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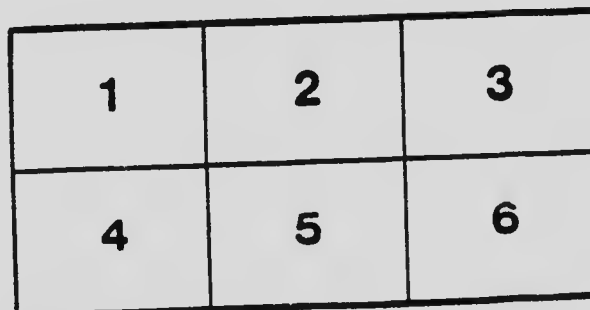
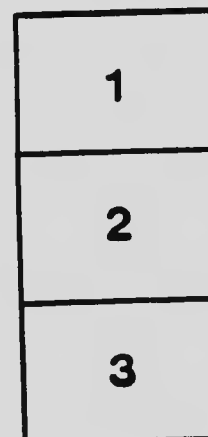
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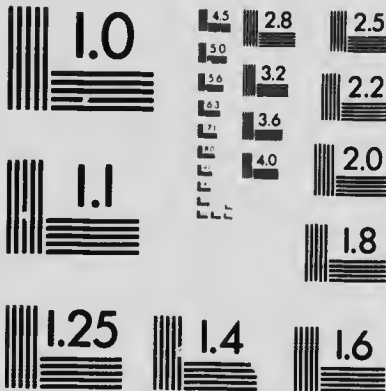
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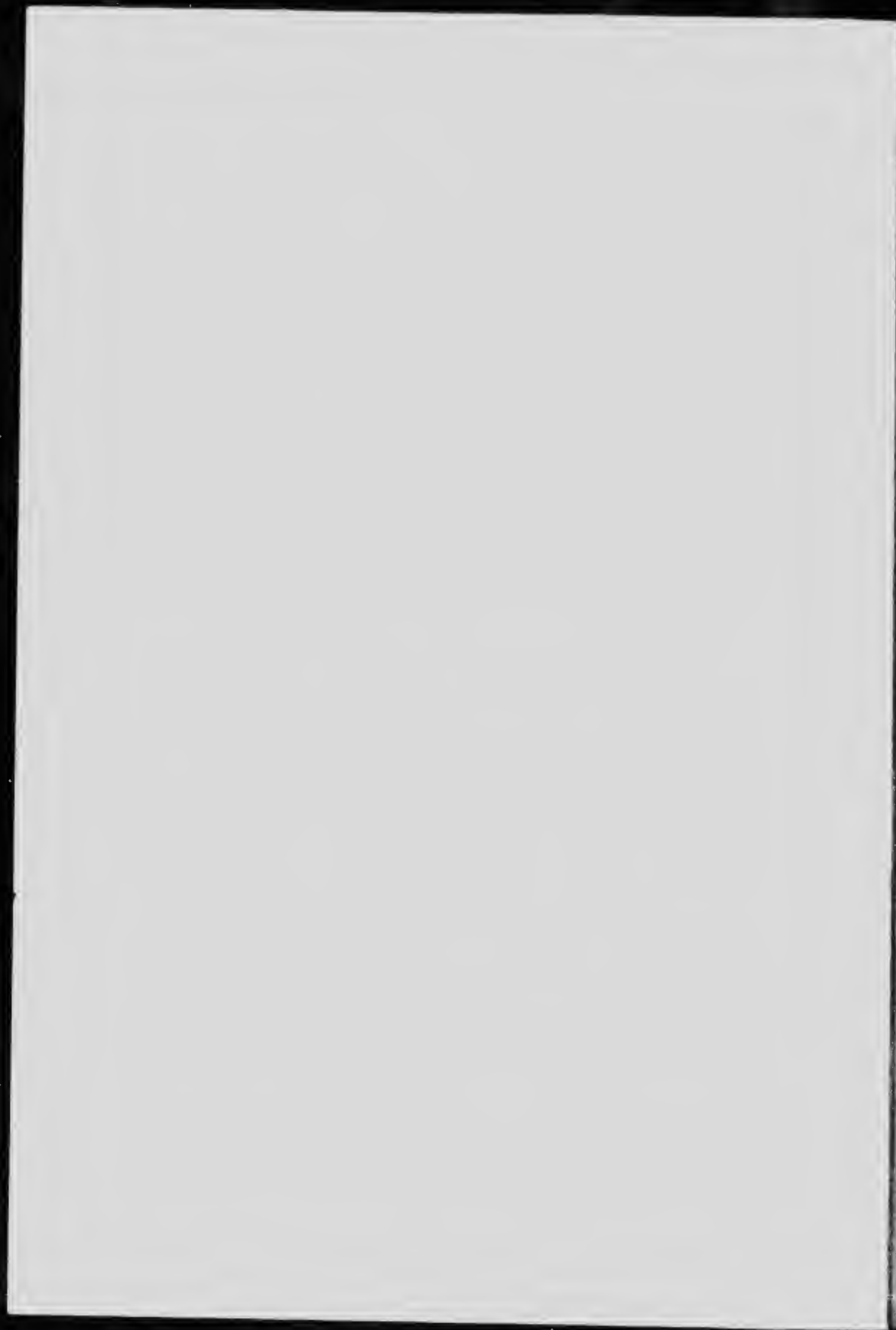
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by Z. A. Lash, K.C., LL.D.,

Toronto, Feb. 22nd, 1918

Canadian Independence

1918

Canadian Independence

DIFFICULTIES IN CHANGING THE BASIS OF THE CANADIAN CONSTITUTION

I do not mean by this to refer to minor difficulties in procuring from the Imperial Parliament amendments to the British North America Act (Canada's Constitution) to meet exceptional cases, such as extending the life of Parliament, or to remedy some omission in the terms of the Act, or even to change some of the relations between the Dominion and the Provinces, or the powers of Parliament or of the Legislatures—all such amendments would be matters of detail. The change I have in mind would affect the very basis of the Constitution, and the purpose of this paper is to explain shortly the main constitutional and practical questions which would have to be solved should any movement for Canada's independence and separation from the British Empire ever receive the support of the majority of her people.

Those who would now support such a movement are very few, and I cannot help feeling that they have not thought out what the accomplishment of Canadian Independence would involve.

Review of Present Position

In order that we may understand the changes which would be required to turn Canada from her present constitutional position into an independent Nation, a short review of the present position is necessary.

The primitive form of government among most, if not all peoples, was through one man—whether he were Tribal Chief, King, or other leader. All the powers of Government were vested in him and he exercised them himself.

With respect to the internal affairs of his tribe or people, he was the governor and the executive and law-making authority; in administering justice, he was the court and judge; in directing war, offensive or defensive, with other tribes or peoples, he was the commander in chief.

As time went on and affairs multiplied, the King could not personally attend to everything, and he had to secure the assistance of others. In relation to Government these were called "Ministers," a word derived from "minor" meaning something less, having less authority than the King himself. In the administration of justice they were called "Judges," but the King himself retained the executive, legislative and judicial authority.

From this primitive condition there grew up the present constitution of the great British Empire, the principles of which are found in the constitutions of Canada and the other Dominions. The basis of it is the executive and legislative and judicial authority of the King, though the exercise of this authority now is surrounded by conditions and limitations which were unknown in earlier times, and which *de facto* but not *de jure* have transferred the executive authority to his Ministers, the legislative authority to his Parliament, and the judicial authority to his Courts and Judges.

The B. N. A. Act

By the British North America Act, the Parliament of Canada is declared to consist of the Queen (now of course the King), an Upper House called the Senate, and the House of Commons. The appointments to the

Senate are for life and are made by the Governor-General in the name of the King. The Legislatures of the Provinces consist of the Lieutenant-Governor and a House styled the Legislative Assembly. In Quebec there are two houses styled the Legislative Council and Legislative Assembly respectively, the members of the Legislative Council being appointed by the Lieutenant-Governor in the King's name.

In the practical working out of the Provincial Constitutions the Lieutenant-Governor represents the King, and it is the same King who is represented under the Dominion Constitution by the Governor-General.

The form of enacting a Statute by the Parliament of Canada is, "His Majesty by and with the advice and consent of the Senate and House of Commons of Canada enacts."

The form used in Ontario is, "His Majesty by and with the advice and consent of the Legislative Assembly of the Province of Ontario enacts."

The form used by the Imperial Parliament is, "Be it enacted and declared by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in Parliament assembled, and by the authority of the same."

By the British North America Act the executive government and authority of and over Canada is declared to be vested in the Queen (now of course the King).

All orders in Council of the Imperial Government are signed by the King on the advice of his Council. All orders in Council of the Canadian Government are signed by the Governor-General acting for the King, on the advice of his Council, and all orders in Council of a Provincial Government are signed by the Lieutenant-Governor, acting for the King, on the advice of his Council.

Justice is administered in Great Britain by the King, through his Courts and Judges, and the last appeal from Canada is to the King, advised in such appeal by the Judicial Committee of his Privy Council.

Justice is administered in Canada and the Provinces by the King, through his Courts and Judges. Writs from those Courts run in the King's name. The same King enacts laws, exercises executive authority, and administers justice in Great Britain, and in all the Dominions and Colonies of the Empire.

By our Constitution it is declared that—

“The command in chief of the Land and Naval Militia and of all Naval and Military Forces of and
“in Canada is hereby declared to continue and be vested
“in the Queen” (now of course the King).

It will be seen that for all great purposes of the Government of Canada, whether executive, legislative, judicial, or for her defence, the basis of power and authority is the King, and should this basis be removed from Parliament, our Governments, Legislatures, Courts and Judges, Government in Canada would cease until some other basis were established.

“Empire” or “Commonwealth”

The word “Empire” properly describes the aggregation as a whole. “Empire” means “Sovereignty” without regard to the relations of the various parts as between themselves. Some critics claim that the word “Commonwealth” would better describe the aggregation, but an analysis of the meaning of this word would lead to differences of opinion difficult to reconcile as to its applicability to the present position. Because of the *de jure* Sovereignty of the King, which has been continued for centuries, the people instinctively use the word “Empire” to describe what this Sovereignty comprises, and no one has been able to discover a word more suited to the position. In the Empire there are

more than self-governing Dominions. If "Commonwealth" is to be used it can only be because the people of the Empire as a whole desire it and provide in some way by agreement for such a constitution as would be better described by that word.

Questions Which 'Would Arise

Imnumerable questions would arise should it be decided by Canada to change the basis of her Constitution by leaving the Empire, whether this change were made by application to the Imperial Parliament for an Act granting a new Constitution, or by the action of Canada herself without reference to the Imperial Government or Parliament.

It is evident that at least the majority of the people of Canada, as a whole, would have to support the decision to leave the Empire. This would involve the approval by the people of a new Constitution. It must be borne in mind that the provisions of the British North America Act would no longer apply. Its general plan might serve as a guide in framing the new Constitution, but the whole question would be wide open and the people would have to decide. If Canada broke away from the Empire without an Act of the Imperial Parliament providing a new Constitution, she would have no Constitution at all; the very foundations of the British North America Act would be removed; there would be neither King nor Governor-General in the Dominion; there would be neither King nor Lieutenant-Governors in the Provinces; there would be no Parliament of Canada and no Provincial Legislatures; the authority of our Courts, civil and criminal, would be gone; the Confederation of Canada would be dissolved and something else would have to take its place. To prevent chaos pending the settlement of a permanent Constitution by the people, executive and legislative and judicial powers would have to be assumed by bodies of some kind.

Canada's Diverse Interests

Canada is a large country extending from the Atlantic to the Pacific. Her local interests are diverse. The interests of the West differ from those of the East. The interests of the parts bordering upon the United States of America differ from other parts. The interests of the Maritime Provinces and of Maritime British Columbia differ from those of the Inland Provinces. The language and laws in the Province of Quebec are not the same as in the other Provinces. The financial positions and resources of the Provinces differ widely.

Assuming that the good sense of the people would, in the first instance, prevent chaos until their chosen delegates from the various parts had met to discuss the basis of a new Constitution, and that no such uprisings and conflicting claims as have occurred in Russia would occur so as to prevent a discussion by these delegates, yet it is easy to see that the questions for discussion would be numerous and difficult of solution.

Dominion and Provinces

The first question would probably be whether the present form of Federal Union would be maintained or something different created, and in this connection there might be difficulty in deciding whether or not Canada would remain as one Nation covering the territory from the Atlantic to the Pacific, and from the United States border to the Arctic Ocean, divided into Provinces or States more or less in harmony with the present divisions, claims for the division of Canada into two or more separate Nations might arise, or the right to negotiate for the admission of some part or parts into the American Union might be set up.

Remember that the whole question would be wide open whether the delegates met to discuss the provisions of an Act to be applied for to the Imperial Parliament, or to discuss a new Constitution after a breaking away without such an Act.

Further Questions

Assume that the present form of a Federal Union would be maintained, where would the executive Government and authority over Canada be vested? Would it be in one person such as a President, and what would be the extent and limitations of his authority?

Would there be a Cabinet of responsible Ministers holding seats in Parliament, and would the President at all times have to act upon the advice of his Ministers, or what independent authority would be conferred upon him?

How would the President be appointed or elected, and for what term?

Would he be given the power of veto over Acts of Parliament; if so, what would be the conditions and limitations surrounding it? Similar questions would arise as to the executive Government and authority over the Provinces.

A new Parliament or law-making body over Canada would have to be constituted. Would it have two Houses or one and how would the members be appointed or elected and for what term?

Unique Position of Quebec

The British North America Act contains specific provisions with respect to the representation in the Parliament of Canada of the various Provinces, one of the most important being that the Province of Quebec shall always have the fixed number of sixty-five representatives in the House of Commons, neither more nor less. The other Provinces have such a number of members as bears the same proportion to the number of its population, ascertained from time to time by the decennial census, as the number sixty-five bears to the number of the population of Quebec, ascertained by the same census. There are other provisions which give to Quebec a unique position as compared with the other Provinces.

It seems strange that the small number who now advocate Canadian independence should find their leader and chief support in the Province of Quebec.

Would Quebec continue to have a fixed number of members, and act as the pivot around which the fixing of the other representations would revolve?

English or French Language

The British North America Act provides that either the English or the French language may be used in the debates of the Houses of Parliament of Canada, and in the Houses of the Legislature of Quebec, and that both those languages *shall* be used in the respective records and journals of those Houses, and that either of those languages may be used in any pleading or process of any Court of Canada, as distinguished from Provincial Courts, and in any Court of Quebec, and that the Acts of the Parliament of Canada, and of the Legislature of Quebec, *shall* be printed and published in both those languages. Would the majority of all the people of Canada agree that these provisions would be continued?

Would the limitations contained in the British North America Act with respect to the powers of the Provincial Legislatures to make laws in relation to education be maintained, extended or modified, and in what respects? It is needless to detail these limitations; they are intended to preserve rights and privileges with respect to denominational schools and separate schools for Roman Catholics and schools for Protestants in Quebec.

Division of Legislative Authority

Would the authority of the Parliament of Canada be a general one to make laws for the peace, order and good government of Canada, excepting only those matters especially assigned to the Provinces, or would its

authority be limited to specified powers, leaving the balance of power with the people, or how otherwise would the division of legislative authority between the Parliament of Canada and the Legislatures of the Provinces be made?

Would the legislative authority of each be exclusive, as it is now under the British North America Act, or would some of the powers be exclusive and others concurrent as is the case in Australia, and with what limitations?

Taxation

Would the limited powers of taxation now vested in the Provincial Legislatures be enlarged or curtailed, and in what respects?

Would the unlimited powers of taxation now possessed by the Parliament of Canada be limited, and in what respect?

Amendments

If unlimited powers were conferred upon the Parliament of Canada, not excluding power to amend, then amendments to the Constitution could be made by Parliament, but if specified powers only were conferred, not including power to amend, what procedure would be followed in order to amend the Constitution? Amendments would certainly become necessary as time went on.

The Constitution of the United States of America contains the following provision respecting amendments:—

“The Congress, whenever two-thirds of both
“Houses shall deem it necessary, shall propose
“amendments to this Constitution, or on the ap-
“plication of the Legislatures of two-thirds of the
“several States, shall call a convention for propos-
“ing amendments, which in either case shall be
“valid to all intents and purposes as part of this

“Constitution when ratified by the Legislatures of
“three-fourths of the several States or by conven-
“tions in three-fourths thereof as the one or the
“other mode of ratification may be proposed by
“the Congress.”

We know how difficult it is to get an amendment under this clause. The one now pending respecting prohibition of the manufacture and sale of intoxicating liquor may not come into effect for years, as a period of years has been given for securing the ratification by the State Legislatures. It may not be ratified by the necessary three-fourths and the country may be kept in uncertainty for years as to the result upon a great question.

Declaring War

As already mentioned, the command in chief of the land and naval militia, and of all naval and military forces of and in Canada, is declared to be vested in the King, and the Parliament of Canada has legislative authority over the militia, military and naval service and defence. Canada has no power to declare war, or to deal with certain foreign affairs of the kind which I will shortly explain; the new Constitution would have to make provisions in these respects. In whom would the power to declare war be vested, and what would be the conditions and limitations surrounding it? In whom would the command in chief of the land and naval forces be vested, and with what conditions and limitations; first, in time of peace; second, in time of war?

Questions Continued

If Canada became an independent Nation, a diplomatic service would have to be provided for. In whom would the power to appoint ambassadors, consuls and others in that service be vested, and under what conditions and limitations? Where would the power to make treaties with Foreign Nations be vested, and with what conditions and limitations?

At present the Provinces establish Courts of Justice, and Canada appoints and pays the Judges; would this system be continued or modified?

Under what system would appointments to the civil services of Canada and the Provinces be made?

The questions I have asked are only some of those involved, they will give you an idea of the difficulties which surround the case.

Domestic and Foreign Affairs

I will turn now to the practical position and enquire whether the supposed advantages of independence would compensate for the disadvantages and warrant taking the risks involved.

We refer to Canada as a self-governing Dominion with full legislative autonomy over her own affairs, but probably we do not all fully understand what the terms "self-governing" and "her own affairs" mean. I think we have such autonomy, but the expression "her own affairs" is indefinite. I will try to explain what it means, and for this purpose I treat the Dominion and the Provinces together as Canada.

So long as a Foreign Nation is not concerned, all affairs in which Canada is concerned are, speaking generally, her own affairs over which she has full legislative autonomy. Questions often arise as to the division between the Dominion and the Provinces of the legislative authority over these affairs, and questions sometimes arise between Canada and Great Britain, but, if no Foreign Country be concerned, such questions are decided by some Forum in Canada or Great Britain, or by disallowance of the statute in question; such differences could hardly lead to war with a Foreign Nation. It is not difficult to draw the dividing line between the affairs of Canada and those of Great Britain; few complaints have been made by Great Britain that Canada has concerned herself with affairs

not her own, and few complaints have been made by Canada that Great Britain has interfered with her autonomy.

Difficulties of a different kind would arise should other Nations have, or claim, the right to interfere; and, speaking generally, it is only in connection with other Nations that Canada has not now full self-government or full legislative autonomy. Canada is a unit or part only of the British Empire, and cannot speak or act for the Empire as a whole, or for the other units or parts.

Relations With Foreign Nations

Canada can have, and does have, relations with other Nations, who are willing to have relations with her, and can deal and does deal with them directly in connection with her own affairs. For instance, she has undoubted legislative authority over the subjects of naturalization and aliens, immigration, navigation and shipping, copyright and trade marks, patents of invention, the regulation of trade and commerce, the postal service, imports and exports, customs and other duties.

It must be borne in mind that the jurisdiction over the matters referred to is vested in Parliament, not in the Government, and it would seem to follow that the exercise of this jurisdiction by the Government must be based upon Parliamentary authority, given before the exercise or by subsequent ratification.

If another Nation thought fit to make a convention or arrangement with Canada, relating to the immigration into or naturalization of her people in Canada, or with relation to navigation or shipping in Canadian waters, or with reference to copyright, trade marks or patents of invention in Canada, imports or exports, customs or other duties, the Canadian postal service, or the trade of Canada, the right to make such convention or regulation would come within the self-govern-

ing powers, or legislative autonomy possessed by Canada with respect to her own affairs; but, in making such convention or arrangement, Canada would act for herself only. She would no doubt, before acting, consult with the British Government in respect of all matters which might involve Imperial interests or prove embarrassing to Great Britain as the head of the Empire, but Canada's technical power to act would not depend upon the consent or approval of that Government, though it would be difficult to complete and carry out any intended arrangement contrary to the expressed wishes of the Imperial authorities.

I have said "if another Nation thought fit," but the other Nation might take the position that it would not deal with, or make any convention or arrangement with a unit or part of the Empire, and that it would deal only with the Government representing the Empire, viz., that of Great Britain. To overcome this objection, Canada would have to ask Great Britain to intervene to the necessary extent.

Although in some cases the Government of Canada through one or more of its members has directly, and without Great Britain's co-operation, negotiated with the Government of a Foreign Country with a view to the settlement of some question, or to the making of some arrangement relating to Canadian affairs, yet, as a rule, Great Britain is consulted and her co-operation asked. Canada has everything to gain and but little, if anything, to lose by such a course. The Government of Great Britain is likely to be far more familiar than the Government of Canada with the treaty and other relations of the Empire with Foreign Nations, and their views as to the effect of the proposed arrangement could not fail to be very helpful to Canada, and might influence greatly her course.

There is not time to enlarge upon this point or to give instances; it is sufficient to say that of late years

the wisdom of consulting Great Britain and inviting her co-operation has been admitted, and Canada has benefited thereby.

To give the Canadian representatives wishing to negotiate with a Foreign Government a status equal to that of plenipotentiaries representing a Sovereign State, Great Britain has clothed such representatives with the status of plenipotentiaries, the document of authority adding the words "for the Dominion of Canada."

Should War Arise

Should disputes arise under any convention or arrangement made by Canada, which could not be settled by negotiation and agreement, and which war alone could settle, the war would be between the Nation concerned and the Empire, it would not be with Canada alone; and it is just at this point where the limit to Canada's self-government or legislative autonomy over her own affairs must be placed. Those disputes, or matters which could not be settled by agreement with Canada, although arising out of her own affairs, and those matters which would require the intervention of Great Britain as the Sovereign State, would cease to be Canada's own affairs, within the proper meaning of that term, and would become foreign affairs over which Canada's self-governing powers or legislative autonomy would not extend, in so far as the intervention of Great Britain might be essential in connection with the Foreign Nation.

For all practical common sense purposes Canada now has all the constitutional powers she requires in conducting her own affairs; the additional power which she would acquire by independence, but which would be of no benefit to her, would be the power or National status enabling her to declare war against another Nation, and to have war declared against her by another Nation.

I do not lose sight of the fact or argument, that Canada might, in connection with her relations with other Nations, bring the whole Empire into war; so might any of the other Dominions, or even Colonies, bring the Empire, including Canada, into war; so also might Great Britain herself, in reference to her relations with other Nations.

I agree that the present position should not be maintained, under which Canada might be involved in war by the action of the Government of Great Britain or of another unit of the Empire, in connection with matters over which she has no control, or in respect of which she has not even been consulted; but the remedy for this can be afforded, not by independence, but by an agreement under which Canada would have the right to take part in those affairs which involve the issues of peace and war.

Advantages or Disadvantages

Those who propose that Canada should declare her independence so that she may have unlimited self-government and unlimited legislative autonomy, claim that her position would be improved were such a result attained. Let us consider shortly what improvement, if any, would take place in relation to the important matters, or those worth while.

Trade

The most important of all are her trade and revenue. Wherein would independence improve her position with respect to trade? It would not affect her home production or her home trade. Would it affect her foreign trade? If a Foreign Nation decided not to trade with Canada, Canada could not make her do so whether she remained a Dominion of the Empire or were an independent Nation. It would be the same whether the refusal were open and absolute or veiled under a high tariff or other hindrance. It is not likely

that Canada's position as a Dominion of the Empire would alone account for a decision not to trade with her, and it is not likely that had she been independent such decision would not have been come to. The chances of Canada's being benefited by independence in such an unlikely event, would be too remote to warrant so serious a step as separation from the Empire on that account.

In what way would her foreign trade be benefited? As already explained Canada has full power now to make trade conventions or arrangements with any Foreign Nation willing to make them with her. Great Britain would not make them for her without her consent. To do so would be to interfere with the autonomy which the British North America Act has conferred—therefore a trade convention or arrangement made by Canada, as a Dominion, without the intervention of Great Britain, would be as beneficial to her as if it were made by her as an independent State. If made by Great Britain for her, at her request, it would be equally beneficial.

The chances that a Foreign Nation might decline to negotiate with Great Britain, or that Great Britain might decline to intervene, are remote. In any event, until such a case arises so that its relative importance could be considered, would it be wise for Canada to make the possibility of such a case arising, the cause for separation from the Empire?

Revenue

Next, take the case of the revenue. How could independence benefit Canada in relation to that? She has now as full power over taxation, direct and indirect, and over every mode of raising a revenue as she could have if she were an independent State. She is autonomous with respect to all matters which could affect her revenue one way or the other—ex. gr. customs and excise, export and import duties, trade and commerce,

emigration and immigration, naturalization and aliens, navigation and shipping, her postal service and all other matters affecting her revenue even though they might affect Foreign Nations, and independence would not add to that autonomy.

Expenditure

Take the case of expenditure. Wherein would Canada's expenditure as an independent Nation be less than her expenditure as a Dominion of the Empire? Certainly not with regard to her internal or domestic affairs and the development of her resources or her trade and commerce. I am at a loss to suggest any thing resulting from independence in respect of which her expenditure would be reduced, but independence would cause enormous additional expenditure.

Listen to what a German (Lasson) has written about a small State:—

"A so-called small State is not a State at all, but only a tolerated community which absurdly pretends to be a State. . . . There may be greater and lesser States. The lesser States have rights only in so far as they possess a power of resistance that must be taken into account in so far as they are desirable allies or respectable adversaries. The little State, however, that is obliged to base its hope of existence on the belief that it will not be attacked for fear that another State will intervene, is no State at all but the vassal of the State to which it looks for protection, and by whose magnanimity it lives."

Diplomatic Service, Army and Navy

To take her proper place among Nations, including Great Britain, which would then be a Foreign Nation, Canada would have to organize diplomatic and consular service and be represented by ambassadors at the various Courts of the World—old and new—and by

Consuls, Vice-Consuls and other officials in places without number. As an independent Nation she would lose the protection of Great Britain's Navy and Army, and would have to create and maintain a Navy and Army of her own, and be prepared to defend and to uphold her rights against foreign aggression.

Can it be doubted that the expenditure of Canada as an independent Nation would far exceed her expenditure as a Dominion of the Empire?

If War and Canada Unprepared

Should Canada become an independent Nation, and should war arise with a Foreign Nation prepared for war, while Canada was unprepared, what would be the result? If that Nation were not the United States of America, Canada would have to appeal to the United States for protection or agree to such terms as the enemy might dictate. If that Nation were the United States, prepared for war, while Canada was unprepared, there would be none to appeal to and Canada would have to submit. What would be her ultimate destiny in either case?

Neither constitutionally, financially, nor in importance as a factor in the World's advancement would Canada advance her present position or her prospects for the future by becoming independent.

The World War

The few who advocate independence say that Canada would thereby escape being embroiled in the troubles of Great Britain and the other parts of the Empire, especially in the quarrels and disputes in Europe, and they point to the war with Germany as an illustration. Before the war and before the truth about Germany's plans and intentions became known, such a contention might have had reasons to support it, but the world knows now that, had Canada been a

numerically small and weak independent Nation (and she would have been that) and, had she remained neutral, her future from the beginning would have been in peril, and, instead of escaping the entanglements of European affairs, she might and probably would have become involved in them without being as well able to take her part as she has proved herself to be as a Dominion of the Empire. If, however, her neutrality had been maintained; if she had not sent to the war the men and munitions and food and supplies which have been sent; if she had not helped in financing for munitions, food and supplies procured on this side of the Atlantic; if the glorious successes of the Canadians in Flanders and France had not been accomplished, who could have said how near Germany would now be to Victory, if Victory were not already hers, and with Germany victorious Canada would, in her eyes, be but one of those States who "have rights only" "in so far as they possess a power of resistance that must be taken into account."

This war has opened our eyes, it has shown us that no part of the world can go on without reference to the other part, and that no distance, by land or water, between Nations, can be relied on as a protection. It has shown us that the definition of a small State which I have quoted has been only too true, and that its truth will be perpetuated should Germany win the war; and it has shown us that Canada as a unit of the great British Empire is far safer, and better able to take part in the World's affairs than she could possibly be as an independent Nation. She has proven her ability and earned her right to take that part. She will never disrupt the British Empire by leaving it. She will maintain her present splendid part and advance to a more splendid future as the foremost Dominion in that great aggregate of Nations. She will take her part as of right in the control of the Foreign Affairs of the Empire and of the Empire's Army and Navy, and she will assume the corresponding obligation to share in

the expense. She cannot remain as she is without representation as of right in the control of Foreign Affairs. She cannot accept the protection of Great Britain's Navy and Army without joining in the expense. If the Empire is at war Canada is at war and she cannot allow Great Britain to fight the wars of the Empire and decline to take part unless it suits her convenience or the ideas of her Government at the time to do so. Canada and the Dominions voluntarily co-ordinated in this war because the very existence of the Empire was at stake, because their liberties in common with the liberties of the peoples of the World were threatened, and because they could not stand by and see the Mother Country in great peril without going to her aid. This war has shown us that something more than voluntary co-ordination is required to solidify the Empire in its future relations to Foreign Nations, and that the self-governing parts of the Empire should have rights in these relations, and corresponding duties and obligations, and that nothing short of an agreement providing for these rights and duties and obligations will suffice.



