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THE CANADIAN CONSTITUTION

A speech delivered by Mr. D.M. Johnson, High Commissioner for Canada in Pakistan, to the Institute for International Affairs, in Karachi, on April 7, 1950.

I thank you for the honour you have done me in asking me to speak before this distinguished gathering. Let me say that I am no stranger to meetings of the Institute of International Affairs. I have been a member of both the parent Institute in London and the Canadian Institute in Ottawa. This, however, is the first meeting that I have ever attended in Pakistan and this is also the first meeting of the Institute that I have ever addressed anywhere. My fellow countrymen in Canada and my British friends in London often invited me to their meetings but never took the risk of asking me to address them. I assure you, therefore, that I appreciate very much the privilege of speaking to you today.

I am glad to see that in Karachi you have a large and flourishing Institute of International Affairs. To my mind the Institutes in the various Commonwealth countries and similar organizations in the United States and other democratic countries have a very important role to play. No democratic country can safely embark on a foreign policy in advance of public opinion in its country. To do so is to invite disaster. Though we all recognize the need for an informed public opinion, it is not easy to bring this about. Members of a government can do a great deal in their speeches and by making available information on foreign affairs, but deliberately to attempt to mould public opinion smacks of propaganda and may misfire. Hence the need for independent bodies devoted to the study of international affairs. Here in gatherings such as this, views of all kinds can be advanced and debated and members with accurate information at their disposal can gradually form their own opinions.

One of the happier and more rewarding tasks of the Institutes in developing public opinion has been the calling together every few years of unofficial Commonwealth conferences to discuss the problems of the Commonwealth in the setting of world affairs. It has been the privilege of my country to have been the host at two of these meetings, one at Toronto in 1933 and the other at Bigwin Inn last year. The last conference, like its predecessors, was a great success. Several members of the Pakistan Institute were, I am very glad, able to attend. Though I was not there myself, the many reports I have received differed about many things but were unanimous in their praise of the delegates from Pakistan. They spoke of the high calibre of your representatives and of the valuable contribution which they were able to make to the debates.

You have not, however, come here to hear me toss bouquets to the Institute of International Affairs, but for the

more prosaic purpose of learning something about the Canadian constitution. My talk is, I believe, one of a series devoted to foreign constitutions which various members of the diplomatic corps are giving. Your committee has had a very practical object in arranging these talks. You have not asked me to come here because you have an academic interest in constitutions of all kinds but because you are now engaged in drafting a constitution for Pakistan and naturally enough you wish to benefit by the experience of other countries. The Canadian constitution is a big subject and I obviously cannot tell you much about it in the short time at my disposal. I shall, however, keep in mind the object you had in view in arranging this series of talks and do my best to tell you something about the Canadian experience in constitution making. I shall commence with a brief historical account of events leading up to Confederation in Canada, that is leading up to the time when Canada, as we now know it, was created. I shall then describe the sort of government which the Fathers of Confederation established, the difficulties encountered and the manner in which they were overcome. Let me say in passing that as I shall be using the term "Fathers of Confederation" from time to time, I should explain that in Canada the distinguished group of men who created Canada are invariably known as the Fathers of Confederation. Then I will go on to describe how our constitution developed, the weaknesses and strains which in time came to the surface and some of the unsolved problems which still remain. If there is time I shall at the end say something about the various branches of the government.

Let me now give you some historical background and a few simple facts. Canada came into being and Confederation, as we call it, was achieved on July 1, 1867 and ever since then July 1st has been celebrated as our national day. Canada was created by an act of the United Kingdom Parliament called the British North America Act. When any person in Canada refers to the Canadian constitution, he usually means the British North America Act and its amendments. As I shall show later, this document, although a very important part of our constitution is not and does not pretend to be the whole Canadian constitution. There were four original provinces: Ontario, Quebec, New Brunswick and Nova Scotia. Provision was made in the Act for the admission of other provinces and in the course of time, six more have been admitted. With the admission of Newfoundland to Canada in 1949, the whole of British North America north of the United States became the federal union of Canada.

Let me now try to tell you in a few words why Confederation came about. To do this it is necessary for me to take you back to the middle of the Nineteenth Century and describe conditions in North America. You had, of course, the United States of America, a country of about thirty million inhabitants increasing rapidly in population, power and prosperity. To the north you had a number of isolated British colonies. On the Atlantic side there was Nova Scotia, New Brunswick and Newfoundland. In the central area there was the large province of Canada which was made up of Ontario and Quebec. Quebec and Ontario had had separate legislatures up until 1840 but in that year they were united in one legislature for reasons I will not go into here. The large prairie area was under the control of the Hudson's Bay Company while on the Pacific coast you had the small but vigorous colony of British Columbia. By 1860, the provinces of Canada, New Brunswick, Nova Scotia and Newfoundland had all won complete responsible government in local affairs.

There were a number of reasons why the various

British colonies in North America were ready to discuss union of some kind in the early 1860's. Politics, trade, defence all played a part. Ontario and Quebec, although divided on racial lines, had for some time been united in one legislature and political deadlock had ensued. New Brunswick and Nova Scotia on the Atlantic seaboard were isolated from central Canada and wished a railway connecting link, which would only be possible through union of some kind. Trade difficulties were serious. An advantageous reciprocity treaty with the United States was expiring and there was doubt that the United States would be willing to renew it. Canadian producers thus faced serious loss of markets.

Defence, too, had something to do with bringing Confederation about. It seems unthinkable now, that we should have had some doubts about the pacific intentions of our great and friendly neighbour to the south. But remember that in 1864 and 1865 when we were discussing the principles of our constitution, the North was emerging victorious from the Civil War. During that war, relations between the North and the United Kingdom had from time to time been strained and bellicose utterances had been made by some American politicians. The British colonies lay helpless along the American frontier.

There was also the problem of the northwest. This is the immense territory out of which the prairie provinces of Alberta, Saskatchewan and Manitoba were later formed. It lay practically uninhabited and, unless British North America took steps to build railways through it and colonize it, there was a possibility that the whole of the rich northwest might have gone to our neighbour to the south.

An obvious answer to all these difficulties and doubts was a political union of some kind. Opportunity came in 1864 when at Charlottetown in the Province of Prince Edward Island, representatives of New Brunswick, Nova Scotia and Prince Edward Island met to consider a smaller project, namely the possible union of the maritime provinces. Delegates from Ontario and Quebec, hearing of this project, appeared at this conference and suggested a wider union. A conference took place later in October of the same year at Quebec, and in the course of a few weeks hammered out a series of resolutions which were to form the basis of federal government. Delegates left for London with the agreed resolutions. Some more changes were made there and eventually the British North America Act was passed, putting in statutory form the resolutions which had been accepted by the delegates.

You may like to hear about some of the difficulties which faced the Fathers of Confederation in drafting a constitution and the manner in which they were solved.

There was never any real doubt about the form that union would take. It is no secret that some of the Fathers of Confederation would have preferred a unitary form of government. They were anxious to create a strong government and they considered that a unitary government would be stronger than any form of federal union. It is easy to see, however, that a unitary legislative union as it was called, was never within the realm of practical politics. Consider the position of Quebec. Here you had a people whose race, language, religion and laws differed from the majority of the people in the other provinces. Is it to be wondered that the people in Quebec would only agree to a union with the other provinces on a basis which would preserve their cherished rights and way of life. But Quebec was not alone in desiring a federal form of government. The

provinces on the Atlantic seaboard had equally strong local loyalties and traditions. Hence whatever the personal predilections of the Fathers of Confederation, the only hope of agreement lay in a union on a federal basis. This was quickly agreed to at the meeting of the Quebec Conference.

The Fathers of Confederation, knowing that they could not have a unitary government, tried to do the next best thing and establish a federal union with a strong central government. You must always remember that an American civil war was raging during the time that the principles of our constitution were being worked out. Rightly or wrongly it was then the current view in Canada that one of the many reasons leading to the civil war was the fact that under the United States constitution, too much power was given to the states and too little to the central government. To remedy what they considered the weakness of the United States federal system, the Fathers of Confederation bolstered the strength of the federal government in a number of ways, the two most important of which are perhaps the following: the residuary powers under the Canadian constitution are given to the federal government whereas in the United States constitution they are allotted to the states. The federal government was given the power of appointing and removing Lieutenant-Governors of the provinces and, more important still, the right to disallow or set aside any provincial statute within a year of its passage.

I might here deliver a short homily on the difficulties of drafting constitutions, for I have to report that whatever the Fathers of Confederation intended and whatever the language of the document they drafted, a quite different sort of federal union has developed. I am not saying that the development was a good or a bad thing but it is fair to say that over the years, the powers of the provinces have increased relatively to those of the federal government. This came about partly by judicial interpretation of the provisions of the constitution and partly by constitutional usage. For example, the power of the federal government to disallow provincial statutes has been used less and less and is in fact rarely invoked except where a provincial statute is clearly unconstitutional and the delay occasioned by testing the statute in the courts would be harmful. It is now true to say that the provinces in their own field of legislation are of equal power and status with the federal government and operate without serious interference from federal authorities.

The actual division of powers between the federal and provincial governments surprisingly enough caused very little trouble at the Quebec Conference. It seems to have been agreed on all sides that as long as the minority rights of language, law and religion were preserved, the central government should be strong. A few words about the distribution agreed upon is now necessary. The federal government was given exclusive power to make laws "for the peace, order and good government of Canada" in relation to matters not coming within the classes of subjects assigned to the provincial legislatures, under a later section. For greater certainty, the federal government was given exclusive jurisdiction over a specified list of subjects including national defence and the armed services, trade and commerce, navigation and shipping, coinage, banks, bills of exchange, interest, legal tender, bankruptcy and insolvency, patents, criminal law and so forth. The federal government also had power to raise money by any system of taxation. In practice it was found that the general power to legislate for "the peace,

rder and good government of Canada" has not conferred much egislative power on the federal government in peace time. enerally, if a subject upon which the dominion wished to egislate was not within one of the specified powers, the ourts found it unconstitutional except, of course, in time of ar, when "the peace, order and good government" clause comes nto full force and effect.

The provincial governments were given exclusive egislative authority over a long list of subjects including he raising of money by direct taxation; the management and sale f public lands; maintenance of hospitals, asylums and charities; unicipal institutions; local works and undertakings; the ncorporation of companies with provincial objects; solemnization f marriage; property and civil rights in the province; the dministration of justice in the province; and generally all atters of a local or private nature. One of these powers, amely property and civil rights within the province, has as the esult of judicial interpretation, become of great importance nd many legislative powers have been allotted to the provinces nder this head.

In addition to powers allotted to each legislature he federal and provincial legislatures have concurrent powers n respect of agriculture and immigration, though it is declared hat federal laws in relation to these matters override rovincial laws. Provincial legislatures have exclusive uthority with regard to education, subject to certain safe- uards for the rights of religious minorities.

The point I wish to make clear is that the Fathers f Confederation were concerned to divide the legislative field etween the provincial and federal legislatures. With one or wo exceptions, they did not attempt to limit legislative powers. or example, you will not find in the British North America Act imitations on the powers of the provincial or federal egislatures such as are found in the constitutionsof the United tates and many other countries. There are no provisions in the ct similar to those in the United States which guarantee reedom of worship, freedom of speech, which prevents the overnment from abolishing trial by jury or demanding excessive ail. There is nothing parallel to the provision in the United tates constitution that neither the federal or state government an deprive any person of life, liberty or property without due rocess of law. For their civil liberties and for protection gainst the arbitrary exercise of powers by the executive, the anadian citizen like his counterpart in the United Kingdom, ooks not to any special provisions in the B.N.A. Act but to the rdinary law of the land.

Though the Fathers of Confederation had no rouble in dividing up the field of legislation between them, ifficulties arose later. This is not surprising. There are any subjects which now engage the attention of our legislators hich are not mentioned in the B.N.A. Act - for example, you ill find nothing about public health, old age pensions, nemployment relief or insurance and for obvious reasons, eronautics or broadcasting. When current political thought alled for legislation about these and many other subjects a egal tussle usually occurred between the federal and rovincial governments which was only settled when the Privy ouncil gave its judgment. Sometimes the subject was llotted to the federal government and sometimes it was llotted to the provinces.

I have now described how legislative power was divided between the central government and the provinces and I have shown that this task provided little controversy or disagreement. Let me now turn to the composition of the legislatures. The Federal Parliament consists of the House of Commons and the Senate. The Fathers of Confederation quickly agreed that the members of the House of Commons should be elected and that the number of representatives from each province should vary according to population. The device hit upon was to give Quebec the fixed number of sixty-five (later increased to seventy-three) and to give each other province a proportionate number of representatives, based on the last federal census. There are now 262 members of the House of Commons.

There was more difficulty about the composition of the Senate. The smaller provinces, having conceded representation by population in the House of Commons, naturally wished a larger representation in the Senate. You will recall that in the United States the number of representatives in the House of Representatives from each state is based on population but that each state sends two senators to Washington. After some debate, a compromise arrangement was agreed upon. Ontario and Quebec got 24 senators each and the three Maritime provinces, 24 among them. When the four Western provinces and Newfoundland joined Canada, they each received six seats in the Senate. There are thus 102 senators. Senators are not elected. They are appointed for life by the government of the day.

I shall not bore you with details of the provincial legislatures. Suffice it to say that each province has a duly elected legislature. In Quebec only is there a second house.

I now come to the problem which gave the Fathers of Confederation the greatest difficulty and which in fact has not yet been solved. I refer to the distribution of financial powers between the central government and the provincial governments. The solution reached at Confederation was roughly as follows: The federal government was given power to levy taxes by any method it desired. The provinces were only given the right to levy direct taxes. This meant that the federal government obtained the exclusive right to levy customs and excise duties. As these duties had formed about eighty per cent of the revenues of the provinces before Confederation, it was obvious that, even with their reduced responsibilities under Confederation, they would not have sufficient revenues to carry on. To fill the gap, the British North America Act provided for the payment of annual subsidies by the federal government to the provinces under a variety of heads. The Fathers of Confederation thought they had made a satisfactory and final settlement of financial relations between the federal and provincial governments and inserted a clause in the B.N.A. Act to the effect that these subsidies were "in full settlement of all future demands on the Dominion".

Never has a human hope proved more illusory. Ever since Confederation there has been a continual upward revision of subsidy payments. The reason for this is obvious. It is not because the provinces were extravagant or in any way at fault. It is simply that with the growth of the modern state, the provinces found themselves saddled with responsibilities which outstripped the capacity of some of them to pay for them. Recall for a moment the current political thought in the middle of the Nineteenth Century. The political doctrine enshrined in the words "laisser-faire" was at its hey day.

The chief functions of government were considered to be the field of defence and internal order. It was thought that the business of the country was best left to the play of economic forces. In other words, the best government was considered the government that did the least governing.

Times have changed since then, and in nearly all democratic countries, whatever party is in power, governments have assumed increasing responsibilities for social services of one kind or another. Canada was no exception. Shortly after Confederation the provinces found themselves faced with heavy expenditures for roads and education. Then came responsibilities for public health matters, mothers' allowances, old-age pensions, unemployment relief and all the other social services of the modern state.

Various expedients were adopted to meet the difficulties which arose from time to time. Sometimes the federal government made grants, sometimes it increased the subsidies and sometimes it bore a share of the cost of services which were provincial responsibilities. The great depression of the early 1930's brought matters to a head. Provinces found themselves responsible for relief of destitute persons on an unprecedented scale. The federal government made grants on an increasing scale but it was realised that some permanent solution was required.

It was in 1937 that the government appointed a Royal Commission with broad powers to consider the economic and financial basis of Confederation, the distribution of federal and provincial powers and the financial relations of the central and provincial governments.

This Commission spent two years of intensive study and in 1939 made its recommendations. They urged the transfer of certain functions from the provinces to the dominion and the shifting of taxing powers. The Commission also recommended the payment from the federal treasury of special grants based on the needs of the provinces and designed to enable the poorer provinces, without resorting to taxation higher than the Canadian average, to provide adequate social, educational and development services. The recommendations of the Commission have never been implemented. War came in 1939. The heavy financial burdens of war fell upon the federal treasury. Unemployment dried up and the financial position of all the provinces improved. During the war the dominion signed tax agreements with all the provinces, whereby the provinces relinquished certain taxes, including income tax, in return for fixed payments from the federal treasury. These tax agreements came to an end after the war. From time to time since then, attempts have been made to make a comprehensive scheme but at the moment the position is that the federal government has tax agreements with some of the provinces but not with others.

I have laboured somewhat this tale of our financial difficulties, to emphasize the importance, in drafting a new constitution, of making sure that responsibilities are not placed on the central, provincial or municipal governments set up, beyond their capacity to pay for them.

I have now discussed the division of powers and the financial relations between the federal and provincial governments. The other problem which has given us some concern is the still unsettled one of amending our own constitution. This may surprise you that, after being in existence over eighty

years, Canada has not settled the procedure for amending its own constitution. There is nothing in the Act itself about the procedure for amending it. Legally there is, of course, no difficulty about it. The British North America Act is an Act of the United Kingdom Parliament and can be amended in the same way as any other act of the United Kingdom Parliament, namely by an amending statute. With Canada's independent status, it goes without saying that the United Kingdom Parliament does not amend the British North America Act except when requested so to do by Canada. The Act has been amended many times and the practice has grown up of having a joint resolution passed in the House of Commons and Senate of Canada, requesting the United Kingdom Parliament to amend the Act in a specific way. The United Kingdom Parliament has invariably acted upon a request of this kind.

This is obviously unsatisfactory. It has continued, not because of the unwillingness of the United Kingdom Parliament to give up its rights but because the people of Canada have not been able to agree upon a satisfactory procedure.

The first step was taken in Ottawa at the last session of Parliament, when the federal government obtained power to amend those parts of the B.N.A. Act which concern the federal government alone. There are, however, a great many provisions of the Act which concern one or more provinces or which concern both the provinces and the dominion. Obviously it would not be satisfactory for the federal government to amend those provisions of the constitution without reference to the provinces. A conference was held in Ottawa in January of this year for the purpose of devising a procedure for the amendment of the constitution. I think it is fair to say the central government and all the provinces agreed that the present position was unsatisfactory. The conference set up a continuing committee consisting of the attorneys-general of the federal government and the provinces who are to study the question and report later to a full meeting of the conference.

So far I have been concentrating more on the legislative branches of the federal and provincial governments. In the few minutes left I should perhaps say something about the executive and judicial branches though what I am going to say will, I am sure, not be new to any of you.

As I explained at the outset, the British North America Act does not profess to be a complete constitutional document. One would look in vain in that Act for many constitutional practices now current in Canada. This is particularly true as regards the functions of the executive authority in both the federal and provincial governments.

Nominal executive authority is vested in the King, since he appoints the Governor General on the advice of his Canadian ministers. The Governor General is bound by the terms of his commission and instructions and in effect acts only upon the advice of his Canadian ministers. For all practical purposes, executive authority is vested in the Cabinet, a body not mentioned in the British North America Act. The members of the Cabinet are chosen by the Prime Minister. The Cabinet formulates policy, sponsors most of the important legislation and each of its members is usually responsible for the administration of a department. Cabinet thus not only formulates policy and sponsors legislation, but controls the administrative machinery that gives it effect.

The doctrine of Cabinet responsibility is well established and the Cabinet resigns as a body if it is beaten on an important issue in the House. I shall not elaborate any further on our system of Cabinet government because as you all know, it is very similar to that of the United Kingdom with which you are familiar.

There is a parallel system in the provinces where the Lieutenant-Governor acts on the advice of his provincial ministers. The provincial cabinets, headed by a premier, perform much the same functions in their own field as the federal cabinet, and carry on as long as they have the support of the members of the provincial legislature.

Now for a word about our judicial system. Although legislative authority over the judicial system is divided between the federal government and the provinces, the system itself is closely integrated. The provincial legislatures are free to set up various courts and the federal government has set up the Exchequer Court of Canada to hear cases in which the Crown in the right of Canada is involved and the Supreme Court of Canada, which is now the final court of appeal in both civil and criminal cases throughout Canada.

The judges of the county and superior courts, as well as those of the Exchequer Court and Supreme Court of Canada, are all appointed and paid by the federal government. Judicial independence is safeguarded by the requirement that judges of the Supreme Court, the Exchequer Court and the Superior Courts of the provinces hold office during good behaviour and are only removable on an address of the Senate and House of Commons.

The Supreme Court of Canada is now the final court of appeal in both civil and criminal cases throughout Canada. The right of appeal to the Judicial Committee of the Privy Council in criminal cases was abolished in 1933 and in civil matters in 1949.

One of the most important functions of the Supreme Court of Canada is, of course, the interpretation of the British North America Act and its amendments, and particularly of those sections of the Act which divide legislative power between the federal government and the provinces.

I have not said a word about Canada's status in international affairs, simply because I thought it was not necessary. It is, of course, obvious to anyone in a Commonwealth country that Canada as well as every other member of the Commonwealth is independent.

I have now told you something about our constitution and its development. All things considered, we think that we did a reasonably good job. But knowing the skill and enthusiasm of my Pakistan friends, I have no doubt that when you come to draft your own constitution, you will do much better.

S/A