is passed on by a manufacturer or a merchant. An indirect tax can be made to seem direct. So governments are put to the necessity of devising subterfuges. The

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Saskatchewan Government recently made every merchant a provincial tax collector. British Columbia has two gasoline taxes, one of them in force, the other ready to be brought into operation by an order-in-council, should the courts at any moment declare the operative Act illegal.

MCKELVIE: Quite true, Mr. McGregor, but, unfortunately, Mill is still an authority, because his definition of taxes has been taken by the Privy Council in taxation cases. But let us go back to the thread of the argument.

The Fathers of Confederation were not for long left to enjoy a sense of satisfaction in regard to their financial arrangements with the Provinces. The very next year—that was in 1868—Nova Scotia was so dissatisfied with the place that it occupied in the new Dominion that it threatened to withdraw from the union. It was unfortunate that in those earlier days of Confederation more energetic efforts were not made to correct causes for complaint.

STEEVES: I wish to ask Mr. McKelvie if he really believes that any adjustment in those days would have made any difference to our troubles to-day. After all, the B.N.A. Act of 1867 was framed to meet the economic conditions of that time. It was definitely framed to meet the conditions of nineteenth century capitalism. I expect you will accuse me of bringing in unorthodox economics, so I am going to quote from a respectable authority, the Honourable Norman Rogers, our present Minister of Labour. He wrote in the 'Canadian Forum' about three years ago, 'A constitution is an instrument through which the community seeks to realize certain declared purposes. The institutions it creates and the powers given to those institutions are assimilated to the character of the purposes it is designed to serve. The B.N.A. Act was an expression of the policy of *laissez faire*'.

I quite agree with Norman Rogers that, with some minor irritations the B.N.A. Act operated quite well for a while, but to-day we have different conditions to those of 1867. Our economic system no longer clicks.

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McKELVIE: Well, Mrs. Steeves, as regards the B.N.A. Act and its times, surely it was a matter of both political and economic necessity. It was Imperial as well as Colonial in its origin, and although minor adjustments were made to meet the early complaints of the Maritimes, it was not until 1926 that they really obtained sympathetic consideration of their case. In its argument before the Duncan Royal Commission in that year, Nova Scotia, as an evidence of the inadequacy of the system of financial division contained in the B.N.A. Act, plaintively asserted that she had exhausted her powers of taxation and was still short by \$2,000,000 of meeting her budget requirements.

After all, though the Fathers of Confederation were gifted men, they were not prophets. They could not anticipate progress in science, education and social standards of the people, and quite naturally based their financial calculations upon the horse and buggy experience of their own times. They fashioned a constitution with the intent of avoiding errors discernable in that of the United States, and to some degree they were successful. They made the B.N.A. Act rigid and, as Professor Soward commented the other day, sought to limit the Provinces to the confines of glorified county councils. Unfortunately, they were over-zealous in this desire and failed to measure the ambitions of the Provinces which had, for so many years, been functioning with much wider powers as colonies than they were to be permitted as units within the Dominion.

It was never for a single moment contemplated that there could arise a conflict of Federal and Provincial powers or an invasion by either government of the taxation field allocated to the other. Discussions at the time made it evident that the respective ambits of the Federal and Provincial taxation branches were considered as being wholly apart. Had there existed any suspicion that such was not the case, it is probable that union would not have been accomplished.

STEEVES: Don't you think you are exaggerating a bit? This is the argument that Provincial Governments just delight in

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giving in these Dominion-Provincial conferences—trying to make it clear to the Dominion Government that the Dominion should retire from the field of direct taxation and leave the spoils to them, but I don't think they were a bit concerned about that in 1867. All they worried about was to get as much subsidy as possible to indemnify them for the loss of the excise and customs duties.

MCKELVIE: I cannot agree with you, on your first point with regard to subsidies. The Honourable A. T. Galt said, during the debate on Confederation: 'The fact that it was proposed to give a subsidy of eighty cents per head to each of the Provinces was by reason of the Dominion having taken over all sources of revenue with the single exception of direct taxation'.

LADNER: But, Mr. McKelvie, surely that was to some extent a fictitious value in allowing the Provinces a subsidy of eighty cents per capita. We must not forget that eighty cents in 1937 has much less purchasing power than it had in 1867; consequently the Provinces must meet the shrinkage. To the extent of that difference, the eighty cents per capita subsidy to the Provinces has failed.

MCKELVIE: Quite right, Mr. Ladner. What I am stressing is the fact that the Honourable Mr. Galt stated that but a single tax was reserved for the Provinces, and I say that had the Provinces for one moment suspected that they wouldn't have had exclusive use of direct taxation there would have been no union.

SOWARD: I quite agree, Mr. McKelvie, but it is also only fair to recall that although the Federal Government invaded the field of direct taxation between 1921 and 1930, it has given over \$500,000,000 to the Provinces by way of subsidies.

MURPHY: Do you mean by way of additional subsidies, Professor Soward?

SOWARD: No, Mr. Murphy, I mean the total payment in subsidies and grants-in-aid of those ten years.

MCKELVIE: But, Professor Soward, there is the other side



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of the story. Let us take British Columbia as an illustration. From 1871 to March, 1935, in excise and customs the Dominion Government has taken out of the Province of British Columbia, roughly \$450,000,000, and in addition by way of income tax from the time it was imposed as a war measure, \$63,000,000 or a total of \$521,000,000. In grants and in subsidies in that same period, British Columbia received only \$29,000,000.

MURPHY: Just a moment, Mr. McKelvie, your figure of \$29,000,000 does not, of course, include the cost of Dominion Government services here in British Columbia.

McKELVIE: True, but I have not taken into account all the sources of revenue of the Dominion within British Columbia.

Now, perhaps, I should make clear how the Dominion was legally able to invade the field of direct taxation. One of the powers reserved to the Dominion, in the B.N.A. Act, gave to the central government the right to raise revenue by 'any mode of taxation'. This, doubtless, was at the time the Act was passed, taken as having reference only to direct taxation within territories administered directly by the Dominion. The very use of the word 'exclusive' as applied to direct taxation as a provincial prerogative was regarded as a sufficient safeguard against encroachment by Ottawa.

The British North American Colonies of that day all had their own customs and excise duties. The returns from these constituted the major part of their several revenues. In the case of Nova Scotia, direct taxation, except in the form of licences, was hardly known.

SOWARD: It was known in Upper and Lower Canada, was it not?

McKELVIE: Municipally, but not as a colonial tax.

When the Colonies became Provinces they were reluctant to apply such imposts as would fall under the heading of direct taxes. In order to obviate this and recompense them for the loss of the powers of making indirect levies, it was arranged that Ottawa should make annual subsidies; one in aid of gov-

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ernment, which was based on population, and another, also on a per capita basis of eighty cents, for services. This latter subsidy is of more importance for it was to be used for local expenditures. Such expenditures were to include: 'administrations of justice, education, grants to literary and scientific bodies, hospitals and charities, and such other matters as cannot be regarded as devolving upon general government'.

Now, take the experience of British Columbia, under this system. It illustrates the position of the Provinces generally. Subsidies from Ottawa in 1872—the year following entry of the Pacific Colony into the Dominion—amounted to \$214,000. Revenues collected by Ottawa in the same year from sources surrendered by British Columbia amounted to more than \$363,000. As a result of this condition, British Columbia initiated a wild land tax in 1873, but even this did not balance the budget, and three years later the Province was forced to impose income, personal property, real property and school taxes.

It would appear that the per capita basis of recompensing the Province for lost taxation powers was wholly inadequate. It would, perhaps, have been wiser to have adopted the formula recommended by Hon. W. S. Fielding in 1907 following the inter-provincial conference of that year; that the subsidies be allocated from a fixed percentage of the Dominion collections from customs and excise, thus increasing with the growth of such revenue.

The arbitrary establishment of eighty cents per capita for the services named did not permit of any improvement in or enlargement of such services. To use British Columbia again as an example of the failure of such a plan—and the same situation exists to a greater or lesser degree in other Provinces—the annual subsidy from Ottawa to-day provides but 7.6 per cent of the costs for the public requirements that in 1867, it was estimated eighty cents per head would maintain.

STEEVES: I am of the opinion that the whole system of unconditional subsidies and grants-in-aid is a bad one. It gives

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the Provincial Governments the loveliest excuse possible to pass the buck for not doing the things they should do. Moreover, the system of subsidies can be used by political parties as a form of polite blackmail, if the Dominion Government at the time happens to be of the same complexion as their own. And then, too, it is unscientific for a government to hand over money to another government and have no control over the expenditure. We have come to a point where only conditional subsidies should be given, for specific purposes. The Dominion Government should set certain standards of service and then pay out grants, in order that these services be carried out by local administrations.

LADNER: Why should the Province be put in a dependent position at all? Don't you think, Mr. McKelvie, that under our Federal system we must find out the different services and their costs, which can and are being rendered by the Provincial and Central Governments. Our whole economic system in respect of the relationship of the government to the taxpayer has changed completely since Confederation. The people of Canada have a new outlook on these matters. To remedy the real weaknesses in our present taxation system is not feasible under our present Constitution.

STEEVES: You agree we must get away from these subsidies and instead of them have a better allocation of the powers of taxation, Mr. Ladner?

LADNER: We are in complete accord.

McKELVIE: The increased demand for educational facilities, for public works, hospitalization and social services in keeping with the general advancement of the times necessitates enormous provincial expenditures.

In order to meet these charges, Provinces have been forced to invade the Federal field of taxation. British Columbia does it. There are nine separate taxes in British Columbia which in my opinion invade the Federal field of taxation and the legality of which is very dubious.

But municipalities, which are creatures of provincial gov-

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ernments are, of course, limited to the sources of revenue which can be delegated to them by such governments. These they find to be insufficient for their needs, and they are continually making appeals for direct assistance.

Inevitably such a condition is a cause for general confusion. Provincial treasuries, knowing that the Privy Council follows Mill's formula, are in constant fear that some of their main sources of revenue will not stand up under attack. On the other hand they feel resentment against encroachment on the part of the Dominion upon what they regard as their peculiar prerogatives in taxation matters. The imposition of the Dominion income tax as a war measure, and its continuance twenty years after the war, is a case in point. There are other imposts, such as the cheque tax which might be cited, but they only serve to further emphasize the principle involved.

LADNER: I think the income tax is unquestionably one of the soundest and most equitable of all taxes. It is based on ability to pay. The Dominion Government, exercising jurisdiction over the whole of Canada is in the very best position to enforce collection. The Provinces are less able to combat ingenious and resourceful schemes to avoid payment. Actual experience proves that. I would favour giving the Dominion sole authority to levy and collect income taxes under an arrangement by which there would be a distribution of such moneys between Federal and Provincial authorities on an equitable basis. In this way the taxpayer would be saved a double taxation system, double expense, and double inconvenience of inspection.

McKELVIE: There is no argument between you and me as to income tax, Mr. Ladner. My objection is to the invasion on the part of the Dominion of the Province's exclusive right to impose income taxes. It isn't of the tax I am complaining, it is the imposition.

MURPHY: You have mentioned a clash between the Provinces and the Dominion, Mr. McKelvie, over the question of income tax. There is also a great deal of antagonism between

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the Provinces with regard to other taxes. Take the question of succession duties. If a man dies in British Columbia and his estate happens to possess shares in a company organized in Ontario, it must pay a heavy succession duty tax in British Columbia and a further heavy succession duty tax in Ontario. Ontario will make no allowance for any payment made to British Columbia, and British Columbia will make no allowance for any payment made to Ontario. Each Province treats the other Provinces in exactly the same manner as it does a foreign country. However, would you mind summarizing the points we have covered so far, Mr. McKelvie?

MCKELVIE: Municipalities demand wider powers of taxation and direct aid from provincial treasuries; provinces extend sympathy and make similar appeals to the Dominion, and Ottawa murmurs soothing words and points to the inflexibility of the good old B.N.A. Act.

Here, shortly, is our taxation position; the public must pay. Eleven million Canadians must raise all the taxes for all forms of Canadian Government. That there should be a rearrangement of the incidence of taxation in accordance with the ability of the individual to pay; and a clear-cut definition of the respective fields of taxation, with a more flexible realignment of the B.N.A. Act, would appear to be matters of the utmost urgency.

## SOCIAL LEGISLATION, THE WESTERN VIEW

BY MARCUS HYMAN

*Discussed by the Kelsey Club, Winnipeg, November 7, 1937*

MACKAY: We are to be led in a discussion of Social Legislation and Constitutional Issues by Mr. Marcus Hyman.

One of the most hopeful characteristics of this age is that we are intensely alive. Our era is one of increasing awareness and heart-searching. Every human activity and institution, however apparently firmly rooted, is subjected to re-examination. We are bewildered by inventories and re-valuations.

Recurrent crises expose deep-lying fallacies—the existence of gaps between socially progressive principles and the practices which prevail. Chemistry, while the handmaiden of medicine and health, is contributing to the horrors of warfare. Engineering, while giving us miraculous control over the forces of nature, is yet chargeable with technological displacement in industry and with unemployment.

Our Canadian Constitution, too, does not escape these defects, and it is particularly in relation to our social services and institutions that we find its foundations crumbling. Social services deal with the happiness, or, if that is too ambitious, with diminishing the misery, of countless persons in the realm of education, of public health, of child welfare and of social insurance. These services, in Canada as elsewhere, are largely devices for the distribution of essential goods and services to persons unable to purchase them—a series of makeshift adjustments growing out of the economic and political structure of society.

The profit system under which we live cannot utilize fully and effectively our available human energies or material resources in the objective of providing adequacy of living. But,



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social services are compelled to fit into the profit system. If people cannot buy what they need, they may get it free, but under conditions which would not subject the market where the price system governs to the successful competition of the social agency. That this principle need not necessarily remain a governing one is shown in our public and free school system; a system which has had some sixty years to take root. We do not insist that the standard of teaching in our free schools shall be below that of private schools in order to avoid a general exodus from the private to the public schools.

The aim and structure of social work was further in the past determined by the principle that distress was considered the result of individual deficiencies. A contrary idea is rapidly gaining ground; I mean the concept that *society* is responsible for distress, and a recognition that not only is the welfare of the individual the concern of society, but his well-being is a direct contributing factor to the well-being of others. With economic conditions having entered a most acute phase, widespread distress and mass poverty demonstrated the inadequacy of welfare resources based on private benevolence; governments in consequence are forced to organize social welfare programmes.

SMITH: Your programme would not require any private benevolence?

HYMAN: Exactly, but for some considerable time to come I see wide scope for private effort. Society must aim at progressively making the lives of people decent as of right, not compelling them to remain recipients of charity. There are still some who consider that we have too many social services and who resist their extension on the ground that they are demoralizing.

MACFARLANE: Aren't some of them demoralizing?

HYMAN: A case might well be made to show the demoralizing effect of social services, or some of them; but I sometimes wonder whether this demoralizing effect is really inherent in the services or is merely demoralizing because we think it

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so. Is it demoralizing for a judge to retire on his pension? Is it demoralizing to live in retirement on savings, or on dividends, or an inherited fortune? Is it demoralizing for a child to attend our public schools? Is it demoralizing to cross a bridge or to pass along the King's Highway, without paying a toll?

MACFARLANE: Or being on the dole. But what are these services you have been referring to?

HYMAN: I will then take a few minutes to touch upon some specific examples of social legislation throughout the Dominion.

### WORKMEN'S COMPENSATION

Workmen's Compensation Acts obtain in eight out of the nine Provinces of Canada, and provide for the relief of those injured in accidents or who have contracted certain occupational diseases as the result of their labours, and, secondly, for the widows of such men as may die through such causes. The first legislation was in Ontario in 1914. Other Provinces have in general followed the Ontario statute. The Manitoba Act was passed in 1916. The tendency is to extend the scope of Workmen's Compensation.

MCWILLIAMS: Is not Workmen's Compensation a rather striking illustration of the growth of the idea of social responsibility?

HYMAN: In what way do you mean?

MCWILLIAMS: The first Compensation Acts recognized the responsibility of an employer only for the acts or negligence of his superintendents or foremen or for the condition of his works. A series of subsequent statutes widened the employer's liability until he became responsible for all injuries to his employees unless caused by the man's wilful conduct. Further, the state has taken over the administration of the whole system of insurance so that compensation to a workman is now almost automatic.

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HYMAN: I am very glad you called attention to that process of growth. It is an excellent illustration of the point I want to make. The enormous value of Workmen's Compensation can be glimpsed by the fact that there are in Canada about 130,000 claims in a year, the compensation for which amounts to about \$10,000,000 in addition to over \$2,000,000 in medical aid. All the people affected by these Acts would otherwise have been derelicts thrown on to the human scrap-heap. In spite of the great resistance that was put up against the passing of this type of legislation, who will say now that it is not just for industry to bear the cost of its casualties?

### OLD AGE PENSIONS

After eight futile attempts the Dominion Parliament in 1927, due to political exigencies, passed the law. It is said that the Federal Government is constitutionally debarred from paying the pensions outright. Recourse was, therefore, had to paying a part of the costs from the Federal Treasury to any Province that would pass an Old Age Pension law. The Dominion's share in 1931 was seventy-five per cent and the tendency is towards increasing it to ninety-nine per cent.

WAINES: Mr. Hyman, would you mind making it clear to us why the Dominion's share could not be increased to one hundred per cent?

HYMAN: It is on the ground that Old Age Pensions are considered to be a matter of Provincial jurisdiction. The contribution of the Federal Government, therefore, can only be by way of a grant-in-aid, and it is thought that if the grant were a hundred per cent it would have to be administered by the Dominion, and that would be *ultra vires*. I may say that, although the reason I just mentioned was adduced by a Federal Minister in Parliament, there are a number of constitutional lawyers who do not agree, but think that there is nothing to prevent the Dominion making it a hundred per cent. The view is that the Dominion can dispose of its own funds in any way it sees fit

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and, therefore, can aid a Province in the discharge of a provincial function to any extent it may wish.

### MINIMUM WAGE

Most of the Provinces have Minimum Wage legislation affecting female employees; in many cases there obtains a statutory minimum for boys and girls. We in Manitoba have had the rather striking experience of having to legislate to prevent an employer paying a grown-up man less than a boy's minimum wage. In the last year or so the law has been extended in some occupations to cover male adults.

SMITH: You have been giving us instances where the Provinces have been successful in obtaining relatively uniform legislation along lines of social services.

HYMAN: Yes, made possible, however, through the initiative and experience of one or other of the Provinces.

### HOURS OF LABOUR

The Dominion Parliament in 1935 passed an Act setting a 48-hour week for certain industries, but as we shall see later this was held *ultra vires*.

### HEALTH INSURANCE

Health insurance, with Old Age Pensions, and Unemployment Insurance, if effective, would make for complete security of the worker. In the Unemployment Insurance Act of 1935 the Federal Parliament included a whole part covering Health Insurance to the extent of making provision for effective co-operation with the Provinces and to make health insurance a definite national policy for the future.

### MOTHERS' ALLOWANCES

Most of the Provinces have Mothers' Allowance legislation. In Manitoba over 1,000 families with 3,500 children are pro-

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vided for at a cost of about \$350,000 a year, though it must be noted that there have been seven successive reductions in the allowances made under the Act. In connection with all these and kindred endeavours two types of difficulties confront us through our constitutional set-up:

The first is that of validity. Where does the power lie to do what is required? In the Dominion, or in the Provinces? And how is it to be done? And secondly, the cost. Are the provincial resources adequate for their needs?

To take up the second point for a while, the provincial powers under sub-section 7 of Sec. 92 of the B.N.A. Act, so far as the social services are concerned, were confined to the 'establishment, maintenance and management of hospitals, asylums, charities and eleemosynary institutions'. That is, the provincial responsibility at Confederation was conceived to be that of looking after charities, hospitals and relief.

Sir Alexander Galt in discussing what financial resources were to be made available to the Provinces at the time of Confederation said 'Local machinery should be as little costly as possible, for it would not do to affront the intelligence of the people, and tell them we had devised an expensive kind of machinery to do a *very insignificant* amount of work'. It was estimated at the time that eighty cents per head of the population would be adequate to meet these needs, and that sum was provided by way of subsidy. These subsidies have changed since Confederation no less than twenty-one times, and every time declared to be a settlement in full.

The Hon. Norman Rogers, our present Federal Minister of Labour, in commenting on this said that we are living in a society based upon one social philosophy trying unsuccessfully to function under a constitutional and financial set-up based upon another quite different social philosophy, that of *laissez-faire*. The control of social services, the regulation of hours and wages were not given to the Federal authorities, because they were conceived to be beyond the domain of *any* government. The new social philosophy originated in dissatisfaction with the social instability inherent in the modern organization

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of industry and commerce. Its objective is a large measure of security for wage earners to be secured by the intervention of the state in the economic life of the community.

The Dominion-Provincial set-up was based on the erroneous assumption that increased expenditures by the Provinces would arise merely from expanding populations, but in fact they have done so through the acceptance of new government obligations. The financial resources of Provincial Governments, at least in the West, are insufficient to meet these obligations. The reform, then, of our public finance will have to include the assumption by the Dominion of such of the social services as are ripe for its control. These now include Old Age Pensions, Unemployment and Health Insurance.

SMITH: Do you seriously suggest that our social services should be administered by a centralized bureaucracy?

HYMAN: No, Mr. Smith, nor need it be unavoidable. These services, to be most effective, might best be administered provincially, municipally, or by variously located commissions, provided that they obtained uniformly throughout the Dominion and were financed from the Federal treasury. It is a very striking fact to note that, whereas in 1881 eleven cents per head was spent by the Provincial Government of Manitoba on public welfare, in 1936 the amount was \$8.32 per head, a 75-fold increase. Another striking fact is that, whereas at Confederation one-fiftieth of the population were consumers of social services through need, the proportion has increased ten-fold and now includes no less than one-fifth of the population.

Between 1880 and 1930 all social services, public and private, might have been shut down in Canada without threats to its stability. No one would venture to believe this still possible.

WAINES: Would you think it is as recent as 1930?

HYMAN: I don't think there had been much evidence of it before.

McWILLIAMS: I think there has been a gradual but rapid development. In 1914-15 we had over 10,000 unemployed in Winnipeg on account of the cessation of construction when the war broke out, and there were many spontaneous processions of



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unemployed to the Parliament Buildings, and at that time there was no Communist party to stir them up. But none of the public authorities felt any duty to provide for the unemployed except to the extent of preventing actual starvation. By the time the next depression came in 1921 and 1922 a great change had come. The conscience of the country would not let men suffer, and the duty of the state in this respect was recognized. Ten years later that duty was taken for granted.

HYMAN: I now turn to the other group of problems, that of validity. In 1935 the Federal Parliament passed a series of Acts to ameliorate the conditions of labour. The Weekly Rest & Industrial Undertakings Act, the Minimum Wage Act, the Limitation of Hours of Work Act. These subjects at the time were admittedly within the jurisdiction of the Provinces, but under Sec. 132 of the B.N.A. Act, the Dominion Parliament thought it had the power to give legislative effect to the treaties internationally binding Canada, whatever the subject matter. As Canada attained autonomy Britain ceased to enter into treaties on behalf of Canada and now Canada negotiates its own. For some years prior to 1935 Canada through its representatives at the annual conferences of the I.L.O. (annex of the League of Nations under the Covenant) had subscribed to certain international conventions covering conditions of labour. These conventions had been duly ratified and now the Federal Parliament was seeking to implement Canada's international undertakings. It might easily have been held by the Privy Council that the Federal Authorities continued to have the powers of giving legislative effect to treaties now that they negotiate and enter into them themselves instead of through the Imperial Authorities. The Privy Council in considering these Acts, however, held them *ultra vires*, taking a view which is reactionary, and, according to some opinions, even unsound in law. I, for one, have always had a strong inclination towards maintaining appeals to the Privy Council on historical and sentimental grounds. I am afraid, however, that the recent references to the Judicial Committee of the

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Privy Council have been so unfortunate, so shocking to me, that I am driven to conversion.

McWILLIAMS: That's what always happens to people who base their opinions on sentimental grounds. Why blame the Privy Council? Our own Supreme Court arrived at almost exactly the same conclusions.

HYMAN: I would say that the scarcity of far-reaching judicial vision is not limited to the judges of the Privy Council.

McWILLIAMS: That's lese-majesty.

HYMAN: While we are hide-bound by the largely rigid constitutional provisions of the B.N.A. Act, the residuary power of legislation exercised by our judges, though well disguised, might have had a very salutary effect, but if these powers are used, as they have been, without an understanding of Canada and Canadian conditions, they become dangerous, and their curtailment must be seriously considered. The decisions of the Privy Council on Mr. Bennett's 'New Deal' Statutes, as they have been called, have grave and far-reaching consequences. They have created for Canadians a constitutional situation scarcely less critical than that which led to Confederation itself. The deadlock between Upper and Lower Canada in the early '60's is replaced by the deadlock between the Dominion and the Provinces in the 1930's.

WAINES: You have referred to residuary powers of legislation exercised by our judges: what, exactly, does this mean?

HYMAN: A large part of our law is judge-made. This is the basis of what is known as our common law: but even in relation to statutes decisions of judges by way of interpretation really made new law. Sometimes these have been progressive; at other times reactionary. Judicial decisions on the B.N.A. Act show trends of expansion at one time of Provincial and at another of Dominion powers. These Court interpretations have in fact amounted to amendments to the B.N.A. Act.

I would like to cite one or two, but I had better limit myself to this. Doubt is cast upon the possibility even of Dominion-Provincial co-operation as an escape from constitutional difficulties. Where there was doubt as to legislative jurisdiction

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the difficulty could be overcome by joint action of all legislatures. This had several times been suggested in previous decisions by the Privy Council. In the judgment on the Marketing Act in the Supreme Court no consideration was given to the fact that every Province in Canada had co-operated with the Dominion in setting up Marketing Boards. Ten legislatures in Canada had acted to attain an end unanimously desired, yet the key statute was declared *ultra vires* and the whole structure destroyed in spite of the fact that the Dominion Act, by section 12, provided that if any parts of the Act were *ultra vires* it should not otherwise be inoperative on that account. Thus the courts take the view that even where there is complete co-operation between all Canadian legislatures, each contributing its share of legislative capacity, still the scheme will be destroyed if one legislature has made a slip in the wording of its contributory statute and has in fact included some subject matter beyond its jurisdiction. Another is that Canada ceases to be a single nation in the conduct of her international relations.

Economically the consequences of the decisions are no less grave. The country is left even more helpless than she was in 1929 to deal with the problems created by the changing economic system. The depression came, revealing gross injustices and inefficiencies; the Stevens Committee and the Royal Commission on Price Spreads disclosed evils crying out for remedy; a considerable attempt was made to provide a system of controls and palliatives on a national scale; this failed because the constitution could not, in the hands of the judiciary interpreting it, be adapted to the new requirements.

If the Federal Government cannot concern itself with questions of wages and hours of employment in industry, if its regulation of trade and commerce is consistently thwarted and if it has no power to join its sister nations in the establishment of world living standards, even though by a political miracle it is supported by the legislatures of all the Provinces, it is wholly incapable of directing or controlling our economic development. Dominion control for the grain trade was success-

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fully attacked in *King vs. Eastern Terminal Elevator* (1925) S.C.R. 434, while a Provincial attempt at a compulsory wheat pool was similarly held *ultra vires* in our Grain Marketing Act (1931) 2 W.W.R. 146.

Thus our Constitution again leaves us stranded.

SMITH: Some eastern constitutional lawyers expressed the opinion that the Dominion might have the power to delegate certain duties and powers to the Provinces and vice versa.

HYMAN: A very pregnant suggestion that opens up possibilities of solving our problems. What, then, is to be done? The Royal Commission now sitting will have to make provision for Dominion competence with regard to implementing Canadian treaties, with Unemployment Insurance, Minimum Wage and Hours of Labour, which are ripe for Federal action, but which cannot be legally effected unless they are specified as belonging to the Dominion. The Commission will have to consider an extension of grants-in-aid for other social services which have not reached the stage of national treatment, but which can best be carried on experimentally by the Provinces.

WAINES: What social services could be carried on experimentally by the Provinces?

HYMAN: Well, Professor, in so far as one Province increases its social services it must be at a disadvantage in cost in relation to industrial competition with other Provinces, and to that extent, experiments in social service would begin with a handicap. Nevertheless there is a wide field of local services which could not be affected by the situation in other Provinces. For example, the fact that a bricklayer or carpenter would work for less in Quebec cannot decisively affect the price of a building which has to be put up in Winnipeg. Up to a certain extent, therefore, Provinces can successfully experiment in raising the general standard of living of its citizens and stand as an example to be followed by other Provinces. Thus it was possible for *some* Province to take the initiative in each of the types of social legislation I have mentioned which now obtain. No doubt some residuary power of interpretation will,

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as now, remain with our Courts, but the possible evils arising from this would be lessened if our Constitution as amended be not conceived to be permanent, as were the laws of the Medes and Persians.

The Grain Act and the Bank Act are subjected to periodic revision. This principle might be applied to our Constitution, calling for a conference to be held every, say, ten years, between the Dominion and the Provinces to review the experiences of the past period, and by agreement arrive at necessary changes. This would be a safety valve, and would take care of stresses and strains in our political and economic set-up that would otherwise endanger the Constitution.

SMITH: It is quite easy, Mr. Hyman, to suggest periodical revisions, but the fundamental question in Confederation is: who is going to do the revising?

HYMAN: I would say that there is no difficulty as to the principle to be adopted. Revision can only be made by general consent of the Dominion and the Provinces. In the first instance no radical changes can be contemplated. Small changes followed by experience will create mutual confidence. This in turn will make substantial changes possible, particularly if coupled with your suggestion of the exercise of delegated powers.

To conclude, the B.N.A. Act must be so amended that within the confines of an effective democratic system, and even to strengthen that system, we be enabled to make provision for the needs of the people and give effect to its will.

## SOCIAL LEGISLATION, THE MARITIME VIEW

BY E. E. KELLEY

*Discussed by the Citadel Club, Halifax, November 14, 1937*

PRESIDENT WALKER: Hitherto our part in these discussions has been confined to matters mainly constitutional and economic. Tonight we have before us a more human topic—that of social legislation, and we are to try to discuss it from a Maritime point of view. Actually, our subject is Canadian legislation concerning social security.

I would suggest that the whole social problem was tremendously emphasized when the Industrial Revolution of the eighteenth century brought in power machines, gathered folk into new large towns, and created the possibilities of unemployment on a large scale. Perhaps we might say that these problems were first tackled scientifically by Bismarck in Germany. As far as concerns the people of our own Empire, perhaps the Liberal Government that came into power in England in 1906 was the first British Government to consider the matter seriously. Since those days everyone has come to consider social legislation a necessity. Don't you think, Mr. Kelley, that we can begin by taking that for granted—I mean that there is throughout our country an urgent desire for social legislation?

KELLEY: Yes indeed, and although we are expected to discuss social legislation from the Maritime point of view, that view is not different from that of the people of the rest of Canada. Where there is what might be called a Maritime point of view, it is dictated by local conditions.

WALKER: Perhaps we should make this point clear.

KELLEY: What I mean, then, is this: Our most recent social legislation is pensions for the blind. If you will consult the figures of the last Dominion census you will find the per-



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centage of blind citizens is higher in the Maritimes than in the other Provinces.

FARQUHAR: You surely do not mean to infer, Mr. Kelley, that there is anything in the Maritimes which causes more blindness than in other parts of Canada? Would you not say that there are more blind people here because the Maritimes have been drained by emigration with the result that the strong and robust have gone away, and the less strong remained, and that if all the young people had stayed, we would not have, because our population would be treble what it is, any higher percentage of blindness than any other part of Canada. I think this should be made clear.

KELLEY: What you suggest, Mr. Farquhar, is altogether possible. There is also the fact that many of our people are engaged in hazardous occupations, such as mining. At all events, we have here a local condition in which the Maritime burden is heavier per person than that borne by the people of the rest of the Dominion.

We have a similar situation in relation to the payment of Old Age Pensions—the Maritime percentage of people of seventy years and over being the highest in all Canada. And since the Provinces must bear their share of Old Age Pensions, these conditions impose upon the Maritime treasuries burdens comparatively heavier than those borne by the treasuries of the other Provinces.

These and similar facts provide reasons for a Maritime point of view on this subject. But, as I have said, the Maritime attitude towards social security does not differ from that of Canadian citizens as a whole.

Let us look briefly at what we now have in the way of social legislation. We will not attempt to exhaust the list, but to note the most familiar examples. One more generally accepted form of social legislation is workmen's compensation. This, let it be noted, has been made a Provincial matter, and in practically all the Provinces we have Workmen's Compensation Acts in operation. In some of the Provinces we have those very admirable acts providing allowances for mothers,

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widowed and otherwise left destitute, and their dependent children. This, again is Provincial legislation. We have in certain of the Provinces minimum wage laws applying to both sexes, but more widely to female workers in certain occupations. In addition to this, in a Provincial way, we have a certain amount of legislation aimed at the limitation of hours of work in industry.

Then, acting jointly with the Dominion, we have in the Provinces such social measures as I have mentioned—Old Age Pensions and Pensions for the Blind. But to study the official record is to be impressed with the fragmentary—one might almost say, chaotic—state of social legislation in this country. There is little, if any, uniformity, and a very real lack of adequate measures in many directions.

So much for what we now have. In the collective opinion of our people we stand sorely in need of legislation to provide such social services as unemployment insurance, accident and health insurance, invalidity pensions, maternity benefits, and other allied measures to promote the comfort, health and general well-being of our people.

MARVEN: Is there any country in the world in which all such social legislation is now in force?

KELLEY: I would not be prepared to say that any single country on earth has all these social measures in force, Mr. Marven, but certainly all of this social legislation is in force throughout the world, though perhaps not all in one single country.

We, in Canada, should endeavour to have uniformity, that satisfactory social services may be enjoyed by all who need them from coast to coast. How the necessary measure of uniformity is to be achieved is one of the most pressing questions of national importance, and it is the insistent demand of a great majority of the Canadian people that all obstacles be removed from the path of social reform at the earliest possible date.

RUTLEDGE: Do you go so far, Mr. Kelley, as to say that all social services should be under the Dominion Government, say under a separate department?

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KELLEY: Yes, in the majority of cases. But there are certain social services—workmen's compensation as an example—which, despite criticism respecting administration, appear to be working out quite satisfactorily under Provincial jurisdiction.

FARQUHAR: I suggest, Mr. Kelley, that social reform is a rather general term. Social conscience grows. It takes time for the community to realize its social responsibility. We know, for example, that it took a long time in England to convince the British people that slavery was wrong, but when the overwhelming weight of opinion came to that view, slavery was abolished throughout the British Dominions. Or we might take the protection of chimney sweeps in England as another example. For years the general public was little disturbed if a chimney sweep suffocated. And so with many another reform.

The record shows that each one took a longer or shorter period, but they took time. So I would suggest to you, that while we are moving more rapidly in these days, it still takes time to convince the majority of the people about many reforms. The sharp division of opinion on how to deal with liquor is a question in point.

Could you say, therefore, that 'all obstacles should be removed from the path of social reform'? Would it not be more correct to say that the obstacles should be removed from the path of any particular social reform upon which the great majority of opinion is united?

KELLEY: I am glad, Mr. Farquhar, has mentioned slavery. Personally I would abolish social insecurity as I would abolish slavery, because much of it is no better than slavery itself. But I had particular reference here to constitutional obstacles, which may easily be removed, if there is a sufficient demand for their removal, and the Dominion and the Provinces agree to remove these constitutional obstacles. However, I realize that legislative progress seldom keeps abreast of public desires and demands.

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CURTIS: And how are the Canadian people to secure much needed and satisfactory social services of this kind?

KELLEY: At the session of 1935, as you know, Professor Curtis, an attempt was made at Ottawa to institute at least a partial system of social security for this country as a national whole. At that session a number of acts were passed with this end in view. But before the machinery of administration could begin to operate in relation to these acts, the vitals of the whole programme were cut away by court decisions. The measures went before the Privy Council in London—with the result that they were wiped from the statute books of the Dominion. And the whole matter was thrown back again into the Provincial field. This, because, as the courts decided, the Dominion authority had invaded the jurisdiction of the Provinces.

We are particularly concerned, however, with those four social measures which grew out of the Labour Part of the Treaty of Versailles—acts respecting—

1. Unemployment Insurance.
2. Minimum Wages.
3. Limitation of hours of work in industry.
4. The weekly day of rest in industry.

FARQUHAR: Would it not be fair to say, Mr. Kelley, that there was a decided difference of opinion about the legality of the measures to which you refer? What I am suggesting is, that the legislation was enacted when all Canada knew there was doubt whether the Dominion had the necessary power, and it hardly seems right to suggest that the responsibility of wiping the legislation from the statute books was solely that of the Privy Council?

KELLEY: This, no doubt, is quite true, Mr. Farquhar. I must make it clear, however, that I am not presenting a legal argument. I was merely pointing out the obstacles which did and do lie in the path of social reform in this country. Even as a layman I appreciate that the Privy Council is the court of last resort, as I also appreciate that we are bound to abide by the decisions of the Privy Council, no matter what our personal opinions about those decisions may be. At all events, the result

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in this case is not only unfortunate, but tragic. We have reached a constitutional deadlock in relation to these matters in Canada—and that deadlock must be broken before an adequate and workable system of social security can be established, and its benefits fairly distributed from sea to sea.

Let us look for a moment at but one of the social measures passed by the Dominion Parliament in 1935, and declared unconstitutional by the courts. I quote its title:

*'An Act to establish an Employment and Social Insurance Commission, to Provide for a National Employment Service, for insurance against Unemployment, for Aid to Unemployed Persons, and for other forms of Social Insurance and Security, and for purposes related thereto.'*

In this statute were provisions for co-operation throughout Canada in matters of 'medical, dental and surgical care' and 'compensation for loss of earnings arising out of ill-health, accident or disease'. So you see, a measure is not necessarily undesirable, simply because it may be declared unconstitutional. In this particular case, in fact, Unemployment Insurance is desired by a great majority of the Canadian people—and by all political parties. The Prime Minister has just released the text of a letter, sent by him to the Provincial Governments, proposing an Amendment to the British North America Act to permit of the establishment of a national system of Unemployment Insurance, and asking Provincial concurrence.

One Dominion Government made the attempt and failed, because the courts decided the necessary authority did not reside within the Federal sphere. Now, another Dominion Government is proposing a constitutional amendment to place the authority there. And this leads to a point of exceptional importance that must be understood by our own people in this country. This fact should be made clear—for it lies at the bottom of most of our difficulties. Let us approach it by way of comparison. In Great Britain they have no such problem as the one to which reference has just been made, because complete authority in matters of this kind is centred in one single Parliament in Great Britain; all that is needed there to

produce social reforms is the desire—translated, of course, into the necessary legislation by that Parliament.

Here we have authority divided between the Dominion and several Provincial Legislatures. So, before we can begin even to think in terms of social legislation as an accomplished fact, we must look at the constitutional aspects of the matter; we must determine, if possible, just where the authority actually does rest. In some cases it resides at Ottawa. In others it rests with the Provinces. And it appears, in certain other cases, the authority may be shared by the Dominion and the Provinces.

There has been a suggestion that this constitutional deadlock in Canada might, to some extent at least, be relieved by the simple expedient of what is called 'delegation of authority'. If by this is meant the shuffling and swapping of powers between the Dominion and the Provinces without recourse to Westminster, then, I submit, it cannot be done within the four corners of the Constitution.

RUTLEDGE: What do you mean by delegation of authority, Mr. Kelley?

KELLEY: I will give you one example, Mr. Rutledge. Within recent years the Dominion Industrial Disputes Act of 1907 was declared unconstitutional by the courts. The machinery for dealing with industrial disputes had for years been centred at Ottawa. The Provinces apparently were quite willing to have this condition continue. Therefore, legislation was passed in the Provincial legislatures delegating to the Dominion, authority to act for the Provinces in this regard. That, I am advised, is legislation that would not stand a test in the courts.

Any attempt to swap Canadian constitutional powers as between the Dominion and the Provinces without recourse to the British Parliament, would be an attempt to amend the terms of the British North America Act within this Dominion—and that, of course, could not stand the test.

We have had some other examples of this sort of thing in Canada—but one does not need to be a constitutional lawyer



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to realize that the idea comes into direct collision with the Constitution itself. Obviously this whole question is one bristling with difficulties—not the least of which lie in the realm of revenue; and still others in the industrial sphere.

RUTLEDGE: It seems to me, Mr. Kelley, that all these things while very desirable in themselves, are bound to place heavier loads on our job-giving industries, most of which, as we know, are running neck and neck with depression. And then do you think that a half opened and largely agricultural country like Canada can afford them all at the present time? I am asking you this question now having in view the fact that our railroads are on the backs of the people to the extent of many millions of dollars deficit a year, our war and old age pensions commitments are enormously large, and the heavy cost of relief is still dragging on.

KELLEY: That, Mr. Rutledge, takes us back to the statement I made at the outset, that the first charge upon revenues should be the care of those who are unable to care for themselves. I have the feeling that we can afford necessary social services. With respect to industry, as Professor Curtis pointed out a few weeks ago, taking the single example of unemployment insurance, no *one* Province could institute such a scheme, because the effect would be to cripple its industries. The same argument applies with equal force in the case, say, of minimum wages, or the limitation of hours of labour. To be fair and satisfactory, legislation in these and similar matters must be Dominion-wide in scope and effect.

FARQUHAR: I think we all agree upon that, Mr. Kelley, but do you not think there is a simple way of doing it without going too far afield? Could we not follow the old method of amending the British North America Act as necessity demanded? That is to say, when all the Provinces were agreed upon a certain measure, that then on addresses of both Houses of Parliament the amendment could be made? Is this not the simple way out?

KELLEY: Not only the simple way, Mr. Farquhar, but, in

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my judgment the only way, provided there is a sufficiency of agreement on what is urgent and necessary. These, as I say, are the impressions of a layman, and this, I feel, is the way these questions strike the average person. For my own part, I would like to see a scheme of social security for all Canada administered by the central authority at Ottawa. And I should also like to see early and adequate constitutional amendments making possible the establishment of such a scheme.

PRESIDENT WALKER: Granted. But supposing we eventually find ourselves able to get uniform legislation applicable to the whole Dominion. There still remains the odd problem. I well remember when the Health Insurance Act of Lloyd George was being put through in England about 1911. In spite of promises of "ninepence for fourpence" a good deal of misunderstanding and distrust of the Government's intentions existed. Quite a body of workers suspected that the general registration necessary to bring the Act into force was only a preliminary to conscription.

## MARKETING PROBLEMS

BY DOROTHY STEEVES

*Discussed by the Constitutional Club, Vancouver,  
November 21, 1937*

STEEVES: We shall be dealing with a subject to-day which is somewhat different from those which have been previously discussed. The regulation and control of the marketing of natural products by governments is a comparatively new development in Canada. The view is held by some people that in the interpretation of the B.N.A. Act we should project ourselves into the minds and intentions of the Fathers of Confederation. To approach the problem in this manner would be entirely useless, because we know that the good Fathers never contemplated the possibility that a time would come when society would question the freedom of the individual in matters of production and trade, and when governments would exercise some measure of authority in this field.

To-day we are dealing with a new problem entirely, and here we have no guide as to the jurisdiction in marketing. The evils of unrestricted competition and the difficulty in finding outlets for increased production had been apparent in some of the European countries for many years before the war. These led to the establishment of producers' co-operatives, voluntary associations of primary producers which received encouragement and assistance, particularly in the field of education, from governments. The excellent results of these policies, especially in the Scandinavian countries and Holland, are well known.

In these older countries, where the development of industrial capitalism was a great deal further advanced than in Canada, the weak position of the individual farmer, faced on one hand with a fluctuating market demand and on the other with semi-monopolistic selling agencies, was becoming more and more

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apparent during the latter half of the 19th century. This led inevitably to the adoption of co-operative marketing measures as the only way whereby a reasonable return for the farmer's labour could be obtained.

In Canada, however, this condition did not arise, until much later. While European agriculture, unable to compete successfully with the more cheaply produced food-stuffs in the colonial regions, was on the down grade, Canadian farmers found a ready and fairly stable market.

In order to meet war demands, we had over-expanded our agricultural productions. At the end of the war we were faced with shrinking markets in a world of new economic nationalisms. We began to feel the effects of technical improvements which increased the output and depressed prices; changing food habits lessened the demand for some agricultural products such as wheat.

It cannot be said that the world slump is altogether responsible for the plight of the farmers, but it certainly accentuated the situation by depressing prices, curtailing credit, lessening purchasing power and raising tariff barriers. While it is true that prices have, in general, risen steadily during the past eighteen months, I think it is safe to say that as long as we are living in a world of competitive nationalisms, with large numbers of unemployed and under-privileged people, the farmer cannot hope for a stable market and adequate prices for his goods, except through stabilizing policies carried out by national governments.

LADNER: Mrs. Steeves, in general, I agree with what you have said. The manufacturers of many classes of products have price understandings stabilized by the tariff so far as they are concerned. Employers in many businesses are organized. Employees enjoy the protection of powerful labour unions. Retail merchants of Canada present a united front. But the strong individualism of the farmers has kept them apart and made their products a prey of distributing agencies. But let me emphasize that all existing unions, selling monopolies and such

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associations are voluntary. Is it in the best interests of the nation that a government should impose organization on the farmers and force the marketing of his product through a government agency?

If it is, then why not extend the same principle to all industry and all economic activity? As Mrs. Steeves might possibly intimate—let's have a co-operative state and state control over everything. I am not prepared to go that far. I still believe in the maximum of individual liberty and initiative.

STEEVES: Many people are of the opinion that farmers would not need government intervention in their affairs if they learned to help themselves through co-operative producers' associations. In theory, this may be true, but actually there is an emergent situation to be dealt with which calls for quick solution, such as only legislative action by governments can provide. The art of co-operation must be learned, and that process is slow. In Northern Europe, co-operative activity is deeply rooted in the life and thought of the people. While co-operatives have made some headway in Canada, their effectiveness has been hampered by non-co-operating minorities.

The need of the Canadian farmer has not been established long enough for an understanding of voluntary co-operation to be built up; moreover, the Canadian pioneer psychology, so different from that of the European farmer, has militated against co-operation.

McGREGOR: At the same time, the Canadian farmer in no enemy of co-operation. You will find no class of people who will co-operate more fully with one another or help one another more freely, when need arises, than the Canadian farmers. The whole history of the frontier is the history of teamwork prevailing against difficulties. It is a question with me whether you can not do more to strengthen the bargaining powers of the farmer by persuasion and education than by passing laws.

The fruit business in the Okanogan is a case in point. Some years ago, when attempts were made to compel them to co-operate, the orchardists were pulling in different directions.

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Lately, they have been getting along much more smoothly, because they have been more or less persuaded by a campaign that co-operation is all to their advantage.

STEEVES: Education for co-operation must go hand in hand with government control. However, even in those countries where co-operation has been strong, it has been found necessary to protect the farmers further by government control of marketing and price-fixing policies. It is not surprising, therefore, that Canada, a country specializing in certain primary products and depending on a stable export market to support her internal economy, is now attempting to rectify the insecurity of the present situation by government measures, designed to strengthen the bargaining power of the farmer, and to stabilize prices for his product.

The difficulty we have had to face in enacting legislation of this kind lies in the fact that the subject of marketing is new and has to be fitted into the older jurisdictions established by the B.N.A. Act, just as a constitutional home had to be found recently for radio and aviation.

The Dominion was given general jurisdiction over trade and commerce, while the Provinces were allocated property and civil rights, including jurisdiction in matters of local trade. Where does government control of marketing come in? Marketing covers foreign trade, inter-provincial and intra-provincial transactions. Experience in the framing of Marketing Acts has made it abundantly clear that these fields overlap and that it is extremely difficult to separate them effectively.

The first experiments in marketing legislation were made in the Provincial field. British Columbia pioneered in this matter by passing the Produce Marketing Act in 1926, providing for the regulation of the marketing of fruit and vegetables. This Act was subsequently declared *ultra vires* by the Supreme Court on the grounds that the pith and substance of the legislation relates to the regulation of trade and commerce, which is a Dominion matter, and that the regulation of Provincial trade referred to in the Act is merely incidental to the broad and general regulation of trade and commerce.



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This decision upsetting the British Columbia Produce Marketing Act was followed by other similar judgments, which seemed to establish effectively that it did not lie within Provincial authority to legislate for the marketing of products which were, in part, to be shipped to other Provinces. Under these circumstances, it seemed reasonable to suppose that a Dominion scheme for this purpose might successfully withstand attack. Where marketing could not find a secure Provincial constitutional home, possibly the Dominion jurisdiction might be more hospitable. Moreover, it had become increasingly clear that marketing was essentially a national problem, requiring uniform legislation. Even if a Province can legally control marketing, that control can never be extended over the marketing of its products in another Province. What is needed is a Dominion scheme which, through a Dominion marketing board and local boards established under its authority, can protect all products which are marketed in any area and which can effectively co-ordinate all marketing throughout the length and breadth of Canada. Such a Dominion marketing scheme might even protect the products of one Province as against inroads of the products of another.

MCGREGOR: Do you mean to set up an internal tariff wall, Mrs. Steeves?

STEEVES: Not tariff walls, Mr. McGregor. Surely means can be found to protect those parts of Canada where there are marketing schemes so that they shall not be injured by the inroads of products from those parts of Canada where they have not such legislation.

LADNER: Your proposal, then, is for a joint scheme of marketing legislation?

STEEVES: Yes, Mr. Ladner.

LADNER: Isn't that what we have now?

STEEVES: We have tried to get it, but our Constitution will not allow us to arrive at it. Hence the need for amending the Constitution.

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SOWARD: In my opinion we must have a stronger central form of government than is consistent with our present position. May I add that a striking feature is that marketing problems are not essentially party problems. The marketing legislation passed in Victoria was the work of a Liberal Government. The marketing legislation passed at Ottawa was the work of a Conservative Government. Both parties were cheered on by the C. C. F. In other words we all realize that we live on the backs of the farmers and we must help them out.

STEEVES: It was with these considerations in mind and a realization that the Canadian farmer would need more and better government protection as time went on, that the Dominion Natural Products Act was framed and put on the Statute Books in 1934. The proponents of this Act felt reasonably satisfied at the time that it could not be assailed from the standpoint of constitutionality. It was pointed out that the pith and substance of the legislation lay in the provisions that any scheme to be approved under the Act had to relate to the marketing of natural products, the principal market of which should be outside the Province of production, or to the marketing of products of which a part was to be exported out of the country. It was felt that under those circumstances marketing would fall under the broad heading of trade and commerce, which is a Dominion concern. Any local marketing act would be merely incidental to the general scheme and would therefore not necessarily be a matter pertaining to property and civil rights.

Moreover, some encouragement for the future constitutionality of Dominion marketing legislation was given by the recent decision in the radio case, which held that the Dominion could deal with matters affecting radio under the residuary power to legislate for the peace, order and good government of Canada. The aviation and radio cases, both dealing with new matters of governmental concern, while dissimilar in character from the question of marketing, nevertheless were based on the same underlying principle as the Marketing Act, namely, that the

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object of the B.N.A. Act was to give to the central government power to secure uniformity of legislation on those questions which were of common concern to all Provinces.

SOWARD: I suppose you would say, Mrs. Steeves, that this decision in the radio case was looked upon at the time as establishing what the Americans call the doctrine of implied powers. Let me make that clear by a quotation from Chief Justice John Marshall:

'We think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.'

STEEVES: I wish that the Privy Council shared John Marshall's views, Professor Soward. Time does not permit us to discuss the provisions of the Dominion Marketing Act, which is modelled largely on the British scheme of control. Briefly, it provided for the formation of local Boards under control of the Dominion Marketing Board, to regulate the marketing of natural products in intra-provincial, inter-provincial or export trade; it provided further for the regulation of marketing in inter-provincial or export trade by the Dominion Board itself or its agencies; it gave a wider power to the Government to regulate and restrict the importation and exportation of natural products. A large number of local schemes were immediately approved by the Dominion Marketing Board and operated under it. Among the Provincial Governments complete unanimity existed with regard to this legislation and every one of them adopted similar legislation supplementing any want of jurisdiction in the Dominion Act. This unanimity proved that the Marketing Act was needed and welcomed throughout the country.

The sad end of the tale is well known to all of us. I believe

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that January 28 of 1937 was rather a tragic day in the annals of Canadian political history, because on that day the action of the Privy Council, at one blow, destroyed nearly all the Dominion's social reform legislation and made it abundantly clear that the B.N.A. Act would have to be changed. Much water will have to flow under the bridge before we can effectively progress to many necessary social and economic changes. However, the Privy Council decisions, to my mind, had one good effect. They opened up people's minds. Superstitions die hard, but I believe the superstition of the divine right of the Privy Council appeal was dealt a death blow on that day.

MCGREGOR: But the result would not have been different had it been left to the Supreme Court of Canada. The Canadian judges were all against the Marketing Act.

MURPHY: I agree with you, Mr. McGregor. Personally, I am rather in favour of retaining the right to appeal to the Privy Council, although I must admit my faith was somewhat shaken when I compared the decisions in the aeronautic and radio cases with the decision in the Natural Products Marketing case. But don't you think we owe a debt of gratitude to the Privy Council, Mrs. Steeves, because these decisions have brought out the great weaknesses of the B.N.A. Act, and in such a way that we have finally reached the point where we realize the Act must be drastically amended and that very soon?

LADNER: The Privy Council merely gave a legal interpretation, not a hair-splitting interpretation, to the provisions of the B.N.A. Act. The members of the Privy Council were in no way animated by any other idea than giving a definite decision on the point to be clarified in the interests of the Canadian people.

SOWARD: I cannot entirely agree. The Privy Council has given several decisions which cannot be logically reconciled with one another. They make confusion worse confounded.

STEEVES: The point is that the Privy Council is beyond our control. We can reform the Supreme Court, but not the Privy Council.

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MURPHY: Ah! Mrs. Steeves, there we have the nigger in the woodpile. I would hate to see Canada placed in the position where judges of her highest court were held in contempt and their integrity questioned, as has been the case with the judges of the Supreme Court of the United States in recent years. We not only do not want that, but we want no political control of our courts. Our remedy lies in formulating the proper legislation, the interpretation of which by the courts, based on the proper rules as now in force, will give the result we desire—and by amending the B.N.A. Act we can easily place ourselves in the position where we can formulate such legislation.

MCGREGOR: But the legislation is not enough, Mr. Murphy; we need both progressive and consistent interpretation.

MURPHY: Yes, but not through political direction or control of the courts. By selecting the best men for the bench we can secure consistent decisions.

STEEVES: The fact remains that the Natural Products Marketing Act was declared *ultra vires* on the grounds that it dealt in part with local trade within the boundaries of the Provinces, in spite of the fact that this trade is merely incidental to the broad scheme of inter-provincial and foreign trade. And so, because there was a weakness in one subsidiary part of the scheme, the whole structure fell. Apparently it meant nothing to the Privy Council that the Dominion and the Provinces were co-operating in this matter.

LADNER: But, Mrs. Steeves, the Privy Council was concerned with that co-operation being carried out in a constitutional manner as all of us are.

STEEVES: It seems a pity that the reference to the courts was made on a hypothetical case and not a concrete one. Had the bare bones of the statute been clothed with the flesh and blood of an actual scheme, the judgment might have been more broad-minded.

Another interesting point about the Privy Council decision is that it almost destroyed the value of the residuary power

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to legislate for peace, order and good government given to the Dominion—this is generally considered to be an emergency clause—and if a world-wide economic crisis, widespread unemployment, exploitation of working people such as was revealed by the Stevens' inquiry, and the depressed condition of agriculture, does not justify the use of it, then we might as well forget about it altogether.

MURPHY: No, Mrs. Steeves, we should amend our constitution and lose no time in doing so.

STEEVES: The Privy Council decision, though, is not the end of the marketing impasse. There are now Provincial Marketing Acts functioning to a limited degree. The British Columbia Natural Products Marketing Act has already been attacked and has been upheld by the Court of Appeal. The matter has now been referred to the Privy Council and the outcome is quite unpredictable. If the Provincial Marketing Act of B. C. is declared *ultra vires* on the ground that it infringes on the Dominion jurisdiction over trade and commerce, then we shall find ourselves in the impossible situation that marketing will be, as it were, in a constitutional no man's land, to be regulated neither by the Dominion nor the Province.

SOWARD: We should bear in mind that this is one of the weaknesses of a federal form of government with a written constitution. Twenty-five years ago ex-President Theodore Roosevelt complained of the twilight zone between the State and Federal Governments which blocked progressive legislation in the U. S. A. To-day another President Roosevelt is facing the same problem.

STEEVES: This is a very interesting parallel, Professor Soward. I am afraid marketing legislation may be relegated to outer darkness if we do not do something about it.

It is quite obvious, therefore, that any contemplated amendments to the B. N. A. Act should aim at clarifying this matter. In my opinion, it would be impossible, under present conditions, to frame legislation which would be water-tight. Perhaps the solution may lie in giving the Dominion and the Provinces



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power to legislate concurrently in this matter, providing always that Dominion law shall have precedence over Provincial law, or, as is stated with regard to the subject of agriculture in Section 95 of the B. N. A. Act, that a Provincial law shall have effect only as long and as far as it is not repugnant to any act of the Parliament of the Dominion.

LADNER: Mrs. Steeves, you are inconsistent. The net result of your contention would be to place in the hands of the Dominion Government complete jurisdiction over the subject matter of marketing, although your idea is to have concurrent legislation. And then again, have you considered the question of Provincial rights which always arise in matters of this kind?

STEEVES: The Dominion would not have complete jurisdiction as I see it in that case, Mr. Ladner, but their statute, of course, would have precedence, which means that they would have a certain measure of control over the Provincial statute.

LADNER: In my opinion that would be no solution. That would be confusion worse compounded, as a young boy once expressed it.

STEEVES: Mr. Ladner, I think some arrangement could be arrived at whereby the Dominion Government, not only in marketing, but in other matters, would make the rule and set the standard and leave it to the Provinces to carry out the local scheme, which a Dominion Board could not do.

SOWARD: I doubt if the expedient of employing concurrent legislation is helpful. When South Africa adopted its Constitution Premier Botha wrote to Sir Wilfrid Laurier for suggestions, and his reply was to avoid the pitfalls of concurrent legislation. I have been driven to the conclusion that we would have to subordinate the Provinces more to the Dominion.

STEEVES: I think that we should have central legislation in order to secure uniformity in the Dominion in certain matters. If the people of the Provinces were to see that this was to their advantage in order that progressive social legislation could be effectively carried out, why should they not agree?

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At the same time it is important that the Provinces should not be entirely hamstrung if one Province should wish to go further than the others along the path of social reform. The matter is urgent. I am thinking of the marketing of our most important natural product, wheat, which has been the subject of so many different kinds of policies, none of which has been really satisfactory. The Government will have to be given wider power in order to enable it to control the whole marketing process and to guarantee a fixed price; to those who complain that the farmers should not be benefited thus at the expense of the taxpayers, the answer is that as long as our tariff policies favour industry, the farmer needs some compensation.

In conclusion, I believe that one of the greatest weaknesses in marketing legislation is that it is not popular or generally supported by the people. It is frequently attacked in the courts for that reason. Canadian farmers have not yet succeeded in selling the marketing idea to the public.

McGREGOR: Nor to themselves—

STEEVES: Because the consumer feels that he is an unconsidered factor. The answer to this is more effective educational policies and the opportunity for the consumer to be represented on Marketing Boards, at least in an advisory capacity. If we can conceive of marketing control, not as an advantage to be gained by one class of workers, but as a necessary part of our political economy, to be administered for the benefit of all, the reasons for friction will disappear and controlled marketing will become a necessary part of a planned economy.

## TREATY-MAKING POWERS

BY SIDNEY E. SMITH

*Discussed by the Kelsey Club, Winnipeg, November 28, 1937*

MACKAY: If you will please come to order, President Smith will lead us in a discussion of Canada's treaty-making powers.

SMITH: It is to my mind very fitting that the Kelsey Club should give some thought to the treaty-making power of Canada. Capacity and power to enter into and perform international undertakings constitute one of the essential attributes of nationhood.

MACKAY: Surely, President Smith, Canada has that power and that capacity, particularly since the Balfour Declaration of 1926 and the Statute of Westminster of 1931.

SMITH: It has long been recognized that Canada could effectively enter into and perform commercial or trade treaties. The attainment of that power and capacity was not instantaneous; it was the result of gradual evolution which on occasion, to say the least, was not encouraged by sections of the British public. However interesting that story might be, we have no time to tell it to-night. Suffice it for me to state that there is no doubt about the plenary jurisdiction of the Dominion Government and the Dominion Parliament to negotiate, enter into, and perform commercial or trade treaties. Great Britain does not, and would not, seek to interfere directly in the exercise of this jurisdiction. The Provinces under the B.N.A. Act cannot interfere. The only control over the making of this type of treaty is political in character. The electorate made that control very manifest in 1911.

Canada's power to make treaties, other than commercial or trade agreements, has been developed and expanded since the Great War. So, in answer to your question, Canada now is a

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self-governing Dominion, or, to quote the Balfour Declaration in the Report of the Imperial Conference of 1926, Canada is one 'of the autonomous communities within the British Empire equal in status in no way subordinate one to another in any aspect of their domestic or external affairs though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations'. Canada has the power to make treaties and Canada may exercise it without the direct intervention of His Majesty's Government at Westminster.

WAINES: Is there no restraint upon the exercise of that power?

SMITH: Yes, politically there certainly is. Solidarity of interests within the Empire would dictate these restraints. For example, if His Majesty's Government at Ottawa advised him to enter into an offensive alliance against Great Britain or any other part of the British Empire, the result would be the secession of Canada from the Empire. Of course, the treaty-making power of a Dominion could not operate directly to impose any obligation of an active character on any other part of the Empire. Moreover, the United Kingdom and the Dominions pledged themselves at the Imperial Conferences of 1923 and 1926 to afford the Government of every other part of the Empire the possibility of knowing in advance what negotiations of treaties are proposed to be carried on, and of determining its attitude towards those negotiations.

DARRACOTT: In whose name are treaties for Canada made?

SMITH: Strictly speaking, treaties are made in the name of His Majesty acting in behalf of Canada. There are various kinds of international agreements, such as treaties, conventions and exchange of notes, but I will not describe them in detail, and in this discussion I will speak of the most important type—treaties. The less formal types of international agreements are really made under the Prerogative of the Crown.

DARRACOTT: Does His Majesty receive advice in this regard directly from his Government at Ottawa?

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SMITH: Yes, that constitutional practice is now well established. Canadian plenipotentiaries in possession of full powers conferred by His Majesty upon the recommendation of the Canadian Government may negotiate and sign a treaty with a foreign state. The treaty does not become effective until it is ratified by His Majesty. The act of ratification requires the affixing of the Great Seal of the Realm and the approval of His Majesty pursuant not only to the advice of his Canadian Government but also of one or more of his Ministers in the United Kingdom. To this extent the Government of Great Britain is involved, but it may be claimed, with some validity, that the affixing of the Great Seal is merely a clerical act. In fact, the Irish Free State and the Union of South Africa have provided by statutes their own seals for all such purposes. For them this formal intervention of the Imperial Government may be dispensed with.

WAINES: Does the B.N.A. Act give to the Canadian Government or Canadian Parliament the power to enter into treaties?

SMITH: No. In Canada and in Great Britain, as I have indicated, the treaty-making power is a Royal Prerogative, that is, the power is vested in His Majesty. Of course, as a constitutional monarch, he acts upon the recommendations of his advisers acting within their spheres as determined by constitutional practice.

WAINES: Does the B.N.A. Act expressly mention treaties?

SMITH: Yes. Section 132 reads: 'The Parliament and Government of Canada shall have all powers 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 foreign countries.' You will observe that this section of the B.N.A. Act relates only to the performance of obligations arising under treaties and not to the formation of treaties.

WAINES: What *is* the distinction between formation and performance?

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SMITH: The ratification of a treaty forms the treaty, assuming that it is accepted by the other nation which is party to the negotiations. Some treaties may require that Canada should change its own domestic law. In such an event, the treaty is not performed until the appropriate legislation is enacted. For example, a treaty entered into by His Majesty in behalf of Canada providing for a change of labour laws would not be performed until it has been implemented by Canadian legislation.

MACFARLANE: Oh, I see. The Dominion Parliament in your example could legislate in relation to labour conditions pursuant to a treaty in this regard. But I thought that labour legislation would fall under the heading, 'Property and Civil Rights', which is assigned by the B.N.A. Act to the Provincial Legislatures.

SMITH: If the treaty is an agreement between the Empire and a foreign country, the Dominion Parliament may enact such legislation.

MACFARLANE: Just what do you mean by an 'Empire' treaty?

SMITH: In 1867 any treaty affecting Canada directly was bound to be an Empire treaty—that is, a treaty recommended to the King by his Imperial Cabinet and signed by his representatives from Great Britain. The International Waterways Treaty of 1911 was an Empire treaty. So was the Japanese treaty of the same year which provided that citizens of Japan would have the right equally with British subjects to engage in business within British territory. The Dominion Parliament passed legislation in performance of this treaty. It was held by the Privy Council that an Act of the Legislature of British Columbia to the effect that citizens of Japan should not be employed on certain works in that Province was invalid because the B.C. Act was inconsistent with the Dominion legislation. As a student of constitutional law, I would point out that the term 'British Empire' is not really a technical designation of His Majesty's territory. It was used for the first time in the



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Peace Treaties of 1918. You will recall that Canadian Ministers signed the Peace Treaties in behalf of Canada. For a few years after 1919 the term 'British Empire' appeared in treaties. In 1923, however, a new treaty form was used in the Halibut Fishery Treaty made between Canada and the United States. His Majesty was the contracting party, but it is the Dominion of Canada which is mentioned in the body of the document and Mr. Lapointe signed as the sole plenipotentiary representing His Majesty.

MACFARLANE: And who gave Mr. Lapointe the authority to sign this treaty?

SMITH: He had full powers from His Majesty the King on the recommendation of the Canadian Government.

MACKAY: Was the Halibut Fishery Treaty an Empire treaty?

SMITH: No, according to decisions of the Privy Council it would not be considered as an Empire treaty and so it would not fall within section 132 of the B.N.A. Act. It could, however, be designated as a Canadian treaty. Will you bear with me, Mr. Chairman, while I tell you of two decisions in 1932 of the Privy Council? To get a clear idea of the treaty-making power of Canada, we should consider these two decisions, the aeronautics and radio cases. In the aeronautics case the Privy Council held that a treaty entered into and ratified by His Majesty acting upon the advice and through his constitutional advisers, and mark this, in Westminster, was an Empire treaty. In the radio case, it was held that a treaty relating to radio communication entered into and ratified pursuant to the action of the Canadian Cabinet was not an Empire treaty. Like the Halibut Fishery Treaty it may be designated as a Canadian treaty.

WAINES: This is getting rather technical. Could the Canadian Parliament, pursuant to the radio treaty, legislate in relation to radio communication?

SMITH: Yes, although the treaty did not fall within section 132 the Privy Council held that the Dominion Parliament

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could trench upon the legislative jurisdiction of the Provinces as prescribed by section 92 of the B.N.A. Act. The performance of treaties as such is not assigned to the Provinces, so the Privy Council certainly appeared to decide that the Canadian Parliament could legislate pursuant to the tenor of the Radio Treaty under the power to enact legislation relating to the 'peace, order and good government of Canada', conferred by section 91 of the B.N.A. Act. You will recall, in addition to legislative jurisdiction relating to trade and commerce, defence, currency and coinage, banking and other subjects of national interest and importance.

HYMAN: So it would appear, Mr. Smith, that after the aeronautics and radio cases the Dominion Parliament could perform or implement any treaty whether entered into by His Majesty pursuant to the advice of his cabinet of the United Kingdom or of his cabinet in Canada, whether it was an Empire treaty or a Canadian treaty.

SMITH: Yes, it did so appear.

HYMAN: At that stage, then, the Dominion Government by advising His Majesty to enter into a treaty with a foreign country could have used the treaty as a pretext for legislating about some subject matter which had been assigned exclusively to the Provincial Legislatures by section 92 of the B.N.A. Act?

SMITH: No, the Courts would be entitled to ask: What was the object of the treaty? If the object was found not to be *bona fide* but rather primarily to encroach upon the legislative jurisdiction of the Provinces, the Dominion legislation in performance of the treaty would be held invalid. Moreover, there is always the political sanction. If any Dominion Government engaged in such hocus-pocus it might meet its defeat at the polls. In the United States and Australia the Federal Government may encroach upon the legislative jurisdiction of the component states in order to perform or implement treaties. And there the treaty-making power vested in the Federal Governments of those countries has not been abused in this respect.

DARRACOTT: Is that the situation to-day in Canada?

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SMITH: Well, it appeared to be. But unfortunately since a case decided by the Privy Council in January of this year, the Dominion cannot perform or implement a Canadian treaty if the subject matter falls within the legislative jurisdiction of the Provinces as prescribed by section 92 of the B.N.A. Act.

MACKAY: I thought the Radio case settled that?

SMITH: So did I until the decision of the Privy Council of January this year, which I mentioned a moment ago. Let me tell you about this decision. The Dominion Government invoking a Royal Prerogative entered into undertakings with other countries to provide for Canadian Industrial employees a weekly day of rest, to establish for them minimum wage scales and to limit their hours of work. You will recall that the Bennett Government in 1935 moved the Canadian Parliament to enact legislation in performance of those international agreements. Upon a reference to the courts the Privy Council held that the legislation was invalid because working conditions and pay for labourers came within the heading of Property and Civil Rights which is assigned by section 92 to the Provinces.

HYMAN: But I thought you said that by the radio case decision the treaty-making power of the Dominion would operate to enable the Dominion Parliament to encroach upon Provincial Legislative power pursuant to the tenor of the particular treaty.

SMITH: Yes, I did.

MACKAY: I can understand from your earlier remarks why this treaty was not an Empire treaty, but I ask again: How could the Privy Council reconcile the decision in this last case with its decisions in the Radio case, for instance?

SMITH: I cannot answer that question.

MCWILLIAMS: What answer to Dr. Mackay's question did the Privy Council itself give?

SMITH: To me an answer that is entirely unsatisfactory.

MCWILLIAMS: I have the report of the Privy Council decision right here, and I think it is quite clear. In distinguishing the radio case their Lordships say—'When that case is ex-

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amined 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 Section 92.' And then on the next page they say—'The distribution of powers between the Dominion and the Provinces as set out in Sections 91 and 92 is one of the most essential conditions, probably the most essential condition, in the inter-provincial compact to which the B.N.A. Act gives effect. . . It would be remarkable that while the Dominion could not initiate legislation however desirable which affected civil rights in the Provinces, yet its Government, not responsible to the Provinces nor controlled by Provincial Parliaments, need only agree with a foreign country to enact such legislation and its Parliament would be forthwith clothed with authority to affect provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguard of provincial constitutional authority.' Now isn't that sound reasoning?

SMITH: Well, they found a way out of the difficulty in the radio case.

MCWILLIAMS: Quite true, but let us see on what grounds. Here is what they said in that case: 'The idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was quite unthought of in 1867. . . It is not therefore to be expected that such a matter should be dealt with in explicit words in either Section 91 or Section 92. The only class of treaty which would bind Canada was thought of as a treaty by Great Britain and that was provided for by Section 132. Being therefore not mentioned explicitly in either Section 91 or Section 92 such legislation falls within the general words at the opening of Section 91 which assign to the Government of the Dominion the power to make laws 'for the Peace, Order and good Government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.' The difference between the labour legislation case and the radio

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case is that the former dealt with matters like hours and wages which have long ago been settled as coming under Section 92 and therefore provincial matters while radio does not come under any part of 92.

SMITH: I realize that you have quoted correctly what the Privy Council said in the last case but in my view and in the view of many Canadian constitutional lawyers the Privy Council shifted its grounds a little too nimbly to be convincing. Certainly one is driven to this view after he has read the decision of the Chief Justice of Canada in this case when it was before the Supreme Court.

McWILLIAMS: Quite true but they agreed exactly with the second member of the Supreme Court.

SMITH: I would point out that the Privy Council in the Labour Legislation case has taken what appeared to be incidental remarks in the Radio case and now makes them the very basis of that earlier decision. As a Canadian concerned about the welfare of his country I regard this decision as stultifying any efforts which the Dominion Government and Dominion Parliament may undertake to further progress in social and economic spheres.

McWILLIAMS: Now you're letting the cat out of the bag. The real fact is that you and many other people feel that there are certain serious social wrongs in Canada and that they can only be righted by legislation applicable to the whole Dominion.

SMITH: Exactly. Don't you?

McWILLIAMS: I do heartily agree with you that far. But what you are doing is finding fault with the courts, our own Supreme Court as well as the Privy Council, because they will not misinterpret the Constitution in order to serve a good purpose. I object emphatically to judges trying to interpret the law in accordance with what they think it ought to be instead of what it is. I value the right of self-government too highly to be willing to surrender it to any body of judges either in Canada or in London.

HYMAN: Would you then sit down with your hands folded and submit to the continuance of these social wrongs?

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MCWILLIAMS: Not at all. I would ask the Canadian people to decide for themselves whether and to what extent they think the power to deal with such matters should be taken out of the hands of the Provinces and vested in the Dominion.

SMITH: As already pointed out by the Citadel Club of Halifax, legislation relating to unemployment insurance, minimum wages, weekly day of rest and limitation of hours of work in industry must be Dominion-wide in scope in order to be effective.

WAINES: So in this field the Dominion now is powerless?

SMITH: Yes. Now to turn to another aspect of the problem. The Fathers of Confederation could not have thought of Canada's present international status and the need for social legislation of which you, Mr. Hyman, spoke three weeks ago. While admitting Mr. McWilliams' assertion that the Privy Council cannot rewrite the B.N.A. Act, I assert that in interpreting it they could have treated it as a 'growing and living tree', to use the words of Lord Sankey in 1930 about the Act, and they would thereby have adapted it to conditions of 1937 not known or envisaged seventy years ago. The letter and not the spirit of 1867 is responsible for the strait-jacket in which our Confederation finds itself. The Constitution should be considered as a document through and by which Canadians may develop their country amidst conditions peculiar to 1937. A constitution should be a road and not a gate.

HYMAN: You then are in favour of abolition of appeals to the Privy Council?

SMITH: Yes, I am. I cannot see how any body of men, however mentally endowed and learned in the law they may be, can be otherwise than ignorant of the conditions, problems and aspirations of Canada in its several parts and of Canada as a whole. How can they vitalize the B.N.A. Act for the handling of new situations and the solution of new problems? How can they with the best will in the world translate into action the attitude of the High Court of Australia (which for all intents and purposes is the final court of appeal for that Commonwealth)? Mr. Justice Isaacs of that Court said, many years



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ago: 'It is the duty of the Judiciary to recognize the development of principles to the new positions which the Nation in its progress from time to time assumes. The judicial organ would otherwise separate itself from the progressive life of the community and act as a clog upon the legislative and executive departments rather than as an interpreter.' That is what I am asking for Canada.

MACFARLANE: If a treaty is entered into by His Majesty upon the advice of his Canadian Cabinet, is Canada *immediately* bound thereby in international law?

SMITH: Yes, I submit that Canada is bound immediately after ratification. In international law it appears that a foreign state is not bound to take cognizance of the internal checks and balances upon the performance of treaties by amending domestic law.

HYMAN: If a treaty is not an Empire treaty or one dealing with subjects assigned by the B.N.A. Act to the Dominion Parliament, then an absurd and dangerous situation may arise.

SMITH: Yes, it is highly unlikely that the Dominion Government could persuade nine Provincial Legislatures to pass Acts pursuant to international undertakings. There is a further difficulty. In negotiating treaties, the Dominion Government will be obliged frequently to bargain and compromise with the representatives of the other country. Now the Dominion Government must seek to attain the best terms possible while they have one eye on the foreign plenipotentiaries and one eye on the Provinces at home.

MACFARLANE: Could not the Canadian Government move the Government of the United Kingdom to advise His Majesty to enter into a treaty with a foreign country relating to Canada?

SMITH: Yes, then the treaty would be an Empire treaty and fall within Section 132. The Dominion Parliament would have power to perform that treaty by enacting legislation whatever the subject matter of the treaty might be. But you of all people will agree with me when I say that that pro-

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cedure would indeed be incompatible with Canada's autonomous position within the Empire.

WAINES: Mr. Smith, you have been speaking of the King acting upon the advice of his advisers in Great Britain or of his advisers in Ottawa. This brings up a question with respect to Canada's position in the event of a declaration of war by His Majesty acting in behalf of the United Kingdom against a foreign country. What do you think Canada's status would be in such an event?

SMITH: It is my view, to use the language of constitutional lawyers, that the Crown is one and indivisible; that is, when His Majesty is at war with a foreign country all his countries *within the Empire* and all the peoples of his countries are at war.

MACFARLANE: But Mr. Smith, is there still an Empire in that sense or is it a Commonwealth of Nations? Of course the Crown is indivisible, as you say, but can one individual not wear more than one Crown? Is there not a case for arguing for a personal union, that is, George VI as King of Canada? Does the Royal Titles Act not lend some support to this contention?

SMITH: I do not think that the Royal Titles Act of 1927 lends support to your contention. The Royal Title now reads in part: 'George VI by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the seas, King.' In other words—His Majesty is King of Great Britain, Ireland and the British Dominions. The Statute of Westminster of 1931 speaks of allegiance to 'the Crown'—not to several crowns. We have not yet asked His Majesty to wear seven crowns. If we did we would be discussing whether the crowns are co-equal and consubstantial. That debate would be indeed Athanasian in character.

I do not believe that Canada could in international law declare her neutrality in the event of a declaration of war by the King acting in behalf of Great Britain. I would remind you that the status of Canada in the event of war between Great

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Britain and a foreign state or between Australia and a foreign state will not be decided by a mere resort to international law. International law will count for little in future wars. The law of the jungle will prevail.

HYMAN: To come back to the treaty-making power of Canada—I know that you have endeavoured to define that power, but it seems to me that it is a mixed matter.

SMITH: Indeed it is. Canada as a nation has the power to enter into any treaty. But the power to perform treaties by way of changing Canada's domestic law is to be found, according to the decisions of the Privy Council sometimes in the Dominion Parliament alone, sometimes in the Dominion Parliament and the Provincial Legislatures and sometimes in the Provincial Legislatures alone. The Fathers of Confederation in 1867 intended to vest in the Canadian Parliament power to perform all treaties, for section 132 covered all treaties affecting Canada that were then known, that is, Empire treaties. A new form of treaty was evolved in 1923. While the Privy Council refused to recognize this type as an Empire treaty, it decided in the radio case that the power to implement it by legislation was conferred on the Dominion Parliament by the 'peace, order and good government' clause of section 91. Even this was an unnecessary bifurcation of the Dominion Parliament's power to perform treaties. Since the Labour Legislation case the Dominion Parliament, however, cannot perform a Canadian treaty if the legislation implementing it relates to matters falling within section 92. This splitting up of the treaty performing power may be a delight to the technical lawyer, but undoubtedly it serves to shackle the Canadian nation in its foreign relations. There should be vested in the Canadian Parliament power to perform any treaty. Canada in forming and performing treaties should be able to act as an undivided unit. To accomplish now this object, it will be necessary to amend the B.N.A. Act.

## APPEALS TO THE PRIVY COUNCIL

BY C. J. BURCHELL

*Discussed by the Citadel Club, Halifax, December 5, 1937*

WALKER: The subject for our discussion is that of appeals from Canadian Courts to the Privy Council in England, particularly in constitutional cases. We have a new member with us, Mr. C. J. Burchell, K.C. Perhaps we might initiate him by asking him to lead our discussion. May I ask, Mr. Burchell, whether the Privy Council is a Court of Appeal for the whole Empire?

BURCHELL: The Privy Council only hears appeals from the Colonies and Dominions, President Walker. Appeals from England and Scotland are to the House of Lords—not to the Privy Council, except in prize cases and certain ecclesiastical causes.

WALKER: Mr. Burchell, will you explain how an executive body like the Privy Council came to be a Court of Appeal in law cases?

BURCHELL: The practice originated several centuries ago, President Walker, in order to protect British people who settled in the Colonies, and whom it was feared might not receive justice in the local courts. Moreover, it was desired to protect British capital invested in the Colonies. It was, therefore, arranged that His Majesty the King, sitting in his Privy Council, should listen to complaints of injustice, alleged to have been done by the courts in the Colonies and rectify the wrong when required.

In theory, appeals are to the foot of the throne. An appeal is sent to England in the form of a petition addressed to his Majesty in Council. When this petition arrives in England, a small Committee of the Privy Council meets and passes an Order in Council referring the petition to the Judicial Com-

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mittee of the Privy Council. The Judicial Committee then deals with the merits of the petition. After hearing the argument of barristers, an opinion is prepared, which is in the form of advice to the King. A small Committee of the Privy Council then meets again to receive and act upon the opinion, but in fact, to adopt it. Thereupon, the King makes an Order in Council declaring whether the complaint of his subject is or is not justified.

FARQUHAR: Surely, Mr. Burchell, nobody would make the suggestion to-day that it is necessary to retain the appeal to the Privy Council in order to protect British capital invested in Canada or people from the British Isles living in Canada.

BURCHELL: The retention of appeals from Canada to the Privy Council is certainly not put on that ground to-day, Mr. Farquhar. As recently as seven years ago, however, the reason why the British Government refused the request of the Irish Free State for the enactment of Imperial Legislation, giving the Irish Government the right to abolish appeals to the Privy Council, was said to be, that the British Government considered that the appeal was required for the protection of British capital invested in the Irish Free State. Since that time, the Irish Free State abolished all appeals to the Privy Council, by an act of its own Dail. Two years ago the Privy Council decided that the act was within the authority of the Free State Dail.

KELLEY: Did you say, Mr. Burchell, that there are two Orders in Council passed by His Majesty in Council in England in connection with all Canadian appeals?

BURCHELL: Yes, Mr. Kelley.

KELLEY: We have heard a lot of talk in Canada in recent years about Government by Order in Council, Mr. Burchell, but I did not realize that the practice had been continued of His Majesty in Council in England passing Orders in Council with respect to Canadian matters. We hear it on all sides, since the passing of the Statute of Westminster, 1931, that we are supposed to be completely self-governing in Canada. The

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passing of Orders in Council in England applicable to Canada would not appear to be in conformity with that status.

BURCHELL: The general understanding, Mr. Kelley, is that we are now completely self-governing. The fact remains, however, that Orders in Council are issued in England in Privy Council cases which declare the law of Canada and which are binding on all courts and on all people in Canada.

MARVEN: Is the Privy Council a court of seven permanent judges like our Supreme Court?

BURCHELL: Oh, no, Mr. Marven, there is a very large number of law lords and judges who may sit in the Privy Council, and the personnel of the Court changes from day to day.

MARVEN: Who selects the judges who are to sit on any particular case?

BURCHELL: The Lord Chancellor.

MARVEN: Does the Lord Chancellor sit himself?

BURCHELL: The Lord Chancellor usually sits on the more important cases.

CURTIS: Do you think, Mr. Burchell, that the British Government to-day would raise any objection if Canada desired to abolish appeals to the Privy Council?

BURCHELL: The British Government would not raise the slightest objection.

RUTLEDGE: That has not always been the attitude of the British Government, Mr. Burchell. When the Supreme Court of Canada was first established as a general court of appeal for Canada in 1875, the Canadian Government wanted to make it a final court of appeal except where special leave to appeal might be granted in exercise of the Royal Prerogative. At that time the British Government did not want to consent to the abolition of appeals to the Privy Council as of right from the Supreme Court of Canada, but finally agreed to do so.

BURCHELL: You are right, Mr. Rutledge, but that was over sixty years ago. I think that at any time since the Great War, if the proper Canadian authorities had asked to have appeals to



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the Privy Council abolished, the British Government would have consented. During the past twenty years the appeal to the Privy Council has been continued because Canadians apparently wanted it continued.

RUTLEDGE: I think there is a sentimental tie in connection with the appeal to the Privy Council.

CURTIS: Is there not possible danger of weakening the sentimental ties of Empire in continuing the appeal? Sometimes Privy Council decisions have been severely criticized as 'made in England'.

BURCHELL: There is that danger, Professor Curtis. I think also that there is a growing body of opinion in Canada that it is unfair to England to continue to ask the Privy Council to settle our disputes, particularly in constitutional cases.

MARVEN: Does Canada contribute to the expenses of the Privy Council or of its judges?

BURCHELL: Canada does not, nor does it control in any way the selection of the judges or officers, or the procedure of the Court.

FARQUHAR: Is there at the present time, an appeal as of right to the Privy Council from decisions of Canadian Courts?

BURCHELL: There is an appeal as of right, Mr. Farquhar, from decisions of Provincial Courts. In Nova Scotia, for example, there is an appeal as of right if the amount involved is upward of £500, this being the amount fixed by a rule of the Privy Council itself. In other Provinces, such as Ontario and Quebec, the Provincial Legislatures have fixed a higher amount. There is no appeal as of right from the decisions of the Supreme Court of Canada, except in admiralty cases. Special leave to appeal from the decisions of that court can, however, be granted as a matter of grace by the Privy Council.

FARQUHAR: Are there many applications for leave to appeal to the Privy Council from the decisions of the Supreme Court of Canada?

BURCHELL: There are many applications each year, Mr. Farquhar, but in substantially half of them, leave to appeal is

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refused. The Privy Council only admits appeals from the Supreme Court of Canada where the case is one of gravity, involving a matter of public interest or some important question of law or affecting property of considerable amount.

FARQUHAR: Mr. Burchell, has the Parliament of Canada by its own legislation the right to prevent appeals from all Canadian Courts to the Privy Council?

BURCHELL: If you had asked me that question three or four years ago, Mr. Farquhar, my answer would have been 'no'. To-day the answer is 'yes, in criminal appeals.'

With respect to appeals in civil cases, Mr. Farquhar, I do not think anybody can give you a definite opinion. Possibly the Parliament of Canada can do it alone, or possibly it may be necessary to have legislation passed also by the Provincial Legislatures to take away all appeals in civil cases, or possibly an act of the Imperial Parliament may be required. As recently as 1926, the Privy Council decided that Canada had not the right to take away the appeal to the Privy Council in criminal cases. In 1935, however, the Privy Council decided that, because of certain conventions agreed upon at Imperial Conferences, followed by the Statute of Westminster 1931, the Parliament of Canada could now pass legislation preventing appeals from Canadian courts to the Privy Council in criminal cases; but the Privy Council expressly refrained from deciding whether, and by what legislature, the appeal could be taken away in civil cases. The point is therefore still undecided. Personally, I think an act should have been obtained from the Imperial Parliament long before this date, and the situation made clear beyond dispute.

WALKER: Am I right, Mr. Burchell, in assuming that the Privy Council in England has been the court to which has been referred for final determination practically all the important questions as to the meaning of the British North America Act since that Act was passed seventy years ago?

BURCHELL: Your assumption is correct, President Walker.

WALKER: Can you tell us, Mr. Burchell, whether these

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decisions by the Privy Council have always been consistent with each other and generally satisfactory to Canadians?

BURCHELL: It is easy, President Walker, to answer the first part of your question. I think all constitutional lawyers in Canada will agree that the decisions of the Privy Council have been anything but consistent. At times the Privy Council has been in favour of the wide extension of Dominion jurisdiction, and at other times in favour of what has been called Provincial autonomy, and the curtailment of Dominion jurisdiction.

MARVEN: Would you amplify and extend that answer, Mr. Burchell?

BURCHELL: May I first suggest, Mr. Marven, that if you wish to discover the intent of the Fathers of Confederation, you should read the history of the Provinces prior to Confederation, the debates which took place in the Legislatures and the addresses of the public men who were behind the movement. In particular, you should read the resolutions which were unanimously agreed upon by the then existing Provinces in 1864, known as the Quebec Resolutions, and the resolutions, agreed upon at London by the delegates from all the Provinces, immediately before the British North America Act was passed. If you read these, Mr. Marven, you will find strong support for the idea that the Provinces were to be united so as to form a nation with a strong central government.

In the Quebec Resolutions, and London Resolutions, you will find it agreed that any Act of a Provincial Legislature might be disallowed by the central government. This clause in itself shows the great power over Provincial legislation which it was intended should be exercisable by the Dominion Government. Moreover, it was also agreed in the Quebec Resolutions and London Resolutions that the Dominion should have power to make laws for the peace, welfare and good government of the Confederated Provinces and that in regard to all subjects over which jurisdiction should belong to both the Provincial and Dominion Legislatures, the laws of the Do-

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minion Parliament should control and supersede those made by the local legislatures.

MARVEN: Are you saying, Mr. Burchell, that the Privy Council, in attempting to interpret the B.N.A. Act, has ignored the information which you have mentioned as available to them?

BURCHELL: Generally speaking, that is correct, Mr. Marven. The method of interpretation adopted by the Privy Council from the very first was to look upon the Act as merely a British statute, to be interpreted within its four corners like any other statute. Remember, also, that the members live three thousand miles away and have no local atmosphere and no local traditions to assist them in the interpretation of the Act.

WALKER: Mr. Burchell, you said that at one time the Privy Council was in favour of Dominion control and at other times in favour of Provincial autonomy. Could you give us a brief resumé of its decisions and tell us how it stands at the present time?

BURCHELL: I will do the best I can, President Walker. Up to the year 1887, there were only a few Canadian appeals to the Privy Council, and none of them involved direct conflict between Provincial and Dominion authority. In one of the early cases in 1879, the Privy Council laid down a ruling to the effect that it was not to be presumed that the Dominion had exceeded its powers 'unless upon grounds of a really serious character'.

It was during this period that the case of *Russell v. the Queen* upheld the validity of Dominion legislation relating to the control of the liquor traffic. This case established perhaps the high water mark in favour of Dominion legislation in Privy Council decisions. It was decided in 1882, and later judges, particularly Lord Watson and Lord Haldane, who were pronouncedly in favour of the extension of Provincial jurisdiction and the consequent curtailment of Dominion jurisdiction, persistently endeavoured to explain it away. As late as 1925, Lord Haldane made the assertion that the only ground

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on which the case could be supported was, to quote his exact words, 'that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and pressing that the national Parliament was called on to intervene to protect the nation from disaster'.

Lord Watson sat on several Canadian appeals from the year 1894 to 1899. He was one of the most powerful of the English judges of the last century and threw all his weight in favour of the curtailment of Dominion jurisdiction. It was his view that what he called the 'autonomy of the Provinces' must be guarded zealously.

From 1912 to 1929, the Privy Council was dominated by Lord Haldane. During that period there were forty-one cases which involved the interpretation of the British North America Act. Lord Haldane sat on thirty-two of these cases and delivered the opinion nineteen times. At first he felt that he should be guided by what he believed to be the ideas of the Fathers of Confederation. Later, however, he came out boldly against extension or development of the authority of the Parliament of Canada.

After Lord Haldane's death, for six years from 1929 to 1935 the pendulum swung sharply back. Lord Sankey was Lord Chancellor and it is, I think, an open secret that he felt it to be the important work of his life to place the emphasis on a fuller extension of the powers of the Parliament of Canada, if Canada was ever really to become a nation. Under his influence, among other important decisions, the control of aerial transport and of radio broadcasting was held to be wholly with the Dominion Government. It is generally agreed, I believe, that any other decision would have held up the progress of Canada, and yet I think the decision would have been different if Lord Haldane had presided over the Privy Council during those years.

In the aeronautics case, Lord Sankey used the following impressive language: 'It must be borne in mind that the real

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object of the Act was to give the central government those high functions and almost sovereign powers which were of common concern to all the Provinces as members of a constituent whole.'

And finally, during the year 1937, Lord Sankey, having retired, there was a sharp reaction. The pendulum swings back again. In six cases decided during the present year involving the validity of eight Canadian statutes, we are back again to Lord Watson and Lord Haldane.

CURTIS: Is it not significant, Mr. Burchell, that no judge in England has the right to declare an act of the British Parliament to be *ultra vires* or beyond its powers?

BURCHELL: Undoubtedly, Professor Curtis.

CURTIS: Well, then, when the Privy Council commenced to declare the legislation of the Canadian Parliament to be *ultra vires*, it was a new departure for English judges, and I think they have brought the ship of state into very dangerous waters. It seems to be a pity that later judges in the Privy Council did not at least follow the ruling laid down in the case of *Valin v. Langlois* in 1879, namely, that it is not to be presumed that the Dominion had exceeded its powers 'unless upon grounds of a really serious character'. If the Privy Council had observed this ruling, the Parliament of Canada, adopting it as their chart, would be able to steer the ship of state more easily while engaging in the larger ventures and when sailing into the foreign waters referred to by Lord Atkin in his decision this year.

The situation, as it appears to me, is that the ship of state is drifting helplessly and the Parliament of Canada, by reason of Privy Council decisions, such as that of Lord Atkin, has not enough power to keep the ship under way.

WALKER: That leads us to the latter part of the question which I put to you some time ago, Mr. Burchell—whether the decisions of the Privy Council involving the interpretation of the British North America Act have been satisfactory to Canadians.

BURCHELL: I think, President Walker, the discussion which has just taken place has perhaps answered your question. I



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will put it this way. If you are a believer in the further extension of Provincial jurisdiction, as developed in the Privy Council decisions, particularly those of Lord Haldane and Lord Watson, and in the decisions of Lord Atkin delivered during the present year, you would probably say that these decisions were satisfactory. The general effect, however, of the decisions is that instead of being one nation in Canada, we are to become nine nations. Under Privy Council decisions, the Parliament of Canada cannot now make an enforceable treaty, if the treaty can in any way be construed as dealing with a matter of property or civil rights, except by calling together the Governments of the nine Provinces and obtaining their approval and consent. This would have to be followed by the passing of nine Provincial Acts, in addition to a Dominion Act, before the Treaty would be enforceable. Moreover in such important matters of common interest as unemployment insurance, the Dominion was held to be powerless to pass legislation applicable to the whole of Canada, because it would infringe on property and civil rights in the Provinces. It seems to some of us at least that Canada can never become a great nation unless these restrictions are removed, and the Parliament of Canada is given authority to deal with matters common to the interests of all Canadians.

Speaking before the Quebec Conference in 1864, Sir John A. Macdonald said:—

‘In framing the constitution, care should be taken to avoid the mistakes and weaknesses of the United States’ system, the primary error of which was the reservation to the different states of all powers not delegated to the general government. We must reverse this process by establishing a strong central Government, to which shall belong all powers not specially conferred on the Provinces. Canada, in my opinion, is better off as she stands than she would be as a member of a confederacy composed of five sovereign states, which would be the result if the powers of the local Government were not defined. A strong

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central Government is indispensable to the success of the experiment we are trying.'

There can be no doubt of the fact that Sir John A. Macdonald and other Fathers of Confederation believed that they had embodied these principles in the British North America Act.

But during the last forty years, the Privy Council has been apparently trying to establish nine sovereign states in Canada, which is certainly not in accord with the plan of the Fathers of Confederation, nor I think in the best interests of Canada.

WALKER: Then, Mr. Burchell, you consider that appeals from Canada to the Privy Council should be abolished.

BURCHELL: I do think so, President Walker, and especially in constitutional cases. I believe there is a constantly growing body of opinion to that effect in Canada to-day. I fully concur in the statement of Dr. Sidney Smith, President of Manitoba University, in the Kelsey Club last Sunday night. He strongly advocated abolition of the appeal to the Privy Council.

By agreement embodied in the Statute of Westminster 1931, the Imperial Parliament cannot pass legislation affecting the people of Canada, except with our consent and at our request. Similarly, under an agreed upon convention, the British Cabinet cannot pass any Orders in Council with relation to Canadian matters against the views of the Dominion Government. This startling change in Empire relations has taken place during the past ten years, with the approval of all political parties in Canada, as well as of all political parties in the United Kingdom. In my humble opinion at least, these declarations of Dominion status were necessary for the solidarity of the Empire. That the Empire was consolidated by the Statute of Westminster was shown by the actions of all the Dominions at the time of the Abdication.

If we are to be completely self-governing in Canada, the passing of Orders in Council in England with relation to Canadian affairs must disappear. In the case of appeals to the Privy Council, orders are issued by the King in his Council in

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London and these orders are binding upon all courts and upon all people in Canada. They, in fact, declare the law of Canada.

Moreover, as suggested by Professor Curtis, I think it is not only unfair to England but there is real danger of weakening the ties of Empire by our continuing to ask the Privy Council in England to settle our problems and disputes in constitutional cases. As is evidenced in our discussion here, and in the Kelsey Club of Winnipeg, Privy Council decisions frequently meet with disapproval in Canada. I think the time has arrived when we should shoulder our own burdens of government and not attempt to throw them off on the Privy Council for solution and then criticize freely, as we all do, when we do not agree with the decisions.

WALKER: What court do you suggest should take its place, Mr. Burchell?

BURCHELL: It should be the Supreme Court of Canada, President Walker, unless there is anything in the suggestion that the Canadian Privy Council might set up a Judicial Committee of its own to hear appeals from all courts in Canada.

RUTLEDGE: Is there not the further suggestion that there should be an Imperial Court of Appeal, Mr. Burchell?

BURCHELL: I am glad you mentioned that, Mr. Rutledge. The possibility of establishing such a court has been considered for many years. The Imperial Conference 1911 recommended that the Judicial Committee of the Privy Council and the House of Lords should be combined into one Imperial Court of Appeal. It was proposed to create a single court which would hear appeals in all cases which originated either in the United Kingdom or in any part of the British Empire. The proposals, however, were not adopted and the House of Lords and Judicial Committee have continued as separate tribunals. So far as Canada is concerned an Empire Court of Appeal might be of some value in other cases, but in constitutional cases I think our Supreme Court of Canada should be supreme.

## UNIFORMITY OF LEGISLATION

BY LEON J. LADNER

*Discussed by the Constitutional Club, Vancouver,  
December 12, 1937*

MURPHY: Ladies and gentlemen, our subject for discussion, that of uniformity of legislation, must of necessity be somewhat technical. Naturally it is a matter which appeals more to the legal minded, but it is of great importance to all of us.

Mr. Ladner, as a former member of parliament and as a legal practitioner of many years standing, you are the logical leader of the discussion.

LADNER: I shall deal briefly with the question of uniformity of legislation, Mr. Chairman. It is a big problem and presents some amazing examples of inconsistencies and incongruities. Let me give you a striking example. In Quebec if a minor, that is a child under twenty-one years of age, starts in business for himself he must pay the liabilities incurred in connection with that business, but in British Columbia a minor cannot be sued for such liabilities.

To indicate the need of uniformity of some laws, particularly those pertaining to the business of merchants and traders, I shall refer to a case which occurred in Vancouver. A young man under twenty-one was in partnership presumably with his father, carrying on a grocery business. When financial troubles arose, the father denied any interest in the firm. The creditors could not sue the young man, nor make an application for bankruptcy against him. He could not legally give a power of attorney to a trustee to wind up the business. The merchants could not legally take back their goods from the store, nor could they take criminal action for defrauding the creditors because technically he had no creditors. Meanwhile he had inherited \$12,000. Within his legal

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rights he sold all the stock which the merchants had sent to the store, realizing about \$2,000, but paying nothing. He even collected his outstanding accounts, while his creditors just looked on aghast, dumbfounded and confounded.

SOWARD: Is British Columbia unique in this particular status of minors in business, Mr. Ladner?

LADNER: No, it applies in all Provinces with the exception of Quebec. The law had its origin in the English law made to protect minors inheriting valuable property against loan sharks and financial vultures who too often prey on their inexperience. The possibility of a minor engaging in business was not contemplated at all and you can understand that it would be easy for a Quebec wholesaler to be misled by filling an order from a firm in British Columbia—not knowing that its owner was a minor. At any rate, imagine the many legal problems in connection with trade, business, personal rights, contracts, companies, education, labour, social laws, real property and so forth. Generally speaking, laws are based on precedent, custom, tradition and the common-sense of the majority of the people expressed through acts of Parliament or judgments of the Courts, the latter creating what is known as our common law. A long and continued practice in business or trade extending over many years becomes what is known in law as the custom of that business.

SOWARD: Mr. Chairman, may I ask you as a lawyer, how many years it takes to create this long and continued practice in business and in trade.

LADNER: It has been indicated in decisions that forty or fifty years or less establishes a custom. And now to proceed. If a dispute arises a plaintiff may plead and prove a custom, whereupon the Court gives its judgment on the point involved, and that custom becomes a part of our common law. Frequently the court decisions conflict and the law is uncertain. To clarify the law, Parliament often enacts those legal principles as our statute law, the other great branch of our legal system. While precedent, custom and tradition are the

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principal influences in the formation of our common and statute laws yet we must study and give full expression to the ever progressing thought in respect to our economic, social and political conditions. An assumption that the teachings of our forefathers expressed the finality of legal and political wisdom is contradicted by the uniform experience of mankind.

STEEVES: All the same, Mr. Ladner, while I do not wish to decry the virtues of British common law, it has its drawbacks. Those who have been brought up in countries where they have codified law, find fault with British common law because of its vagueness and uncertainty. I was very interested in what you said because you practically admitted what you and the Chairman were denying a few Sundays ago when we were arguing about the Privy Council, namely that judges under the British system are not only the interpreters of law, but the makers of law; that, to me, is the most potent argument for the abolition of the Privy Council.

McKELVIE: Mr. Ladner, is it not necessary in obtaining uniformity of law throughout Canada, to develop a uniformity of living standards?

LADNER: That would apply in certain classes of law, particularly those dealing with social protection, minimum wages and hours of labour. We have not a uniformity of living standards in Canada and consequently it is difficult to have uniformity of laws. The principles of our common law apply uniformly throughout Canada, but each Province has its own statute law. Because of the variations and differences in the provisions of statute laws of the Provinces, the need for uniformity of legislation has arisen in the interests, mainly, of business, trade and social standards. However, to the extent that well established customs, systems of education, ideas on social security, labour and business practices differ amongst the Provinces, just to that extent is there bound to be lack of uniformity in our statute law.

MURPHY: Have you not touched, Mr. Ladner, on one of the great reasons why there should be uniformity of legis-



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lation in Canada? For instance, our business men in British Columbia must pay through their taxes or in other ways, workmen's compensation assessments, minimum wages, mothers' pensions, public health and other social charges, and they are bound by the Hours of Work Act and other such Acts. I consider these splendid pieces of legislation, but in certain other Provinces they have not gone as far as we have in British Columbia, with the result that our business men, when they are selling in our great market, the Prairies, against manufacturers in other Provinces, are naturally penalized. Their operating costs are higher and they must charge a higher price for their goods. If we had uniformity of legislation, then we would all stand on an equal footing. In other words, what we need is an educational campaign along those lines throughout Canada.

SOWARD: Do you mean that British Columbia, for instance, should educate the Province of Quebec along minimum wage lines?

LADNER: It would be presumptuous on our part.

SOWARD: I raised the question merely to show its difficulty. Surely the remedy is to transfer more power to the Federal Government, and we have an illustration at hand of the need when three of the Provinces cannot agree with six others on the question of unemployment insurance.

STEEVES: In this matter of labour legislation, it surely is an impossibility to achieve unanimity in Provincial statutes by persuasion. Constitutional revision appears to be the only way. Mr. Bennett's labour legislation got turned down by the Privy Council in spite of the fact that it was thought the Dominion could legislate to give effect to its commitments as a member of the League of Nations and the International Labour Organization. The Dominion certainly should have the power to make laws on basic labour conditions, although at the same time the Provinces should be safeguarded in case they want to go further than the Dominion. In matters of labour, some Provinces will necessarily be more progressive than others.

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I believe British Columbia has set an example to the rest of the Dominion by the passage of her latest labour statute a few days ago, guaranteeing the right of employers and employees to organize and providing for compulsory arbitration in the case of disputes.

MCKELVIE: As long as we have nine Provinces having nine different types of legislation we cannot have uniformity of standards of living. I don't think anyone wants to lower the standard of living in British Columbia, but it is manifestly unfair that it should be penalized because of a higher standard.

SOWARD: To put it bluntly, the present trend is to stress the rights of the minorities; I am more worried about the rights of the majority.

LADNER: Majorities should, but minorities generally control governments. The fact is that the written part of our Federal Constitution, sometimes known as the British North America Act, gave the Provinces jurisdiction in respect of all matters coming within the classes of subjects enumerated in section 92. There are fifteen classes, such as property and civil rights, direct taxation, solemnization of marriages, and in the words of subsection 16 'generally all matters of a merely local or private nature in the Province.'

Since 1867 the Provinces have passed thousands of statutes. The Fathers of Confederation anticipated the need of uniformity of legislation. Hence we find such a step provided for in section 94 of the B.N.A. Act headed 'Uniformity of Laws in Ontario, Nova Scotia and New Brunswick'. Quebec has the French civil law and was, of course, not included. Section 94 is of so much interest that I will quote it:

'The Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property or civil rights in Ontario, Nova Scotia and New Brunswick, and of the procedure of all or any of the courts in those three Provinces.'

These powers are unrestricted but of no effect unless adopted and enacted as law by the Legislature. May I now direct your attention more specifically to the steps which have

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been taken amongst the Provinces to bring about uniformity of legislation? All the Provinces, with the exception of Quebec and Saskatchewan, during the years 1918 and 1919 passed statutes providing for the appointment of Commissioners to attend a Conference of Commissioners from the different Provinces for the purpose of promoting uniformity of legislation in the Provinces. Quebec and Saskatchewan have, for many years, and the Dominion Government has for the past three years, sent representatives to the annual Conference of Commissioners.

LADNER: The idea of Provincial action to bring about uniformity of legislation was suggested to the Provinces by the Council of the Canadian Bar Association which had studied the results in the United States. Since 1892 the National Conference of Commissioners of the various States had been meeting annually to bring about uniformity in state laws and had accomplished a great deal.

The first meeting of the appointed Commissioners and representatives from the Provinces of Canada which had not made appointments, took place in Montreal in September, 1918, and organized the Conference of Commissioners on Uniformity of Laws in Canada. The Dominion is also represented at these conferences by three experts, John Reid, K.C., of the Department of External Affairs, C. P. Plaxton, K.C., of the Department of Justice, and W. P. J. O'Meara, K.C., from the Secretary of State's Department. Altogether eighteen Commissioners and six representatives have been meeting annually. The Attorney Generals of the Provinces are ex-officio members and may attend the meetings. Two well-known lawyers, R. L. Maitland, K.C. of Vancouver and H. G. Lawson, M.C. of Victoria, are the British Columbia Commissioners. They are ably assisted from time to time by H. G. Garrett, for many years Registrar of Companies, and A. B. Pineo. These Conferences have been directed mainly towards commercial, business and industrial subjects. Altogether seventeen important model Acts drawn by the Commissioners have been adopted by

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the various Provinces. In many cases eight of the nine Provinces have adopted the model statutes. Due largely to a different system of laws, Quebec, up to the end of 1936, had not adopted any of the model statutes prepared by the Commissioners.

STEEVES: Do you believe that this is the best system of achieving uniformity, Mr. Ladner? Actually, if we are to get unanimity in the various legislatures, we are bound to follow the pace of the slowest and that doesn't seem to be in the best interests of the public. There is a Gordian knot there which cannot be untied and must be cut and that can only be done by the broadening of Dominion powers. It seems to me that the residuary power of the Dominion to legislate for the peace, order and good government might be more clearly defined to take in many matters of civil law which are of Dominion-wide interest or importance. The scope of these matters is increasing year by year, and again I want to stress the point of labour legislation. The greatest reason of all for achieving some degree of uniformity is that Canada is now a nation and must take her place as a progressive and civilized nation, built up on the basis of a strong and economically secure working class.

LADNER: Time may possibly cure that situation, Mr. Chairman. The Provinces have failed to adopt uniformity of laws in respect of married women's property. In 1935 steps were taken to bring this about. For instance, a husband should not be liable to be sued or made responsible for his wife's ante-nuptial debts, or contracts, or wrongs, or for any wrongs committed by his wife during marriage. To give an example—in her ownership and enjoyment of her property, in the making of contracts, and actions at law, a wife should be in the same position as a man or unmarried woman.

Only by statute law has she gained those rights. Eight of the nine Provinces from time to time have given effect to those rights and many others by passing Acts of their legislatures. All the common law Provinces of Canada—Quebec being excepted—have enacted Married Women's Property Acts em-

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bodying the same principle, though in different wording and in some instances having different minor provisions.

STEEVES: As far as Quebec is concerned, this is because much of the civil law of Quebec has its roots in Roman law; in these countries which operate under that type of law married women are put in the same classification as children and congenital idiots.

LADNER: It is interesting to note, Mr. Chairman, that though there is uniformity in principle so far as the Provinces are concerned, yet such were the variations that the Conference Commissioners deemed it necessary to prepare and submit to the various Provinces a uniform model Act which so far has not been adopted according to the last report.

Let us consider briefly the position of the motorist. He is tagged under city laws for parking in the wrong place, arrested for going too fast in some Provinces and for going too slow in others. When an accident occurs the first thing the lawyer thinks about is the negligence of the driver if he or she is still alive.

Could the plaintiff, by the exercise of reasonable care and skill have avoided the accident? Which of the parties, as the lawyer would state the proposition, was guilty of ultimate negligence? To what extent do the actions of servants bind the master? Should the degree of negligence be divided on a percentage basis, as in British Columbia? The problem is too intricate and involved to discuss in detail. Under the old common law a person suing who was guilty of negligence contributing to the accident was debarred from recovering any part of his loss. Legislation was required to adopt a more equitable rule of division of loss in proportion to fault. In 1924 a model Contributory Negligence Act to give effect to this equitable principle was adopted by the Commission and recommended to the Provinces. British Columbia, New Brunswick and Nova Scotia adopted it but no other Province did.

The tourist traffic, taking thousands of motorists from one part of the continent to another, is one of the important rea-

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sons for uniformity of legislation in respect of the rights and obligations of motorists, and particularly the rule of the road. Until 1922, if I remember correctly, all traffic travelled on the left side in British Columbia. The influence of the United States where the right side of the road is the rule, brought about the change in Canada.

There is conflict in Canada in many of the statute laws of the Provinces, but it is a matter of peculiar interest that while each Province acted separately, there is almost complete uniformity on the question of arbitration.

MCKELVIE: It would appear to me, Mr. Ladner, from what you have said, that there is a considerable amount of legislation exercised by the Provinces, that could be more effectively administered and controlled by the Dominion. After all, isn't that the real solution, to obtain uniformity of legislation? My suggestion is that in any review of the B.N.A. Act an entirely new realignment of the powers as between Provincial legislatures and the Dominion should be framed, in the interests of Canada as a whole.

LADNER: What do you say, Mr. Murphy?

CHAIRMAN: I am inclined to agree with Mr. McKelvie. Personally I would give power to the Dominion to enforce uniformity of legislation, possibly with some limitation, such as consent by, say, six Provinces. It is the only logical way to secure the uniformity we must have.

LADNER: Though I am in the minority I disagree with the contentions of all of you for the reason that in a country so vast geographically, with such differentiated interests, and different races of people, it is not desirable to have too great an authority placed in a centralized government, but matters of a purely local or largely local nature should, as provided in the B.N.A. Act, be reserved for the Provinces.

STEEVES: There are not many matters left which can be defined as purely local in this day and age.

LADNER: I would now like to discuss briefly the question of the Securities Act and matters pertaining to it. In this age of



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speculation, investment in bonds, shares, and other company securities that question is perhaps the one which most actively engages the mind of the investing public. The Security Frauds Prevention Act now known as the Securities Act was originally passed as a uniform measure in all the nine Provinces.

There has, however, been no concerted effort to maintain it in an absolutely uniform condition, and each Province has enacted amendments which have produced a certain amount of diversity. In principle the Acts are the same, but the type and policy of administration seem to vary considerably.

CHAIRMAN: From my own experience, Mr. Ladner, that is quite true. A certain company with which I was connected, obtained registration in British Columbia, Alberta and Quebec, and was turned down in another Province as the officials there believed the property held by the company—which was an oil property—had no merit. They came to that decision, not after consulting the Alberta Securities officials who were on the ground, but through out-dated maps and geological reports. They did not consider the very latest geological reports which the company placed before them. If there had been uniformity of legislation and some common policy of administration this particular Province would have consulted the Securities officials of the Province where the property was situated, before making a decision, so would have obtained some up-to-date information concerning it.

LADNER: To return to the question of securities, the model Act on securities was adopted by the Provinces in 1929 as a result of the stock market crash. This is a subject above all others on which there should be uniformity of legislation because people in the West buy eastern securities and people in the East purchase western securities.

As I pointed out at the beginning, seventeen model Acts prepared by the Commissioners have been adopted in various Provinces but not all the Provinces. These Acts are: Bulk Sales, Legitimization, Warehousemen's Lien, Conditional Sales, Life Insurance, Fire Insurance, Policy Act, Reciprocal

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Enforcement of Judgments, Contributory Negligence, Intestate Succession, Devolution of Real Property, Bills of Sale, Wills, Judicial Notice of Statutes and Proof of State Documents, Limitation of Actions, Corporation Securities Registration and Foreign Judgments Act. The Commissioners on uniformity of legislation have as their motto 'Our principle is simply this: Uniformity where you can have it, diversity where you must have it, but on all cases certainty.'

The object of the Commissioners is concisely stated in the report of the conference of 1936 presented by R. L. Maitland, K.C., one of the B. C. Commissioners to the Canadian Bar Association. He said: 'The Commissioners do not feel that any Province is obliged to adopt these Acts which have been drafted and approved by the Commission after a very careful consideration, but rather feel that these Acts are available to the Provinces to adopt if they see fit, and if they are adopted from time to time, such action will bring about better uniformity throughout the Dominion.'

## METHODS OF AMENDMENT

BY R. F. McWILLIAMS

*Discussed by the Kelsey Club, Winnipeg, December 19, 1937*

McWILLIAMS: Mr. Chairman, we have been discussing for several weeks various problems arising out of the powers given or not given to the Dominion or to the Provinces under the terms of our Constitution, and on each occasion we have been forced to consider whether it would be advisable to amend the Constitution in order better to serve the public interest. Now we come to a discussion of the methods by which the Constitution can or might be amended.

I think it is important to dispose of one point first of all. While it is true that any amendment of our Constitution must be made in the form of a statute of the Imperial Parliament, that Parliament has impliedly stated that it will make whatever amendments the people of Canada desire on request, and that, if the people of Canada decide to adopt a method of amendment which eliminates any necessity for even formal action by the Imperial Parliament, it will without question pass such legislation as may be required to give legal effect to the desire of Canada. There is therefore no ground for any feeling that we are still in a state of subordination. It rests entirely in our hands to say how long we wish the present method of amendment to continue and what other method we would substitute for it. All we have to do is to agree among ourselves.

There is another point which should be dealt with before we start on a discussion of the method of amending our Constitution. By what form of action, if any, could the Canadian people or their Parliament secure an amendment at the present time? There are many people in Canada who are afraid to tackle the question of amending our Constitution because they

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fear that if the door is once opened there is no telling how far it may be forced open. That fear is very general among the French Canadians. Such a view rests on the assumption that as things stand there is no way of amendment other than by unanimous consent of the Dominion and Provinces. I want to submit for your consideration the view that there is now a simple and ample method of amendment open to the Canadian Parliament, if Parliament chooses to make use of it.

Suppose the Canadian Parliament should approve of and submit to His Majesty a petition requesting a stated amendment to the B.N.A. Act without consulting or obtaining the consent of the Provinces, and suppose further that one or more Provinces objected to the proposed amendment. Would such dissenting Provinces be heard by the Imperial Parliament or would that Parliament refuse to go behind the request of Canada speaking through its Dominion Parliament?

The essential issue came squarely before the Imperial Parliament in 1935 in the matter of a petition from the State of Western Australia. For a number of years the three smaller States of the Australian Commonwealth have been protesting that they are not getting a square deal in the distribution of revenues just as our smaller Provinces have been protesting. In Western Australia, which corresponds to British Columbia, the feeling was particularly keen, and, being unable to get adequate redress the people of that State decided by a plebiscite to withdraw from the Commonwealth. Their Legislature accordingly presented a petition to His Majesty asking in effect that the Imperial Parliament amend the Act which created the Commonwealth of Australia by striking out all the words which applied to Western Australia. Parliament referred the petition to a special committee of both Houses to consider whether the Imperial Parliament has now any right or power to deal with such a petition. The decision was that such a petition could not be entertained. In effect the Imperial Parliament said, 'Australia is now a completely self-governing nation which speaks to the outside world, including the Mother

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Country, only through its Commonwealth Parliament or Government. The people of Australia must settle their differences among themselves; nobody else has any right to interfere except in such ways and to such extent as the Commonwealth consents to.'

MACKAY: Don't you think the case of secession is an extreme one which fails to illustrate the general principle?

MCWILLIAMS: If they would not do so in so extreme a case, they would not interfere in a lesser one.

To apply this principle to Canada, I think it is beyond question that the same answer would be given to any representations or objections by a Canadian Province. In fact the case is much stronger against a Canadian Province than against an Australian State. Under the Australian Constitution the States are the primary source of political power and possess all powers not specifically vested in the Federal authority. In Canada the reverse is true. Further, the Australian States have retained for certain purposes a direct connection with the Imperial authority. For example, their State Governors are appointed by London. The Westminster Act has a clause reserving this connection. The Canadian Provinces on the contrary have no direct dealings with the British Government.

MACFARLANE: But they have with the British Courts, have they not?

MCWILLIAMS: Undoubtedly so, but we are dealing now with legislation. In my opinion the power of the Dominion at the present time to secure an amendment without consulting the Provinces, while resting mainly on the principles underlying the new relations between the States of the Empire, is strengthened by the terms of the Westminster Act. Section 4 of that Act says:

'No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend or be deemed to extend to a Dominion as part of the law of that Dominion unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.'

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While this section is expressed in the negative form it is a reasonable conclusion that it would apply also in the positive form—that the Parliament of the United Kingdom would act on the request of a Dominion. That view is strengthened by the fact that in the preamble to the Statute in which the reasons for passing it are set out the same principle is expressed in the positive form.

SMITH: But, Mr. McWilliams, are not the Provinces protected by the Statute of Westminster where it expressly provides that nothing in that Act shall be deemed to apply to the repeal amendment or alteration of the B.N.A. Acts?

McWILLIAMS: Yes, Mr. President, that is quite true. Sec. 7 makes that provision. But the two sections must be read together and each given effect to. The practical effect of Section 4 and of the whole principle of the Statute is to eliminate any means by which a Province can be heard at London.

MACFARLANE: Well, this all suits me. I feel like welcoming the lost. All through this series of discussions, Mr. McWilliams, you have been defending Provincial rights, and now you come up with a declaration which goes far in support of a strong Federal authority, at least so far as amendment to the Constitution is concerned.

McWILLIAMS: I shall have to make the same charge against you, Professor MacFarlane, that I made at our last meeting against President Smith when he let the cat out of the bag. You are confusing the question of what the law is with the question of what the law ought to be. If you came to consult me as a lawyer I would be bound to advise you on the basis of what the law does in fact say, no matter how unfair I might consider it as applied to your case.

On the point at issue I have stated what I consider the law to be but it does not at all follow that I think that that is what the law ought to be and in this particular case I do not think so. Before we proceed will you let me deal with one other point in connection with the preceding argument?



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The B.N.A. Act has been amended several times though the amendments have not been important or contentious. In each case the amendment has been made on the petition of the Dominion Parliament alone or even of the Dominion Government. I think I am right in saying that in no case have the Provinces even joined in the petition. For example the Imperial Statute of 1907 passed to give effect to a revision of the Provincial subsidies begins with the words 'Whereas an address has been presented to His Majesty by the Senate and Commons of Canada in the terms set forth in the schedule to this Act.' There is, therefore, well-established precedent for the view that our Constitution can be and will be amended on the request of the Dominion Parliament without any reference to the Provinces.

WAINES: That is all very well in the cases you cited, which were all favourable to the Provinces. But hasn't the Dominion Parliament been careful not to petition in cases where there would be objection on the part of any Province? What would happen if the interests of the Dominion and the Provinces were to clash?

MCWILLIAMS: But the point is that the Imperial Parliament has established the precedent of acting on the request of the Dominion alone. Is that a satisfactory state for the law to be in? I do not think it is, and I think we should proceed without delay to evolve a sounder method of amendment.

In considering the amendment of the Constitution we should bear in mind that there are three quite different classes of matters to be dealt with. What is a fair requirement as to one class may not be at all fair as to another class.

The first class has to do with those racial and religious rights which have been guaranteed to minorities. No amendment should be made in such matters without the consent of the Province concerned or perhaps without the consent of all the Provinces as well as the Dominion. All but a few Canadians recognize that such guarantees are an essential part of our national union and should not be exposed to the risk of

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being impaired by any majority. If those of our people who treasure these privileges could be assured of their inviolability their objection to the adoption of a method of amending the Constitution by Canada itself would be largely overcome.

MACFARLANE: Do you think the power to amend our Constitution should rest entirely in this country?

MCWILLIAMS: Oh, certainly. Any other method is inconsistent with the principle established by the Westminster Act.

Then as to the second class of matters—those which have to do with the respective jurisdictions of the Dominion and the Provinces. There will be from time to time, as there is now, a need for changes in the distribution of powers or revenues to meet changed conditions. The Fathers of Confederation did a remarkably fine piece of work in devising a distribution that worked as well as it has for so long a time, but in the course of seventy years there have been such remarkable changes in economic conditions and in our view of the functions of government, that some redistribution of functions is necessary and overdue. The problem is by what authority should the changes be made.

I disagree with those who hold in effect that the Dominion Parliament should have the right to take over all matters which in its judgment have become matters of national concern. I disagree still more with those who think the courts should revise their interpretations of the Constitution in order to facilitate the expansion of Dominion power.

SMITH: Then you accept the compact theory?

MCWILLIAMS: Not at all, Mr. President. Because I refuse to join with those who are on the extreme right does not mean that I accept the views of those on the extreme left. I think the whole framework of our Constitution as well as the circumstances under which it was drafted exclude the compact theory.

MACKAY: For the benefit of a layman in such matters will you explain just what you mean by the compact theory?

MCWILLIAMS: The compact theory means, Mr. Chairman, that Confederation was in the nature of a contract between

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four independent parties, in which other parties subsequently joined on the same terms, and that consequently no change can be made without the consent of all the parties to the contract. The contrary view is that Confederation created a nation divided into parts for certain specified purposes and that a nation must have the right to make such changes as it may think necessary from time to time, subject only to the limitations which it has accepted as a condition of its organization. The practical effect of the difference is that under the compact theory no change could be made without the unanimous consent of all the Provinces, while under the national theory changes can properly be made, not, it is true, by the action of one party, but by a reasonable measure of general consent.

MACFARLANE: But you would not subscribe to the organic theory of the State, with sovereignty vested exclusively in the State, would you?

McWILLIAMS: No, in my view that is going too far in the other direction. If two-thirds or more of the Provinces are agreeable to a change as to jurisdiction it would be a denial of nationhood to permit one or two dissenting Provinces to block generally accepted changes. However, that rule should be subject to this qualification under the circumstances in Canada. It should not be possible for all seven smaller Provinces to combine and force a change over the heads of Ontario and Quebec which have between them more than half of the total population.

MACKAY: What would you consider a fair rule?

McWILLIAMS: That changes of this kind could be made by the Dominion Parliament with the consent of two-thirds of the Provinces, provided those Provinces have a population equal to sixty per cent of the total population of Canada.

MACKAY: How does that compare with the method used by Australia?

McWILLIAMS: In Australia the Constitution can be amended by a referendum, provided there is a favourable vote in a

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majority of the States and also a majority of the total votes cast in the whole country.

MACKAY: Why do you not suggest a percentage of the popular vote?

MCWILLIAMS: Because I am dealing with the question of jurisdiction in which the people act through their Provincial authorities.

MACFARLANE: Are you sure you aren't dealing with the question of Provincial rights?

MCWILLIAMS: Well, after all, the Provinces are Provinces, and when you are dealing with a question of jurisdiction the Provinces ought to be treated as such. That there is a real possibility of the Constitution being amended without any consent by the Provinces may be seen from what might have happened in 1935.

Suppose Mr. Bennett had taken the same view of the law in that respect as the Courts subsequently did. He would then quite properly have looked about for some other foundation for legislation which he evidently believed to be very much in the public interest. He might then have adopted the view which I have supported as to the powers of the Dominion Parliament and proposed a petition to His Majesty for an amendment to the B.N.A. Act which would have placed the Dominion power beyond question. As Mr. Bennett had at the time a large majority in both Houses such a recommendation by him would doubtless have been acted upon. The result would have been an amendment transferring jurisdiction over a large and important class of matters from the Provinces to the Dominion without the consent of any of the Provinces.

Would this have been desirable? It is possible that Mr. Bennett refrained from taking that course because it might cause discord between the Dominion and the Provinces. Nevertheless the power is there ready for use whenever a Prime Minister thinks that the circumstances demand it. It is quite possible that the question will have to be dealt with within the next few months. Mr. King has asked the Provinces whether

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they will consent to an amendment of the Constitution that would give the Dominion power to establish a system of unemployment insurance. Suppose seven Provinces reply in the affirmative and two in the negative. Should the Dominion Parliament refrain from action because of that amount of dissent, or should it proceed to give effect to a proposal which had the support of a large majority of the Provinces? I have expressed my own view as to the degree of agreement which should be required. But whatever the standard should be, it is high time that Canadians got together and agreed upon the terms on which any amendment could be made.

Now we come to the third class of matters—those which have to do with the internal organization of the Federal authority. Suppose, for example, that it became advisable to change the manner of appointment of members of the Senate as by making their appointments good for ten years instead of for life or by having them elected; or to reduce the number of members of the House of Commons or prevent an increase by lowering the number of members from Quebec and from other Provinces in proportion; or to introduce a method of settling differences between the Commons and the Senate; or to provide for the appointment of the Governor-General in form as well as in fact by the Dominion Government. These are all questions which do not affect the Provinces as such. They may greatly concern the people of some Provinces but those people are represented for such purposes by their members at Ottawa, not by their Provincial Governments.

SMITH: What reason is there to assume that different views should be expressed by the representatives of the same people merely because one group sits in a Provincial capital and the other in a Federal capital?

McWILLIAMS: Well, the issues are different, because the people have selected one group of representatives for one purpose and another group for another purpose. The same Province often elects a Liberal majority in one Parliament and a Conservative majority in another Parliament at the same time.

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As to this third class of matters, those which have to do with the internal organization of the Federal authority, I do not think the Provinces are entitled to any voice. They concern matters of general interest and should be dealt with as other such matters, that is by a Parliament elected by the people for the purpose of dealing with national affairs. It might be wise to put a measure of restriction on the freedom of Parliament to make such changes in view of their extraordinary character. It might be provided that no change of the constitution would be effective until confirmed by a further statute passed after a general election, or that no change would be effective until passed three times in successive sessions as in the British Parliament Act. But with these safeguards against hasty action I think the Federal Parliament should have full power to amend its own constitution.

There remains for consideration the question whether there are any amendments which ought to be made without waiting for the adoption of a general scheme of amendment. It may take years to get a sufficiently general agreement, and it would not be wise to force any scheme without a fairly general consent. In my opinion there are two respects in which the Constitution should be amended without delay.

The first amendment immediately required has to do with the Dominion's power or lack of power to regulate trade and industry. By s.s. 2 of Sec. 91 the Dominion was given specific power over The Regulation of Trade and Commerce. Just how far this power was intended to go has been a matter of dispute ever since. At that time communications in the country were very poor and most trade, other than export and import trade, was local in character. Every country town had its group of small industries. Since that time trade and industry have become largely inter-provincial or Dominion wide. But the interpretation placed by the courts on this power has been so narrow that the Dominion is quite unable to deal effectively with the new conditions.



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MACFARLANE: Surely you are not suggesting that the courts have misinterpreted the Constitution?

MCWILLIAMS: The Courts interpreted it in the light of the meaning that would have been given to the term in 1867. If the Fathers of Confederation had anticipated such developments they would undoubtedly have given the Dominion wider powers. It is not sufficient that the Dominion should have jurisdiction over inter-provincial trade alone. It must have jurisdiction to regulate the conditions in all industries whose products enter into either external or inter-provincial trade. Without such powers progress in the regulation of industrial conditions becomes almost impossible. No Province can afford to impose upon its industries standards which make it impossible for them to compete with the products of other Provinces which do not insist on as high standards. It is not necessary or advisable for the Dominion to deal with local trade or with small industries catering only to local trade. These might better be left in the care of those authorities which have a more intimate knowledge of local circumstances. But every manufacturer or merchant who desires to sell his goods outside of the Province of origin should be required to come under uniform Dominion regulations.

I think this purpose could be achieved quite simply by the addition to s.s. 2 of Sec. 91 of the words 'including the regulation of the conditions in all trades and industries engaging in inter-provincial or external trade.'

WAINES: Do you think those words would be wide enough to cover minimum wages or maximum hours, for example?

MCWILLIAMS: There is undoubtedly a practical difficulty, Professor Waines, in expressing what is intended in a few words. On the other hand, it is undesirable to load a constitution with details which often prove to be most effective in defeating the main purpose. A constitution should lay down principles and be interpreted in the spirit not by the letter.

MACFARLANE: Especially if that constitution is to be interpreted by the Privy Council.

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MCWILLIAMS: Or any other court. I think the difficulty could be overcome by setting out what is intended with all necessary detail in the preamble to the statute making the amendment. The form of words, however, is not important, provided the result is achieved. The present proposal with reference to unemployment insurance is a step in the right direction, but I should like to see the Government take a bolder step and deal with the whole question in one amendment.

The other point as to which I think there is need for an immediate amendment has to do with the financial terms as between the Dominion and the Provinces. Prior to Confederation the principal source of revenue in each of the then colonies was the customs and excise. When these were given up to the new Dominion, as was necessary, the Provinces were left with no adequate sources of revenue. To meet that situation the novel device of Provincial subsidies was devised. It is a complete mistake to speak of these subsidies as though they were a hand-out or even a grant-in-aid by the Dominion. They are nothing of the kind. They are simply a convenient way of dividing a revenue in which the Provinces have as much interest as the Dominion but which can only be collected by the Federal authority.

WAINES: It seems to me the real situation in Canada is that the distribution of resources is such that it has enabled certain sections of the country to develop in wealth and population, more than other sections, with the result that there are, in a budgetary sense, poorer and richer Provinces, and the maintenance of Canadian standards of expenditure justify the transfer of resources from the people of the wealthier Provinces to the Governments of the poorer Provinces for the purpose of maintaining these standards.

MCWILLIAMS: I don't think it is so much the distribution of resources as the economic policy pursued by the country.

WAINES: I agree, but the point is that the poorer sections

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of the country cannot meet their obligations out of their own resources.

MCWILLIAMS: The sources of revenue allocated to the Provinces by Section 92 have never been adequate and from the beginning there have been oft repeated demands for more liberal terms. The Maritime Provinces and Manitoba have suffered particularly and have been constantly pressing their claims. Those Provinces which have been so fortunate as to have large natural resources like timber and mines, particularly Ontario, have been able to finance themselves without difficulty and those in which wealth has accumulated are now able to raise large revenues from income taxes and succession duties. But those Provinces which lack those special natural resources and which have little taxable wealth are quite unable to meet the demands on them for social services and education.

HYMAN: Why not solve the problem by having the Dominion take over these services?

MCWILLIAMS: That would be an easy way out, Mr. Hyman, but in my view an unsound one. The proper course is first to consider what is a sound distribution of the functions of government, then to consider what sources of revenue fall naturally to one or other authority, or may be more conveniently collected by the Dominion, and then, comparing the respective obligations and revenues, to consider whether there is a just distribution. I have no doubt that the result would be to make it evident that there must be a large increase in the so called subsidies to all the smaller Provinces.

MACKAY: What is your idea of the amount of increase there should be?

MCWILLIAMS: It would be impossible, Mr. Chairman, to answer that question definitely without more information than any person now has. The enquiries of the Royal Commission will provide us with the data and probably with the answer. In the meantime the best answer is to look at what is done in Australia which has had to struggle with exactly the same problem. When the Commonwealth was established in 1900

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it was provided that three-fourths of the customs revenue should be distributed among the States. In 1910 a new arrangement was made under which each State received a subsidy of 25 shillings per capita. Even this did not prove sufficient, and, after the Commonwealth had several times made special grants in aid of the weaker States, it appointed a Royal Commission in 1933 to investigate the whole question thoroughly. That Commission has made three reports with this result: In the present year all States will receive a subsidy at the rate of twenty-five shillings per capita and the three weaker States will receive additional subsidies averaging forty shillings per capita, or a total of sixty-five shillings. Compare this with what Manitoba gets—a regular subsidy equal to about ten shillings and a special grant this year of an additional four shillings and eight pence.

WAINES: That would mean a subsidy four times as great as at present.

McWILLIAMS: Just about that. It would mean that we would be able to carry on the proper services without having to unload our responsibilities on the Dominion. We would continue to manage our own affairs.

MACKAY: Would that require an amendment to the B.N.A. Act?

McWILLIAMS: There is some difference of opinion amongst lawyers on that point, Mr. Chairman. Some think the Dominion has the power to make such payments as it sees fit; others think that a change in the scale of subsidies set out in the B.N.A. Act can only be made by an amendment to that Act. The point was discussed in 1907 when the last revision was made, and it was thought safer to secure an amendment to Sec. 118 of the Act. I think the same course should be followed now.

MACKAY: Mr. McWilliams, I think it would be well if you would at this point summarize the views which you have expressed.

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MCWILLIAMS: I shall be glad to do so, Mr. Chairman. To state them briefly I would say:

1. At the present time the Constitution can be amended by a petition of the Dominion Parliament without any consultation with, or consent of, the Provinces.
2. That this is not a desirable state of affairs, and, consequently, that the people of Canada should proceed without delay to agree upon a sound method of amendment.
3. That the rights guaranteed to racial and religious minorities should not be subject to alteration except with the consent of all the Provinces.
4. That amendments affecting the respective jurisdictions of the Dominion and the Provinces should be made by the Dominion Parliament with the consent of not less than two-thirds of the Provinces, those Provinces to have not less than sixty per cent of the population of Canada.
5. That amendments affecting the organization of the Federal authority should be made by the Dominion Parliament subject to the condition that the changes must be approved in succeeding sessions.

## METHODS OF AMENDMENT

BY J. E. RUTLEDGE

*Discussed by the Citadel Club of Halifax, December 26, 1937*

WALKER: The subject we are to talk about is 'Methods of Amendment' of the Constitution. Our discussion will be on how we may amend the British North America Act. Mr. Rutledge, will you begin by telling us about some of the conditions underlying the passing of that Act in 1867; then, briefly, what the Act purports to do, what it has failed to do, and what is the way out?

RUTLEDGE: The British North America Act was undoubtedly a fine piece of work and entitled to the greatest respect. The fact that in seventy years it has been amended but six times proves that. Some of the amendments were caused by changing conditions that neither the Fathers of Confederation nor Lord Thring, the chief draftsman, could have foreseen. The changes that are deemed to be necessary to-day, are caused, chiefly by changing social and economic conditions.

In 1867 Canada had a population of but three million people. The revenues and expenditures after Confederation were only a fraction of what they are to-day. There were no such things as motor vehicles requiring hard surfaced highways; there was then no radio, no aircraft, no electric light, no telephone service. The Eastern Provinces were well settled and the Western Provinces uninhabited except by Indians, a few half-breeds and fur-traders. British Columbia, for example, when it came into the Confederation in 1871 had but nine thousand whites. Prince Edward Island, which came in around the same time had eighty thousand people.

Industries since those early years have multiplied. Whole sections of the country have ceased to depend largely on agri-



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culture and the forests. Industries have become highly centralized in the central Provinces. Cities have increased their populations and new cities come into being. A great depression has brought unbalanced budgets and there have arisen demands for social services never dreamed of in 1867. Vast sums have been spent in railway and highway construction. The whole economic face of the Dominion has changed. Some reform of the Constitution, I submit, is necessary to enable the country to deal with these changed and changing conditions.

Let us see what the British North America Act provided. It was primarily a measure for union of the then three Provinces, Canada, Nova Scotia and New Brunswick. The word 'union' is used throughout the Act. What the Fathers were endeavouring to affect was real union. The Act provided for representation in a new Parliament at Ottawa and for a Senate and House of Commons, and it provided further for a distribution of the powers of the Dominion and the Provinces. There was further provision for the establishment of courts, the carrying out of treaties; and safeguards were inserted for what have come to be called 'minority rights' in the Provinces, that is to say, rights relating to religion, education and the use of English and French. A fairly successful attempt was made to deal with every conceivable subject of legislation that the situation present or future might call for.

WALKER: Was there any provision in the Act for its amendment?

RUTLEDGE: No, President Walker. Undoubtedly this omission was not by accident. The Fathers of Confederation gave all the residuary powers to make laws for the peace, order and good government of Canada to the Dominion, and not to the Provinces. Apparently, they thought that everything conceivable would fall, as it does in fact, either to the Dominion or to the Provinces, and it was never believed that there would be any legislative sorrow that the British North America Act could not heal. Furthermore, that should an

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amendment be necessary it would take place upon suitable representations from the Dominion.

The great anomaly, Mr. Chairman, as I see it is that Canada, not only a self-governing Dominion but a sovereign state under the Statute of Westminster, is obliged to go to the Imperial Parliament, that is to say, to the Legislature of a sister sovereign state in order to have an amendment made to its constitution. I venture to say that no other country looks to the Parliament of another country for the amendment of its constitution.

BURCHELL: That is an anomaly, Mr. Rutledge, but the British Commonwealth of Nations is built up on anomalies. The Balfour Report adopted by the Imperial Conference 1926 states that the British Commonwealth defies classification and bears no resemblance to any other political organization.

It is a still greater anomaly for the United Kingdom to allow Canada to continue to use the Imperial Parliament for the amendment of the British North America Act. Especially so when we know that the Imperial Parliament will only pass such amendments as Canada requests. In fact, if not in form, all amendments to the B.N.A. Act have been made by the Parliament of Canada. The Imperial Parliament is no longer Imperial. It is really the subordinate legislature to-day as it can only pass legislation with respect to Canada in the form approved by the Canadian Parliament. Therefore the objection to the existing position might well come from the United Kingdom, not from Canada, but they are not objecting over there.

It is interesting to note that in an application from Western Australia for secession from the Australian Commonwealth two years ago the Imperial Parliament established the precedent, that no petition relating to amendments to the Constitution would be received from a Provincial Legislature. The effect of this precedent has been discussed by the Kelsey Club. The view held by the Kelsey Club was that only the Canadian Parliament can speak for Canada before the Imperial Parliament. If, for instance, the House of Commons and Senate at Ottawa decide

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next session jointly to petition the Imperial Parliament for an amendment to the B.N.A. Act, which would permit the Canadian Parliament to override the recent Privy Council decision and enact an unemployment insurance scheme, I do not think there is any doubt but that the Imperial Parliament would approve the petition and enact accordingly. I believe that in this day and generation the Imperial Parliament would refuse to act as an arbitrator between the Provinces and the Dominion.

I am, therefore, for the present at least, in favour of the present position and of the continuance of the British North America Act, with such amendments as are required for the purpose of strengthening the power of the central government in matters of common interest, such as unemployment insurance, but at the same time, preserving to the Provincial Legislatures full control of matters which are local, and particularly rights relating to race, religion and language. At all events, I think that we should wait and see what happens to the proposed amendment authorizing the unemployment insurance scheme before we consider any new methods of changing our Constitution.

RUTLEDGE: I think there is much to be said in favour of your views, Mr. Burchell, but my view is that the Constitution should not be amended without the Provinces having a right to a direct voice in changes which peculiarly affect them.

FARQUHAR: There has never been any difficulty in having a Constitution amended at London. I think I can subscribe in general to what Mr. Burchell has just said. But do you suggest as an alternative, Mr. Rutledge, that we should now have inserted in the British North America Act, or make some other statute providing an express method of amendment, by which changes may be made in the Constitution without going to Westminster?

RUTLEDGE: Yes, Mr. Farquhar, I do think the time has come when we should take steps to provide for amending our own Constitution.

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WALKER: You said a few moments ago that in seventy years the Act had been amended only six times. Would you tell us what these amendments were about, and how they were made?

RUTLEDGE: One of the amendments had to do with the establishment of new Provinces and their representation in the Parliament of Canada. Another was to remove doubts as to the privileges, immunities and powers of the Senate and the House of Commons and the members of those bodies. In 1907 new provisions were made for Provincial subsidies. In 1915 the number of senators was increased from seventy-two to ninety-six, and in the following year the duration of the Twelfth Parliament was extended for one year. You will see that none of these amendments altered in any way any of the major provisions of the Act of 1867. As to how they came to be made the answer is that all of them were made on the joint addresses of the Senate and the House of Commons. Only in one instance, that relating to Provincial subsidies in 1907, were the Provinces consulted. In this present year the Provinces are again being consulted by the Dominion in the matter of an amendment that will provide the Dominion with power to enact and administer an unemployment insurance scheme. I take it that consultation of the Provinces is a matter of political expediency, not of legal right. The supreme right of amendment remains at Westminster.

CURTIS: What would you say, Mr. Rutledge, to the view expressed from time to time that the Constitution was a contract between the Dominion and the Provinces, and that before any amendment affecting Provincial powers takes place, the Provinces should be consulted?

RUTLEDGE: You know that Lord Sankey in the Privy Council in the Aerial Navigation Case said that '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 Confederation is founded'. This year in the Minimum Wage Case Lord Atkin in delivering the decision of the

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Privy Council speaks of the distribution of powers between the Dominions and the Provinces under the Act as 'the inter-provincial compact'.

CURTIS: Then the Dominion is obliged to go to the Provinces for an amendment providing for an unemployment insurance scheme. It must follow that if one or more Provinces do not consent there will be no such Act unless the Provinces individually see fit to pass them.

RUTLEDGE: That would follow, Professor Curtis. The supporters of Provincial rights take the stand that Confederation is a contract, that cannot be changed without the consent of all the parties, but if two law lords had not just spoken, I should have thought that doctrine had been largely exploded.

Without going into the subject very fully, I would like to point out that Mr. Rogers, now Minister of Labour, in 1931 said that there could have been no contract in 1867 between the four Provinces of Ontario, Quebec, Nova Scotia and New Brunswick because neither Ontario nor Quebec could be parties to the agreement for they did not exist as separate Provinces. Prince Edward Island and British Columbia could not be parties because they came in later, and obviously the three Prairie Provinces could not be parties to such an agreement because they were created by acts of the Dominion itself. I think it is generally conceded that the contract or compact theory does not get one very far.

MARVEN: But the compact theory is a view that will die hard in certain sections of Canada.

RUTLEDGE: That is so, Mr. Marven. Mr. Rogers once said, 'our first task is to remove the barbed wire that has been set in our path by the proponents of the compact theory of Confederation. It must be cut down and destroyed.'

MARVEN: It has been said many times that the Courts, and particularly the Privy Council, have in effect been making what may be called amendments to the Constitution. Why should we not have the courts solve our difficulties? The Privy Council gave in the Radio Case and again in the Aerial Navi-

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gation Case, constructions favouring Dominion control of the air, which apparently met with approval. In the United States it is said that the Supreme Court has saved the Constitution. Why not rely on the courts?

RUTLEDGE: In answer to that, Mr. Marven, I can best point out what Dr. Skelton said before a Committee of the Commons two years ago: '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 re-allocate. 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 British North America Act regarding the organization of the executive and legislative branches of the Dominion.'

WALKER: If what Dr. Skelton says is right, perhaps people have been expecting too much from the courts?

RUTLEDGE: I think you are right, President Walker. I am opposed to the suggestion that any court should be bound to interpret the Constitution in a manner harmonious with prevailing political sentiment; that is to give from time to time so-called 'political decisions'. It is for the legislature—for the people—to make the laws and for the courts to interpret them, not to fit the whims of the passing day, but in the light of what those who made the laws actually intended them to mean. That is my firm view.

WALKER: Well, gentlemen, we must not get away from our subject, 'methods of amendment'. Perhaps Mr. Rutledge would outline how the Constitutions of some other countries are amended.

RUTLEDGE: Will you first let me take the case of the United States, President Walker? The Constitution of the United States is not in the form of a statute. There are four ways of amending it but only one way has ever been used; that is, the proposal for amendment is made by a two-thirds vote in the Senate and in the House of Representatives, followed by rati-



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fication of the legislatures of three-fourths of the States. Neither the President nor the State Governors have any veto. I might add that since the American Constitution was adopted over 2,500 amendments have been proposed but only twenty-five have been passed by Congress. Out of the twenty-five amendments passed in the United States the first ten were really part of the original Constitution and four of the twenty-five that passed Congress have never been approved by a sufficient number of States. The recent one relating to child labour was not approved by a requisite majority of the States.

Then there is Australia. That Dominion has the power to amend its Constitution. First, it is necessary to get a majority in both Houses; then follows ratification by referendum to the electors in each State of the Commonwealth, then approval by the Governor-General. It might be noted that if one House disagrees and the other House passes the proposal, again at the same or next session the Governor-General may submit it to the electors. I might further add that if the amendment involves any question of state representation in the Parliament or alteration of state boundaries, or change of a state's constitution, it must be approved by a majority of the electors of the state concerned.

Then there is South Africa. That Dominion has an act of the British Parliament, 'the Union of South Africa Act' of 1909. In 1934, in an endeavour to clean up the whole constitutional question the Parliament of the Union passed certain Acts, among them 'The Constitution Act'. The latter repeated word for word the Act passed by the United Kingdom with amendments up to date. The South Africans are well provided for.

MARVEN: I am interested in what you say as to the referendum. Why couldn't a similar method be adopted for Canada?

RUTLEDGE: A referendum is contrary to the principles of representative government, Mr. Marven. Our elected members are bound, under the British way of doing things, to accept responsibility. Moreover, it is expensive to hold, except when Dominion elections are being held; and those may not be

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times when it is necessary to deal with the question involved. It is said that the referendum is not working well in Australia. Finally, the method is not used in the United States and the people on this side of the water are not used to the referendum. Australia has really acquired a degree of inflexibility it did not expect and has as much difficulty in getting amendments to its Constitution by way of referendum as we have without it. On this point we differ from the Constitutional Club of Vancouver.

FARQUHAR: Do you believe that a constitution should be easily amended?

RUTLEDGE: Yes, Mr. Farquhar, I do. There should be a degree of flexibility, some ease of adaption to changing circumstances so that reform may come without revolution. The will of the people is the thing to be carried out.

WALKER: I suggest that Mr. Rutledge outline any proposals he may have as to how the Constitution of Canada might be amended.

RUTLEDGE: There have been a number of different ways suggested, President Walker, and some of them blend one into the other. Stated briefly some of them are:

The Australian method of joint address of the Houses after a Dominion-wide referendum and approval of the electors. Where the rights of a Province are peculiarly affected, approval by the electors of the Province.

Another method is to have the British North America Acts, as they now are, and submit amendments to the Imperial Parliament on an address of both the Senate and the House of Commons. This is the present method which has worked fairly well, but, I submit, is out of line with our new status under the Statute of Westminster.

Then there is the suggestion that the British North America Act have inserted in it a clause stating under what conditions amendments to that Act should be made by the Imperial Parliament. It has been suggested that such an amendment clause would provide that any change pertaining to the Do-

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minion alone be dealt with by the Dominion without the consent of the Provinces. But where a matter of Provincial interest is concerned then the consent of the Provincial Governments be obtained. Some go so far as to say that the consent should be unanimous; others that at least two-thirds of the Provinces (including any Province that is intimately affected); others a simple majority of the Provinces (including of course any Province whose representation in the House or whose boundaries are to be altered or whose Constitution changed.)

CURTIS: There would certainly be some flexibility in a constitution like that, and I should think enough stability to give the constitution a reasonable degree of permanency. There is, however, one difficulty. I do not think that unanimity is likely to be had on many constitutional matters involving the rights of the Provinces. The United States Constitution can be amended only with the consent of three-fourths of the States; I should think that in Canada if a certain majority of the Provinces consented to an amendment it ought to go through. If neither consent or dissent be given within, say two years, then consent be assumed.

WALKER: What about Quebec? That Province was given special treatment in 1867, in the matter of a fixed representation in the House of Commons. Do you not think, Mr. Rutledge, that it would again have to receive special treatment?

RUTLEDGE: Yes, I think that not only Quebec but every other Province in which there are now religious or racial minorities, would require special treatment. It was suggested and quite unanimously agreed upon in the Parliamentary committee referred to, that in any amendment affecting minority rights (so called) the Provinces should be unanimous. I think we, too, might all agree upon that.

WALKER: Are there any other proposals?

RUTLEDGE: Yes, there is another proposal made—a very interesting one—as to how we might go about it. It has been suggested that there be called a constituent assembly of the

Dominion and of all the Provinces. It would be a body truly representative of the whole people. It might be composed of all the members of all the legislatures of the Dominion and the Provinces, or if that body would be considered too large, then reduction pro rata according to population, together with a number of specially qualified persons. The total number of members of the different Houses in Canada is 882. Undoubtedly that would be too large a body but all parties and all views should be represented. Might I add that the material now being gathered by the Rowell Commission would be of great use to such an assembly?

WALKER: What do you now say, Mr. Rutledge, in summing up your views?

RUTLEDGE: My submission is that the Constitution ought to be amended; secondly, that a method of amendment different from the one now in use ought to be provided; thirdly, that the Constitution of this Dominion ought to be resident in the Dominion and not in Great Britain; fourthly, that the best way to deal with the whole situation is to call an assembly or conference of persons representing the whole Canadian people for the purpose of considering what should be done. There are strong views to the effect that the present system will meet Canada's needs for years to come, but my belief is that the British North America Act should be overhauled, consolidated, amended to bring it in line with changed conditions and re-enacted in Canada by legislatures of the Dominion and of the Provinces. It would contain, of course, a clause providing for its own amendment in the future.

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BY D. A. MCGREGOR

*Discussed by the Constitutional Club, Vancouver, January  
2, 1938*

CHAIRMAN: We meet for our final discussion upon Canadian Constitutional questions, and our special subject is the Method of Amendment. Mr. McGregor, you have attended the sittings of the Rowell Commission and have heard at first hand the views of two of the Provinces. I would ask you, therefore, to lead the discussion.

MCGREGOR: The Rowell Commission, Mr. Chairman, has heard many suggestions as to what changes should be made in the Canadian Constitution, but few as to the method of making them. There seems no question that Canada is in need of a new constitution, or a rebuilt constitution. The whole machine—for it is a machine—needs to be taken apart and re-assembled in the light of modern ideas of the functions of government, and set running as the Fathers of Confederation intended it to run, so that it may, in the words of the Quebec Resolutions, 'promote the best interests and present and future prosperity of British North America'.

You know, of course, Mr. Chairman, that the Fathers of Confederation made no provision for the amendment of the Constitution they had set up, and from that you may deduce that the Fathers though it would never require recasting or change. Yet they were practical statesmen who had been in the hurly-burly of the constitutional fight for years, and they must have known that there is no such thing as finality in constitution-making. They must have realized that they were beginning a job, not completing one.

SOWARD: Will you explain, Mr. McGregor, why in the

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original draft of the British North America Act no provision was made for the amendment of the Constitution?

MCGREGOR: There are two answers to the question. One is that the status of Canada, at the time, was definitely colonial. Downing Street was the master, and if the new Constitution proved defective in any particular, it was only necessary to ask Downing Street to have it changed.

The second reason is that there was no need to set up special amending machinery. The Fathers of Confederation had all been brought up under the British system, which puts its whole trust in parliament. Under the British system, parliament is supreme. It is above the Constitution, and can legislate away or change laws, customs, conventions, being in this respect very different from the United States Congress, which is subject to the Constitution.

Now, while to Canada the British North America Act was a Constitution, to the Houses of Parliament at Westminster it was only another bit of legislation, and so subject to amendment by these two Houses any time they thought it desirable. There is only one way to make changes in an Act of the British Parliament; that is, to pass another Act; and all the machinery for passing Acts is ready and well known. There is no need to manufacture it.

As the years passed, it became necessary to make certain formal changes, and the Parliament of Canada took the simplest and most direct means of getting them. Its two Houses passed resolutions asking the British Government to have the changes made at Westminster, and this was always done. It was all very easy so long as no exception was taken to the amendments. And, for years, none was taken. Most of the amendments were of a routine nature and went through with a minimum of discussion. Only on one occasion was it thought necessary to consult the Provinces. That was in 1907, when certain financial adjustments were made. Then all the Provinces consented except British Columbia.



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STEEVES: What is the reason that British Columbia did not consent to the amendment, Mr. McGregor?

MCGREGOR: The reason, Mrs. Steeves, was that Sir Richard McBride objected to a phrase in the draft amendment which suggested that the financial arrangements under the amendment were final and unalterable. He objected to the finality rather than to the substance of the amendment and even carried his objections to London. The phrase was eliminated, but not because of the objection, it was said in Parliament.

CHAIRMAN: Have the Provinces the power, do you think, to block any amendment to our Constitution that might be desired by the two Federal Houses?

MCGREGOR: There is a theory, Mr. Chairman, that has grown up in Canada known as the 'Compact Theory' of Confederation. This theory holds that the British North America Act was based upon an agreement among the original Provinces, that there was, in effect, a definite contract, and that, before any change could be made in the Constitution, the full consent of all the contracting parties had to be secured.

SOWARD: How old is this compact theory, Mr. McGregor? Had it any real significance before 1930 when Premiers Taschereau and Ferguson brought it forward to block some of the proposals suggested in the Statute of Westminster?

MCGREGOR: I think it had been developed before that time, Professor Soward. It apparently had no force in 1907, when Sir Richard McBride made his objection.

This compact theory of Confederation was strongly assailed in the admirable brief which the Native Sons of Canada presented to the Rowell Commission at Winnipeg recently, and was handled rather roughly in the brief of the Saskatchewan Government. Some years before, it had been attacked by the Nova Scotia Government in its brief to the Jones Commission. Whatever basis the theory may have historically—and that is something for the historians to fight over—its general acceptance, to-day, would give Canada probably the most rigid constitution on earth. It would make it necessary, before even the

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smallest constitutional change could be made, for the consent of all the nine Provinces to be secured. It would make it possible for even the smallest Province to veto the will of all the others. It would, in short, put Canada in a strait-jacket. The United States Constitution can be amended by the consent of three-fourths of the States, and that three-fourths is difficult enough to get, and sometimes takes years. To demand unanimity would be to stop the wheel entirely.

The old Confederation was the result of a compromise. The new Confederation, if we get it, must be the result of a compromise, too. To insist upon unanimity is to exclude compromise, and so to make change practically impossible, however necessary.

There are various ways of amending the constitution of a federation. One plan is to hold a convention or conference, as was done in Canada in 1864. A second way is to take a plebiscite, as they do in Australia, where an amendment, to be adopted, after having passed the Federal Parliament, must secure the approval of a majority of the electors voting and a majority of the States. The third plan is that in vogue in the United States, where the proposed change, after being approved by a two-third majority in each House, is submitted to the State legislatures, and passes on receiving the approval of three-quarters of them.

In Switzerland, constitutional amendments must have a majority of the voters and a majority of the cantons. The simplest plan is that to be followed under the new Russian constitution, which allows the Supreme Council to make amendments by a two-thirds vote of both its Chambers. In several of the Constitutions mentioned there is provision for the people to initiate changes by petition, the proposals then going through the usual routine.

Canada might, conceivably, adopt any one of the plans suggested. But there are really two jobs ahead of Canada. One is to bring the Constitution into conformity with our needs. The other is to set up the machinery for future amendment. Under

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our new status—equal to any, subordinate to none in any aspect of our domestic or external affairs—we can hardly continue to leave our Constitution in the keeping of another of the Empire Governments, and it is hardly conceivable that any of the other Governments would wish to keep it.

The first thing to do, then, is to bring our Constitution home and arrange it to suit our needs and our convenience. Then we can make some arrangements for its revision, either periodically or at such times as revision seems desirable.

CHAIRMAN: Do you think there would be any opposition from any of the Provinces to that suggestion?

MCGREGOR: I think there would probably be opposition from New Brunswick, at least, Mr. Chairman, and possibly from Quebec.

SOWARD: There is one point on which I would like your opinion, Mr. McGregor. I have heard it stated by some authorities that they would rather avoid any formal application to amend the Constitution and leave it where it is now, that is, subject to an address by both Houses of Parliament to the British Parliament, as in the past. Would you agree with that argument, Mr. McGregor?

MCGREGOR: It might be satisfactory from the Canadian point of view, Professor Soward, but I can hardly think it could continue to be satisfactory from the British point of view. Take a hypothetical case. Suppose the Parliament of Canada and a majority of the Provinces of Canada agreed on a certain amendment, and a minority of the Provinces objected very strenuously to such an amendment, the amendment under our present arrangements would go to the Imperial House. Quite possibly the Province which objected would make representations opposing the amendment, and the Imperial Houses would then be put in rather an embarrassing position. If they passed the amendment as asked, they would be going contrary to the wishes of part of the Canadian people, and if they refused to pass the amendment they would be doing the same thing. They would be injecting themselves into a Canadian

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political quarrel, and I cannot conceive of their wishing to do that.

SOWARD: I agree with you.

McKELVIE: I am afraid that I cannot entirely subscribe to that, Professor Soward. London furthered Confederation for Imperial interest; Canada is, and must continue to be, an important factor in the Imperial family, and Great Britain should not shirk responsibility, particularly in respect of acting in an impartial and judicial manner where the views of the Federal and Provincial jurisdictions conflict.

McGREGOR: For the first changes in our Constitution we might well adopt the plan of the constitutional conference or convention. There is precedent in favour of it. It worked well in 1864, and started us on our way as a Dominion. So it seems possible it would work again. The conference, like the Quebec Conference of 1864, should be representative of all the parties and all the Provinces.

STEEVES: Mr. McGregor, what do you think of the idea that was suggested by Dr. Arthur Beauchesne at the sittings of the special committee appointed by the House of Commons in 1935? Dr. Beauchesne suggested there that we have an independent constitutional assembly composed of representatives of the Provinces, and from all parties in the Provinces, which would independently draw up a new constitution, or draw up constitutional amendments as the case may be, and then submit these amendments for approval to the Provincial Parliaments and the Dominion Parliament. The idea was to take politics entirely out of constitutional matters.

McGREGOR: The assembly that Dr. Beauchesne favoured, Mrs. Steeves, could take the place of conference or convention, as I have suggested.

Perhaps you can tell us, Professor Soward, how the delegates were chosen in 1864?

SOWARD: In Canada a coalition government had just been formed which included all parties in favour of Confederation, and these parties alone sent representatives to Quebec and

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Charlottetown. The opposition was not invited, so it could not put its views forward either at Charlottetown or Quebec, and was only heard in Ottawa after the return of the delegates. Still more serious was the fact that the people of New Brunswick or Nova Scotia never properly discussed the Constitution. They were not given the opportunity, and hence their lingering resentment against the B.N.A. Act. This time we will have to see that there is no repetition of that mistake, and it will take careful planning to work such a conference as you suggest.

What also interests me about the suggestion of conferences, Mr. Chairman, is that normally the people of Canada are extraordinarily casual in their interests in the national party politics as compared to the American people. Since the war we have had only two conferences, one of the Liberal Party in 1919, and the other of the Conservative Party in 1927. Consequently, there is no close association of the Federal parliamentarians with the rank and file of the party, as there is in the United States, and I am rather wondering if the device you suggest would not show—

STEEVES: I don't want to interrupt you, Professor Soward, but the C.C.F. have a National Party conference each year.

SOWARD: You are quite right, Mrs. Steeves. I stand corrected, and I might add that in Great Britain the Labour and the Conservative Parties hold an annual conference.

MCGREGOR: There are, of course, thousands of people in Canada who know nothing about the Constitution, and care nothing. Of those who do know and do care, some are in favour of radical amendment so as to make it possible for the Dominion and the Provinces to meet the problems of an exacting age; and some are in favour of leaving the Constitution as it is, because they realize that certain fundamental rights are guaranteed in that Constitution, either explicitly or implicitly, and they fear that if changes are made some of these rights will be placed in danger. Both these parties are honestly

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concerned with the problem, and it should not be impossible, when we take up the question of amendment, to meet the demands of both.

STEEVES: I think you are being unduly optimistic there, Mr. McGregor. I think we have definitely two trends in our Canadian people, those who are in favour of maintaining the status quo because it maintains their own privileges as a class, and those who want to go on with reforms that would distribute more wealth to the people, and it is going to be a fight to the death between the two. It seems to me that only the device of a plebiscite taken of all the people will decide it.

MCGREGOR: Do you think, Mrs. Steeves, that even the diehards are content with the Constitution exactly as it is?

STEEVES: Oh, no, Mr. McGregor; but it would have to be amended to suit their own ends, and it is in a different direction from those who want it amended for progressive reform. The diehards would like to have the Constitution amended in order to give them some definite financial control over the Provinces, to make it possible to have their own vested interests safeguarded in the future. It is quite a different constitutional amendment from the one desired by the radicals.

MCGREGOR: As I have suggested, the compact theory of Confederation, with its insistence upon the consent of every Province before there can be any constitutional change, must be ruled out if there is to be any approach to constitutional flexibility in Canada. But the compact theory is the argument of those who hold that flexibility is of less importance than the rights which flexibility may endanger. Here, then, is the first opportunity for compromise, and if the compromise is broad enough, it should clear the way for such progressive changes as the march of time suggests.

While we left our Constitution in the keeping of the two Houses at Westminster and petitioned these Houses to make such amendments as we required, we put our trust in the supremacy of Parliament, and we were never betrayed. When we bring our Constitution home, the supremacy of Parliament



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will no longer be sufficient guarantee, for while in Great Britain they have one Parliament, which is supreme, in Canada we have ten Parliaments, each of which is superior to all the others in the field assigned to it. Each Parliament will wish to have its interests safeguarded against encroachment, so it will be necessary to give the Canadian Constitution a place in Canada superior to that which the British Constitution has in Great Britain. It will be necessary to make it, to some extent at least, superior to the Federal Parliament.

This suggests the field of compromise. If there are rights which some of our people deem sacred and guarantees which some of them hold essential, it should be possible to give these rights and guarantees a preferred place in our Constitution—to instal them in an inner chamber, as it were—in the very ark of the covenant—and make them inviolable save with the consent of all the Provinces or a substantial majority of all the people.

Once these sacred things are placed beyond the possibility of violation, the other parts of the Constitution—the mere machinery of government—should be subject to change and modification and improvement as the times and circumstances require. They might be made amendable by Parliament. If thought desirable, something more than a bare majority might be stipulated—say Russia's two-thirds. Or a majority of the Provinces might govern; or a plebiscite, as in Australia.

CHAIRMAN: Which one of these methods would you advocate, Mr. McGregor?

MCGREGOR: There are certain amendments, Mr. Chairman, that might be satisfactorily adopted by a bare majority of Parliament, but others might require something more. I think a plan of submitting any contentious amendment to a plebiscite would be most satisfactory.

CHAIRMAN: A plebiscite is possibly the best method of amendment, because on controversial and important amendments it gives the different parties interested an opportunity of discussing the problems at public meetings and having the

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public properly informed upon the problem. It seems to me that this would be the most democratic method that we can devise.

SOWARD: I hope you are both right, but in view of the recent declaration of Mr. Hepburn and Mr. Duplessis I am a little dubious of it.

MCGREGOR: True. But whatever method of amendment you adopt, the aim should be to get a safe Constitution—one that will guarantee our rights and liberties—and a flexible constitution—one we can change when we feel we have to—and a constitution that will work and can be made to work.

## APPENDIX

### A NEW BRUNSWICK VIEW OF CONFEDERATION

BY

ALFRED GOLDSWORTHY BAILEY

*January 12, 1938*

When Prime Minister the Rt. Hon. W. L. Mackenzie King a few months ago requested the consent of the Provincial Governments to an amendment of the British North America Act which would place unemployment insurance and related matters within the jurisdiction of the Federal Parliament, Premier Dysart replied on behalf of New Brunswick that the proposal was one which must be determined by the Legislative Assembly of the Province. The New Brunswick Government, he said, fully appreciated the ultimate objective of improving the social security of the individual, and was in complete accord with the principle involved. Nevertheless the proposed constitutional amendment, or any similar proposal, must necessarily be submitted in definite form. Only on this basis might a decision be reached, since the different Provinces might have varying conceptions of what was proposed. The Legislative Assembly, he said, alone must speak.

In taking this stand on the matter, the New Brunswick Government was not creating a precedent. It was not invoking a new principle never before invoked, and never before applied in matters pertaining to the relationship between the Dominion and the Provinces. It was not a view voiced without regard to the historic circumstances of this Province. Indeed it was held to be consistent with the conditions of the political evolution and structure of British North America. It was based upon a conception of the Constitution which has some-

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times been referred to as the 'Compact Theory' of Confederation.

Briefly stated, the compact principle is based upon the conception that the British North America Act of 1867 gave effect to a treaty between New Brunswick, Nova Scotia, and the two sections of united Canada which later became Ontario and Quebec. As the Act gave sanction to a compromise between these political communities, and as it emerged as a result of their consent to Confederation, it is maintained that any proposed amendment, before it can be implemented by legislation, must necessarily receive the approval of the Provinces which were consenting parties to the original agreement.

To establish the correctness of this view it is thought necessary first to examine the history of the Confederation movement during the years preceding the passing of the British North American Act, and second, it is deemed pertinent to inquire as to the spirit in which the Act has been interpreted from time to time in connection with the relationship and status of the Federal and Provincial powers.

Susceptible of varying interpretations as the history of Confederation may appear to be, certain facts and points of view stand out clearly from the whole transaction. It is necessary to delineate these facts and points of view with exactitude, since they bear directly upon the point now at issue.

With the principle of agreement and consent the attitude of the Imperial Government throughout the Confederation negotiations was consistent. It is worthy of note that the British Government would not announce any definite course of policy with regard to a Confederation proposal that originated with only one of the Provinces. The concurrence of all the Provinces to be united was clearly required as a point of departure. The attitude of Downing Street may be found in a despatch of March 18, 1865, to the Hon. Arthur Hamilton Gordon, Lieutenant-Governor of New Brunswick. The cordial approval of the proceedings of the Quebec Conference is here given. Measures based on the plan drawn up by the delegates

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at the Quebec Conference would be submitted to the Imperial Parliament, *if* the Provincial Legislatures should sanction that plan. It is evident from this undertaking that the right was conceded to the Provinces to conclude an agreement which was in the nature of a treaty among themselves.

Many proponents of the compact principle have regarded the Resolutions of the Quebec Conference of 1864 as a treaty between the Provinces that were represented by delegates on that occasion. There are several reasons why such a view must be regarded as untenable. It is here sufficient to state that the Quebec Resolutions were rejected by Prince Edward Island, consideration of them was postponed by Newfoundland. Moreover, they were never ratified by New Brunswick or Nova Scotia, although debates on the issues they had raised took place in the Legislatures of both Provinces. In New Brunswick the Government, headed by the Hon. Samuel Leonard Tilley, after a vigorous campaign in support of the Quebec Resolutions was defeated at the polls. The election which ensued in the following year returned a Legislative Assembly favourable to the principle of Confederation, but not to a union based on the Quebec Resolutions. Two elections had been held in New Brunswick on the issue and the people of this Province became well informed on the question. The records do not leave any room for doubt as to what was done. New Brunswick, like Nova Scotia, voiced its approval of the general principle of union, but demanded a new deal with respect to the details of the measure. The view that the Quebec Resolutions *in toto* constituted a compact between the Provinces, therefore, cannot be sustained.

To what extent, therefore, and in what sense, can the British North America Act be considered as having sanctioned a treaty or compact between New Brunswick, Nova Scotia, and the Canadas? The Nova Scotia legislature, when in the end it passed a resolution in favour of union, authorized its delegates to arrange with the Imperial Government a scheme which would effectually ensure just provisions for the rights

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and interests of that Province. Moreover, the New Brunswick legislature authorized its delegates to unite with the delegates from other Provinces in arranging with the Imperial Government for the union of British North America, and as in the case of the Nova Scotia resolution, upon such terms as would secure the just rights and interests of New Brunswick accompanied with provisions for the immediate construction of the Intercolonial Railway. Here were explicitly stated not only legislative approval of the principle of union but also of the conditions of acceptance. It seems probable that the whole catalogue of conditions was not enumerated in these resolutions because most of the provisions of the Quebec plan were agreed to by everybody.

It was perhaps for this reason that when New Brunswick and Nova Scotia sent delegates to the London Conference of 1866, they did so with the approval of their legislatures, with most of the terms of union understood and accepted, and with a view to securing a revision of the objectionable terms contained in the Quebec Resolutions that had been drawn up two years before. The Quebec Resolutions were abandoned as forming a binding agreement, and they were used by the delegates in London only as a convenient basis of discussion. To negotiate a new agreement, the legislatures of these Provinces gave their delegates, as it were, plenipotentiary powers. In London the negotiations were started *de novo*.

It has been maintained, however, by those who do not accept the compact principle of Confederation, that unlike the Quebec Conference of 1864, the delegates to the London Conference of 1866, acted in a purely advisory capacity to the British Government, and that a new agreement was not negotiated by the delegates of the Provinces themselves. It seems clear, however, that there was not merely one London Conference. There were two. The first one sat, with the Hon. John A. Macdonald as chairman, at the Westminster Palace Hotel from December 4 to December 24, 1866. The delegates drew up a series of sixty-nine resolutions, known as the London Resol-



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utions, which constituted a new inter-provincial agreement. Although Canada had been committed to the Quebec Resolutions, Macdonald stated at the conference of delegates, that if New Brunswick and Nova Scotia should demand new terms, it was understood in Canada, although never committed to writing, that the Canadian delegates should be prepared to listen and consider. Such was the first London Conference which drew up the London Resolutions upon which the British North America Act was based. Only at the second London Conference which met after Christmas 1866 did the delegates act in an advisory capacity to the British Government for the purpose of drafting the British North America Act and the Canada Railway Loan Act to give effect to the inter-provincial agreement.

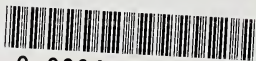
The nature of the Constitution, as one based on the principles of compact and consent, was formally recognized by the Parliament of Canada in 1907. The Subsidy Act of that year, by which the allowance to the Provinces provided in the British North America Act were to be substantially increased, was based upon the principle of consultation with the Provinces. In confirmation of this principle it was acknowledged that the Act of 1867 gave effect to a treaty, and that no amendment designed to disturb the terms of that treaty, could be effected without the consent of the parties that were bound by it. The most recent recognition of the compact principle was that given by the Lords of the Judicial Committee of the Privy Council, in rendering judgment on certain legislation of the Parliament of Canada, on January 28, 1937. In this judgment reference is made to 'the inter-provincial compact to which the B.N.A. Act gives effect'. Moreover, it is not irrelevant to recall that the Statute of Westminster, which gave legal effect to the national status of the Dominions, did not increase the legislative field of the Parliament of Canada at the expense of the Provinces, nor did it apply to the repeal, amendment, or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

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In addition, it is regarded as noteworthy that the compact principle of Confederation has been generally recognized in connection with the rights of racial minorities within the Dominion. Few persons, perhaps no one, would have had the temerity to suggest that an amendment to the Constitution which would effect the rights of a racial minority should be carried through without the consent of that minority.

On the basis of the facts that have been presented, it is maintained here in New Brunswick, that Canada is a confederation as proposed at the London Conference, not a federation as proposed at Quebec. This status, it is held, determines the fact that the union is based on a compact, the terms of which cannot be amended without the consent of the contracting parties; or in other words, that Canada derives its being and authority from the Provinces with Imperial sanction, and that this authority is a matter of agreement between the Provinces. Finally, it is deemed of vital interest to demand a strict adherence to the letter and spirit of the Constitution as thus conceived.

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