

Canadian Federalism: A Scott's Eye View in Prose and Poetry*

It was 1947. Canada was engaged in dismantling the governmental arrangements and machinery that had served it through six years of war. We were returning to a peace-time footing. A voice in the land was apprehensive; we might become too much the captives of the late W.L.M. King who "always led us back to where we were before." The voice now rang out, loud and clear:

We are most deeply concerned with national unity.
This is one country; the state has new obligations.
So we submit our national responsibilities
To the veto of provincial politicians. We shall worship
At the altar of divided jurisdiction, and thus we shall honour
The Compact of Confederation.¹

For 20 years before that time and now for 20 years succeeding it, Frank Scott's voice has been a voice of conscience, piercing stand-patism and pretension in literature as well as in law, in universities as well as in public life. It has been a voice of conscience harnessed to conviction, summoning his colleagues and his students, his friends everywhere, his fellow citizens, to active involvement in public affairs.

Forty years of his own deep involvement in Canadian society show how well he practised what he preached. No fence sitter he. Canadians needed to be shaken out of political apathy; hence we find him at the founding convention of the Co-operative Commonwealth Federation and as president of the League for Social Reconstruction. Canadian legal education needed reflection and reinvigoration; so we find him helping to found the Association of Canadian Law Teachers (of which he became first president in 1950), and chairing a special committee on legal research of the Canadian Bar Association. Universities needed to be reminded that the teaching staff has a contribution to make to educational policy

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¹ From Scott's *'Orderly Decontrol' 1947*. All the poems mentioned in this speech may be found in *F.R. Scott: Selected Poems*, (Toronto, 1966), except *Some Privy Counsel*, which was first published at (1950), 28 Can. Bar Rev. 780.

and has a role to play in administration of university affairs; so we find him a founding father of the Canadian Association of University Teachers. (It is now a vigorous national organization which a few years ago paid its compliments to Frank Scott with an honorary life membership.) Repressive legislation and arbitrary executive action threatened freedom of speech and freedom to support minority groups; so we find Frank Scott trading his academic gown for a court gown and entering the lists at the highest level of judicial combat — in the Supreme Court of Canada. In his four appearances before that Court, he was successful three times; in the fourth case he failed by a whisker. He memorialized one of his eventual successes with biting humour, at a time when he had failed at the provincial court level. I recall to you his poem *A Lass in Wonderland* which begins as follows:

I went to bat for the Lady Chatte
Dressed in my bib and gown...

Let me speak the words of two verses in this poem:

The word 'obscene' was supposed to mean
'Undue exploitation of sex'.
This wording's fine for your needs and mine
But it's far too free for Quebec's.

....

Then too the sales made in the paper-back trade
Served to aggravate judicial spleen,
For it seems a high price will make any book nice
While its mass distribution's obscene.

To such an intellectual activist, uncommitted intelligence and non-committal postures deserved disdain. Listen to these verses from a poem entitled *To Certain Friends*:

They show great zeal collecting the news and statistics.
They know far more about every question than I do,
But their knowledge of how to use the knowledge grows smaller
and smaller.

They make a virtue of having an open mind,
Open to endless arrivals of other men's suggestions,
To the rain of facts that deepen the drought of the will.
Above all, they fear the positive formation of opinion, ...
For this could mean leaving the shade of the middle ground
To walk in the open air, and in unknown places;
Might lead, perhaps — dread thought! — to definite action.
They will grow old seeking to avoid conclusions, ...
Till one day, after the world has tired of waiting,
While they are busy arguing about the obvious,
A half-witted demagogue will walk away with their children.

What are the elements that have combined to give so distinctive a character and personality to Frank Scott? Let me compound the

prescription. Take a cultivated mind (it is no detraction to be a Rhodes Scholar); mix with an equal measure of passion for social justice; season with wisdom; add a good dash of humour; energize the whole through marriage to Marian Dales. *Et voilà!*

So that my remarks will not overrun a reasonable time span, I propose to confine myself to two central themes in Frank Scott's thinking; first, his conception of federalism, and, second, his devotion to civil liberties. It is not surprising that his writings should from time to time stress the interplay in Canada between federalism and civil liberties. Thus, in his published Alan B. Plaunt Memorial lectures delivered in 1959 at Carleton University under the title *Civil Liberties and Canadian Federalism*,² he saw "civil liberties as part of a never ceasing constitutional evolution."³ He was, however, quite conscious of the inevitable subtlety with which distinctions between federal and provincial power in relation to civil liberties had to be drawn. I am reminded of a couplet in one of his poems entitled *Conflict*:

Pro and con have single stem
Half a truth dividing them.

What has Frank Scott had to say about Canadian federalism in the 30 and more years that he has been writing about the interaction of national and provincial power? Let me admit at once that I owe him much for the sense of direction that he has given to my own work in Canadian constitutional law, and I am glad to have this occasion and this audience to witness this expression of my debt. Frank Scott is strict enough a lawyer to say that "the law of the Canadian Constitution derives from Imperial enactment, not from provincial consent."⁴ But he is also a social scientist who knows, as he said in an article in the *Canadian Bar Review* in 1937, that "[judicial] interpretations of the Canadian constitution vitally affect the political, social and economic destinies of [all] Canadians."⁵ It was therefore obvious to him that our final Court for constitutional matters must be one that had some intimacy with Canadian life and would be prepared, in the best traditions of judicial statesmanship, to allow changing social and economic forces to be reflected in constitutional interpretation. I may intrude here a proposition of my own on this question; namely, that a final constitutional court

² (Ottawa, 1959).

³ At p. 5.

⁴ *Index to the Confederation Debates, 1865*, reprinted edition, (Ottawa, 1952), p. 8 (Introduction).

⁵ *The Consequences of the Privy Council Decisions*, (1937), 15 Can. Bar Rev. 485, at p. 493.

should be expected to live with the consequences of its decisions; to endure them as other citizens and inhabitants of this country must. Thus it was that Scott urged at the time the abolition of appeals to the Judicial Committee of the Privy Council. I quote a telling passage from the 1937 article:

The Privy Council is and always will be a thoroughly unsatisfactory court of appeal for Canada in constitutional matters; its members are too remote, too little trained in our law, too casually selected, and have too short a tenure. Confederation itself may well have difficulty in surviving the disintegrating effect of the Court's judgments upon the *British North America Act*.⁶

I had just graduated in law at the time and still recall the impact that this piece of writing made upon me.

Appeals to the Privy Council were not abolished until 1949; but in the interval Professor Scott summed up the course of Privy Council constitutional decision in a now classic verse entitled *Some Privy Counsel*. It is a capsule textbook of Canadian constitutional law, which I cannot resist quoting, although I suspect it is familiar to many of you in this room:

"Emergency, emergency", I cried, "give us emergency,
This shall be the doctrine of our salvation.
Are we not surrounded by emergencies?
The rent of a house, the cost of food, pensions and health,
the unemployed,
These are lasting emergencies, tragic for me."
Yet ever the answer was property and civil rights,
And my peace-time troubles were counted as nothing.
"At least you have an unoccupied field," I urged,
"Or something ancillary for a man with four children?
Surely my insecurity and want affect the body politic?"
But back came the echo of property and civil rights.
I was told to wrap my sorrows in water-tight compartments.
"Please, please", I entreated, "look at my problem.
I and my brothers, regardless of race, are afflicted.
Our welfare hangs on remote policies, distant decisions,
Planning of trade, guaranteed prices, high employment —
Can provincial fractions deal with this complex whole?
Surely such questions are now supra-national!"
But the judges fidgeted over their digests
And blew me away with the canons of construction.
"This is intolerable", I shouted, "this is one country;
Two flourishing cultures, but joined in one nation.
I demand peace, order and good government,
This you must admit is the aim of Confederation!"
But firmly and sternly I was pushed to a corner
And covered with the wet blanket of provincial autonomy.

⁶ *Ibid.*, at p. 494.

Stifling under the burden I raised my hands to Heaven
 And called out with my last and expiring breath
 "At least you cannot deny I have a new aspect?
 I cite in my aid the fresh approach of Lord Simon!"
 But all I could hear was the old sing-song,
 This time in Latin, muttering *stare decisis*.

You can gather from this verse that for Scott, constitutional decision could not be based on abstract principles; the constitution could not remain a living document if the courts insisted on separating it from the social, political and economic changes that were reflected in almost all phases of Canadian life. The broad terms in which the central parts of the constitution were couched were susceptible to contemporary application, and it was therefore unnecessary to put constitutional interpretation into a straight-jacket. If this was done through conscious choice, it showed terrible short-sightedness; if done as an exercise in mechanical jurisprudence, it showed inability to appreciate the creative role that courts must play in the interpretation of a federal constitution.

Scott has always faced up to the classic dilemma of federalism, the balance between centralization and decentralization. "Too much centralization," he said, "invites tyranny; too little creates anarchy."⁷ What is more, he has faced up to this dilemma without ignoring the significance for Canada of safeguarding the cultural values of Quebec. In drawing attention to these values he has pointed out that until Confederation, in other words for the first century of British rule, French-speaking Canadians were subject to governments controlled by British Protestants so far as concerned jurisdiction over property and civil rights, education and religion. Confederation which "re-created the legal entity called Quebec... provided for French Canada a degree of autonomy which it had never previously known, not even under the French regime when colonial freedom was minimal."⁸ In short, as Scott put it, "to Quebec, Confederation represented a partial escape from centralized control."

I do not think I will court disagreement from Frank Scott in saying here, as I have said many times before, that I know of no federal constitution under which, whether by specification or by interpretation, the local units of the federation — in Canada, the provinces — enjoy as much regulatory power in economic and social welfare matters as is the case in Canada. If we look at the picture

⁷ *Centralization and Decentralization in Canadian Federalism*, (1951), 29 Can. Bar Rev. 1095, at p. 1124.

⁸ *Ibid.*, at p. 1096.

in insurance regulation, in securities regulation, in the marketing of natural products, in manufacturing, in the service trades, in labour relations — and the list can be extended — provincial competence in these matters has been judicially confirmed for more than half a century. In the welfare field, only in respect of unemployment insurance is there exclusive federal competence — and that only because of a constitutional amendment agreed to in 1940 — and only in respect of old age pensions is there concurrent national authority. Judicial interpretation which has been quite mechanical in this country, has helped of course to harden political attitudes; and the unvarying certainty of confirmation of provincial regulatory power through court decision has, over the years, weakened the national initiative. As Scott himself has put it, the “provinces have much more status and legal authority now than they started with.” Having authority is one thing; being able to exercise it effectively is another. Economic considerations affecting one Province rather than others may make its authority in particular fields illusory. Similarly, financial resources may be too meagre to permit full exercise of authority in the social welfare field. But withal, “provincial autonomy [means] national inactivity,” if I may add to my borrowings of Scott’s phrases.

One way in which the national government had sought to overcome constitutional paralysis to deal directly with matters that economically and socially cried for national solutions, was to employ its paramount taxing and spending power. Legally, the right to spend on objects which the national government could not directly regulate was unassailable. In Scott’s striking phrase “generosity is not unconstitutional.” The legal position on the spending power has, however, had an adverse political effect which in turn has reinforced the present apparent freeze in the distribution of law-making power. The pressure for nationally-oriented social and economic policies has in the past been met by the national government by resort to its tax revenues. Some constitutional lawyers, including Scott, believe that there has been too much of an acquiescence by the national government in the present judicially-established relationship between national and local power. They would like to see more legislative initiative at the national level. As matters stand, the resort to taxing and spending as the spearheads of national policy has confirmed the provinces in their claims to wide regulatory power; and because, in some cases, effective exercise of such broad power is presently beyond their financial resources or capacity, they have sought a re-allocation of taxing authority to enable them to discharge their constitutional responsibilities. The consequences of such a re-allocation on an already constitutionally-weak central gov-

ernment cannot be lightly dismissed by any province, however autonomous minded it may be. That could lead to the anarchy which is so repugnant to Scott's conception of Canadian federalism.

Troubled as Scott has been by assertions of provincial autonomy which might fracture any sense of national purpose and immobilize national action, he has been equally troubled by attempts in some quarters to rewrite Confederation history as exemplifying a treaty between two peoples; that is, as he put it, "that the Constitution is primarily designed to preserve and promote the duality of cultures."⁹ This conception differed from that of provincial autonomy "since the notion of cultural partnership does not favour any province except Quebec." Yet Scott believed in the value of the duality of cultures, accepted at Confederation, just as he believed in provincial autonomy. But he saw these matters in balance with a vigorous central government, which would have a duty to promote cultural duality beyond the constitutional safeguards provided for it in the Constitution; and which in its general legislative and executive role would mesh interprovincial interests rather than be subordinated to action only upon a manifestation of collective provincial desires. "I am one of those who believe," he said in a presidential address in 1961 to the Humanities and Social Sciences Section II of the Royal Society of Canada "that the original constitution of Canada, changing as it must in face of new demands and new challenges, is still basically adapted to the sum total of our various hopes and aspirations." Clearly included was the hope that the dual nationalism manifesting itself today in Canada would find an outlet primarily in cultural partnership so as to leave our political federalism unbroken.

I can aptly emphasize Frank Scott's concern to protect and advance civil liberties by noting simply that all four cases in which he appeared before the Supreme Court of Canada involved civil liberties issues. It would, however, be presenting only half a portrait to leave it at that. Civil liberties in the Scott lexicon embrace not only the protection of the values that underly the working of our parliamentary institutions; not only the protection of the ordinary man or woman in the street from arbitrary or unreasonable restraints by the state; not only an insistence on fair and open legal procedures, but, as important for him as these, the positive duty of the state to prohibit discrimination in all phases of community life where based on irrelevant criteria, and the positive duty of the state to provide equal educational opportunity and reasonable measures to cushion hardship resulting from economic vicissitudes. This broad

⁹ *Proceedings of the Royal Society of Canada*, vol. 55, 3rd ser., 1961, pp. 83-95.

conception is fighting ground, but as such quite congenial to the Scott temperament. "Defence against the state and protection by the state are two correlative functions, not contradictory but complementary."¹⁰ It is especially important to note that ardent concern for minority rights, for the position of minorities (like our Indian and Eskimo fellow citizens) under the law and in social and economic relations, comes within Scott's broad compass of civil liberties. It is a concern that has its roots in the Constitution as well as in his social philosophy.

A bill of rights drafted by Scott would be much broader than the present limited statutory bill in force at the federal level. It would, moreover, likely be drafted as a constitutional bill of rights, binding upon legislatures. But at all events, it would be drafted to include adequate enforcement machinery; no civil liberties in the air for Professor Scott. It would, moreover, express the democratic conviction reflected in his poem *Dedication*:

Till power is brought to pooling
And outcasts share in ruling
There will not be an ending
Nor any peace for spending.

He has, for him, been comparatively quiet since 1963 when he became a member of the Royal Commission on Bilingualism and Biculturalism. He retired as Dean of the McGill Faculty of Law the following year after three heavy years of service in that post; a post, which I may say (without being invidious about other persons), he earned many years before his appointment was made. McGill needed the adornment of having him in that office more than he needed it for any personal satisfaction. He has continued to lecture in other universities and places as well as in McGill. Membership on the B. & B. Commission is not as rewarding as, say, a Senate appointment, but now that Senators must retire at age 75, the tenurial prospects of Commission membership do not look bad by comparison.

If one were to search for the mainspring of Frank Scott's concern for social justice for his fellow men and women, regardless of race or colour or religion or place of origin, or status or station in life, it may be seen in his *Creed*, a published quatrain, which is as follows:

The world is my country
The human race is my race
The spirit of man is my God
The future of man is my heaven

¹⁰ *Dominion Jurisdiction over Human Rights and Fundamental Freedoms*, (1949), 27 Can. Bar Rev. 497, at p. 536.

This is the comprehension which he has sought to foster in Canada, and in that integral part of it known as Quebec. For him there has never been any thought of switching in order to keep fighting. I can testify to the serious efforts that many of us in Ontario, in Toronto and elsewhere, made to lure him from his native province, but to no avail. He believes that Quebec provides as good a vantage point as any other province (and historically a better vantage point than most) to trumpet his support for an effective national government compatibly with a recognition of provincial autonomy in matters that can be socially and economically comprehended by the provinces; and, compatible with both, his support for minority rights and for a cultural duality that will express the national and international asset value of having two working languages.

Honours of a kind that testify to intellectual achievement have come to Professor Scott in ample measure. A Guggenheim Fellow in 1940; a member of the Royal Society of Canada since 1947 and Chairman of its Humanities and Social Sciences Section II in 1960; a succession of honorary doctorates. This evening as he sits with those whose company he enjoys the best — his students — and those who know him best — his university colleagues, we can forget his intellectuality and his activism in speech and in book, and salute him as a warm human being, at home with whomever and wherever he is, a man for all seasons, happily and deeply Canadian.

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