POLITICAL SCIENCE UNDERGRADUATE REVIEW

VOL. 2 Winter 2017 ARTICLE 2

Judging the Judiciary as Federalism's Umpire

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When an attempt to shift the responsibility for unemployment insurance from the provinces to the federal government in response to the Great Depression was halted in 1937 after having been deemed unconstitutional by the judicial committee of the Privy Council, it provoked angry responses from contemporary legal scholars. Some questioned the wisdom of British Judges making rulings of social importance over Canadian affairs. However, newer analysis of the Court′s decision, as well as a breakdown of some of the criticisms of the past shows that many of the arguments levied against the JCPC were misguided and that the JCPC, like the modern Supreme Court that replaced it, effectively played the role of an umpire in setting disputes between the two levels of government in a democratic fashion, as well as in a manner that conforms to Canada's multinational character.

Since the introduction of the Charter of Rights and Freedoms, attention to issues of federalism within the constitution has dwindled, yielding to a more modern approach with a strong emphasis on individual rights (Greschner 2000, 58). However, that does not mean that the division of powers between the provinces and the federal government is no longer an issue. It is easy to forget that the Constitution Act of 1867 still draws the lines between provincial and federal jurisdictions, which sections 91 and 92 of the act dictate. And in the days before the Charter, sections 91 and 92 provided the grounds on which the two levels of governments fought for legislative control while under judicial supervision. The role of the courts in mediating these conflicts is an important detail worth examining. With that said, the focus of this paper will be on one prominent controversial episode in which the division of powers was brought into question and differing views on Canadian federalism and the purpose of the courts came into conflict: the failure of R. B. Bennett's New Deal in 1937 in which six out of eight pieces of legislation passed by the federal government to ease the suffering inflicted by the great depression were struck down by the courts as unconstitutional. At the time, the judgement of the courts sparked a strong negative reaction from academics who loudly condemned the Judicial Committee of the Privy Council. Did the courts behave correctly at the time? Or did intervention by the courts constitute as an undemocratic hindrance to the legislative process? Despite the backlash it received over the failure of the New Deal, an examination of the court's decision will show that it acted properly despite the problems inherent in the JCPC, such as the problematic nature of having British judges pass rulings on Canadian issues. With

their ruling on the New Deal, the JCPC played the role of the umpire in federalism and a moderator between the federal government and the provinces adequately.

In detail, what happened in 1935 was this: in an attempt to emulate what President Roosevelt had done in the United States, Prime Minister Bennett promised to instigate reforms through the Employment and Insurance act, which would have involved "a more progressive taxation system, a maximum work week, a minimum wage, closer regulation of working conditions, unemployment insurance, health and accident insurance, a revised old-age pension and agricultural support programs" (English 2006, n.p.). Following Bennett's defeat in a general election, his successor Mackenzie King referred the package to the JCPC and key provisions of the Act were ruled to be ultra vires, beyond the jurisdiction of the federal government. (Simeon et al., 2014, 74). The Court's reasoning was that social security is under the jurisdiction of the provinces, through their power over property and civil rights as granted by section 92 (13) (Baier 2008, 25). Following the Rowell–Sirois Commission, an inquiry into federal-provincial relations, all the provinces agreed to a constitutional amendment transferring the responsibility of unemployment insurance from the provinces to the federal government.

As mentioned earlier, the court's actions evoked the ire of English-Canadian scholars. In his article "The Special Nature of Canadian Federalism", F. R. Scott directed harsh criticisms towards the JCPC while arguing for greater centralization. He makes several interesting points. First he argues that "many social problems exceed the boundaries of provincial jurisdiction within which they legally lie" (1947, 13). This argument lies on the assumption that the federal government, with greater access to financial resources, is more capable and more competent at tackling large scale issues than the provinces are. He then proceeds to argue that Canadian federalism is centralist by nature and design, citing the Peace, Order and Good Government clause in section 91 (1947, 20), the federal government's power of disallowance (1947, 16), as well as the intentions of the Canada's founding fathers. The amount of weight he gives to the inherent power of the federal government is evident when he discusses his views on the 1940 amendment:

> Hence I view the amendment of 1940, granting the subject of unemployment insurance to the Dominion, as effecting no transfer from provinces to the Dominion at all; all it did was to clarify a Dominion power which the courts, by their long line of restrictive judgments, had lost the capacity of identifying. For it would be difficult to imagine a subject more obviously national in scope and importance, more surely beyond the local aspect of property and civil rights, than unemployment insurance designed to protect the national economy from the mass misery and widespread dislocation brought about by the world′s greatest economic depression. (Scott 1947, 24)

Scott's first point is sound enough. The effects of the depression were indeed beyond the scope of the provinces to tackle. This is evident enough as all the provinces agreed to the amendment to transfer unemployment insurance responsibilities to the federal government. But Scott argues that the effects of the depression amounted to a national crisis, and the JCPC were mistaken in striking down the act in the first place (1947, 24). However, the Courts did not see the depression as an emergency (Hogg and Wright, 2005, 340). With hindsight, it could be argued that while the effects of the depression were beyond the scope of the provinces to effectively handle, it did not pose an threat to the country in the same way the two world wars did, as those were seen as national crises. The effectiveness of the provinces

to handle an issue is insufficient reason to allow the federal government to override provincial authority. This principle was just recently affirmed in the court's opinion on the Securities Act (2011) when it explained that "as important as the preservation of capital markets and the maintenance of Canada's financial stability are, they do not justify a wholesale takeover of the regulation of the securities industry which is the ultimate consequence of the proposed federal legislation." With that in mind, the JCPC was acting in a way today's Supreme Court would. As Cairns puts it,

> "In a constitutional system the function of judicial review must be more than simply allowing desirable policies to be implemented by whatever level of government so wishes. A worthwhile court of final appeal is bound on occasion to prevent one level of government from doing what a group of temporary incumbents or its supporters would like to do. Criticism of a court based on the fact that it has prevented a desirable objective from being attained is not good enough" (1971, 342).

What about Scott's larger point that by its nature, Canadian federalism is heavily centralized in favor of the federal government? Scott bases his argument on the intentions of the founding fathers of confederation. Fredrick Vaughn makes a similar argument, explaining that the centralist design of Canadian federalism was a response to the American civil war (1986, 505). But the intentions of the framers of the constitution have been disputed. Peter Hogg and Wade K. Wright argue that the founders had been divided from the start on whether Canada was meant to be a heavily centralized state or a loose confederacy, and that an argument based on what the founding fathers intended depended on who is being regarded as framers of the BNA act. As Hogg and Wright explain, if "Sir John A. Macdonald and the other English-Canadian federalists are regarded as the framers, the conclusion that will inevitably follow is that the framers intended Canada to be highly centralized. On the other hand, if only the provincial politicians from Quebec and the Maritimes are regarded as the framers, the conclusion that will inevitably follow is that the framers intended Canada to be highly decentralized." With that in mind, it would appear that Scott's argument for greater centralization fits into the former and has neglected to consider the non-English-Canadian federalist perspective, meaning that its argument to adhere to a centralist vision is not conclusive.

More importantly, however, it is not the function of the courts to guide their decisions based on what the founding fathers may have intended. Instead, it is the responsibility of the courts to base their decisions on the text of the constitution, a text that was meant to be open to interpretation and not confined to the views and perspectives of men from the 1860's. As Hogg and Wright argue, "the text is ambiguous, probably intentionally so" (2005, 338). The 1867 constitution contains evidence to support visions of a more centralized federal system, such as POGG power and disallowance, as well as evidence for a more decentralized system such as the province's control over property and civil rights in section 92 (13). In this case, unemployment insurance was deemed to fall under section 92 (13). Largely, it was through the court's generous interpretation of section 92 (13) which gave provinces a chance to broaden their jurisdiction. The ability to interpret the text of the constitution without having to constrain judgements on historical or outdated understandings is an important one. An important example of this is in Edwards v Canada (1929), which ruled that women were qualified persons and can sit in the Senate. It is also the case from which the living tree doctrine emerged, a doctrine that relies on liberal interpretations of the constitution which are free from the confines of framer's intent. As Lord Sankey

explained in the ruling, ″The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits″.

Having dealt with the criticisms of the JCPC and the arguments for centralization, just how well did the JCPC fulfill its role as an umpire over the Employment and Insurance act? Considering the outcome, the Courts served its role well. Firstly, the legislation that was struck down was replaced by legislation that was both constitutional and fulfilled the same purpose. The fact that this was achieved by amending the constitution rather than amending the legislation matters little as both the courts and the legislatures fulfilled their roles in that "the courts speak to the legislative and executive branches[...] the legislature responds to the courts ; hence the dialogue among the branches" (Greschner 2000, 54). By ruling the Employment and Insurance Act as unconstitutional, the courts spoke to the provinces and the federal government, which in turn sparked inter-governmental negotiations, negotiations which resulted in a constitutional amendment to which all the province agreed. Without that agreement, there would have been no amendment and the provinces would have been left with the responsibilities of fighting the effects of the depression with their limited resources. So not only was there a dialogue between legislatures and the courts, but elected lawmakers were able to have the final word and not appointed judges in Britain, which ultimately makes the process a democratic one.

It should be noted that while the JCPC did manage play the role of the umpire, they weren't necessarily the most desirable one. While they fulfilled their function reasonably well, especially in this case, there are good reasons for the abolishment of appeals to the JCPC. First, it makes sense that Canadian judges would have a superior understanding of Canadian socio-political issues than distant judges residing across the Atlantic (Cairns 1971, 328). In addition, both old and modern day scholars have levied charges of bias towards the JCPC. The judges harbored particularly protective attitudes towards the provinces and saw themselves as more than just umpires but as policy makers (Cairns 1971, 313). It's possible that as a result of this bias, that the courts chose to liberally interpret section 92 (13) of the BNA act, and not the peace, order and good government clause in section 91. This bias is what stops the JCPC from being the ideal impartial umpire that we expect modern courts to be when they moderate disputes about federalism.

However, the end of appeals to the Privy Council in 1949 did not result in a drastic swing towards centralization (Hogg and Wright 2005, 352). Some had thought that without having to appeal to the JCPC, the Supreme Court would act as an agent of centralization (Cairns 1971, 333). However, the courts continue to draw an even line between federal and provincial power that does not result in one being subordinate to the other, as they did when they ruled that provincial consent was needed to patriate the constitution in the Patriation Reference (Hogg and Wright 2005, 350). Perhaps this means that as flawed as it may have been, the judges in the Privy Council weren't completely out of touch and that Canada's decentralized federalism has more to do with Canadian society than with the foreign intervention of the JCPC. Hogg and Wright also argue that the decentralization brought on by the JCPC was generally in line with Canadian society being a multination state, as to avoid alienating Quebec through strong centralist trends (2005, 345). This gives us another explanation as to why the courts did not liberally interpret section 91 of the BNA act in order to empower the federal government: preserving national unity as opposed to favoritism being exercised by the judges towards the provinces. As Pierre Trudeau wrote in 1968:

> "It has long been a custom in English Canada to denounce the Privy Council for its provincial bias; but it should perhaps be considered that if the lawlords had not leaned in that direction, Quebec separatism might not be a threat today; it might be an accomplished fact" (198).

Hogg and Wright concluded that overall, the Supreme Court has not departed from the lines of authority established by the Privy Council in that Canada had not shifted radically towards either greater centralization or decentralization (2005, 350). Yet, accusations of bias were still raised against the Supreme Court following the end of appeals (Greschner 2000, 66). So despite the digression exercised by the Courts, those who see themselves on the losing side of the Court's decisions are generally vocal about what they regard as bias. Overall, this adds to the legitimacy of the court's decision regarding the Employment and Insurance Act. It also shows that in spite of the problems that may have been inherent to the Privy Council, it fulfilled its function as a responsible judiciary.

In conclusion, history seems to have vindicated the Privy Council of the wrongdoings its critics had charged it with when it struck down the Employment and Insurance act. Flawed as it may have been, when we consider the ideal role of the courts in Canadian politics and how they ought to moderate conflicts between the two levels of government and not to cripple either one of them, we can see that the Privy Council acted quite fairly. To adhere to the framers' intent, as many of the Privy Council's critics wanted, would have not only go against the living tree doctrine which continues to guide our courts, but would've been contrary to the multinational characteristic of the country. We could also see that the process was indeed a democratic one as the court's decision resulted in an agreement between all the provinces and Ottawa, transferring responsibilities for unemployment insurance from the provinces to the federal government, thus empowering them to handle the effects of the depression and allowing political will to take its course. Because of that, we can see that the courts were successful in fulfilling a key role by facilitating a conversation between the three parties.

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