

Constitutional Thought in the Late Nineteenth Century

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MY STORY IS TAKEN FROM THE LATE NINETEENTH CENTURY and the cases about federalism. Lots of ink has been spilled over these cases, so why on earth am I interested in them, and why do I hope that someone might share my interest? My answer is that I am interested in a perspective that has been neglected. I'm going to talk about ways of thinking about law.

Between Confederation and 1900 there were about 125 cases that contained federalism issues. Most of them have been forgotten, but some are still well-known. Every Canadian lawyer, historian, and political scientist knows about *Russell*,¹ *Parsons*,² *Hodge*,³ and the *Local Prohibition Reference*,⁴ although her or his knowledge may be no more than a dim recollection of a name. These cases settled much doctrine in ways that are still familiar, and first-year students still struggle with them. They were entangled with politics, especially the provincial rights movement, and the outcomes were part of the triumph of the provinces.

I want to concentrate on the *Local Prohibition Reference*, which is probably the best-known of these cases. Everyone knows that it was about liquor and was an important holding in favour of the provinces. More precisely, the Judicial Committee of the Privy Council held that the provinces could prohibit sales of liquor (and most manufacturing, but not importing). As well, it interpreted section 91(2) of the *British*

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¹ *Russell v. R.* (1882), 7 A.C. 829 (P.C.).

² *Citizens Insurance Co. v. Parsons* (1881), 7 A.C. 96 (P.C.), aff'g (1881), 4 S.C.R. 215.

³ *Hodge v. R.* (1883), 9 A.C. 117 (P.C.), aff'g (1882), 7 O.A.R. 246.

⁴ *A.G. Ontario v. A.G. Dominion and the Distillers and Brewers Association of Ontario*, [1896] A.C. 348 (P.C.), rev'g (1894) 24 S.C.R. 170.

*North America Act*⁵ narrowly; it interpreted sections 92(13) and 92(16) expansively; and it threatened the federal residual power under "peace, order, and good government". But I don't want to talk about the doctrine. Instead, I want to talk about the ways of reasoning, and I want to talk about the Supreme Court of Canada as well as the Privy Council. If you look for the *Local Prohibition Reference* judgments in a library, you will, whatever library you choose, probably find the Privy Council judgment tattered, torn, and underlined, and the Supreme Court judgments dusty and unblemished. Such have been the limits of our interests and our knowledge.

The story can best be told by beginning in the 1880s. The temperance movement was a strong social and political force, and it sought to persuade both the Dominion and provincial governments to enact prohibition legislation. Fortunately or unfortunately for the politicians, the constitutional division of powers to legislate about liquor was confused and uncertain. *Russell*,⁶ decided more than a decade before, had upheld local option legislation enacted by the Dominion, and was still a formidable authority, but the provinces could make a reasonable argument that they could enact the same kind of legislation.

The premier of Ontario, Oliver Mowat, was both sympathetic to the cause of prohibition and too crafty a politician to commit himself to any extreme position. In 1890, the municipalities in Ontario were given, by a provincial statute, powers to opt for prohibition in terms that had existed at Confederation.⁷ This legislation was challenged and upheld in 1891, in the *Local Option Reference*,⁸ although on the understanding that it permitted prohibition of retail sales only.

The *Local Option Reference* was not appealed to the Supreme Court of Canada, but a similar challenge, *Huson v. The Township of South Norwich*,⁹ was. The arguments were heard in May, 1893, but the decision was delayed. Earlier in 1893, the opposition in Ontario had introduced a bill calling for total prohibition. Mowat responded with an amendment that called for a plebiscite on New Year's Day, 1894,

⁵ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 [hereinafter *B.N.A. Act*].

⁶ *Supra*, note 1.

⁷ *An Act to Improve the Liquor License Laws*, S.O. 1890, c. 56.

⁸ *In Re Local Option Act* (1891), 18 O.A.R. 572.

⁹ (1895), 24 S.C.R. 145.

and the result was a large majority for prohibition. Mowat then claimed that the jurisdictional uncertainties must be resolved before the government could act, and by agreement with the Dominion government, seven questions were referred to the Supreme Court; the first six were simple and abstract questions about the powers of the provinces to prohibit sales, manufacturing, and importation of liquor, and the seventh asked about the 1890 Ontario act. The *Reference* was argued in May, 1894, but the membership of the court was different from what it had been for *Huson*. The Court gave its judgments in both *Huson* and the *Reference* on the same day, January 15, 1895, and the difference in membership was crucial. In *Huson*, a majority of three to two upheld the legislation (that is, held that the provinces could prohibit retail sales), and in the *Reference*, the Court held by the same margin that the provinces had no power at all to prohibit. So the result was that two majorities, of three to two, gave directly contrary judgments on the same day.

I wish to talk about the three majority judgments in the *Local Prohibition Reference*,¹⁰ written by Justices Gwynne, Sedgewick and King, and, as I said at the outset, I want to talk particularly about their ways of reasoning, not the result they reached. (I do, though, hasten to add that reasoning and results cannot be so sharply separated, except in a very short paper.) For those judges, the central theme was the tension between the Dominion power to regulate trade and commerce, given by section 91(2) of the *B.N.A. Act*, and the provincial interest in governing its own distinctive and local affairs, given primarily in section 92(8). All three interpreted these sections in the light of the understandings and context of Confederation, and all wrote with passion and intensity about Canada.

Two examples can illustrate their reasoning. The first is the beginning of Gwynne's judgment. He discussed Confederation, making lengthy quotations from speeches, and the general structure of the *British North America Act*, and he presented a vision of a powerful Dominion that might have been written by Sir John A. Macdonald. From this beginning, he concluded that a strong trade and commerce power was needed, and concluded with a warning that to give control of trade to the local legislatures would deny the intent of the framers and imperil Confederation. It would be

¹⁰ *Supra*, note 4.

a matter of deep regret, as defeating the plain intent of the framers of our constitution, and imperiling the success of the scheme of confederation.¹¹

The second example is Sedgewick's discussion of the trade and commerce power. He began by asserting that the *B.N.A. Act* was a product of a compact among the colonies, and therefore must be interpreted,

from a Canadian standpoint ...In the British North America act, it was in a technical sense only that the Imperial Parliament spoke; it was there that in a real and substantial sense the Canadian people spoke, and it is to their language, as they understood it, that effect must be given.¹²

He stressed the desire to avoid the apparent weaknesses of the commerce power in the United States, and undertook a thorough study of the language of the Canadian statutes at Confederation to show that the word "commerce" was intended to have a wide meaning.¹³

The contrast to the judgment of the Privy Council was dramatic. There, the *B.N.A. Act* was interpreted as though the will of the Imperial Parliament was embedded in its words and was apparent from reading and thinking about them. The reasoning was autonomous, and was separated from context and values. For example, consider the response to the two examples. Gwynne's passionate vision of Canada was simply ignored. During argument, Haldane, who appeared briefly as one of the counsel for the provinces to describe the judgments of the Supreme Court, came to Gwynne's judgment, and said that the speeches about Confederation were

of great historical value, but not otherwise pertinent....it does seem a little odd to refer to those things which took place and which were no doubt the basis of the act which

¹¹ *Ibid.* at 229.

¹² *Ibid.*, at 231.

¹³ Both Gwynne and Sedgewick assumed that the power to prohibit could not be assigned to both the Dominion and the provinces. They considered the aspect rule, which had been declared more than a decade before, in *Hodge*, but claimed, in effect, that prohibition was a subject which must be in either section 91 or section 92. The Privy Council did not answer their claim.

afterwards became the Confederation act, for that is certainly not what your Lordships have got to interpret."¹⁴

Second, Sedgewick's careful consideration of the context of section 91(2) was replaced by assertions about the abstract meaning of words: the proposition that "regulation" did not include prohibition was asserted without explanation or justification, except one terse citation to an earlier case.

How can this difference be explained? I think that the judgments in the Supreme Court were the last defiant cries of a tradition that was about to vanish. The approach of Gwynne and Sedgewick was shared by most of the Canadian judges in the early cases, from the late 1870s to the mid 1880s. Most of them were willing to consider the context of Confederation as an illumination or a dictionary for interpretation. In contrast, the judgment of the Privy Council was the authoritative expression of a new approach that supplanted the contextual tradition.

I can best explain this claim by leaving the world of constitutional cases for a moment, and talking generally about modes of lawyers' thought. During the second half of the nineteenth century, a substantial shift in lawyers' ways of thinking occurred throughout the Anglo-American legal world. The basic elements that were dominant by the end of the century were the equality and autonomy of individuals (and legal entities generally), a division between the public and private realms, and the paramountcy of the common law and the courts. Powers, including legislative powers, were paradigmatically spheres that had sharp boundaries, and within these boundaries, powers could be exercised without restraint or limit. The function of the courts was to determine whether these boundaries had been exceeded; this function was objective, autonomous and apolitical. Legal reasoning was distinctive, and sharply separated from politics and context - like the reasoning of the Privy Council in the *Local Prohibition Reference*. This mode of thought was shaped by many factors, including the past and the professional concerns of lawyers, but it was essentially the legal framework of mid-nineteenth century liberalism. Of course, this description is a model, and even as a model, it is greatly simplified. The minds of individual lawyers were much more complex and muddled, and included inconsistent elements, often

¹⁴ The argument was reprinted and can be found in some libraries and collections of lawyers' papers, for example, the Blake papers and the Irving papers in the Public Archives of Ontario. This passage is on pages 157-59.

layers of thought from the past. There were differences among individuals, between generations, and between practicing lawyers and other members of the legal profession. Yet this mode of thought was powerful and pervasive. It has, though, no widely-accepted name, so for convenience I shall refer to it as "rule of law" thought, in honour of Albert Venn Dicey, one of its primary makers.

So far, I have claimed that the modes of legal thought shifted in the second half of the nineteenth century, and that this shift appeared in the federalism cases. Next, and more difficult, I want to suggest some relations between lawyers' thought, and politics and outcomes. I shall use three examples.

The first relates to the nature of the provincial legislatures. Were they supreme or subordinate? In the late 1870s, Mowat claimed they were supreme, and this claim was part of his broad struggle for the autonomy of Ontario and its liberty to manage its own affairs.¹⁶ He eventually succeeded about five years later in *Hodge*: the provincial legislatures were declared by the Privy Council to be "supreme," and independent and autonomous. When Mowat first made that claim, it was problematic and provocative, largely because of traditional British understandings of sovereignty. If there must be, as Blackstone had said, a single sovereign in every government, how could the Ontario legislature be supreme without denying that the Dominion was also supreme?

The context of legal thought helps understand Mowat's triumph. The provincial claim was expressed (and conceived) in the familiar and authoritative language of legal discourse, especially the doctrine of legislative supremacy, and the rule of law thought, especially its spheres of powers and its sharp distinction between law and politics. The British North America act said "there shall be a Legislature for Ontario," and the word "legislature" had a settled meanings for lawyers, which excluded other meanings, including subordination. The *B.N.A. Act* also included some elements that fit awkwardly with this connotation, especially Dominion disallowance of provincial legislation, but the distinction between law and politics permitted disallowance to be excluded from the determination of the natures of the legislatures. The formal sovereignty of the British Imperial Parliament avoided the difficulties of finding ultimate sovereignty somewhere else, in the people or the constitution; and imagining two supreme legislatures in the same colony, with different powers, was much more consistent

¹⁶ He made the argument in a legal forum first in *Severn v. R.* (1879), 2 S.C.R. 70.

with the dominant modes of thought than any reworking of the nature of legislatures.

My second example is the interpretation of the Dominion "trade and commerce" power under section 91(2). In *Parsons*, the Privy Council said that power did not govern transactions within a province. Perhaps this limitation was shaped by the elements of the rule of law thought that required sharp lines and binary distinctions, and sought to avoid decisions that required distinctions of degree or judicial judgment - which some of the judgments in the Supreme Court judgment had suggested.

My last example is the doctrine about relations between the powers of the Dominion and the provincial legislatures: rules about spheres of powers, pith and substance, necessarily incidental effects, aspects, and paramountcy. All this was settled by the late 1890s in ways that still seem familiar to us, but the final steps came late. From the very outset there was no doubt about some of the doctrines: i) legislative power was divided between supreme legislatures, ii) legislation by the Dominion - or the provinces - might affect subjects about which the other could also legislate, and iii) an inquiry must be made into "pith and substance". Setting out these propositions in this way exaggerates the extent to which they were perceived as discrete and independent doctrines, however. In reality, much of the understandings and language remained unsettled.

The uncertainty continued in the *Local Prohibition Reference*, and a few months later, A.H.F. Lefroy, Canada's leading constitutional scholar, published his text, *The Law of Legislative Power in Canada*.¹⁶ There, the doctrine was presented in a set of elegant, coherent rules about mutually exclusive spheres of power, the "true nature and character of legislation," the aspect rule, necessarily incidental encroachments, and paramountcy. Constitutional powers were mutually exclusive, but legislation of the Dominion or a province could affect subjects that the other had power to legislate about in two ways: through different "aspects," and by "necessarily incidental" encroachments. Lefroy made the cases more consistent and coherent than they were, and his readings were shaped by a great faith in the rule of law thought. His entire text was an expression of this mode of thought, and its appearance at the same time as the *Local Prohibition Reference* symbolized the transformation of Canadian legal thought.

Earlier, I said that these constitutional cases were entangled with politics and the provincial rights movement. The constitutional

¹⁶ (Toronto: Toronto Law Book 1897-98).

discourse of the provincial rights movement was the discourse of the rule of law. The language of mutually exclusive spheres of power was united with the language of coordinate legislatures in the rule of law understanding of the constitution, and it was used in the political arena as well as in the courts. It was used to express the claims of the provinces to sovereignty and autonomy, and it was shared by many lawyer/politicians, among whom Edward Blake, David Mills, and Oliver Mowat were dominant.¹⁷ Their use of this language was not merely a tactical choice of a convenient form. It was the way they perceived and understood the constitutional world.

It eventually became the dominant way of thinking and talking about the Constitution. Something valuable was lost, and it remained lost during most of the twentieth century, when talk about the limits of jurisdiction obscured talk about the meanings of Canada. A way of thinking that had embodied a political vision of our country had been supplanted by a way of talking that was empty and impoverished.

¹⁷ This thought has been reconstructed in Robert Vipond, *Liberty and Community* (Albany: State University of New York Press, 1991).