

CONSTITUTIONAL LAW

Surveying recent constitutional developments in this Centennial year, one develops a persistent impression of being in the eye of a great storm. For the time being the scene is relatively quiet, but momentous forces are gathering beyond the horizon.

The most interesting events of the past year were in the civil liberties field. Unfortunately, they were generally disappointing.

Alberta established a provincial ombudsman and several other provinces announced their intention to study the possibility of creating similar institutions, but the federal government's decision not to set up a federal ombudsman, despite the strong recommendation of an all party Parliamentary committee,¹ was a serious set back to those who regard the institution as an important safeguard for civil liberties.²

The Supreme Court of Canada upheld the right to erect federal election posters despite a municipal by-law prohibiting signs of any type, but it was very careful to avoid a civil liberties rationale for its decision, choosing instead to say that the "field was occupied" by a provision in the federal Elections Act to the effect that all election signs should carry the names of printer and publisher.³

The year's most important civil liberties case was undoubtedly *Walter v. A. G. of Alberta*,⁴ in which Alberta's Communal Property Act, prohibiting the purchase of land without government approval by Hutterite communities and other similar groups, was held by provincial trial and appellate courts to be constitutionally valid. The trial judge held that the statute, in pith and substance, "relates to land tenure in the province", and not to religion, even though it "may well affect people of some religious faiths more than others." The appeal court agreed and in doing so proposed a serious restriction to the controversial *dictum* of Chief Justice Duff in the *Alberta Statutes Reference*⁵ that the use of the term "Parliament" in the B.N.A. Act impliedly guarantees certain civil liberties, because "Parliament" which the preamble requires to be defined by reference to British practice, means a legislative body whose members are elected in a democratic atmosphere. The Alberta Court stated:

1. Minutes of Proceedings & Evidence, Standing Committee on Privileges and Elections, No. 10, March 1, 1965, p. 558.

2. The literature on the subject was considerably enriched during the year by the publication of two studies by Professor Walter Gellhorn of Columbia University: *Ombudsmen & others: Citizens' Protectors in Nine Countries*, and *When Americans Complain: Governmental Grievance Procedures*.

3. *R. v. McKay* (1966) 53 D.L.R. (2d) 532.

4. (1966) 54 D.L.R. (2d) 750 (Milvain, J.); (1967) 60 D.L.R. 253 (App. Div.)

5. (1938) S.C.R. 100.

"Freedom of religion, if we are to judge by the disabilities due to religion that continued in England down to and after the time of Confederation, was not a principle that was essential to the constitution of the United Kingdom, and therefore could not, by itself, be affected by the preamble of the B.N.A. Act. The Act we are considering is not concerned with the dissemination of information either political or religious —."

It will be interesting to see whether the Supreme Court of Canada, when the case comes before it, will continue the retreat that has been evident in recent years from its bold civil liberties stands of the 1950's.

Perhaps the most outrageous case of the year was *Bintner v. Regina Public School Board*, in which the Saskatchewan Court of Appeal held that education authorities who refused to allow a Roman Catholic to attend a public school in an area where a parochial school was available were not (presumably because they acted on a *bona fide* interpretation of the legislation) "discriminating" within the meaning of the Saskatchewan Bill of Rights Act, which states that: "every class of persons shall enjoy the right to education in any school . . . without discrimination because of . . . religion . . ."⁶

There has been considerable discussion recently about the legal status of rights "guaranteed" to Canadian Indians by the various Indian "treaties" of years gone by. Some progress toward a solution of this problem was made during the year under review. The Indian Act provides that, *subject to any treaty*, all laws of general application "from time to time in force in any province" are applicable to Indians in the province.⁷ In *R. v. White & Bob*⁸ the Supreme Court of Canada held that because of the italicized proviso, an Indian may exercise hunting rights guaranteed by Indian treaties, even if it involves contravention of provincial game laws. In *R. v. George*,⁹ however, the same court convicted an Indian for hunting in contravention of the federal Migratory Birds Act, even though he was exercising a right guaranteed by an Indian for hunting in contravention of the federal Migratory laws, not federal ones. Impliedly, this decision denies that Indian treaties can have any constitutional force of their own, independent of legislation like the Indian Act.

6. (1966) 55 D.L.R. (2d) 647. Leave to appeal to the Supreme Court of Canada was refused, but a new trial is possible, since the court pointed out that it was not deciding whether the action of the authorities was "right or wrong in law." The action of the Regina School Board was defended by Professor B. L. Strayer in *Bintner v. Regina Public School Board and the Constitutional Right to Segregate*, (1965) 31 Sask. B.R. 225. Professor Strayer takes the imaginative if shocking position that the Saskatchewan constitution impliedly guarantees a right to discriminate in this way.

7. R.S.C. 1952, c. 149, s. 87.

8. (1966) 52 D.L.R. (2d) 481, affirming the decision of the B.C. Court of Appeal: (1965) 50 D.L.R. (2d) 613. See discussion of this case and related problems in K. Lysyk, "Indian Hunting Rights: Constitutional Considerations and the Role of Indian Treaties in B.C.," (1966) 2 U.B.C.L.R. 401.

9. (1966) 55 D.L.R. (2d) 386.

There is a possibility, however, that the *George* decision does not apply to Indians in Manitoba, Saskatchewan or Alberta. Several years after the passage of the Migratory Birds Act, legislation was enacted by the federal Parliament, and confirmed by an Imperial statute, the B.N.A. Act, 1930, transferring natural resources to the prairie provinces. This legislation contained a section¹⁰ granting certain hunting rights to Indians in those areas. In *R. v. Daniels*¹¹ the accused, an Indian, was charged with a breach of the Migratory Birds Act. His defence was that he was exercising his rights under the 1930 statute. The Manitoba Court of Appeal rejected this defence holding that although the two federal acts were not reconcilable, the earlier (Migratory Birds Act) must take priority over the later. This surprising conclusion was not concurred in by Mr. Justice Freedman, whose dissenting judgment held that of two inconsistent statutes the later in time should take precedence, and pointed out as well that in this case the later act has a constitutionally entrenched status. An appeal to the Supreme Court of Canada is pending.

Not all of the Indian treaty cases involved such significant issues, however. One accused, charged with failure to make payments under a provincial hospitalization plan, defended on the ground that an 1876 Indian treaty with his tribe guaranteed "that a medicine chest shall be kept at the house of each Indian agent for the use and benefit of the Indians at the direction of such agent", which he interpreted as a promise of free medical and hospital care.¹² There is no need to report the outcome of that case.

Only two decisions on the distribution of legislative jurisdiction call for comment. Mr. Justice Tucker of the Saskatchewan Court of Queen's Bench gave much consideration to the constitutional status of credit unions in *La Caisse Populaire Notre Dame v. Moyen*.¹³ The defendant in that case attempted to defeat a debt claim by a credit union with the argument that since credit unions carry on "banking" operations, they are under the exclusive jurisdiction of the federal Parliament, so the provincial legislation authorizing incorporation of credit unions is accordingly *ultra vires*, and the plaintiff lacks legal capacity. Mr. Justice Tucker held that credit unions do carry on a banking business, which would justify federal legislation, but that they also have non-banking aspects ("encouraging thrift and mutual assistance"), which, in the absence of federal legislation, at least, justifies provincial credit union statutes.

10. Manitoba Natural Resources Act, S.C. 1930, c. 29, appended agreement, para. 13.

11. (1966) 57 D.L.R. (2d) 365.

12. *R. v. Johnston* (1966) 56 D.L.R. (2d) 749.

13. (1967) 61 D.L.R. (2d) 118.

In *Minimum Wage Commission of Quebec v. Bell Telephone*¹⁴ the Supreme Court of Canada held that an interprovincial telephone company does not have to comply with provincial labour standards legislation, even where there is no inconsistent federal statute in force. The long line of cases establishing that federal enterprises are subject to provincial laws¹⁵ was distinguished on the ground that the laws there in question were not as closely related as those in the present case to the operation over which there was federal jurisdiction. The immediate consequences of this decision may not be great, since federal employment standards legislation has now been enacted,¹⁶ but it may operate as a further restriction to the power of the provinces to control enterprises that have managed in one way or another to acquire the magic immunity accorded to matters designated as "federal".¹⁷

Several books on Canadian constitutional law were published during the year. Mr. Justice Laskin brought his casebook, *Canadian Constitutional Law*, up to date with a third edition. A second edition of F. P. Varcoe's text appeared under a new title, *The Constitution of Canada*, but the contents were not significantly improved. Professor W. S. Tarnopolsky published a very thorough study, entitled *The Canadian Bill of Rights*. The Ontario Government's Advisory Committee on Confederation has recently released three volumes of essays by leading constitutional scholars on various aspects of the Canadian constitution. And, although it is not strictly concerned with constitutional law, mention should perhaps also be made of the *Report of the Special Committee on Hate Propaganda in Canada*, prepared under the chairmanship of Dean Maxwell Cohen.

It has, then, been a relatively routine year in constitutional law. It is unlikely, however, that a similar statement will be appropriate when the next issue of this Journal is published. By then the Committee on Bilingualism and Biculturalism will have reported, the Supreme Court of Canada will have rendered a decision in the offshore mineral rights dispute, the problem of the provincial right to enter into external treaties may have found a judicial focus, and perhaps, the federal government will have become more specific in its proposals for major constitutional revision.

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14. (1967) 59 D.L.R. (2d) 145.

15. E.g. *C.P.R. v. Notre Dame de Bonsecours* (1899) A.C. 367, holding that a federal railway must obey a municipal by-law requiring ditches to be kept clean.

16. Labour Standards Act, S.C. 1964-65, c. 38.

17. See Gibson, "The B.C. Power Case: New Restrictions on Provincial control over Federal Companies" (1983) 1 Man. L.S.J. 155.

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