V. MacDonald

Dalhousie

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Dear Vincent,

I have just finished reading your article in the current number of the U. of T. Law Journal, and have enjoyed it immensely. Work of this explanatory sort is of great importance, particularly at the present time.

One or two ideas occurred to me while reading the article which I feel like passing on to you, for whatever they may be worth.

Your list of the canons of construction is most useful. I spend a lot of time trying to explain these to my students; you have for the first time made them available in print. But at the outset of my lecturing I always meet this difficulty: the Privy Council keep reminding us from time to time that the wise course is for them to decide each case "as best they can", without attempting exhaustive definitions. The object of this rule is "to prevent too rigid declarations of the courts from interfering with such elasticity as is given in the written constitution".(P.A.T.A. case,1931 A.C. at p.317).

In other words, the first canon of construction is that you must not rely on canons of construction. At best these rules are the merest guides, liable to be applied or not as the occasion demands.

Then some of the canons conflict with others. It seems to me that the doctrine of aspects leaves precious little room for the application of the rule that the abstinence of the Dominion from legislating on its exclusive powers cannot enlarge provincial jurisdiction. There is not much place for exclusiveness in the constitution now, until a Dominion statute actually fills the gap. This development is perhaps natural, because if the fundamental idea of the constitution is the division between general and local matters, then even the Dominion enumerated powers, in their local aspect, seem to become part of property and civil rights. But carried to its logical conclusion this would leave us with all governments able to legislate on everything, the courts being solely concerned to find a national aspect in Dominion laws and applying the doctrine of paramountcy.

The next task we have to apply ourselves to is to boil down these canons of construction into one or two simple and all-embracing rules. How about it ?

Your canon K, on p. 273, repeats what I have always felt was a slip on the part of the P.C. Surely the

word "paramount" should be "exclusive" ?

You mention the earlier attitude which treated the BNA Act as an ordinary statute. The most scandalous example of the evil effect of this attitude has always seemed to me to be the way in which the holding in Toronto v. Virgo (1896 A.C. 88) was applied to the trade and commerce clause, in Ont. v. Can. 1896 A.C. at p. 493. The word "regulate" interpreted in the same way for the City of Toronto as for the Dominion constitution !

At page 276 you say that "up to 1925" the trend of decision favoured the provinces. I am one of the authorities cited for this proposition. Actually I now think it more true to say that at first, up to Russell's case, decisions were reasonable, with that case leaning heavily towards the Dominion. All Canadian courts for about the first 20 years after Confederation seemed to understand the Quebec agreement thoroughly. The Supreme Court of Canada as late as the Liquor Prohibition case of 1896 stood up for Dominion powers, but after being overruled in that case they gave up the fight. The tide turned somewhere in the 1880's, and I have a hunch it was connected with Oliver Mowat's cleverness in waging his campaign against Macdonald. Ontario led the fight for provincial rights.

Well, these are scattered remarks. Now that you have dealt with the general trend of interpretation I must really complete my study of that trend as applied to the Dominion residuary clause. I have the work mostly done, but I have let too many other projects intervene.

Yours sincerely,