

CONSTITUTIONAL AMENDMENTS IN CANADA

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[That this paper has been written at all is due to certain criticisms on my recent Dodge Lectures, at Yale University, on *The Constitution of Canada*—criticisms which seemed to indicate a want of acquaintance with our real Constitution; the paper is not written in any missionary spirit or to suggest superiority or even excellence in our institutions, but simply as a statement of fact.—W. R. R.]

To the student of political institutions there are few things more interesting than the differences between the systems of government of the two English-speaking peoples on the North American Continent. The people of the United States and those of Canada are largely of the same origin, the same language and the same religion; they have much the same ideals of liberty and justice; and their differences in government are therefore the more interesting.

THE BRITISH NORTH AMERICA ACT

An intelligent foreigner who desired to understand the two systems of government would naturally be referred to the Constitution of the United States (and those of the several States) on the one hand and to the British North America Act, 1867, on the other.

The English-speaking peoples are not noted for their logical consistency in matters of politics nor do they trouble much over matters of form. If an institution works reasonably well they are content, however illogical it may be and whatever its form; though they ruthlessly abolish it, once it is proven by the event—not by argument—to be harmful.

The intelligent reader can obtain a fairly accurate view of the government of the American people from an examination of the Constitution alone. There will be some error—for example, as to the method of selecting the President. No doubt by the letter of the Constitution the people elect suitable persons who then select the best man they can for the Presidential chair. We know, of course, that this has been but a form for more than a century; that it is certain who will be selected when it is known who have been elected to select. In fact the Presidential Electors simply act as agents with authority to cast a vote for a person named, though in law they may select whom they please. The system works well enough; but let it once happen that the Electors did act in the manner apparently contemplated by the Constitution, and the Electoral College would probably disappear very soon.

In the British North America Act, however, no one could find anything like our actual government in Canada. It suggests a Governor-

General who governs the Dominion almost at will—selecting Ministers, Senators, Judges, calling together and dissolving Parliament at will, directing what fiscal measures the Parliament shall discuss, etc., etc., in true autocratic style—while every Canadian knows that the choice of Ministers is about as limited as the choice of Presidents and that the Governor-General has in most cases no more to do with calling together and dissolving Parliament than he has with the choice of Senators and Judges—and that is *nil*. Being a monarchical country we keep up the ancient monarchical forms—they work all right when used in the democratic spirit, and we are content.

Perhaps in nothing is the British North America Act more misleading than in its general form. It purports to be a gift by the Imperial Parliament, an expression of the will and the power of the Imperial Parliament at Westminster in the language of that Parliament. In law that is perfectly accurate—it is as true now as in Blackstone's time that in "the British Parliament . . . the legislative and . . . the supreme and absolute authority is vested by our constitution" and "our American plantations . . . are subject . . . to the control of Parliament."

The real transaction, however, was quite different. Some of the British American Provinces, "Colonies," were in the seventh decade of the last century dissatisfied with the existing state of affairs. Canada (then consisting of what is now Ontario and Quebec) had trouble over the equal representation of Lower and Upper Canada in her Parliament; Nova Scotia, New Brunswick and Prince Edward Island had also their troubles; moreover, they wished closer connection with the upper Provinces by rail; then, too, there was some fear that the United States might visit on Britain's helpless offspring on this continent a vicarious punishment for the Mother Country's want of sympathy during the Civil War—as indeed the United States did in 1866 by its abrogation of the Elgin-Marcy Treaty of Reciprocity—and there were in all the Provinces other considerations of more or less weight which seemed to call for a change. At a meeting of delegates from the Maritime Provinces held at Charlottetown, September, 1864, delegates from Canada appeared; and a meeting of delegates from all the Provinces was arranged at Quebec for October.

Now all these "Colonies" had full responsible government and had possessed full control over their own affairs without intervention by the Home Administration for many years before this.¹ The object

¹A reviewer finds fault with me for saying that constitutional government, responsible government, was introduced into the Canadas in 1841: well, the Imperial Parliament thought they were conferring it—52 and 53 Hansard (3d Series); Canadians thought they had received it, and Dr. Todd says they had—*Parliamentary Government in British Colonies* (2d ed.) 73—I leave it at that. In the Maritime Provinces it began in 1848.

of the Quebec Conference was not to obtain a greater measure of self-government but to arrange a union between the Provinces. A full discussion took place and certain Resolutions were agreed upon as the basis of union. There never was any doubt as to the proper course to pursue to make these Resolutions binding in law—the paramount power of the Imperial Parliament must be appealed to.

An Act was prepared by Colonial statesmen to carry into effect the Resolutions which contained the agreement of the Provinces. The language contained was the language of Colonials and but one change was even suggested by the Home Government—Lord Stanley thought that the name "Kingdom of Canada" might offend the Republican susceptibilities of the United States, and the name "Dominion of Canada" was employed instead.

In the House of Lords at Westminster the Earl of Carnarvon in moving the second reading of the Bill said that the measure was founded on the Quebec Resolutions and "must be accepted as a treaty of union,"² "a compact between the Provinces,"³ "the result of a compromise,"⁴ a measure "resting upon the free consent of the various contracting parties."⁵ In the Commons Charles Bowyer Adderley (afterwards Lord Norton), Under Secretary, said it was "a scheme of union which embodied almost literally and without modification the Resolutions adopted at Quebec in the year 1864;"⁶ "a matter of most delicate treaty and compact between the Provinces . . . a matter of mutual concession and compromise"; and added "we have in fact to accept or reject the proposal which the Provinces have made."⁷

While every one recognized with Baillie-Cochrane (afterwards Lord Lamington) that this was "giving to Canada almost perfect independence,"⁸ the only objection to the Bill arose from a doubt whether there was in fact free consent on the part of Nova Scotia.⁹ Parliament considered that the Legislatures of the various Provinces truly represented the people, and declined to give effect to a somewhat numerous signed petition from Nova Scotia opposed to the expressed desire of the Legislature.¹⁰ The trifling amendments made were concurred in by the Colonial delegates sent over to procure the passing of the Bill; and the Bill passed.

While, as Adderley said,¹¹ the "most striking feature [of the Bill] is

² 185 Hansard (3d Series) 558.

³ *Ibid.*, 567.

⁴ *Ibid.*, 582.

⁵ *Ibid.*, 571.

⁶ *Ibid.*, 1165.

⁷ *Ibid.*, 1169.

⁸ *Ibid.*, 1193.

⁹ *Ibid.*, 571, 589, 804, 1011, 1182, 1195.

¹⁰ *Ibid.*, 580, 1019, 1020, 1183, 1188.

¹¹ *Ibid.*, 1169.

its scrupulous adherence as far as the circumstances of the case would permit to the constitutional features" of the Mother Country, it should always be borne in mind that the Act is in fact a "compact," a "treaty" put into a legally binding form. This compact made between the original Provinces, Canada (now become the two Provinces of Ontario and Quebec), Nova Scotia and New Brunswick, was necessarily concurred and participated in by the other Provinces as they came in.

The agreement was the result of many compromises all carefully thought out and made after full consideration: but no one thought that it was necessarily final. It is not unlikely that some provision would have been made for amendments in the Act itself but for Lower Canada. Lower Canada had a population predominantly French by descent and language, Roman Catholic in religion, with laws (outside of the criminal law) based upon the Civil Law; the other Provinces were predominantly English, Scottish, Irish, by descent, of English speech, largely Protestant, and with laws based on the Common Law of England. From the time of the Conquest of Canada in 1759-60, there had been expressed from time to time a desire on the part of some to treat the French Canadians as a conquered people and gradually to bring about an English population—a Legislative Union of Upper and Lower Canada was favoured for this purpose by Lord Durham in his Report (pp. 226, 227)—and there was always a dread, more or less openly expressed, that the laws, language and institutions of French Canada would be submerged. The French Canadians were not content to leave in the hands of their English-speaking fellow Canadians the power to do this by amending the Constitution agreed upon—they would not be willing to give such power to-day.

No such method could be adopted as in the United States; in a substantially homogeneous people like that of the original States, three-fourths might be expected not to pass any amendment which was not for the common good; but three-fourths of Canada was non-French and therefore not in sympathy with the peculiar institutions of Lower Canada.

The matter of amendment was left at large: no amendment could be made to the British North America Act except by the authority which passed it. But it never was anticipated that no amendment would ever be needed—the Delegates were practical politicians of long experience. No one feared that the Imperial Parliament would refuse an Amendment desired by a practically unanimous Canada; and no one feared that the Imperial Parliament would make any Amendment which was not desired by a practically unanimous Canada—French Canadians had and have the same implicit faith in the justice of the Home Parliament as English Canadians. All parties recognized that as the Act was a compact, it would naturally follow that no change

should be made in this compact without the consent of all the contracting parties; and it would equally follow that any and every change should be made if all the contracting parties desired it. Logically it might seem that a desire for an Amendment should be made to appear by the Legislatures of the Provinces; but that was impossible—the Legislature of Canada went out of existence and has no successor; the former "Canada" was divided into two Provinces, Ontario and Quebec, each with its own Legislature and neither the successor of the former Legislature of Canada. Moreover, the Provinces of the Dominion and their Legislatures have not the same jurisdiction as the former Provinces and their Legislatures.

The practice adopted is for the two Houses of the Parliament of Canada to present a petition to the King setting out the precise Amendment desired; on this Petition reaching the Home Administration, a Bill is prepared and passed through the Parliament in the exact words desired by Canada.

There never has been any attempt, any suggestion, to amend the Act except on such a Petition; there never has been a Petition which was not acceded to by the passing of the proposed Amendment. Any other course would be unthinkable—as unthinkable as that the Presidential Electors at the recent election should have ignored Wilson and Hughes and have unanimously elected Roosevelt. Britain is not the Britain of 1776; she quite recognizes that those of our race have the will as they have the right to govern themselves, whether for good or ill.

What may be considered by some an exception to the general statement is to be found in three Acts. In 1869, 1870 and 1873 Canada desired to borrow money on the guaranty of the Imperial Treasury so as to get the money cheaper—the money was required to pay off the Hudson's Bay Company, and to build fortifications and railroads. The Imperial Parliament authorized the Treasury to guarantee the loans on condition that Canada secured the Treasury by a charge on the Consolidated Revenue Fund; if this guaranty should be given, the Acts provided that Canada should not pass any valid legislation destroying the priority of the charge of the Treasury.

In our system there is no constitutional limitation prohibiting confiscation. The Parliament of Canada or the Legislature of a Province can legally confiscate without compensation in any case within the ambit of their jurisdiction. There is not the slightest doubt of the power of the Dominion to pass valid legislation giving or taking away priority of charges upon the Consolidated Revenue Fund. These Imperial Acts, then, modified the Constitution in the one particular—but there was nothing to compel Canada to accept the guaranty; and the provision as to Canada not impairing the priority of the charge was simply a term in the contract made between her and the Old Land

and assented to by her.¹² These Statutes were (1869) 32-33 Vic. ch. 101; (1870) 33-34 Vic. ch. 82; (1873) 36-37 Vic. ch. 45.

There have been two Imperial Statutes giving power to take in additional territory (the immense Hudson's Bay Territory),¹³ and settling boundaries¹⁴; three validating Acts of doubtful validity passed by the Dominion Parliament;¹⁵ one increasing the number of Senators from the Western Provinces;¹⁶ and one extending the life of the existing Parliament for one year.¹⁷

On moving in the Canadian House of Commons the Petition for this last, the Prime Minister, Sir Robert Borden, said: "I entirely admit that no extension should be asked unless it appears to have the support of public opinion and unless it is approved by both political

¹² That Canada had the power to do as she pleased is manifested in a speech in the Commons at Westminster, July 8, 1869, by Sinclair Aytoun, when complaining of the Finance Minister of the Dominion employing a loan by the Imperial Government in contravention of the Canada Loan Act, 1867. He did not call in question Mr. Rose's conduct, because Canada was virtually an independent country and Mr. Rose was responsible only to the Parliament of Canada. 197 Hansard (3d Series) 1446.

¹³ (1868) 31-32 Vic. ch. 105; 193 Hansard (3d Series) 998, 1001.

¹⁴ (1889) 52-53 Vic. ch. 28. The Quebec Act of (1774) 14 Geo. III. ch. 85 (Imp.) extended the boundaries of the existing Province of Quebec (formed by the Royal Proclamation of October, 1763) so that its southern boundary ran along the Ohio River to its embouchure in the Mississippi; then the boundary ran "northward" from this point. When the Province of Quebec was divided into two Provinces in 1791, Upper Canada had all the territory west of a certain defined line in the former Province of Quebec. When the Dominion bought out the Hudson Bay Company, it first formed a new Province, Manitoba, and afterwards a Territory of Keewatin; to Keewatin it gave as its eastern boundary the western boundary of Ontario. Ontario had succeeded to the territory formerly that of Upper Canada. The question then was raised where was the western boundary of Ontario, and the answer to that question must be found in the interpretation of the word "northward" in the Quebec Act. The Dominion claimed that "northward" meant due north; Ontario, that it meant in a northerly direction along the Mississippi. An arbitration decided that the latter was the correct interpretation; but the Dominion would not accept the award. The question was then left to the Judicial Committee of the Privy Council, who agreed with the Arbitrators and recommended legislation (whether necessary or not) as advisable. The Canadian Parliament unanimously passed an address and Petition asking for such legislation—the terms of the Petition had been agreed upon by Dominion and Province. 28 *Canadian Commons Debates* (1889) 1329, 1363, 1423. The Bill passed without opposition and without debate. 338 Hansard, 514, 515, 835, 1068, 1685, 1790. The Act is (1889) 52-53 Vic. ch. 28 and the petition is printed as a Schedule to it.

¹⁵ (1871) 34-35 Vic. ch. 28; (1895) 59 Vic. ch. 3 (these also expressly conferred the power for the future); (1889) 52-53 Vic. ch. 28.

¹⁶ (1915) 5-6 Geo. V. ch. 45.

¹⁷ (1916) 6-7 Geo. V. ch. 19.

parties"; the Leader of the Opposition said: "the British Parliament . . . will never under any circumstances alter the Constitution of this Country except upon a unanimous resolution of the two branches of the Canadian Parliament."¹⁸

When it was desired to extend the life of Parliament for another year the Prime Minister said expressly that the proposition would be dropped unless the resolution was carried by a unanimous or a practically unanimous vote; the vote was 82 to 62 and the matter dropped.¹⁹

Whether in the abstract it would have been better that the British North America Act should give the power to amend the Constitution by a three-fourths vote or some other vote, may be a matter of opinion, perhaps of sentiment: all discussions of such a question would be academic—the French Canadians would not have entered into such a contract, and it takes two to make a bargain. Equally futile would have been the suggestion that an amendment thereto be made by the vote of three-fourths or any number less than the whole of the Provinces. In politics as in everything else you cannot get away from geography and history.

PROVINCIAL CONSTITUTIONS

The part of the population of Canada which prevented it from being substantially homogeneous in the original Confederation was collected in the one place, Lower Canada, which was to be made a separate Province—there could be no objection to allowing each Province to amend its Constitution in any way consistent with the existence and permanency of the Dominion.

The Earl of Carnarvon on the second reading of the Bill in the House of Lords, February 19, 1867, said: "Whilst the provisions regulating the constitution of the central Parliament are in the nature of permanent enactments, those which govern the Local Legislatures will be subject to amendment by these bodies";²⁰ and in Committee: ". . . one of the principles upon which the Bill was based—namely that the local Legislatures should have the power of amending their own constitution."²¹

Naturally this power could not be absolute: as the power of the States of the Union could not be absolute.

The very first thing agreed upon was a federal union under the Crown of Great Britain and Ireland—the continuance of a monarchical form of government, just as in the United States the essence of the Union was a republican form of government. As the United States guarantees to every State in the Union a republican form of

¹⁸ *Canadian House of Commons Debates* (1916) 629, 632, 634.

¹⁹ *Ibid.* (1917), 3557, 3558, 3593.

²⁰ 185 *Hansard* (3d Series) 562.

²¹ *Ibid.*, 805.

government, so it was intended that the Provinces should be guaranteed a monarchical form. The representative of the King in the Province is the Lieutenant-Governor, appointed for that purpose by the Dominion Administration: and the Legislatures consist of the Lieutenant-Governor and one or two Houses. The British North America Act by Section 92 (1) gives full and exclusive power to the Legislature in every Province in relation to "The Amendment from time to time notwithstanding anything in this Act, of the Constitution of the Province except as regards the office of Lieutenant-Governor."

It will be observed that this is Representative Government carried to its logical conclusion—when the voters elect Representatives, the power is in the Representatives without further reference to the people.

Under this section the Amendments have been many: only a few will be mentioned here.

While Ontario from the first had only one House in her Legislature,²² the other three Provinces, Quebec, Nova Scotia and New Brunswick, had two.²³ Nova Scotia and Quebec still retain their two Chambers: but New Brunswick got rid of her Second Chamber, the Legislative Council, by the Act (1891) 54 Vic. ch. 9 (N. B.) passed April 16, 1891, which abolished it on the dissolution of the existing Legislature; the Legislature in 1893 had only the one House, the Legislative Assembly.

The Province of Manitoba was formed by the Dominion Statute (1870) 33 Vic. ch. 3 (Dom.), the validity of which was placed beyond doubt by the Imperial Act (1871) 34 Vic. ch. 28 (Imp.) The Canadian Act framed a Legislature for the new Province composed of the Lieutenant-Governor and two Houses, the Legislative Council and the Legislative Assembly:²⁴ the Manitoba Legislature abolished the Council by the Act (1876) 39 Vic. ch. 28 (Man.).

Prince Edward Island, which refused to come into the original union, was admitted in 1873 under powers granted by Section 146 of the B. N. A. She at that time had two Houses both elective: in 1893 these were dissolved by the Act 56 Vic. ch. 1 (P. E. I.), and a single House provided for, composed of fifteen Councillors and fifteen Assemblymen elected by voters of different franchises but sitting and voting together.

The other Provinces either came in—British Columbia— or were created—Saskatchewan and Alberta— with a single House.

Saskatchewan in 1917 by its Statute 7 Geo. IV, ch. 4 (Sask.) provided for representation by three members in its next Legislature of "persons of whatever age and of either sex who at the time of the . . . election are serving in any capacity in the expeditionary forces

²² Sec. 69.

²³ Secs. 71, 88.

²⁴ Sec. 9.

of Canada or in any branch of His Majesty's Imperial Forces in Great Britain, France or Belgium" who had been resident in the Province for three months before joining—one member for those in Great Britain and two for those in France and Belgium, every candidate to have actually served six months.

Alberta did better: that Province by the Act (1917) 7 Geo. V. ch. 12 (Alberta) provided for two members representing the soldiers and nurses in Great Britain, France or Belgium: but also by ch. 38 enacted that twelve named Members of the House should be Members of the next House without election for their existing Ridings—they having enlisted for overseas service and being under military control.

But Ontario went even further—by the Act of (1918) 8 Geo. V. ch. 4 the life of the existing Legislature is extended until a year after the close of the war. The life of an Ontario Legislature is fixed at four years by the British North America Act, sec. 85, but no one has any doubt that any Legislature can extend its own life indefinitely, or shorten it. It was not thought wise to distract the Province with an election during war times and the Leaders of the two parties agreed to an Act extending the life of the present Legislature till a year after the war. Only one voice was raised against this measure, and that not on the ground that there was no power in the Legislature but that such a measure was unconstitutional in our (not the American) sense of the term.

The most serious difficulty an American meets in fully comprehending the Constitution of Canada is due to the fact that the Constitution of the United States and of the several States is in writing: and where there is any question of the meaning of these Constitutions, the Courts are appealed to for an interpretation. In Canada as in England most of the Constitution is unwritten: and while the British North America Act, 1867, may be called a written Constitution of Canada, no one can gather from it a correct idea as to the real government of Canada. It has often been pointed out that the word "Constitution" itself has a different connotation in American and in English (and therefore Canadian) usage. "In our usage, the Constitution is the totality of the principles more or less vaguely and generally stated upon which we think the people should be concerned: in American usage, the Constitution is a written document containing so many words and letters which authoritatively and without appeal dictates what shall and what shall not be done. With us anything unconstitutional is wrong, however legal it may be: with the American anything which is unconstitutional is illegal. With us to say that a measure is unconstitutional rather suggests that it is legal but inadvisable."²⁵

²⁵ *The Constitution of Canada* (Dodge Lectures, Yale University) 52.

The solitary recalcitrant in the Ontario House did not contend that the House could not extend its own life, but that it should not—that such a measure was contrary to the principles of British and therefore of Canadian Government.

It is true that the instances of such an extension by Parliament in the Mother Country are few. Leaving aside as wholly anomalous the Long Parliament, the first instance is the well known Septennial Bill in 1715 during the troublous times following the Pretender's invasion; the Parliament elected under (1694) 6 W. & M. ch. 2, for three years by the Statute 1 Geo. 1 St. 2 ch. 38, extended its life to seven years. Whether this was constitutional in the English sense of the word is still a matter of controversy—that it was constitutional in the American sense of the word is not doubted by anyone. The existing Parliament of Great Britain and Ireland has extended its life several times: the Parliament of New Zealand also has extended its life by Statute. Whether these are constitutional, depends on the view taken of the exigency which occasioned them.

In Newfoundland (which of course is not a part of Canada) the Legislature by a recent Statute restricted the power of the Legislative Council without wholly abolishing it; its consent is unnecessary in money bills, the Speaker of the Assembly to determine what are money bills; and any other public bill which passes the Assembly in three successive Sessions becomes law notwithstanding rejection by the Council. This Act is of course based upon and is similar in its provisions to the well known Imperial Act (1911) 1, 2 Geo. V. ch. 13 (Imp.) which drew the teeth of the House of Lords.

In Canada there is, however, a certain check upon improper legislation by the Provinces: by sections 56 and 90 of the British North American Act, the Governor-General, *i. e.*, in practice, the Ottawa Administration, may disallow any Provincial Act within one year of its receipt at Ottawa. This power was rather freely used during the early years of Confederation; but the "constitutional practice" now settled is not to interfere unless the Act seems *ultra vires*. Nevertheless the legal power still remains and may be exercised at any time and in any emergency calling for such a proceeding.

The corresponding power given by section 56 to His Majesty in respect of Dominion legislation has been exercised only once and that at the implied invitation of the Canadian Administration.