

# "SOCIAL SECURITY" AND B.N.A. ACT

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ALL our political parties and all our legislators, Dominion and Provincial, appear to agree that after the war we in Canada are to have "social security". Indeed, after reading the party and political *pronunciamentos*, one might be excused for thinking that after the war Canada would be "paradise enow." But how, under our existing constitution, can we have "social security"? Plenty of committees, official and unofficial, are working on plans for the rehabilitation of our armed forces in civilian life and the transfer of munition workers to peacetime industries. But first things should come first, and there is a pre-requisite here. What is badly needed is a plan for the revision of the B.N.A. Act, to make possible the carrying out of these plans and the maintenance of social security after peacetime conditions in industry have been restored.

Let us consider first the obvious problem of getting our industries back to a peacetime basis, and rehabilitating service men and munition workers in employment. How is it to be done? It has been suggested more than once that it will be necessary to keep our present controls in operation for a time. But will the Dominion Parliament have the power to do so, once the war is over? It will doubtless be said that it could be done if the Government were to declare a national emergency. But will not that be a shaky basis for interfering with private business throughout the Provinces? Even in the middle of a war, some judges have held that parts of our control policy are unconstitutional. In Australia it has already been made clear that constitutional amendments are deemed necessary for the purpose.

But this is not the main problem I wish to discuss. This is only a temporary problem after all, and perhaps the lawyers may find a solution under the existing constitution. There is not much hope, however, that they could find a method under the present B.N.A. Act for putting into force a full policy of social security throughout the Dominion. That is not a temporary problem; it is a question of the long-term working of the constitution. If social security is to be an accomplished fact, we cannot afford to have a long series of appeals to the courts, starting with

the Provincial Courts and travelling the long weary road to the Privy Council. If social security is to work, the powers of the Dominion and Provincial legislatures must be clear, so that there will be no doubt about the lines of demarcation between their respective legislative fields.

The most frequently talked of form of social security is the *Beveridge Plan*.<sup>\*</sup> It will bring our problem into focus if we consider for a moment the relation of that plan to the Canadian constitution. By a recent amendment to the B.N.A. Act, the Dominion Parliament possesses authority to legislate on unemployment insurance; but the *Beveridge Plan* goes far beyond this field. It provides also for old age pensions, mothers' allowances, workmen's compensation, health insurance, funeral grants, disability benefits, training benefits, industrial pensions. The first three of these additional features we already have in Canada, and they are under provincial authority. The other five are unknown to our laws; and presumably they too would fall within the provincial ambit. But social security, if it is to be Dominion-wide and on a uniform basis—as it must be to be "social security"—must be placed within the jurisdiction of the Dominion Parliament. In other words, if the plan is to be a success, the Dominion Government will need to be able to say "must" to recalcitrant individuals and corporations. Incidentally (though this matter will call for fuller treatment later) the Dominion alone possesses the financial strength to operate a system of social security.

It seems clear, then, that we could not under our present constitution adopt the *Beveridge Plan*—not in an effective form. Moreover, the *Beveridge Plan* in England—and its counterpart in New Zealand—imply other constitutional conditions which are lacking in Canada. In both countries Parliament has full legislative control over all fields of human activity. But to keep to two vital points: in both countries Parliament has full authority over wages and hours of labour. In Canada these are both under provincial control. Yet they are an essential part of social security. A vital part of the *Beveridge Plan* is an adequate subsistence standard. How are we to have a subsistence standard, if minimum wages may differ from Province to Province? And how are we to measure the standard of earnings, if the work-day may be two or four hours longer in one Province than in another?

What amendments to the B.N.A. Act are, then, necessary? I take it, the Dominion must have control of wages and hours. Certainly the Dominion must be able to fix a minimum for the former and a maximum for the latter. Then, obviously, the Dom-

<sup>\*</sup> This article was received before the appearance of the *Marsh Report*.—Editor.

inion must be put in charge of old age pensions, mothers' (and children's) allowances, and workmen's compensation. The Dominion Parliament must also be able to legislate regarding health insurance, accident insurance, and disability insurance. It will also be necessary, as I see it, that Dominion control over internal trade and commerce should be greatly extended. This last will be necessary even for the temporary problem of rehabilitation. Australia is already considering amendments to the constitution for this purpose. There it is proposed to give the federal Parliament specific authority—for five years after the war—to legislate, *inter alia*, regarding the re-instatement and advancement of ex-service men and the transfer of workers in munition industries.

Indeed, it is difficult to see how the job of rehabilitation is to be done, unless the Dominion Parliament has considerably wider powers than these. In fact the Australian federal government is asking for much wider powers. These include employment; the development of the country and the expansion of production and markets; the supply of goods and services; and the establishment and development of industries. They include also prices of goods and services; profiteering; encouragement of population; national works and services, including water conservation, afforestation, and soil protection; improvement of living standards; transport, including air transport; national health and fitness, the housing of the people, child welfare; and, finally, the guarantee of "the four freedoms." The Australian proposals are, it is true, limited to the five years after the end of the war; but no doubt the federal authorities will ask for a further extension of some, at least, of these powers.

It is probably not necessary to make provision in the B.N.A. Act for Dominion jurisdiction over all the subjects set out in the Australian proposals. In one field, air transport, our Dominion Parliament already has control. In part of another field, encouragement of population, our Parliament again already has control of immigration, which would seem to be sufficient. A good many of the detailed provisions of the Australian proposals would appear to be unnecessary here. Some—such as the establishment and development of industries and the supply of goods and services—go far beyond social security into the area of a definite national policy of socialism, which is not an immediate problem in Canada. But, of the Australian proposals, one other at least will be needed here, both for rehabilitation and for social security. This is price control. It is difficult to see how we are to get over

the period of rehabilitation without it; and without it a minimum standard of subsistence could scarcely fail to be shot full of holes.

Then, let us turn to the financial phase of the problem. Does anyone suppose that the Provinces could supply the funds for carrying out the *Beveridge Plan* in Canada? The estimated annual cost in the United Kingdom—even at the beginning—for the national exchequer is £351 million. At the present rate of exchange, this is equivalent to \$1,555 million in Canadian funds. The population of the United Kingdom is roughly four times that of Canada, so that the corresponding figure for this country would be \$389 million a year. This sum is greater than the total expenditure of all the Provinces together for all purposes in 1940. Moreover, in view of the normally higher money costs of living in Canada, the amount involved would probably be considerably greater. It is obvious that the financial burden is too heavy for the backs of the Provinces. It would be sheer folly for the Dominion to raise such a sum by taxation and then turn the spending of it over to the provincial governments. "No taxation without representation" is sound; so also is no spending without responsibility for finding the funds.

The new fields within which the federal authorities should have exclusive jurisdiction to enable them to carry out a policy of social security have been mainly indicated above, but it may not be amiss to enumerate them here:

Powers now being exercised by the Provinces:

- Wages.
- Hours.
- Old age pensions.
- Workmen's compensation.
- Mothers' allowances.

Other powers:

- Price control.
- Health insurance.
- Industrial insurance.
- Industrial training.
- Marriage, maternity, children's, widows', guardians', separation, and funeral grants.

How are the necessary amendments to be made to the B.N.A. Act? I am not a lawyer, and this is finally a question for the legal profession. To a layman, however, it would appear that, in addition to the increase of the Dominion powers in Section 91, the terms "property and civil rights" in Section 92 need clearer definition. These words have been the reason for most of our

troubles in constitutional interpretation. A battle royal has raged before the Privy Council between "property and civil rights" and "trade and commerce" in Section 91; and "trade and commerce" have usually been knocked out of the ring. A wide field of human activity is common to both these phrases; and the Old Country judges, far removed from Canadian conditions, have leaned heavily to the side of "provincial rights". Within the disputed field it should be possible to define an area which, for example, would endow the federal authorities with power to control the distribution of labour during the period of rehabilitation, an extension of federal powers which has not been included in the list just given.

It is not an improbable guess that the Fathers of Confederation would be much surprised if they could know the interpretation which the Privy Council has put upon some parts of the constitution which they designed. They could hardly have foreseen the transformation which has come over Canadian business since 1867. Then commercial operations were mainly local in character. The big corporations of to-day were far in the future. Now these corporations, interlocked one with another through directorates, operate "from sea to sea"—and "from the river to the ends of the earth". In those days the authority given to Provinces to charter companies "with provincial objects" would have seemed reasonably clear. Now, by a decision of the Privy Council, any Province may incorporate a company which may do business in all nine Provinces—and (apparently) even beyond the bounds of the Dominion.

I remember growing quite enthusiastic, half a century ago, over the victories of Sir Oliver Mowatt in his constitutional battles with Sir John A. Macdonald. But my enthusiasm over those victories has been sadly dampened. By later decisions of the Privy Council the control of business in the public interest has been hamstrung to a dangerous extent. Insurance law has been thrown into confusion—even to the dissatisfaction of many of the insurance companies. The influence which has operated to bring about these developments has been the interpretation which has been given to what are customarily called the "reserved powers". Fifty years ago the general interpretation of the doctrine on the subject was that the powers other than those specifically assigned to the Provinces were reserved to the Dominion. Even in 1911, writing in the *Encyclopaedia Britannica*, Dr. G. R. Parkin expressed the view that "all residuary powers are given to the general government"; while James Bryce in enunciating

the contrary doctrine for the United States, expressly stated that the American doctrine "has been followed in the constitution of Australia, but not in that of Canada." A layman reading decisions of the Privy Council during the present century might be forgiven for thinking that Canada had adopted the United States doctrine.

Cogent reasons may be adduced for extending federal jurisdiction even further than has been suggested in this article. I have endeavoured to keep these suggestions within limits which would not involve undue interference with our federal system. That system has grown out of the conditions which confronted the Fathers of Confederation. The preservation of minority rights in religion and education is a sacred corner stone in the foundation of our Dominion. Provincial control of crown lands within their borders is now a settled question, even in the new Provinces carved out of what were originally Dominion lands. Quebec—and to some extent other Provinces—can boast its own system of civil law. Of these differences the Provinces are tenacious; witness the small use made of Section 94 of the B.N.A. Act, which gave the Dominion Parliament authority, with the consent of the Provinces, to bring about uniformity in the civil laws of Ontario, New Brunswick and Nova Scotia. In the past it has been a slow and difficult process to get new powers for the Dominion. Permanence in the fundamental law of the nation is a valuable asset. No changes should be made until their necessity is clearly established. But the present—is surely an occasion which calls for the adoption of a fundamental law which will make social security possible in Canada.