

JAMES STEPHEN ON NOVA SCOTIAN COLLEGE CHARTERS, 1840-41

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JAMES STEPHEN¹ permanent undersecretary in the Colonial Office, 1836-1847, took an active interest in the college charters approved by the legislature of Nova Scotia 1840-41. During this time the official designation of Dalhousie was changed by law from a college to a university, and Acadia College at Horton and St. Mary's College at Halifax were founded. The charters for these three institutions were discussed at some length in the Legislative Council and House of Assembly of Nova Scotia, and they were carefully scrutinized at the Colonial office. In the main this scrutiny was provided by James Stephen in his dual capacity as legal adviser and permanent undersecretary for colonial affairs.

Stephen's reports on these college charters throw light on the methods followed in handling this type of legislation, on his views concerning the administration of colonial colleges, and on the reasons why the legislature of Nova Scotia was asked to amend the charter acts.²

On May 12, 1840 Stephen reported to the colonial secretary, Lord John Russell, on the Dalhousie College Charter Act, Nova Scotia Act No. 2046, of March, 1840. In this report Stephen pointed out that the act prescribed the following method for filling vacancies on the Board of Governors for Dalhousie College: "On the first vacancy the Legislative Council is to nominate three Candidates, from whom the House of Assembly is to select two, of which two the Governor is to choose one. On the second vacancy, this Order is to be reversed; the Assembly Commencing by the nomination of three Candidates, of whom the Council is to choose two, between which two the Governor is to decide; and so on alternately."

This procedure Stephen condemned. He wrote: "It appears to me very undesirable that political Bodies of this kind should interpose at all in the voice of the rulers of a Collegiate Institution. In the result it can scarcely fail to happen that the party feelings by which the two Houses of Legislature are so continually animated, should be infused into the College. Further it seems to me, that this arrangement affords an example of the tendency so constantly manifested by Colonial Legislatures, to

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1. For general discussions of the work of James, later Sir James, Stephen at the Colonial Office, see my articles "Sir James Stephen and British North American Problems, 1840-1847," in the *Canadian Historical Review*, V, 22-41, March, 1924; and "Mr. Ove's secretary Stephen, in the *Journal of Modern History*, I 40-66, March, 1929.

2. Unless otherwise indicated, the reports and minutes quoted in this paper are from British Public Record Office Manuscripts, Law Officers' Reports on Colonial Laws, Series C.O., 323, vols. 55 and 56.

usurp administrative functions which do not properly belong to them, and for the right exercise of which they are very ill qualified." "If such should be your Lordship's opinion it would of course be unnecessary to disallow the Act, which in all other respects I apprehend to be unobjectionable, and which, in this respect, the Local Legislature would probably be willing to amend."

The act with Stephen's report then went to Lord John Russell, who declared, May 14, 1840 that the act should be disallowed. But he added: "I am not aware however if any serious inconvenience might follow such a course." To this Stephen replied on the same date in a minute addressed to the Parliamentary Undersecretary for Colonial Affairs (Vernon Smith):

The inconvenience which would arise from the disallowance of the Dalhousie College Act may I think be measured by the extent of the dis-satisfaction with which such a proceeding would be attended. This Prerogative has always been used tenderly and abstemiously. Such at least has always been the principle and in accordance with that principle the custom has been for many years past to try the milder course of recommending amendments, except where the objection was of vital nature, and affected rather the principle of the Law itself than some particular Enactment easily separable from the rest as is the case here. I write this in reference to Lord John Russell's preceding minute and in order to solve as far as I am able the doubt which his Lordship has there thrown out.

Vernon Smith agreed with Stephen that disallowance might lead to serious inconveniences. Lord John then wrote: "Then inform Lt. Govr. that the clause in question must be amended, or omitted."

On June 16, 1840, Lord John Russell, in a dispatch to Sir Colin Campbell, wrote, concerning the Dalhousie College Act:

It is not desirable in the choice of Rulers of a Collegiate Institution that the House of Assembly should exercise any control, for it can scarcely fail in the result to happen, that the party feelings by which the two Houses of Legislature are so continually animated should be infused into the College. Moreover it is the exercise of functions, which neither correctly nor advantageously belong to the Assembly to assume. You will therefore call upon them to amend or repeal this clause.³

In accordance with these instructions an amended Dalhousie College Bill was in 1841 introduced in the Nova Scotia legislature. During the debate, February 15, 1841, in the House of

3. *Journal of Proceedings of the House of Assembly, Nova Scotia, 1841. Appendix No. 5.*

Assembly, on the third reading of the bill, Mr. Young introduced a rider by which the college should be "deemed and taken to be a university," and that no religious test should be required of its teachers, students, administrators, or members of Board of Governors.⁴ This was approved by both houses, and the bill was signed by the lieutenant governor.

The amended Dalhousie College Act, Nova Scotia Act No. 2194 of 1841, was reported on by James Stephen October 7, 1841. The new Colonial Secretary, Lord Stanley, was briefed on the history of the act. Stephen explained that it stipulated "that the Board of Governors shall hereafter consist of persons to be appointed by the Governor with the advice of the Executive Council." Stephen then went on to report that the act "further provided that the College shall be a university with the right of conferring Degrees:- That no religious test is to be required from the Professors, Scholars, Graduatés, Students or Officers;-that the privileges of the university are to be open to all persons without regard to their religious persuasion;— and that the Governor may select as professors, teachers and officers competent persons of any religious belief." "I apprehend," Stephen wrote, "that this Act is not objectionable, because I understand it to be in effect the Compromise, assented to by the Bishop of the Diocese, of a protracted controversy which leaves the Church of England in possession of her own separate College, and renders Dalhousie College, according to the original design, an Institution open to Christians of every Denomination, and indeed to those who are not Christians even in name. It would however, I think, have been more satisfactory if the Bishop's acquiescence in this Act had been expressly ascertained."

With this Lord Stanley concurred. In a marginal note he wrote: "I think the Bishop's express acquiescence in his exclusion [from the Board of Governors] sh[ould] be obtained and signification of H[er] M[ajesty]'s pleasure meantime suspended." The bishop's approval was apparently secured because the act was soon put in operation.

The difficulties which a hundred ten years ago beset dissenters from the Church of England in Nova Scotia are exemplified from the early history of Acadia College. In his report to Lord John Russell, May 14, 1841, on Nova Scotia Act No. 2042, 1841, "An act for incorporating The Trustees of the Queen College at Horton," James Stephen summarized the history of earlier proceedings for establishing this institution. He wrote:

4. *Ibid.*, p. 33.

The Society of the Baptists in Nova Scotia having raised a large sum of money for the purchase of Lands and the foundation of a College, applied by petition to the Queen on the 11th January 1839 for permission to designate it as Queen's College. The Marquis of Normanby [then Colonial Secretary] answered in substance that he had not thought it right to advise Her Majesty to accede to a request, the success of which would probably give pain to a very numerous Body of Her Majesty's Provincial subjects. As far as I recollect the grounds of this decision, (which were communicated to me by Lord Normanby not in writing but viva voce) were, that his Lordship thought that as the Petition proceeded from a single denomination of Dissenters, it would be regarded by the members of the Church of England as objectionable that the use of the Royal name should be expressly conceded to the Petitioners, as such a concession might be supposed to imply some special favour toward those peculiar Religious tenets by which the Baptists are distinguished. Further I think his Lordship remarked, that though it might not be objectionable to follow it was very difficult to make a precedent of this kind, and no instance could then be cited of the Sovereign having bestowed such a distinction on any Religious Body dissenting from the Church of England; and this was the more material in the case of Nova Scotia, because there is an Act of Assembly there which expressly declares the Church of England to be the Established Church of the Province.

Subsequently to the date of his Lordship's Despatch the Baptist Society applied to the Local Legislature for an Act to incorporate their College, which, has accordingly been passed. It is described in that Act by the title "*Queen's College* and the Society have now transmitted a Second Petition repeating their former request for permission to enjoy this Royal designation. I apprehend that there can no longer be any difficulty in acceding to this application. To object to such titular distinction when actually conferred by the Local Legislature, would be an essentially different proceeding to raising the same objection when the question was under discussion merely between the Petitioners and Her Majesty's Government.

Neither do I perceive that there is any objection to the Act on any other ground unless your Lordship should regard it as objectionable, that two members of the College Council are always to be appointed by the Legislative Council and other two by the House of Assembly. The intervention of the Houses of Legislature in matters of this kind, may be regarded as the assumption by them of a share in the Administrative authority which does not properly belong to them, and as tending to transfer to the College some of those political feelings by which the Council and Assembly are themselves continually agitated. I refer to this question on the present as on a recent occasion, not as one on which I entertain any clear opinion, but rather as one which it appears to me neces-

sary that your Lordship should consider before the course to be taken on this Act is finally decided. Even however if it should be thought that there is any weight in the objection to this particular Enactment it is I apprehend not of weight to justify the disallowance of the Act. It has a suspending Clause and therefore will not come into operation until the Royal assent shall have been signified.

In a minute dated May 16, 1840, Lord John Russell stated: "I feel great objection to these nominations by the Assembly and Legislative Council. Inform the Lieutenant Governor that I hope he would ascertain whether this act could not be amended in that respect. The other objection then falls to the ground." However, in dispatch to Campbell on June 16, 1840, Lord John Russell stated that with reference to Act No. 2042 for incorporating Queen's College at Horton he agreed to the objections advanced by Lord Normanby in despatch No. 6 of March 22, 1839. Since Russell hereby endorsed Normanby's objection to the use of the name "Queen's College" the Baptists of Nova Scotia decided to change it to Acadia College.

On October 7, 1841, Stephen reported on the amending act, No. 2191 of 1841. Stephen wrote:

The Act . . . amends a former Act by giving the College at Horton the designation of the Acadian [sic] College instead of the former designation of the Queen's College. The College at Horton is established by Protestant Dissenters, and for the inculcation of their peculiar religious opinions. In the preceding Act it was called the Queen's College; to which Lord John Russell objected, as not deeming it right that Her Majesty should appear as the special Patron of such an Institution. But, subject to this objection, his Lordship stated that the Queen was ready to confirm the Act. The objection has now been obviated, and subject to the remarks to be made in the sequel regarding the Roman Catholic College of St. Mary's, I infer that both the original Act, and the present Act in amendment of it, should now be confirmed. The original Act has a suspending Clause.

In the margin of this report Lord Stanley wrote, "Yes."⁵

5. Among other Nova Scotian Acts upon which Stephen reported October 7, 1841, was one authorizing the Baptist congregation at Pleasant Valley in the township of Cornwallis to appoint a committee for letting pews in their chapel and collecting rents thereon. About it Stephen wrote: "I notice this Act not with a view to objecting it, but merely because I am not aware how far your Lordship is apprised, of the extent to which the Legislatures of British North America have gone in imparting the aid of the State towards regulating the internal economy of the various Congregations dissenting from the Established Church of England and Ireland. This is an example rather than an innovation. Such Laws as the present abound in all the British North American Provinces. If such an Act were now to appear for the first time, it might be necessary to advert to the objections to which in theory at least, it is manifestly open. But believing, as I do, that it is utterly impossible to stem, on the North American Continent, the Current of popular opinion in favour of absolute equality amongst all Christian Societies, and in favour of the equal right of all to Legislative assistance, and assuming, as I do, that your Lordship will decline any controversy on such subjects, I should have passed over this Act without any special notice, had it not been the first of its kind which has reached this Department since the Seals of it were last committed to your Lordship's hands."

Lord Stanley who had previously, 1833-34 servedas colonial secretary, wrote in the margin of this report: "I concur in that general view and in the principle. I see no ground for objecting to the provisions of the Act."

On the same day that James Stephen reported on the charter act for Acadia College, he reported on "The Act No. 2197" for incorporating "A Roman Catholic College to be called St. Mary's." Concerning this Stephen wrote:

The Government of it is placed in the hands of seven Roman Catholics, who are named in the Act and in three other persons one of whom is to be named by each of the three Branches of the Legislature. There are to be six or more professors, who apparently will all be Roman Catholic. But no Religion is to be required of the Trustees, Scholars or Graduates. The College may hold lands to the value of \$10,000. So long as any money is contributed by the Provincial Treasury, the Governor and Executive Council may enquire into the proceedings of the College and remove Offenders. But when the Contributions cease this right of interference also ceases.

This is another example of the latitudinarian, or rather the all-comprehending spirit in religious matters to which I have already adverted. The College of Acadia already noticed affords the precedent on which the College of St. Mary's is incorporated, Both Acts have suspending clauses. Therefore the Queen must, in each case, positively reject the Law, or positively enact it. Neither Act can be silently left to its operation. Here therefore arises an inevitable question of no light importance. It is a question in many respects beyond my competency, and involving consideration of high State Policy. To incorporate a College expressly with a view to the diffusion of the Roman Catholic Faith, is doubtless a very startling measure. I am not quite clear that it is consistent with the Act of Supremacy; which, by express terms, applies to all the transmarine possessions of the Crown which should subsequently be acquired. It may therefore be right to consult the Attorney and Solicitor General on the point of Law. I anticipate that they will report that there is no legal objection to the Royal confirmation of this Act. If so, the subject will be clear of all difficulties, excepting such as fall within the province of Statesmen rather than of Lawyers, I apprehend that I should afford your Lordship no assistance by expressing my own view on the manner in which those difficulties ought to be encountered.

To this Lord Stanley minuted: "The legal case must be submitted—then disposed of. I should be glad to hear Mr. Stephen on this point of policy, his disclaimer notwithstanding."

The act was sent to the crown lawyers October 23, 1841. On May 17, 1842, they reported in favour of the confirmation of the act. Stephen then wrote to the Parliamentary Under-secretary, G. W. Hope, on May 26:

In the report [of October 7, 1841] to which Mr. Blunt refers I stated my anticipation that the Crown lawyers would report that there was no legal objection to the Royal Confirmation of this Act, and I added, that if so, the subject would be clear of all difficulties, excepting such as fall within the province of Statesmen rather than of Lawyers; on which Lord Stanley observes that when the case should be disposed of by The Crown Lawyers he would wish to have my opinion on the policy of the measure. That opinion, therefore, is, that the Act, although expressly passed to promote the Roman Catholic Faith by providing a College for the Institution of Roman Catholic youth, ought not to be disallowed. If I had myself a vote to give on such Enactments, I should, without a scruple, give it against any law providing for the education of any part of the people according to any system of Doctrine or Discipline except those of the English or Scotch Church. But, if when such laws are passed. I had a vote to give as to the manner of disposing of them, it would be in favour of their confirmation.

Lord Stanley directed, May 28, 1841, that the St. Mary's College Charter Act should be "Specially confirmed."