GOVERNMENT AND THE LAW

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Mr. Chairman, Ladies and Gentlemen:

I know of no work in which competent persons can render more enduring service to the nation than that in ~~which~~ which the members of this Association are engaged. To assist in the preparation of aptly framed ~~labour~~ legislation, particularly that affecting labour and management individually and in their mutual relations, and to share in its wise administration are tasks that require much learning, skill and understanding. Having seen some of you at work, and having read of your activities in the Labour Gazette and in your Annual Proceedings, I am sure that these ~~necessary~~ qualities are well exemplified in the membership of this Association.

I have found some difficulty in selecting a subject upon which I could speak with sufficient authority to engage the interest of administrators of labour laws, without running the risk of having my private opinions confounded with my official position; and thereby, perhaps, doing more harm than good.

Upon reflecting on this difficulty, it has occurred to me that we have certain common interests. First, we are both engaged in work which involves the interpretation and application of legislation, and secondly, as citizens of Canada we share the benefits of the great principles ~~evolved by our ancestors during centuries of political struggle and~~ which together make up that cardinal characteristic of our way of life known as The Rule of Law.

Accordingly, I propose to remind you of some of the concepts and methods by which we have attained to a very high degree of internal liberty, and of justly controlled relations between individuals, and between the individual and the State. I should like to remind you also of the respective parts played by Legislatures, Governments and the Courts in securing this great heritage to us; and the necessity of their continuing to do so if Justice according to Law is to be preserved as the ultimate ideal in the present frame of circumstance. Finally, I propose to remind you of some of the developments which have required new techniques in governmental administration; and have presented to the Courts, in modern dress, the age-old problem of reconciling government powers and methods with the traditional rights of the individual.

As we consider these matters, I would have you remember two comments of Woodrow Wilson, a great authority on Government:

(1) "No more vital truth was ever uttered than that freedom and free institutions cannot be long maintained by any people who do not understand the nature of their own government;"

and (2) that "The history of Liberty is a history of limitations of government power, not the increase of it."

The Constitution of Great Britain is a creature of the Common Law, reflecting principles declared by the ordinary Courts from their studies of the customs of the realm and of the precedents of the past. There is in Great Britain no written Constitution to which all persons and institutions must conform as there is in many countries. The ultimate principles

of this unwritten Constitution
relating to government are, first, that all rights, powers and duties flow from the Law, and are subject to challenge and declaration in the Courts of justice; and , secondly, that any declaration made by Parliament is the supreme form of law, binding upon all persons and organs according to its meaning as ascertained by the Courts.

Thus we come to the result that government power, as well as private rights, take their origin in the Common Law and are subject to the declarations of the Courts.

What has often been called "The Rule of Law" is not a rule of law at all, but a deduction from these principles and the general spirit of administration. It has reference to the fact that government according to law involves the limitation of powers in the State, and the notions of Liberty and Equality before the Law; and in particular that the powers of the Crown and its servants are derived from, and limited by, judicial decisions made by the Courts of Law or laws enacted by Parliament.

A special aspect of the Rule of Law is that the legality of any asserted right or power can be tested in the ordinary courts, whose position has been deliberately fortified so that they function in complete independence of the litigants, whether they be private persons or the State itself, with that calm neutrality which is equally devoid of subserviency or fear or self-interest.

The intimate relationship between the Common Law and the Constitution, and between the Subject and the State, has been described by a recent writer in these terms:

"The common law is more than a system of living and changing rules; it is a system of law based on fundamental principles. The greatest of these has been the freedom of justice from political and administrative control, the fact that judges hold office and exercise their functions without fear of control or censure by the government and are answerable only to Parliament itself. This has contributed greatly to that other great characteristic -- the sense of individual liberty of speech, thought and action protected from arbitrary infringement by an independent and ever-watchful judiciary which alone has power to try and punish. These principles, in their nature political and constitutional, are of the very essence of the Common Law."

In Great Britain as in Canada the chief function of the Courts in the realm of private law is to find and apply the law in the decision of cases between individuals. That law is to be found either in relevant principles laid down in previous decided cases; or in the meaning of the language of a binding enactment as judicially ascertained. In either instance, judicial decision is the result of the application of a pre-existing or declared rule of law binding on the Court. Canadian courts function exactly as those in Great Britain; for they likewise declare and apply common law principles and must give effect to enacted law according to its tenor.

The accelerated output of statutory law has often led to the belief that the Common Law has lost much of its importance to the citizen. This is quite erroneous wrong; for though parts of the Common Law have been codified, and parts have been altered or

abrogated, or reversed in their operation, by statute, it is still true that very little of it which intimately affects the citizen in his daily life has lost its effect. Indeed, there is much to be said for the view that the Legislatures have intervened too little in matters of private law; and that the Common Law is left unaided to provide solutions for emergent problems produced by rapid changes in economic and social practices and in political ideas. The truth is that the great bulk of modern legislation is of a social or regulatory ~~or administrative~~ character, and is concerned more with the ~~reciprocal~~ mutual relations of State and individuals than with the mutual ~~relations~~ rights of individuals.

~~In the field of private law, then,~~ Justice according to law continues to mean for the main part justice according to the principles of the Common Law amended in part by legislation, and modified by judicial decisions to suit current conditions, ~~with occasional great innovations which furnish new points of departure.~~ Since the Courts can seldom make giant strides in the way of modernizing the law; for they are prisoners of the technique which requires the application of previously declared principles; great reforms must come by way of Legislation - which is often long deferred.

Similarly, in the sphere of enacted law, the Courts are bound to ~~apply~~ discover and enforce the will of the Legislature ~~because of the doctrine of the Supremacy of Parliament.~~

The interpretation of a statute requires the discovery of its true meaning as revealed by scrutiny of its language in all its parts. This is not an easy task, because of the fallibility of language as a conveyor of exact meanings; and because the

text may have to be applied to situations ~~uncontemplated~~ unforeseen by those who framed it, as in the case, ~~of new inventions or~~, for example, of the application of the B.N.A. Act to new developments in ~~the way~~ of transportation and communication. Always the Court is seeking meaning in relation to facts; and abstract or dictionary meanings provide little help; for the meaning of a word in a statute is affected by the over-all purpose of the statute and by the immediate context in which the word is found. As Holmes so well said: "A word is not a crystal-transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." To extract from the language of a statute ~~and to express~~ its true meaning in relation to a new set of facts is the most difficult of judicial tasks. And here the Courts must remember that it is not their function ~~to declare the meaning of the statute, and not~~ to enlarge or to restrict that meaning according to their own views of what is just or expedient.

~~Now legislation in the sense of~~ The will of the State expressed in an enactment by a supreme law-making body is not only the supreme form of law. It is also the chief means by which government of the State is carried on by the various administrative agencies; for no such enactment is self-operating, any more than it is self-interpreting. The direct administration of some types of statutes is sometimes the business of the Courts, as, for example, the administration of justice under the Criminal Code. In increasing measure, however, ~~direct~~ administration of a statute is

the business of a government Department or of a Board ~~or Commission~~ created for that purpose. Thus, for example, the features of an Industrial Relations statute which relate to the prevention and composition of strikes and lock-outs are usually administered by departmental officials, whilst those designed to promote collective bargaining are administered by Boards.

All administrators must, of course, interpret the enactment to be administered. It is clear, however, that interpretation by Judges in the course of litigation, and interpretation by officials or Boards in the course of administration, often vary. This is inevitable; for, just as words mean different things to different minds engaged in the same work, so they may convey vastly different meanings when approached by judicial and administrative minds from different points of view.

This brings me to the very fundamental matter of the validity of legislation.

Even in the case of a ~~unitary~~ State with an omnipotent Parliament, power is often delegated to a Minister or a Board to make regulations having the force of law or to decide the rights of parties in the ~~detailed~~ administration of a statute. The exercise of these delegated powers frequently is challenged as involving an absence or excess of jurisdiction. In such a case, the governing enactment must be interpreted to determine whether ~~any regulation or decision~~ the thing done made by the subordinate body was within the powers entrusted to it; and a similar problem of jurisdiction and interpretation arises whenever the validity of a statute passed by a Legislature in a Federal system is challenged.

Now to speak briefly of the constitutional validity of legislation:

The Constitution of Canada being an enactment of the Parliament of Great Britain, it follows that the Parliament of Canada and the Legislatures of the Provinces possess only delegated or derivative powers to make laws; and, as the power to make laws is divided among Parliament and the Legislatures, it is necessary to interpret the Constitution to determine whether any enactment by either is within the powers delegated to it by that master instrument. Accordingly, every Canadian statute must emanate from a Legislature having jurisdiction to enact it. Every such statute is thus subject to potential challenge as to its constitutional validity, and the Courts must declare it invalid if it does not accord with the division of legislative power made by the B.N.A. Act.

This power of judicial review of legislation is frequently exercised in countries which have a Federal system. As indicative of its reality, I need only mention that in 1925 the Industrial Disputes Investigation Act was declared invalid after twenty years of existence; and in 1937 most of the "New Deal" legislation of the Bennett régime was also declared invalid. A further illustration is the recent decision of the United States Supreme Court invalidating the President's seizure of the Steel Industry as not being founded on any express or implied grant of power to the President in the Constitution. Another instance is the decision of the Court of Appeal of South Africa holding invalid a statute disqualifying certain classes of voters because that statute had

not been enacted in conformity with the so-called entrenched sections of the Constitution. This power to review the validity of legislative enactments is essential in a Federal system; for the exercise of any kind of power must stand the test of conformity to its Constitution, if freedom is to subsist in accordance with its basic principles.

Legislation at large is the expression in law of the current philosophy of government. Prior to the Industrial Revolution legislation reflected the accepted belief that there should be a minimum of State intervention in social, economic, and private affairs. The vast changes wrought by that Revolution in the pattern of modern life produced a corresponding evolution in the conception of the proper function of government. The new conception requires the State to provide, in a positive way, for the social welfare and security of the people and increased regulation of business and economic affairs, and is epitomized in such current phrases as The Social Welfare State, Planned Economy, Cradle-to-the-Grave Security, etc. Governments everywhere have yielded to this twin-pressure of changing facts and changing opinions.

One result of this new conception has been a great spate of laws designed to provide social services and security by way of unemployment relief, pensions, and family allowances; to control production and competition by regulating prices and monopolies; to regulate labour-management relations in respect of wages, strikes, and collective bargaining; and generally to regulate many matters affecting the lives of citizens.

Another result of the recognized need for ~~ameliorative and regulatory~~ such enactments - and the consequent strain it has put upon Parliaments - has been the device of confining the text of statutes to a skeleton-like declaration of principles, and delegating discretionary powers to those entrusted with their detailed administration. Accordingly, we find ~~numerous~~ many statutes delegating to officials or boards:

1. power to make binding regulations to carry out the purposes of the parent statute and so expressed as to confer great latitude of discretion in their terms; and

2. power to adjudicate upon questions arising in the course of administration and to decide the rights of citizens involved - and often such adjudications are expressed to be final and not open to review in the Courts.

From the ~~delegation~~ bestowal of such ~~discretionary~~ powers, has come a body of administrative laws which greatly exceeds the annual output of the Legislatures themselves, and a body of administrative decisions greatly in excess of the annual decisions of all the Courts in Canada.

Since all these enactments and decisions affect human rights, it is not surprising that an increasing resort has been had to the Courts to determine their validity.

~~Faced with a new phenomenon of this magnitude, it may be that the courts appeared, initially, to be antagonistic to these developments and to have reacted by ultra-restrictive interpretations of the master documents involved. Now, however, the courts accept~~ - as they must - this new technique of government as an established

feature of modern life, and seek ~~dispassionately~~ simply to determine whether or not the regulation or decision was one within the power of the executive agency to make or give. Just as they have no concern with the wisdom or expediency or justice of sovereign legislation, so they have no proper concern with the appropriateness or policy of an executive action. It is their proper concern, however, to see that executive regulations accord with the power conferred; and that executive decisions are such as the deciding body had jurisdiction to make, and that they were arrived at by a procedure consistent with the elementary observances of justice.

This limited supervision of executive action does not apply where the power conferred is in the nature of a discretion to be exercised on the basis of conceived expediency or departmental policy. And even where the power requires the functionary to act judicially in determining individual rights, the statute may by sufficiently precise terms exclude the Courts from inquiry into the legality of such a decision.

If the Rule of Law is to continue to be the dominant feature of Canadian life, it is essential that the Courts continue to have power to determine the existence and abuse of executive power and to declare accordingly. Otherwise, the way will be paved for that very arbitrariness in executive government which centuries ago led to the restriction of the power of the Crown.

What I have been saying, of course, has no special reference to any government nor any class of officials; for I have been concerned with techniques and tendencies which have manifested themselves no less in other countries than in Canada.

It is because Courts are not immersed in the daily business of government, because they are independent of governments and citizens alike, and because they are charged with the duty of declaring the invalidity of laws passed or decisions made without proper legal foundation, that they constitute the first bulwark against the encroachment of State activity upon the liberty of the individual. This is not to deny that other bulwarks exist, particularly in the form of public opinion as manifested in representative Legislatures, and in the self-restraint of governments responsible to them. It is merely to say that the judiciary must confine the other agencies of government to their legitimate functions whilst being careful to stay within its own.

Unfortunately, the judicial supervision of executive agencies must be exercised chiefly through the prerogative writs such as Certiorari and Mandamus. These are encrusted with limitations inherent in their own antiquity, which confine them to matters of jurisdiction, real or abused, and require constant regard to many subtle and outworn distinctions and impair their application to modern problems.

It is to be hoped that, in their limited but vital role of seeing to it that executive agencies neither exceed their powers nor abdicate their duties, the Courts will soon be provided with tools of supervision more appropriate than those now available.

I am conscious, Ladies and Gentlemen, that I have spoken in a vein of seriousness which may be considered inappropriate at such a function as this. My only defence must be that I have discussed matters of vital import to all Canadians, and matters which no audience could understand more acutely than this.

I trust we all appreciate the necessity of working out a proper reconciliation between the functions of government and of the judiciary in maintaining those safeguards to human liberty which have characterized the Reign of Law in all British systems. If these are maintained, then we shall be able to say of Canada what George the Fifth said of Britain years ago: "The system bequeathed to us by our ancestors, again modified for the needs of a new age, has been found once more, as of old, the best way to secure government by the people, freedom for the individual, the ordered strength of the State, and the Rule of Law over governors and governed alike."