

# “DISALLOWANCE” IN ALBERTA

C. S. BURCHILL

IN the summer of 1935 the voters of the Province of Alberta elected, by an overwhelming majority, a Government pledged to implement a drastic and revolutionary program of legislation. Two years later this program began to take form. Three Acts in particular embodied the measures which had been promised by the candidates and approved by the electorate. His Excellency the Governor-General of Canada, on the advice of his responsible ministers, promptly disallowed the provincial legislation. Excitement ran high in Alberta. A special session of the Assembly was summoned and the disputed measures were approved again, in substantially the same form as before, by a large majority of the elected representatives of the people. His Honour, the Lieutenant-Governor of Alberta, contrary to the advice of his responsible ministers, declined to approve the three offending bills, and reserved them for the consideration of the Governor-General; the will of the legislature was definitely thwarted.

These activities of the Governor-General-in-Council, and of the Lieutenant-Governor out of Council, have brought sharply into prominence a feature of the Canadian Constitution which has long been neglected—the power of the Crown to over-ride the will of the legislature. So far as the British Constitution was concerned, this power was generally held to have lapsed with the last exercise of the royal veto by Queen Anne, and with the explicit condemnation of the “suspending” and “dispensing” powers in 1689. The Canadian parliament, too, in its legislation, is safe from executive interference since the enactment of the Statute of Westminster; but our provincial legislatures, if the precedents of 1937 are to stand, must be prepared to submit to a considerable degree of executive control. When Lieutenant-Governor Bowen reserved the bills submitted to him for approval by his ministers, and when the Governor-General-in-Council disallowed measures passed by the Alberta legislature, these officials were asserting the principle that what is sauce for a constitutional goose at Ottawa or London is no proper condiment for a constitutional gander at Edmonton or Toronto. The subtle conventions which regulate the national Governments within the Empire break down when applied to the local Governments. The great battles of the 17th century which deprived the Crown of its direct control over legislation, and those of the 18th century which

shattered George III's elaborate system of indirect control, won no victories for popular government in the Canadian provinces. At Westminster the Crown now has power only "to advise" (privately), "to counsel" (secretly), and "to warn" (surreptitiously), and a King who oversteps the limits set by his ministers may be forced from the throne into private life; but in our provincial capitals the Crown, in the person of the Lieutenant-Governor, may reject ministerial advice and nullify legislative proposals just as though Pym or Burke or Baldwin had never lived.

The steady regression in the power of the Crown, in relation to the national legislatures, taken together with the increasingly confident exercise of the same power in connection with the provincial Governments, is a constitutional paradox of considerable importance. True, the disallowance of provincial legislation is no new thing in Canada; it has occurred nearly a hundred times since Confederation; but there is no parallel for the rejection of measures supported by such an overwhelming majority as that which approved the abortive Alberta legislation in 1937. The trend is not confined to Canada; the dismissal of the Lang ministry in New South Wales in 1933 is an example of a similar tendency in other parts of the Empire to use the authority of the Crown to coerce the local legislatures. The outcome of the constitutional crisis of 1936 in Canada, and the abdication of Edward VIII in 1936, both illustrate the precisely opposite tendency in the national Governments. The paradox of a simultaneous rejuvenation and decadence in the authority of the Crown recalls the stories of the monkey-gland medicaments a decade ago.

Any explanation or evaluation of these constitutional trends must take into account both the immediate circumstances which evoked the expression of the dominant tendency, and the long-term factors which made inevitable the emergence of that tendency. The situation in Alberta, for instance, was abnormal and depression-born. A new party, composed largely of politically inexperienced enthusiasts, was pitch-forked into office, pledged to the creation of a tax-free Utopia in which all citizens should receive a gratuitous social dividend of at least \$25.00 a month. The movement was based on the genuine and justifiable conviction that the advancement of productive technology had made unnecessary the misery and poverty of the depression years, and it represented a sincere and powerful determination on the part of the great mass of the people to banish the stupidities and wastes of the existing economic system. Just how to ring out the old and ring in the new order was a matter to which no great attention had been devoted. The problem was

believed to be capable of solution; the voters expected that the Social Credit candidates knew how to solve it; the candidates were sure that their leader, Mr. Aberhart, a former arithmetic teacher, could work out the problem; and Mr. Aberhart was sure that Major Douglas knew the answer. Not until after the election, when the voters began to ask their members for results, did trouble arise. Mr. Aberhart couldn't work out the problem himself, and when he turned to the back of the book for a peek at the answer, he found that the author didn't know the solution either. Major Douglas had devised a formula for ending poverty in the midst of plenty, but was very reluctant to explain how his formula should be applied in solving the Alberta equation. Poverty continued to flourish, and the erratic and amateurish legislation of the next eighteen months completely failed to abolish the curse. Finally an insurgent group broke away from Mr. Aberhart's lead, blocked the passage of any further legislation, including the budget for 1937, and at last compelled the premier virtually to abdicate his position and to turn over the direction of provincial policies to Messrs. Powell and Byrne, who had been selected as the best obtainable "experts" on the Douglas System. The bills disallowed by the Federal Government in the summer of 1937, and those reserved by Lieutenant-Governor Bowen in the autumn of this year, had been grudgingly passed by the patched-up Social Credit party under the direction of the "experts."

Neither group of measures commanded much genuine support within the majority party itself, and both evoked a storm of criticism in the provincial press. Monster mass meetings organized by the People's League denounced the Government's policy and record. Chambers of Commerce and other public bodies appealed to Ottawa to prevent the enforcement of the laws; and the Federal Government, genuinely alarmed at the course of the provincial legislature, and convinced that the move would be politically popular, disallowed the obnoxious measures.

Disallowance is a power specifically granted to the Dominion Government by the B. N. A. Act, but its exercise has always been attended with political dangers. The Liberal party in particular, which has long posed as the champion of "provincial rights," has been reluctant to employ the veto. The Liberal view of the principles on which the power should be used was laid down by Sir Wilfrid Laurier in 1879:

"The doctrine is now settled," he said, "that the power of disallowing provincial laws is to be confined to those cases only where provincial legislatures may have stepped beyond their jurisdiction

into prohibited ground; that this power is to be exercised only for the protection of imperial or federal rights which may have been invaded by provincial legislatures, but never to afford relief to any section of the community which may deem itself aggrieved by that legislation. Interference in all such cases would be a violation of the federal principle."

Laurier's dictum has pretty well defined the policy of the Liberal party in exercising the veto power, and much of the support which that party has consistently received, from the province of Quebec in particular, has been due to this rigid respect for local authority. Fortunately, the measures disallowed in the summer of 1937 were all cases in which the Province had "stepped beyond its jurisdiction into prohibited ground," and the Liberal Government at Ottawa could nullify them without abandoning its traditional position. The special autumn session of the Alberta legislature, however, presented a problem of a different kind. Under the guidance of the Social Credit "experts," it proposed a drastic press-licensing measure, whereby the Government could suspend the publication of any newspaper or could impose heavy penalties on any journal or on any member of its staff for criticism of the administration; at the same time all newspapers were to be required to publish, free of charge, propaganda material supplied by the publicity bureau of the Government party.

The press-licensing bill was probably *intra vires*; at the same time the press throughout Canada generally, and violently and volubly so in Alberta, "deemed itself aggrieved by that legislation." To disallow the measure would be to break away definitely from the traditional Liberal policy; to permit its enforcement would call down on the Liberal Government the wrath of the whole newspaper fraternity throughout Canada. Either alternative was unpleasant. So the Lieutenant-Governor reserved the bill, greatly to the relief of the Government which had appointed him.

The recrudescence of the power of the Crown, as illustrated by the Alberta situation, has been due primarily to the emergence of a sharp cleavage of opinion between the federal and provincial Governments. In part, the dispute involved the infringement of provincial upon federal authority, but it also involved, in the reservation of the Press-Licensing Bill, an encroachment of federal authority into a provincial field; for the Lieutenant-Governor must be regarded as the agent and servant of the Dominion Government. The reservation, accordingly, is within the scope of Sir Wilfrid Laurier's definition: "a violation of the federal principle." Similarly, the dismissal of the New South Wales ministry in 1933 was "a

violation of the federal principle." The United States in recent years, in the T. V. A., in the A. A. A., and in most of its other alphabetical organizations, has furnished examples of similar "violations of the federal principle," sustainable only on technicalities, as the navigation clause was stretched to justify the whole T. V. A. program. Such "violation of the federal principle" appears to be a dominant trend in constitutional developments throughout the world. The abolition of the federal organization in Germany three years ago shows the trend carried to its logical conclusion. It may be that the federal form of organization has outlived its usefulness.

The decline of federalism as a principle of government can probably be traced to the American Civil War. In an address to the Cooper Institute, just before his inauguration, Abraham Lincoln stated the problem: "If it is right, we cannot justly object to its nationality—its universality; if it is wrong, they cannot justly insist upon its extension—its enlargement." He was talking about slavery, of course, but he might just as well have been talking of the Canadian Bank Act or the Alberta Press Licensing Bill. Where sharp cleavages of opinion occur, there must be provided some method of resolving those differences. A sovereign authority must have legal power to establish its decision throughout the nation, or it must acquire that power, or the nation must disintegrate into a number of distinct units, each sovereign in its own right. The concept of a divided sovereignty is logically untenable. There is, for instance, a famous Privy Council judgment which asserts that the legislatures of the Canadian provinces, when operating within their exclusive fields, act with an "authority as plenary and ample as the Imperial parliament, in the plenitude of its powers, possessed and could bestow."

The rigid application of this principle can have only one possible outcome—the disintegration of the federal state. The Provincial Governments in Canada, for example, are given control of property and civil rights within the Province, but such control, as the Alberta legislature has clearly perceived, cannot be dynamically exercised without infringing on the fields of bankruptcy or on those of banking and credit. If the powers of the Province in the field of property and civil right are regarded as "plenary and ample", then the Dominion must surrender some of the exclusive powers guaranteed to it by section 91; if, on the other hand, the authority of the Dominion in its own field is to be maintained, then the Provinces must be content to exercise their power within the narrow limits imposed by federal policy. One or the other Government must be supreme. If the doctrine of provincial autonomy is carried

to its logical conclusion, we must be content with only a shadow Government at Ottawa, and must be prepared for a progressive disintegration of the nation. If the Dominion parliament is to maintain supremacy in its own fields, then the Provinces must confine their policies, in the matters under their particular control, within bounds which will not conflict with the national policy in other areas of legislation. These bounds will probably be increasingly defined by the use of the power of the Crown, either by the Governor-General-in-Council or by the Lieutenant-Governor, to nullify provincial measures repugnant, not merely to the constitution, but to any established federal policy. The power of the Crown may also be used to expel from office local Governments which display a determined opposition to national policies. No other course is possible, if there is to be a national policy of any vigour.

This necessity was clearly recognized at the time of Confederation. The American Civil War was then in progress, providing a vivid illustration of the disruptive consequences of local sovereignty. Macdonald and his associates would gladly have avoided federalism of any kind, had not the practical difficulties in the way of legislative union been too great. As it was, they gave to the Federal Government in Canada powers much greater than those which had been assigned to the central legislature by the American constitution. Criminal Law, Banks and Credit, Marriage and Divorce, were some of the fields assigned exclusively to the general government, contrary to the American precedent. Moreover, the supremacy of the Federal Government was, in the opinion of the Fathers, assured by giving to it the residual power, the power of disallowance, and the right to appoint and control the Lieutenant-Governors of the Provinces. The predilection of the framers of the constitution for centralization was further indicated by the inclusion in the constitution of section 132, giving the Federal Government express authority to legislate on any subject whatever in the course of implementing foreign treaties, and by the insertion of section 94 which looked to the eventual establishment of a uniform civil code for the English-speaking provinces.

Lincoln, in the Cooper Institute address already referred to, took as his text a statement by Stephen A. Douglas. "Our fathers," Douglas had said, "when they framed the government under which we live, understood this question just as well, and even better than we do now." The same text might be used for any contemporary discussion of the Canadian constitution. The Fathers of Confederation understood, even better than we, the need for a strong, virile, central government; they established ample safeguards to



prevent the enfeeblement, through an enervating particularism, of the state they had created. These safeguards have been permitted to lapse. Federal politicians, bidding against each other to secure the support of provincial political machines, have made concession after concession to local autonomist movements; the Judicial Committee of the Privy Council, as the interpreter of the constitution, in a long series of unfortunate judgments, has upheld the power of the Provinces at the expense of the Dominion; mere considerations of convenience have permitted the local Governments to intrude into strictly federal fields, notably the field of indirect taxation, and so to weaken further the national unity. The whole trend of constitutional practice until recent years has been towards disintegration. Constitutional theory has followed a similar course, reaching a climax in the "compact theory" of Confederation, which emphasizes the idea of local sovereignty and tends to make of the British North America Act the most rigid constitutional straight-jacket in the world.

The depression revealed strikingly the importance of the Federal Government. So great had been its practical and theoretical enfeeblement in the past few decades, that it now found itself unable to cope effectively with any major national problem. The calamity of unemployment could not be dealt with dynamically; the Dominion could only dole out money to the provincial Governments to be expended on barren and unproductive relief. Similarly, the national Government had become too impotent to provide any workable system of unemployment or health insurance. Old age pensions, like unemployment relief, had to be organized on the basis of provincial administration of funds provided by the Dominion. National marketing policies, a vital necessity in these days of totalitarian states, for a country so dependent as Canada on foreign trade, were vitiated by Privy Council decisions upholding provincial autonomy. The national emergency created by the collapse of western agriculture found in Canada no such effective and energetic treatment as was developed in the United States. The Farmers' Creditors Arrangement Act operates feebly and ineffectively in a legal environment complicated by conflicting provincial Debt Adjustment Acts and moratoria, while the P. F. R. A. administration is dependent at all times on the vagaries of provincial policies. The attempt to co-ordinate public finance methods through the Bank of Canada and the Loan Council was stultified by the refusal of Alberta to co-operate, and by the adoption in that Province of a policy of frank repudiation. The weakness of the national Government in Canada has been startlingly exposed by this series of

failures. The attempt of the Province of Alberta to assume control of its banking system was a natural encroachment upon the authority of a senior Government which had already to so great an extent abdicated its sovereignty.

It may be that the vigorous exercise of the power of the Crown, to check this last invasion of federal authority, and to prevent the subversion of national policy by the Alberta legislature, will mark the reversal of the constitutional trend of preceding decades. In a federal state, as we have already pointed out, the opposing tendencies towards disintegration and centralization are always at work. Australia, the United States, and Germany illustrate the trend towards centralization. Canada, until 1937, has travelled the road to disintegration. "Let us make what law we can," Wentworth told the British Commons long ago, "there must be—nay there will be—a trust left in the Crown." It is possible that the exercise of this trust may be the means of restoring some dignity and authority, some degree of sovereignty, to our national Government.