

should include not only the right of the majority to rule, but equally the right of minorities to their rights. A citizen, in thinking whether or not he might belong to the majority or minority group, should keep in mind that every single citizen is a minority of one, and if legislation can be promulgated taking away one's rights without due compensation, then I put it to honourable senators that we are living in a land where a definition of democracy has to be somewhat circumscribed to apply to it.

Professor W. P. M. Kennedy says:

—the power of disallowance was inserted in the British North America Act to cover, in general terms, unjust, confiscatory, or ex post facto legislation, against which there are express safeguards in the constitution of the United States.

A priori, there is a certain amount of support for this contention. It is well known that the constitution of the United States was carefully studied by those who laid the foundations and organized the framework of Canadian federation. It is not unreasonable to suppose that they had in mind in the 'disallowance sections' a means of dealing with provincial legislation which might be judged unsound in principle. Cartier, as we shall see, explicitly said that this was the intention. As a matter of fact, from federation to 1893, the weight of evidence, both from the bench and from the federal cabinet, is in favour of this point of view.

The paper comments:

When provincial legislation discriminates against certain persons and, at the same time, deprives these persons of their right to appeal to the courts against the exercise of arbitrary power, the exercise of the power of disallowance is the only remedy.

This is particularly true for two categories of persons affected by arbitrary provincial legislation: those who are in a minority and those who are not living in the province. The remedy given to them in a democratic country at the ballot box is of no assistance.

This opinion is that of Professor Frank R. Scott, who wrote in his book "The Canadian Constitution and Human Rights":

"Hence the federal government can keep a watchful eye on provincial behaviour, and has the legal power to stop a provincial government from adopting laws which unjustly restrict or attack minority rights or human rights. Many provincial laws have in fact been disallowed in the past, the latest examples being some of the Social Credit laws in Alberta in 1941. The Fathers of Confederation undoubtedly intended that this power should be used to protect minorities: for example, when Georges Etienne Cartier was asked during the Confederation debates in 1865 what would happen if the French majority in Quebec tried to blot out the English-speaking minority from any representation in the Quebec legislature, he replied that the law could be vetoed. 'I would recommend it myself in case of injustice,' he said."

Hon. Mr. Martin: It is up to the honourable senator to decide what he wishes to do with the document put out by

[Hon. Mr. van Roggen.]

the research group. I notice that he has made some selections, which is his right. But, in order to give honourable senators the fullest opportunity of reviewing this matter, perhaps he might wish to have the information incorporated in some other way, perhaps as an appendix to today's proceedings—

Hon. Mr. van Roggen: I am entirely in the hands of the Senate. I merely telephoned the Research Branch of the Library, and asked for any material on this subject. They sent this information to me, which is a paper prepared in 1968. It may be too voluminous to append to the *Debates of the Senate* of today as it comprises some 60 pages. Certainly any honourable senator can obtain a copy by simply telephoning the Research Branch.

Honourable senators, I turn now to another matter. Do we have the same protection as the English under common law? Every school boy is familiar with the oversimplified principle that Parliament is all powerful. As the saying goes, "Parliament can make a man a woman." In England, however, with its famous "unwritten Constitution," the courts on numerous occasions have come to the aid of the citizen against arbitrary parliamentary enactments, relying on Magna Carta, the Bill of Rights, Habeas Corpus, the Act of Settlement, et cetera; but in Canada, where we have a quasi-Constitution in the BNA Act, this power of the courts is not so clear.

Admittedly, the preamble to the BNA Act makes reference to a "Constitution similar in Principle to that of the United Kingdom," but unfortunately the true meaning of these words has not received much attention by our courts, and they are after all only part of the preamble to the BNA Act.

Tarnopolsky in his book on the Canadian Bill of Rights (1966) states at page 19:

It is difficult to ascertain why there was no discussion of civil liberties at the time of Confederation. Possibly this was a result of a reaction to the American experience with the civil war rising out of controversy over states rights and the rights of certain inhabitants of the United States. It was more probably the result of the belief of the Fathers of Confederation that the new country they were creating was a successor to the heritage of English constitutional law. The Magna Carta, the Bill of Rights, the Act of Settlement, among others, and the English Common Law, with its emphasis on the rights of free men which could not be taken away—

Mr. Justice Abbott of the Supreme Court of Canada touched upon this in *Switzman vs. Elbling*, (1957) Supreme Court Reports, page 328, where he said, in reference to legislation to suppress communistic propaganda and hence public debate and public discussion:

Although it is not necessary, of course, to determine this question for the purpose of the present appeal, the Canadian Constitution being declared to be similar in principle to that of the United Kingdom, I am also of opinion that as our Constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate.

In other words, honourable senators, there may be a power in our Constitution over and above the power of