

REFLECTIONS ON CANADA IN THE EMPIRE

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THE legal mind is tempted to believe that national status can be fixed by law. Applied to the component parts of the British Empire, this idea contains only a modicum of truth. A deep sense of national distinction is a thing born of the spirit. The statement may be derided as a platitude until the fire flames to a white heat, to surprise and bewilder alien peoples. Pulpit and press at times deplore this hidden fire, and plead for international outlook and function. In the mind of such an idealist, the League of Nations was conceived. An attempt may be made, from a detached Canadian point of view, to analyse that status of the Dominions, or, more accurately, this Dominion of Canada within the bounds of the known provisional legislation. It is pertinent both to review the efforts of the Dominions to give coherence to their views, and to recognize the admirable restraint and tolerance which governmental authority in Great Britain has exercised in shaping its policy to meet these views in the Dominions. A bit of history and a date must here be introduced.

The Dominion of Canada was created in 1867 by virtue of a statute of the Parliament of the United Kingdom of Great Britain and Ireland (30 Victoria, Chapter III) cited as "The British North America Act, 1867" and its subsequent amendments, and thereby became a self-governing Dominion. In that legislation the executive government and authority of and over Canada is declared to continue and be vested in the reigning monarch. The Command in Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is declared to continue and be vested in the Monarch, and further it is stated that there shall be One Parliament for Canada, consisting of the Monarch, an Upper House styled the Senate, and the House of Commons.

"British Empire" does not represent a legal entity; it is a broad descriptive term. The other phrase used just as vaguely, "British Commonwealth of Nations", means as well no legal entity; the phrase was recently coined. Many attempts have been made to define it, but these definitions are all illogical and difficult of interpretation. "The United Kingdom of Great

Britain and Northern Ireland" is the only legal entity, with the Dominions forming parts of the whole. The populations of the Dominions are British subjects. Northern Ireland and Eirè are no longer of equivalent status, the latter being defined as a Sovereign, Independent State, but associated for certain purposes with the British Commonwealth of Nations; no attempt is made to explain what these purposes are. This latter definition naturally follows the action of the Irish Free State in enacting the constitution which came into operation in December 1937. That Constitution attempts an interpretation of a national status. It declares that Ireland is a sovereign, independent, democratic state. It affirms the inalienable, indefeasible and sovereign right of the Irish nation to choose its own form of government, to determine its relations with other nations, and to develop its life, political, economic and cultural, in accordance with its own genius and traditions. The Constitution purports to apply to the whole of Ireland, but it provides that, "pending the reintegration of the national territory", the laws enacted by the Parliament established by the Constitution shall have the same area and extent of application as those of the Irish Free State. The intent of this wording is to envisage the ultimate inclusion of Northern Ireland. In the face of these declarations, the inclusion of Eirè in the Commonwealth would be somewhat questionable, because a sovereign and independent state cannot by any reasoned argument be considered to be a part of the British Commonwealth of Nations, however this term may be interpreted. This designation never had any parliamentary sanction until the legislation of the parliament of the United Kingdom was enacted in 1931, entitled "The Statute of Westminster" (22 George V, Chapter 4). In a publication of that Act, Sir John Simon in a foreword touches the delicate nerve when he says:

"Certainly, the Statute of Westminster is a very remarkable document, for it not only embodies much that was the unwritten practice, but ventures upon formal pronouncements on some matters which, in the evolution of the British Commonwealth of Nations, might otherwise be points of controversy. Whether the Statute of Westminster does not raise constitutional controversy as well as allay it, time will show."

This legislation was enacted to confirm and ratify certain declarations made by the delegates to the Imperial Conferences of 1926 and 1930. These Imperial Conferences became a more or less intermittent custom, to give the Premiers of the various

Dominions opportunity to endeavour to put into coherent form the various strivings, towards autonomy on the one hand and adherence to the British Empire on the other, which from time to time became active in the different Dominions. In that Act the preamble recites that the Crown is the symbol of the free association of the members of the British Commonwealth of Nations. It further states that these members are united by a common allegiance to the Crown; that it would be in accord with the established constitutional position of these members that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom. It goes further, and recites that it is in similar accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion. The enactment then proceeds with the attempt to give effect to these desires and dispositions. It defines the word "Dominion" as meaning the "Dominion of Canada, The Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State, Newfoundland and India." The subsequent legislation making the Irish Free State an independent, sovereign state naturally nullifies its inclusion under the designation created in this Act, in the British Commonwealth of Nations. It provides that no law made thereafter by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, and, further, that the Parliament of the United Kingdom is not to legislate for a Dominion except by consent. Article 3 is a difficult and controversial provision. It is declared that the Parliament of a Dominion has full power to make laws having extra-territorial operation. The editor of the publication explains that the section followed *verbatim* the recommendation submitted in the Legislation Conference Report; that it cannot be read in its full signification without incurring a danger of a widespread conflict of laws in the Commonwealth, and that the proper reading of it remains for the competent Courts hereafter. The subject is full of obscurity, and there is conflict in legal opinion as expressed in the Courts and in the writings of jurists. There we have (barring certain other provisions, which are not relevant to this article)

the gist and substance of this so-called charter of the "British Commonwealth of Nations", India not being affected. It can readily be seen that this extra-territorial power would be involved in connection with cases of deportation, marriage, criminal law, taxation and copyright. An illustration may be used in the case of a Dominion having the power to deport an alien and compel the shipping company which brought him to the Dominions to return him to his own country. The question is as to whether or not the Dominion's authority ceased beyond its own borders. The Judicial Committee of the Privy Council held that once the power to expel aliens was given, the Canadian Parliament by implication had the power to impose the extra-territorial constraint which was necessary to enable it to expel those aliens from its borders. In conflict with these extra-territorial rights given Dominions is the wide reach of Imperial Statutes as compared with that of any Dominion.

Apart from the measures cited, the main questions involved in this implied right of extra-territorial legislation are the predominating features of making treaties with foreign powers and of the decision as to peace or war, whenever the Dominion reaches such a determination, between the Dominion and a foreign power. A vital restriction is contained in this legislation covered by Article 7, whereby nothing in the Act is to be deemed to apply to the repeal, amendment or alteration of the *British North America Act* 1867-1930, and further, that the power conferred by this Act upon the Parliament of Canada or upon the Legislatures of the Provinces is restricted to the enactment of laws with relation to matters within the competence of the Parliament of Canada, or of any of the Legislatures of the Provinces respectively. This restriction clearly disposes of the question of peace or war. It has been contended by writers and certain schools of thought within the Dominion of Canada that Canada will follow Great Britain into a war only after a decision by the Canadian Parliament. The provisions of the *British North America Act* clearly define that the Dominion of Canada has no such competence, but that if the Monarch of the United Kingdom of Great Britain and Northern Ireland declares a state of war to exist with a foreign power, then *ipso facto* the Dominion is at war with that power. Now the *Statute of Westminster* does not change that competence. On the contrary, it restricts the power of the Dominion to matters previously within the competence of the Parliament of Canada. If these two Acts comprise the constitution of the Dominion of Canada, the

reasoned conclusion must be that Canada is a self-governing Dominion restricted to legislation applying to laws governing its people within its own borders. Outside its own borders Canada is an integral part of the United Kingdom of Great Britain and Northern Ireland. The Monarch is Commander-in-Chief of the Military and Naval Forces. It can, therefore, be laid down that if Great Britain is at war, Canada is at war, despite any action for or against by the Parliament of Canada. A distinction exists which seems to be a constant source of obscurity in Canada. The fact that a British declaration of war involves this Dominion in war has never been disputed, but for the second step, of active participation in the war, the assent of the Parliament of Canada is needed.

In the event that the Government of Great Britain advises the Dominions that a state of war exists between Great Britain and a foreign power, does it not follow that the Parliament of Great Britain has legislated for all British subjects? It is a matter of indifference as to whether this applies to British subjects all over the world or to British subjects within the Empire. Canadians living in the United States might ignore such British legislation, but in Canada each British subject is bound by that legislation. This extra-territorial presumed right given the Dominions is a difficult steed to ride. Sir Robert Borden on many occasions, and particularly during the Great War, contended consistently that Canada is an integral part of the British Empire and at one with the Empire; that the only alternative course for Canada to pursue would be entire independence of Great Britain. He did add one important qualification to that unalterable membership in the British Empire. This was that a Dominion, if it took part in a war being fought by Great Britain, should have a voice in the conduct of such warfare. At the time of the Great War, he demanded this participation in the councils of the Empire and obtained it for Canada.

Canada has successfully bridged the apparent discrepancy in allegiance relating to the armed forces of the Dominion. The Militia Act states that the Command in Chief of the Militia is declared to continue and be vested in the King, and shall be exercised and administered by the King or by the Governor-General as his representative. It further provides that the Army Act for the time being in force in Great Britain and the King's Regulations shall have force and effect as if they had been enacted by the Parliament of Canada for the government of the Militia. The Army and Air Force Act is an annual Act, but the Militia

Act forms part of the Consolidated Statutes, and its wording precludes the necessity of making it an annual enactment.

A declaration of war is not deliberate legislation. In fact, it may be forced upon a nation overnight, or may logically follow an undeclared act of war. The intention of the extra-territorial clause could not have been to cover the declaration of a state of war. It cannot be conceived that the British Government could ever have time to await definite consent of a Dominion. As a Dominion can act only following a decision of its own Parliament, imagination declines to follow the idea that a declaration of war can await such deliberate action. Events move faster than this sort of a program, as the happenings of September, 1938, have proved. To carry further the implications of this extra-territorial right would be to enter only the realm of surmise and speculation. It is dangerous ground only if it is used to bolster up the theory that Canada can be an integral part of the British Commonwealth at one time and an independent and sovereign state at another time, and again at its option enter into membership of that Commonwealth.

At this point it is pertinent to attempt an examination of the essential difference between Canada being involved in a state of war when Great Britain is at war, and on the other hand the inherent authority of Canada to determine the extent and degree of her participation in such war. These are two vital and separate matters. The international events of 1938 provide an opportunity to ascertain whether or not the official attitude of Canada as a member of the British Commonwealth of Nations has changed since the enactment of the *Statute of Westminster* in 1931, bearing primarily upon the two questions of the existence of a state of war and of participation in war. In the Canadian House of Commons on May 24, Mr. Mackenzie King, in setting forth the foreign policy of Canada, reviewed his previous declarations at various Imperial Conferences, and pointed to the different theories enunciated in Canada from time to time to the effect that we would accept any policy adopted by the British Government of the day and give it our support regardless of our own views and interests and regardless of the consequences: that we will accept the policy of Great Britain whenever she acts through the League and in accordance with the Covenant: that we will advise Great Britain as to what course she should follow so that we will not be involved in the consequences of a policy which we thought wrong: that we should say we will declare here and now our neutrality in any future conflict,

decline to take part, under any circumstances, in any conflict in which the United Kingdom may be engaged. After analysing and refusing these different hypotheses, he summed up by stating: "This would amount to tying the hands of Parliament regardless of the circumstances of the war or of the participation, of what interests of Canada may or may not be involved. Over and over again we have laid down the principle that, so far as *participation* by Canada in a war is concerned, it will be for our Parliament to decide. Having taken that attitude in respect to *participation*, I think we might well take a similar attitude with respect to neutrality. At the present time there are no commitments, as far as Canada is concerned, to participate in any war; equally, there are no commitments whereby we agree to remain neutral under all circumstances. The policy with respect to participation and neutrality is that Parliament will decide what is to be done." The Canadian Prime Minister repeated his statement made at Geneva in 1936 that "the nations of the British Commonwealth are held together by ties of friendship, by similar political institutions and by common attachment to definite ideals rather than by commitments to join together in war." This may be a cool way of measuring British citizenship; warmer terms might have been used, even in a parliamentary speech, but they serve the purpose. The debate went on, and the leader of the Canadian Opposition (Mr. Bennett) in attempting to expound and elaborate the Prime Minister's speech, said: "He (Mr. King) made a declaration, one which I say is accepted by constitutionalists as sound, that if any part of the British Empire is at war—and within that expression we are included as is the United Kingdom, then also Canada is at war; but whether or not Canada should participate in that war is a matter to be determined by the Canadian people and the Canadian Parliament." To this Mr. King interjected that this was correctly stated, and as he intended his words to mean; Mr. Lapointe concurred.

A recent important book¹ by a writer of standing, published in England, contains a gross error when, in unfortunate language relative to the British Cabinet affairs of February and March 1938, the claim is made that Canada should have been consulted thereto, when no authority in Canada has advanced such claim. The mistake consists of a quotation declared to have emanated from Canada to the effect that "Canada should refuse to imperil Canadian unity and security by accepting in advance the view

1. "The Dominions as Sovereign States. Their Constitutions and Governments." Professor A. Berriedale Keith, University of Edinburgh. Macmillan, 1938.

that when Britain was at war Canada also was at war." From this misquotation the writer concludes: "Canadian isolation has thus advanced virtually to the claim of the right of neutrality." The Parliament of Canada has never claimed the right of neutrality. It has claimed only the right of independent action as to the extent of its participation. The *Militia Act* is framed to fit in with this determination by Canada, in that whenever the Governor-in-Council places the Militia on active service, a proclamation shall be issued for the meeting of Parliament within fifteen days.

It has been urged that the Westminster Statute establishes as law what had before rested on convention. This is partly true, but there follows the problem of testing the extent of the function of the law. While the Balfour formula is accepted that the Dominions are autonomous communities within the Empire, equal in status, the further qualification must be applied that the principles of equality and similarity appropriate to status do not universally extend to function. The disregard of this qualification in the 1930 Imperial Conference and the inferences of the Westminster Statute do not silence the doubt nor establish the function.

The extent and degree of Canada's participation in a war in which the United Kingdom is involved need not be narrowed down to maximum or minimum measurements. Those who voice any opinion on the matter seem to be influenced somewhat by the fear of what is called the steady diminution in Canada of the British elements proper. Just how this is measured is often left in doubt, but there would not appear to be cause for worry. The Commons of Canada comprises 245 members, of whom 65 are from the Province of Quebec. The total population in 1931 was about 10,400,000, of which those of British origin comprised about 5,400,000, while about 2,900,000 were of French origin. The British strain persists; minority status in Quebec and propinquity to the neighbouring democracy are strengthening not weakening factors. It is useless as well as mischievous to discuss the right of the Dominions to secede. The right of secession, if it is inherent in the *Statute of Westminster*, may be a hypothetical legal argument, but, as a practical issue, secession is of no interest to Canadians even as an academic postulate. The degree and extent of participation may remain a continuing uncertainty. Mr. Mackenzie King expressed the situation (May 24) when he said—"In other words, we have worked out a satisfactory and enduring solution of the relations between the

several members of the British Commonwealth in peace time; we have not yet worked out a completely logical solution of the position in war time."

An examination of a hypothetical position of neutrality opens up room for the imagination. The elements of neutrality are well known. It is not sufficient that any nation may declare itself neutral among other belligerents, but its neutrality must be accepted by the belligerents and other neutral powers; otherwise, its neutrality falls to the ground. Neutrality is dependent upon the exercise of its functions by the power claiming it. The exercise of this power includes the sale of munitions, materials and all contraband of war to both or all belligerents equally and without favour one against the other, or an equal refusal of sale. The neutral power cannot afford relief, succor or subsistence to any warship of a belligerent, except the succor obtainable by any castaways or one in peril of the hazards of the sea, and that succor is limited as to duration, usually 24 hours. No armed force, whether naval or military, can enter within the borders of the neutral power without being interned. If any of these provisions of accepted procedure are not observed by the neutral power, belligerent "A" may contend that the neutral power is giving assistance to belligerent "B", and that the neutral power has ceased to be such and is at war with the aggrieved belligerent. The implications of neutrality for Canada go further. The Monarch would cease to be the Commander-in-Chief of the Military and Naval Forces of the Dominion; that authority would be vested in the head of the Department of National Defence. The Canadian Government would presumably appoint its own Commander-in-Chief. The officers and men would be relieved of their oath of allegiance to the Crown, and would necessarily take a new oath of allegiance to the Government of the Dominion of Canada. That is simple enough, but it might reasonably follow that any member of these forces might find such a course quite distasteful, and would prefer to be a private citizen, holding himself free to give his allegiance as his individual conscience might direct. No Canadian can envisage this change of allegiance, nor can he visualize the paradox of Canada's harbours being closed against British Navy. He would be faced with the cold reality that neutrality means independence and secession. An alternative to complete participation measured only by capacity brings us to an impasse.

The Imperial Conferences have only advisory powers. Far removed from these semi-authoritative conferences are the meet-

ings also dubbed conferences of various non-official Institutions, the youngest of these being "The British Commonwealth Relations Conference." These conferences have no official standing, and the conclusions reached by them are entirely *obiter dicta*; they bind no one. The delegates to these conferences are not appointed by any governmental authority. The conclusions of a recent conference were reported in the press to the effect that Canada by the dictates of international law may remain neutral and enjoy the rights and privileges of a neutral nation. The so-called dictates of international law are not defined. Inspired by the same conference, another opinion is enunciated that the best thing Canada could do, in the event of a European war, would be to quarantine Europe. This is rather a happy phrase. We have heard of boycotts and sanctions which did not work, but this word *quarantine* implies the action of a superior people, superior in judgment and in strength. The argument followed that Canada should then seek the assistance of the United States through application for membership in the Pan-American Union. At once, further ambiguity intervenes. An independent, sovereign state refuses adherence to the British Commonwealth of Nations; finds herself too weak to stand alone, and, to maintain her neutrality, seeks the support of a stronger nation. What becomes of independence, of sovereignty then? Sir Robert Borden's contention of independence would come true, but only as a temporary condition. The history of Europe in 1938 has proved that a protector of minorities does not protect from the outside.

Without intending to be pontifical, one may say that the secret of the avoidance of an impasse at any critical time is full and complete co-operation between the United Kingdom and the members of the Commonwealth. This will cover the spirit of the partnership contract. That this spirit is being consistently followed is in evidence. Two distinct cases have arisen to illustrate inter-relations within the Empire:

Prime Minister Chamberlain in his speech in the British Parliament on October 3rd, reporting upon the discussions at Munich, said: "Throughout these discussions the Governments of the Dominions have been kept in closest touch with the march of events by telegraph and by personal contact. I would like to say how greatly I was encouraged on each of the journeys I made to Germany by the knowledge that I went with the good wishes of the Governments of the Dominions. They shared

all our anxieties and all our hopes. They rejoiced with us when peace was preserved. With us, they looked forward to further efforts to consolidate what has been won." This is one of the cases in which the Dominions were vitally interested, and took steps to make their opinions known. Later in the month of October, in the debate in the House of Commons on the motion to approve the Anglo-Italian accord, the Secretary for the Dominions and Colonies announced that, in accordance with a decision laid down as a result of successive Imperial Conferences, the Dominion Governments are kept constantly informed by telegraph of the information at the disposal of His Majesty's Government as well as on His Majesty's policy regarding foreign affairs, and that in September alone 150 telegrams on foreign affairs had been sent to the Dominions. Prime Minister Chamberlain referred to the attitude of the Dominions, and stated that while Australia and South Africa had cabled approval of the agreement, no reply had been received from Canada or New Zealand. This brought a statement from Acting Prime Minister of Canada, E. A. Lapointe, at Ottawa, to the effect that as the agreement did not deal with any matters in which Canada had any direct interest, there had not been any occasion for the expression of the views of the Canadian Government.

So long as this reciprocity of intelligence and disposition inspires the relations between the United Kingdom and Canada, it is safe to let circumstances influence but not mould our destiny. A marriage has no meaning if it is measured only by the terms of the civil contract. Canada has not the same place within the Empire as she held before 1914: that invisible electorate typified by our cenotaphs will cast a ballot in the nation's need.

Canada may seek the safe way; she did not in 1914. She may become self-seeking, may lose her faith or follow after false gods and so turn away from her allegiance, but that time has not come. Nationality and love of country are things of the spirit.