

meant that the same legislation existed after Confederation as had been in force before Confederation—it was to continue to exist after Confederation until it was changed by the proper authority. But there was this difference, that the powers to amend the existing law were not the same.

Under the United Canada (1840-1867) the provinces had much more power than they have now under Confederation on account of the powers that had been transferred to the Parliament of Canada—they were taken away from the powers that first belonged to the provinces, and this explains the second part of section 129. You will realize that it needs to be re-drafted.

The first part of that long sentence, which is section 129, means that the law which then existed continued to be in force, just as if the Union had not been made.

And then there is the second part of the wrongly drafted sentence which reads thus:

... subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

This is the drafting that I complain of. To have any meaning it should have been written as follows:

Subject nevertheless to be repealed, abolished or altered by the Parliament of Canada according to its exclusive authority or by the Legislature of the respective province according to its exclusive authority under the Act.

The distinction made by sections 91 and 92 and the exclusiveness of the respective jurisdictions are so evident that it is impossible to come to the conclusion that in the mind of the Fathers of Confederation the provinces could not after Confederation, enact any piece of legislation which had been declared under the exclusive jurisdiction of the Parliament of Canada. It also meant that the Parliament of Canada could not pass any piece of legislation that was left solely and exclusively under the jurisdiction of the province. I am sure that you follow me.

Otherwise, section 129 would have completely destroyed the effect of sections 91 and 92. It is evident one cannot come to any other conclusion that, in the minds of the Fathers of Confederation, they said to the Parliament of Canada, "You have certain exclusive powers given to you, so mind your own business," and they said to the province, "You have definite powers, they are exclusive, and you too shall mind your own business". But that wrongly drafted section has created confusion in the minds of some lawmakers, judges, lawyers and authors too. It requires a new drafting if the act is to continue in some form or another.

The second paragraph reads thus:

(b) to "the exclusive legislative authority of the Parliament of Canada" extending to marriage and divorce in virtue of subsection (26) of section 91 of the said act, with the exception of the exclusive powers of Provincial Legislatures to make laws "for the solemnization of marriage", in virtue of subsection (12) of section 92 of the said act, and

(c) the interpretation of the said law by the Supreme Court of Canada and the Privy Council on appeal from the Supreme Court of Canada in the matter of a reference to the Supreme Court of Canada