THE GOVERNMENT OF CANADA
(CONSTITUTION OF 1982)

CHAPTER I

Political Tradition and the Constitution

Historical Background

Canada, which today has an area of almost 10 million square kilometers and a population of 23,500,000, out of which 6,000,000 are French, was originally founded in 1608 by the French colonists. The Seven Years' war between the French and the English had its repercussions in Canada too. General Wolfe, Commander of the British forces in North America, conquered Quebec in September, 1759 and Montreal a year later. As a result of the Treaty of Paris, 1763, France recognized the cessation of Canada to Britain. The Treaty, however, provided that "His Britannic Majesty, on his part, agrees to grant liberty of the Catholic religion to the inhabitants of Canada."

The King of Britain thereafter appointed a Governor to rule Canada on his behalf. He was assisted by a Council and an Assembly. But complications soon arose because of the heavy influx of British immigrants. Parliament passed an Act in 1774 which aimed to remove the grievances and disabilities of the Roman Catholics. But the situation again worsened when a large number of Loyalists from America, immediately after the Declaration of Independence by the thirteen Colonies, entered and settled in Canada. Parliament thereupon passed the Constitution Act, 1791, which divided Canada into two Provinces, the Upper Canada with a British majority and the Lower Canada with a French majority. Each Province had its own Council and Assembly, the former nominated and hereditary and the latter was elective. The Governor was independent of the legislature and he received instructions from the Colonial Office in London. But even this system of administration did not remedy the situation. In Lower Canada the British dominated in the Council whereas the French were in majority in the Assembly. This resulted into unceasing deadlocks between the two Chambers and the irresponsive Executive and representative Assembly. The ethnic and religious controversy, French versus English, became unmanageable. Louis-Joseph Papineau, the leader of the French, declared an open revolt against the King of Britain. The rebellion was suppressed and Papineau fled, but the smouldering embers of discontent were not finally extinguished. In Upper Canada, too, things were not running smooth. The British majority there could not reconcile itself with an irresponsive popular control over the administration.

The British Government suspended the Constitution Act and sent Lord Durham to Canada with full administrative authority. Lord Durham went deep into the problems of Canada and after two years of his stay submitted to the British Government his report which is eminently known as the Durham Report. The Durham Report constituted a landmark in British constitutional history as it set a political way for Canada. Lord Durham recommended, *inter alia,* that establishment of responsible government should alone bring the English and the French to an enduring national integration. Parliament passed an Act in July 1840 uniting the Upper and Lower Canada. For two decades the system of government thus established functioned no doubt, but new problems emerged which finally necessitated the union of all the Canadian areas in a Federal polity.

Birth of a Dominion

The four Provinces in 1867 that became the federal Provinces of Ontario, Quebec, Nova Scotia and New Brunswick were little more than scanty pockets of settlement, subsisting on forests, farms, fisheries, industries and localised manufacture. They possessed only three cities—Quebec, Montreal and Toronto—with more than 300,000 inhabitants, and a little

more than 12 per cent of the people lived in towns with a population of over 5,000. There were a variety of conditions which favoured the union of these struggling Colonies and the potentially hostile political bodies. At the Montreal Inter-Provincial banquet of 1861, Joseph Howe maintained, in the after-dinner speech, that if public men of the "various Colonies could only get together as were then doing, they would discover what excellent fellows they all were and the barriers between them would soon go down." Here were the germs of the second political miracle occurring on the North American Continent; the first having occurred when thirteen States united to form the United States of America.

The idea of a union of the Colonies in the British North America dates back to the time of the American Colonies winning their independence. But the cooperating circumstances which would have resulted into the materialization of such ideas never took place. Lord Durham, while favouring a union, wrote in his famous Report: "I found two nations warring in the bosom of a single state; I found a struggle, not of principles, but of races; and I perceived that it would be idle to attempt any amelioration of laws or institutions until we could first succeed in terminating the deadly animosity that now separates Lower Canada into the hostile divisions of French and English." The situation was no better in other Provinces and to the situation in Lower Canada were added all the problems and difficulties that were found in the other Colonies as well.

The two major recommendations of the Durham Report were the re-union of Upper and Lower Canada and the immediate grant of responsible government. Lord Durham had considered that only union between the two Canadas could eliminate the racial conflict in Lower Canada and, thus, make it possible for responsible government to function effectively. But the separate cultures of the two peoples complicated the working of responsible government and created endless frictions which resulted in political deadlock, sudden ministerial changes, and general instability. The demand in Upper Canada for representation according to the numbers threatened to upset the political balance. The French, in Lower Canada, which was less populous, feared it as an attempt to destroy their separate culture and concluded that they could survive only as distinct community within the framework of a true federation. Federation, they considered, was the best possible solution for harmonising the diverse cultural groups in a larger political unit. Professor Alexander Brady sums up the circumstances that helped the birth of a federation. He says, "it was a means of preserving their identity; for other colonists it was an escape for colonial inferiority to self-government in a generous national *plane*, with an ever widening horizon of expansion."

Economic problems also plagued a divided Canada. The repeal of the Navigation Laws and the abandonment of the preferential tariffs in the forties and fifties gave a new and convincing impetus to the proposal for union. Economic embarrassments were apprehended by all to become more acute with the expiration of the Reciprocity Treaty with the United States as it would result into serious loss of markets for the Canadian producers. The only solution of these and other difficulties following in their wake was enlargement of political and economic boundaries where all Canadians in union with each other "strengthen their position as best as they might in a highly dangerous and competitive world." Defence was no less important. The many-sided menace from the United States "cast a shadow over all the colonies; the bellicose statements of many American politicians, the exceptional military power of the country engaged in a prolonged civil war; the danger frequently apparent of becoming embroiled in war through British-American quarrels; and the threat to the colony of Canada, although this in a sense was a common threat also, of having the United States isolate the whole north-eastern corner of North America from the remainder of the continent by taking possession of all empty-western territory."

Finally, the pre-federation period was a time of great economic upheaval which disturbed the economies of all the Colonies. With their limited resources and undeveloped means of communication and transport the Colonies could not adjust themselves to the new technological and industrial needs. "The shift from wood to iron," says Prof. Creighton, "from water-power to steam boats became virtually an accomplished fact. All these changes fell with jarring force upon provincial economies which were unprepared to sustain the tremendous and expensive adjustments involved."

The cumulative effect of all these circum-

stances was that the Canadian federation became a matter of practical politics in the spring of 1864, when Dr. Charles Tupper, the Prime Minister of Nova Scotia, introduced a resolution in its provincial legislature for the appointment of delegates "to confer with delegates who may be appointed by the governments of New Brunswick and Prince Edward Island for the purpose of considering the subject of the union of the three provinces under one Government and Legislature." The Nova Scotia Legislature unanimously endorsed Trupper's resolution, and similar resolutions were passed by the Legislatures of the two Maritime Colonies, New Brunswick and Prince Edward Island. A conference was called to meet at Charlottetown on September 1, 1864. On June 30, a new coalition government was formed in the Province of Canada which pledged to use its best efforts to bring about federation in the British North American Colonies. The proposed Charlotte- town conference was considered propitious by Canadian Government and at the request of his Cabinet, Lord Monck entered into communication with the Lieutenant-Governors of the Maritime Colonies and asked if a Canadian delegation might join the conference and participate in its deliberations. The request was granted and eight Canadian Ministers, including MacDonbald, Brown Carter and Galt, joined the conference. Nova Scotia, New Brunswick and Prince Edward Island sent five delegates each, making a total of twenty-three delegates in all.

The conference met as scheduled. The Canadian representatives put forward their proposals for a comprehensive union of all the Colonies. The delegates from the Maritime Colonies, proceeded to the separate considerration of the proposals to which their respective Legislatures had agreed and authorised them to confer. But it became soon apparent that the union among themselves could not hope for success. Federation was the only feasible plan and the delegates reached a decision that a formal conference of all the delegations, including New Foundland should re-assemble at Quebec in October.

On October 10, 1864 there assembled at Quebec one of the most epoch-making conferences in the Canadian history. Canada had its twelve delegates, New Brunswick and Prince Edward Island seven each, Nova Scotia five,and New Foundland two, in all thirty-three. The fundamental principle accepted at Charlotte- town was endorsed unreservedly at Quebec that is, that the new government should be a federation. In less than eighteen days seventy-two resolutions were agreed on, which practically became the subsequent North America Act of 1867. These resolutions were approved by Parliament of Canada, but met with considerable opposition in the Maritime Provinces. This led to the convening of a conference by the British Government in London consisting of the representatives of Nova Scotia, New Brunswick and Canada. The outcome was the passage of the British North America Act of 1867, which received royal assent on March 29, and was proclaimed on May 22, and came into effect on July 1.

Thus, on July 1, 1867, came into being the Dominion of Canada consisting of four Provinces—Ontrario, Quebec (United Canada redivided), New Brunswick and Nova Scotia. The Queen was given power, on the advice of the Privy Council and on the address from Parliament of Canada and the legislatures of New Foundland, Prince Edward Island and British Columbia, to admit the remaining Colonies or any of them into the Dominion, and with the same advice she was given power to admit Ruppert's Land and North- Western territory on address from Parliament of Canada. Ruppert's Land and North-Western territory were, accordingly, adminted in 1870. The Province of Manitoba was admitted at the same time, and in the following year came in British Columbia. Prince Edward Island was admitted two years later in 1873. In 1905 two Dominion statutes transferred a large block of the western territory into the Province of Alberta and Saskatchewan. Finally, in 1949, New Foundland became the tenth province of the Dominion of Canada.

The Canadian Constitution Act, 1982

Canada is now made up of ten constituent units, called the Provinces. Canada achieved political independence between the years 1919 and 1931. The Statute of Westminster, 1931, gave legal expression to what was already a fact. The Balfour Declaration of 1926 had reconginsed the equality of the Dominions and the United Kingdom. It was reinforced by the Imperial Conference of 1930. The Statute of Westminster statutorily established that the dominions enjoyed complete autonomy in their internal and external affairs and the ties which

bound them together and with the United Kingdom were of equality and not subordination. The allegiance of the Dominions to the reigning monarch of the United Kingdom did not assign to them a place of inferiority so far as their relations with the British Government were concerned. He was as much their King as of the United Kingdom; several monarchs wrapped up in one person, completely distinct from one another. The King acted on the advice of Dominion Ministers in all matters relating to the administration of the Dominion. The Dominion was free to make any law and there was no limit on its legislative power. No Dominion statute could be declared void because it was repugnant to the law of the United Kingdom, and no act of the Parliament in the United Kingdom was to extend to the Dominion unless the act specifically declared that the Dominion had requested and consented to its enactment.

But Canada could not amend its Constitution, the British North America Act, 1867. The British North America Act, unlike the Commonwealth of Australia Constitution Act, contained no amending clause whatever. The framers of the 1867 Constitution felt that if any amendments to the basic Act of 1867 were necessary, Canada would address the authorities in London to amend the British North America Act and the British would do accordingly. The British Parliament had always acted a little more than an automaton and quietly and quickly passed the required amendment. The Statute of 1867 was amended 23 times till 1982. The British Parliament was, thus, simply an agent in the realization of the wishes of the Canadian Parliament.

But this procedure of amending the British North America Act by an Act of British Parliament placed Canada, in the opinion of the vast majority of Canadians, in a humiliating position. Canada would have acquired an amending formula and had "patriated"[1] its Constitution in 1931, but the Provinces and the Federal Government could not agree on the content of the amending formula. Thus, it was agreed that the power to amend the British North America Act, 1867, would be left with the Westminster Parliament. But the efforts to find an agreed formula were not abandoned and negotiations between the federal and Provincial Governments were held in 1935, 1949, 1960, 1964, 1978, 1979 and 1980, all ending in disagreement. An agreement between the federal and nine Provincial Governments in November 1981 on the contents of the Constitution Act, 1982, which included an amending formula, ended the 55 years' impasse. Quebec did not give its assent to the Agreement of Ten (Federal and nine Provincial) Governments.

On December 2, 1981, by a 246 to 24 vote, the Canadian House of Commons adopted the text of the address as it stood amended by an Agreement of the Ten. The Senate passed it on December 8, by a vote of 59 to 23, and the same evening the Address left for London. This address was a solemn request to the British authorities to amend the basic Statute of 1867. The text of the Address read:

"THAT, WHEREAS in the past certain amendments to the Constitution of Canada have been made by the Parliament of the United Kingdom at the request and with the consent of Canada;

AND WHEREAS it is in accord with the statutes of Canada as an independent state that Canadians be able to amend their Constitution in Canada in all respects:

AND WHEREAS it is also desirable to provide in the Constitution of Canada for the recognition of certain fundamental rights and freedoms and to make other amendments to the Constitution;

A respectful address be presented to Her Majesty the Queen in the following words;

To the Queen's Most

Excellent Majesty:

Most gracious Sovereign:

We, your Majesty's loyal subjects, the House of Commons of Canada in Parliament assembled, respectfully approach your Majesty, requesting that you may graciously be pleased to cause to be laid before the Parliament of the United Kingdom a measure containing the recital and clauses hereinafter set forth...."

Two Acts were proposed for adoption by the British Parliament. The first was the Canada Act, the instrument of "patriation". Appended

1. "Patriation" means that Canada "would obtain or recover from the British Parliament the power to amend the Constitution of Canada, in the sectors common to both orders of government and, for the British Parliament, it would mean letting go of a power that it retained in spite of itself in 1931, as a favour to Canada". Gerald A. Beaudoin, *The Patriation of the Canadian Constitution,* issued by the Canadian High Commission, New Delhi.

to this Act was the Constitution Act, 1982, which included, *inter alia,* the Chapter of Rights and Freedoms, the amending formula, etc.

In December 1981, the Government of Quebec approached the Court of Appeal at Montreal with the following question: was there a constitutional convention giving Quebec the right to veto amendments to the Constitution which would have the effect of making the Agreement of the Ten unsconstitutional from the viewpoint of convention? Meantime, in London, in January 1982, the Native Peoples were held "nonsuited" by the Biritsh Court of Appeal on the question of the jurisdiction of the Crown over their rights. All legislative power over them the court ruled, belonged to Canada and the Crown no longer had any authority whatsoever in that area.

Legally, nothing stood in the way of the British Parliament to amend the British North America Act, 1867. The British Government felt that the Agreement of the Ten met a "substantial measure of provincial consent"[2] criterion decreed by the Supreme Court of Canada on September 28, 1982. In his letter of December 19, 1981, Premier Levesque of Quebec asked Prime Minister Mrs. Margaret Thatcher to suspend proceedings on the resolution of the Canadian Parliament in the Parliament of U.K. until Quebec gave its consent to the resolution or until the court had decided on the Quebec right of veto question. Mrs Thatcher in her reply to Premier Levesque on January 14, 1982 wrote that she intended to proceed with the resolution and that the question of the Quebec veto was a purely Canadian one in view of the decision of the Supreme Court.

The British Parliament passed the Twenty-Third amendment to the British North America Act, 1867, enacting the Constitution Act, 1981, "which shall have the force of law in Canada and shall come into force as provided in that Act." It also provided that no act of Parliament of the United Kingdom "passed after the Constitution Act,1981, comes into force shall extend to Canada as part of its law." With this enactment which was cited as the Canada Act the process of "patriation" was complete and Canada acquired the right to amend or repeal the Canada Constitution.

The Proclamation bringing Canada's new Constitution Act into law was signed by Queen Elizabeth II in a historic ceremony in Parliament Hill in Ottawa, on April 17, 1982. Prime Minister Pierre Trudeau said at ceremony proclaiming the Act: "After 50 years of discussion we have finally decided to retrace what is properly ours. It is with happy hearts, and with gratitude for the patience displayed by Great Britain, that we are preparing to acquire today our complete national sovereignty." Quebec decided not to participate in the ceremony. In addressing the Quebec's decision the Prime Minister said: "I know many Quebecers find themselves pulled in two directions by that decision. But one need not look only at the results of the referendum in May 1980 (some 60 per cent of Quebecers refused to give mandate to the Provincial Government to negotiate a new political relationship with the rest of Canada, an arrangement described as "sovereignty-association") to realize how strong is the attachment to Canada among the people of Quebec. By definition, the silent majority does not make a lot of noise. It is content to make history."[3] The Queen later addressed about 32,000 people attending the outdoor ceremonies on Parliament Hill. She lauded Quebec's cultural contribution despite her sorrow that the Province had refused to participate in the Proclamation of the country's new Constitu-

2. The Prime Minister and the Provincial Premiers met in Ottawa (September 8-13, 1980) to consider patriation, a charter to rights, distribution of powers, federal institutions etc. No unanimous agreement was reached. Prime Minister, Trudeau announced a plan of action which included patriation, an amending formula, a Charter of Rights, etc. Six Provincial Premiers announced their opposition to the Federal Patriation resolution and their intention of challenging the proposal in Courts. Manitoba asked its Court of Appeal for a ruling, *inter alia,* on the constitutionality of the patriation resolution. The New Foundland and Quebec Governments also sought rulings from their respective Provincial Courts of Appeal. The Manitoba Court of Appeal ruled (three to two) that the Federal Government could ask the United Kingdom Parliament to amend the Canadian Constitution of the Provinces. The New Foundland Court of Appeal ruled unanimously that consent of the Provinces was necessary before the Constitution could be amended by the U.K. Parliament. The Quebec Court of Appeal ruled (four-to-one) that the resolution was within the constitutional authority of the Senate and the House of Commons. The Supreme Court of Canada heard appeals from the decisions of all the three Provincial Courts of Appeal. On September 28, 1981 the Supreme Court declared that the Federal government's constitutional resolution was valid but that by convention, it required a substantial measure of provincial consent." The Court stated, however, that it was up to the political actors to define what was meant by "substantial provincial consent".
3. *Canada Weekly,* April 28, 1982.

tion. "Although we regret the absence of the premier of Quebec, it is right to associate the people of Quebec with this celebration because without them, Canada would not be what it is today," she said in French.[4]

Basis of the Constitution (1982)

The Constitution Act, 1982, is not a new Canadian Constitution. The Biritsh North America Act, 1867, together with all its amendments (23 in number, the last being the passage of legislation allowing the Constitution Act, 1982, to come into force) as well as other important laws that touch on constitutional matters remain in existence and are incorporated in the Constitution Act, 1982. For example, the British North America Act now becomes the Constitution Act 1867, and so do other Acts that from time to time amended the original Act.

The Constitution Act 1867, is, thus, the pivot on which hinges the constitutional framework of Canada. It is the instrument that created the Dominion of Canada by uniting the four original Provinces and binds together in perpetual common ties the Provinces that today make the federation of Canada. As the Constitution Act, 1867, was designed to bring unity not the diversity of the new nation, it contains the scheme of distribution of powers between the Centre and the Provinces, and organisation of governments at both levels.

Apart from the written part of the Canadian Constitution there are innumerable conventions and judicial practices that have moulded and shaped the Constitution during the 115 years of its career. The Preamble to the Act had been the main innovator of the constitutional conventions when it declared in 1867 that it was the desire of the original Provinces to be united "with a constitution similar in Principle to that of the United Kingdom." It means that all those principles which are basic to the cabinet system of government in the United Kingdom and find their origin and continuance in the conventions of the constitution would be observed in Canada too. The Constitution Act, 1867, did not incorporate any of these conventions. The Preamble is not a part of the Act, but the direction it contains for the fulfilment of the objective makes a vital difference in theory and practice.

Amending Procedure

At the time of writing of the Act of 1867, the founding fathers of Canada took the attitude that if future changes to the Act were needed, Canadians could simply ask the British Parliament to amend it, and it had always been done without demur. The Constitution Act, 1982, puts an end to this anachronistic practice by which Canada, a fully sovereign nation, still had to ask a foreign Parliament, to legislate changes in its Constitution.

Part V of the 1982 Constitution, covering Sections 38 to 49 contains a procedure for amending the Constitution of Canada. The amending procedure spells out how Canadians, through their National and Provincial Governments, can make changes in their Constitution. This procedure contains essentially five amending powers.

An amendment of the Constitution may be made by a resolution of the House of Commons and the Senate and by resolutions of the Provincial Legislative Assemblies of at least two-thirds of the Provinces that have in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the Provinces.[5] An amendment may be initiated either by the House of Commons or the Senate or by the Legislative Assembly of a Province. This general amending formula has two important aspects: the amending procedure spells out, for the first time, a role for the Provinces in making constitutional changes, and, secondly, no single Province, big or small, can veto a constitutional amendment. That requires the consent of both the Houses of Parliament and seven Provincial Legislatures representing at least 50 per cent of the population of all the Provinces. Article 39 (I), as a measure of abundant caution, provides that no proclamation shall be issued by the Governor-General declaring that the Constitution stands amended before the expiry of one year from the adoption of the resolution by the Parliament unless the Legislative Assembly of each Province has previously adopted a resolution of assent or dissent. After the expiry of one year the proclamation can be issued by the Governor-General even if all the Provincial Assemblies had not signified their

4. *Ibid.*
5. Section 38 (1)

assent or dissent, provided Assemblies of seven Provinces representing 50 per cent of the population of all the Provinces had assented to the amendment as passed by Parliament. But no proclamation shall be issued after the expiration of three years from the date of the adoption of the resolution initiating the amendment. It lapses.[6]

If the amendment affects the rights, prerogatives or proprietary rights of Provinces or privileges of the legislature for government of a Province, it requires the support of a majority of the total membership of each House of Parliament and the Legislative Assemblies of at least two-thirds of the Provinces representing at least 50 per cent of the population. Such an amendment shall not have effect in a Province the Legislative Assembly of which has expressed its dissent supported by a majority of its total membership prior to the issue of the proclamation unless that Legislative Assembly, subsequently, by resolution supported by a majority of its total membership revokes its dissent and authorizes the amendment. The resolution of dissent may be revoked at any time before or after the issue of the proclamation.

Where an amendment is made, transferring Provincial legislative powers relating to education or other cultural matters from the jurisdiction of the Provincial Legislatures to Parliament, the Federal Government shall provide reasonable compensation to province which had "opted out" of the change (that is, has refused to accept the transfer for itself). Of course, there is a limit of three Provinces that can choose to opt out because if more than three Provinces opposed an amendment, it would not be adopted as the consent of at least seven Provinces is required to render the amendment valid.

For the following five subjects an amendment requires the consent of Parliament and the Legislative Assembly of each Province, that is, the Parliament and ten Legislative Assemblies must agree thereto; even a single dissent may defeat the amendment:

(a) the office of the Queen, the Governor-General and the Lieutenant-Governor of a Province;

(b) the right of a Province to a number of members in the House of Commons not less than the number of Senators by which the Province is entitled to be represented at the time the Procedure for amending the Constitution (Part V) comes into force;

(c) subject to Section 43 (amendment of provisions relating to some but not all Provinces) the use of the English or the French language;

(d) the composition of the Supreme Court of Canada;

(e) an amendment to Part V relating to the Procedure for Amending of the Constitution.

When an amendment concerns some or more Provinces, but not all including any alteration to boundaries between Provinces, and any amendment to any provision that relates to the use of English and French, the amendment must be the result of consent of the two Houses of Parliament and of Provincial Assemblies involved.

Finally, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive and legislative authority of Canada. But the amendment to the Constitution of Canada in relation to the following matters can be made only in accordance with the general procedure for amending the Constitution, that is, the consent of the Canadian Parliament and seven Provincial Legislative Assemblies representing at least 50 per cent of the population of all Provinces:

(a) the principle of proportional representation of the Provinces in the House of Commons prescribed by the Constitution of Canada;

(b) the powers of the Senate and the method of selecting Senators;

(c) the number of members by which a Province is entitled to be represented in the Senate and the residence qualifications of the Senators;

(d) the Supreme Court of Canada subject to Section 41(d) which provides that any amendment relating to the Supreme Court requires the consent of the Parliament and the Assemblies of all the ten Provinces;

(e) the extension of the existing provinces into the territories; and

(f) notwithstanding any other law or practice, the establishment of Provinces.

6. Section 46 (1)

The Legislatures of the Provinces, as had been the case before the proclamation of the Constitution Act, 1982, can exclusively make laws amending their Constitutions.

Article 49 provides for the setting up of a Constitutional Conference composed of the Prime Minister of Canada and the first ministers of the Provinces within fifteen years after the Procedure for Amending Constitution of Canada, as contained in Part V, comes into force to review the provisions of this Part.

Federalism

Canada is a federal State, established in 1867. In that year, at the request of three separate colonies (Canada, Nova Scotia and New Brunswick), the British Parliament passed the British America Act (now the Constitution Act, 1867) which federally united the three "to form.... one dominion under the name of Canada." The Act merely embodied, with one modification (providing for the appointment of extra Senators to break a deadlock between the two Houses of Parliament), the decisions that delegates from the Colonies—the "Fathers of Federation" -had themselves arrived at.

The Act divided the Dominion into four Provinces. The pre-Confederation "province of Canada" became the Province of Ontario and Quebec, while Nova Scotia and New Brunswick retained their former limits. In 1870, the Parliament of Canada created Manitoba; British Columbia entered the Union in 1871 and Prince Island in 1873. In 1905 the Parliament of Canada created Saskatchewan and Alberta and in 1949 New Foundland joined.

But the Fathers of the Canadian Constitution were not wedded to the narrow ideas of federalism and they did not follow the path carved out by the framers of the American Constitution. The United States had been engaged from the days of Jefferson in the long and bitter controversy over rights and powers of the States which culminated in the tragic Civil War. Canadian leaders had the opportunity to become wiser from the experience of their neighbours. The majority of the delegates assembled at the Quebec Conference had the abiding conviction that the outstanding lesson to be learned from the menacing circumstances of the American Republic was the necessity of strengthening the centripetal forces in a federation, which they proposed to set up. The best way, they decided, was to give a few enumerated subjects of jurisdiction to the constituent units and leave the residue for the Central Government. "The true principle of confederation," asserted Sir John MacDonald, "lay in giving to the Central Government all the principles and powers of sovereignty, and that the subordinate or individual states should have no powers but those expressly bestowed on them. We should, thus, have a powerful Central Government, a powerful Central Legislature, and a decentralized system of minor legislatures for local purposes." At another occasion MacDonald confidently claimed: that "Here we have adopted a different system. We have strengthened the Central Government. We have given the Central Legislature all the great subjects to legislation. We have thus avoided that great source of weakness which has been the cause of disruption of the United States."

The distribution of powers in the Canadian Constitution was, thus, in vast contrast to that of the Constitution of the United States and it was directly the result of the events that followed the inauguration of the American federation culminating into the Civil War. Unlike the United States, the Provinces in Canada were assigned exclusive jurisdiction on subjects enumerated in Section 92 of the Act and the Dominion had jurisdiction over the rest and for "greater certainty" Section 91 of the Act enumerated 29 subjects which were assigned to the Dominion (Federal) Parliament. The enumerated subjects assigned to the Provinces were just 16 in number and they were essentially of a local nature. Some subjects, which in the United States had been left with the States, such as marriage and divorce and criminal law (Entries 26 and 27 Section 91) were given in Canada to the Dominion (Federal) Parliament. But that was not enough. Section 91 also empowered the Federal Parliament "to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces." This is an all-embracing provision which enables the Federal Parliament to make laws on subjects which are within the exclusive jurisdiction of the Provinces on the plea that they affected the peace, order and good government of Canada. At top of this, the Federal Government was given the power to disallow any law passed by a Provincial Legislature within a year of its enactment.

The Federal Government possessed the power of appointing and removing the Lieutenant-Governor in each Province. It could also instruct the Lieutenant-Governor to withhold his assent to Bills or reserve them for the consideration of the Governor-General. All important judicial appointments in the Provinces were vested in the Federal Government. The members of the Senate were nominated by the Federal Government and the representation of the Provinces in the Senate, unlike the United States, was not based on equality. The Canadian Senate, thus, significantly differed from its namesake in the United States.

The Canadian federation was designed by its architects to depart radically from the federal principle which divides and distributes powers between a central government and governments of the constituent units, and accepts both sets of government within their respective spheres of jurisdiction as coordinate and independent. The most essential characteristic of the federal government is that neither the central government nor the regional governments can render the one helplessly dependent upon the other for its existence or proper functioning. But the Canadian Provinces were desired to be inferior bodies "possessing little more prestige and authority," as Dawson says, "than inflated municipalities." In the discussions at the Quebec Conference, Provincial Legislatures were repeatedly described as "subordinate," "minor," and "inferior" bodies. Speaking on the Quebec Resolution in Parliament of Canada on February 6, 1865, John MacDonald said, "We... strengthen the Central Parliament and make the confederation one people and one government, instead of five peoples and five governments, with merely a point of authority connecting us to a limited and insufficient extent...this is to be one United Province with the local governments and legislatures subordinate to the general government and legislature." The amplification of this point by Charles Tupper is yet more blunt. He said, "we propose to preserve the Local Governments in the Lower Provinces because we have no municipal institutions." But he was also careful to state that "while we should diminish the powers of Local Governments we must not stock too largely the prejudices of the people in that respect." Thus, it was the definite intention of the Constitution-makers to make the Provincial Governments in Canada subordinate to the Central Government and not coordinate with it. Their purpose was not to repeat the events that had happened in the United States of America. Whatever the intentions of the Founding Fathers, it must be admitted that they defeated the purpose of a federal polity.

The powers of disallowance and veto further rendered the Provinces helplessly dependent upon the Central Government. The British North America Act empowered the Dominion Government to prevent the Provincial Legislature from making laws upon its own allotted subjects, if the Dominion Government happened to disapprove the policy involved in such laws. In *Re-Disallowance* and *Reservation* (1938) the Supreme Court of Canada held that the Dominion Government's powers of disallowance and veto were unrestricted in law and extended to all kinds of legislation, financial and ordinary. This is tantamount to placing the Provincial Governments entirely at the mercy of the Dominion Government.

All these are unitary elements and Professor K.C. Where, a renowned authority on federalism, tersely put it, "Could there be a more powerful weapon for centralising and unifying the government than this?"[7] Wheare, then, examines the controversial question whether Canada has a unitary or federal type of government. His conclusion is that in spite of these unitary elements, '"the federal principle is not completely ousted" from the Canadian Constitution; it does find a place there and an important place. "Yet if we confine ourselves to the strict law of the constitution," he adds, "it is hard to know whether we should call it a federal constitution with considerable unitary modifications, or a unitary constitution, with considerable federal modifications. It would be straining the federal principle too far, I think, to describe it as a federal constitution, without adding any qualifying phrase. For this reason I prefer to say that Canada has a quasi-federal constitution."[8]

But Professor Kennedy, another renowned scholar, categorically says that "Canada is a federation in essence." His conclusions are based upon a series of legal decisions, and that reduces them into four:

(1) The Federal Parliament is not a delegation from the British Parliament or from the

7. Where, K. C., *Federal Government*, p. 20.
8. *Ibid.*

Provinces. It has full and complete powers over its sphere of jurisdiction.

(2) The Provincial Legislatures are not delegation from the British Parliament. Their authority is plenary within the limits prescribed by the Constitution and, as held in *Hodge* v. *The Queen* within the sphere so prescribed "the local legislature is supreme and has the same authority as the Imperial Parliament or the Parliament of the Dominion."

(3) The Provincial Legislatures are not delegations from the Federal Parliament and their status is in no way analogous to municipal bodies. In the liquidators of the *Maritime Bank of Canada* v. *The Receiver- General of New Brunswick,* Lord Watson declared: "That Act of 1867.... nowhere professes to curtail in any respect the rights and privileges of the Crown or to disturb the relations then subsisting between the sovereign and the provinces. The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a Federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy...As regards those matters which by Section 92 are specially reserved for provincial legislation of each province continues....as supreme as it was before the passing of the Act."

(4) The Provinces remain independent and autonomous. Professor Kennedy summing up the position and status of the Federal Government and Provinces says that both governments "exercise co-ordinate authority and are severally Sovereign within the sphere specifically or generically or by implication constitutionally granted to them."[9] This construction, he holds, agrees with the Preamble of the British North America (Canada) Act which reads "whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united."

A federal constitution is really what the Judges declare it to be. Interpreting the Constitution of the United States the Supreme Court adopted a definite theory of federalism. It had been assumed that the States retained their 'sovereignty' in all matters which were not expressly taken away from them and as such no legislation of Congress must interfere with powers which remained with the States, and no legislation of the States must be allowed to interfere with the exercise of powers specially assigned to the Federal Government. The Supreme Court has the power to declare unconstitutional Federal or State legislation which, in its opinion, offended against the limitations imposed by the Constitution. Moreover, in interpreting the Constitution, the Supreme Court has always remembered that a Constitution is not an ordinary law. It is a fundamental law providing the machinery of government and it has to be interpreted according to the conditions which it has to meet and solve. Mere reliance on the letter of the law and the intentions of its framers would make the Constitution static thereby preventing the organs of government adapting themselves to changing social and economic conditions.

But the Supreme Court of Canada and the Judicial Committee of the Privy Council (till 1949) had not followed the practice of the American Supreme Court. They regarded the British North America (Canada) Act as a statute to be interpreted like other statutes. And faithful to the traditional rules of statutory interpretation, the Judges had been concerned with the literal meaning of the words in the Act of 1867 without reference to historical facts, or the intentions of the framers of the Constitution, or the changing social and economic conditions of the country to which the machinery of the government must fit in. The result is that there has not been a straight line interpreting the British North America (Canada) Act. Lord Haldane, in the *Attorney-General of Australia* v. *Colonial Sugar Refining Co.,* held that the Constitution of Canada could not be described as federal except in a loose sense. In spite of the conflicting interpreations of the British North America (Canada) Act, history has proved otherwise. The American federation began its career with a theory of State rights. Today, we find there the ever-increasing growth of central power and the process of centralization is in full swing, that is, the national government assuming influence or control over functions which formerly were considered under State jurisdiction. Canada began its political existence with the scales highly tilted in favour of the central authority. Today, the Canadian Provinces enjoy powers almost greater than those in the States in the American federation.

9. *The Constitution of Canada,* p. 408.

Many factors are responsible for this development, but it has been essentially determined by the attitudes of mind prevalent among those vested with political authority. Sir John MacDonald, the most outstanding statesman of the early period and, in fact, the architect of the Canadian federation, had convincingly, viewed the Provincial Legislatures subordinate bodies and regarded the Lieutenant-Governors as nominees of the Federal Government whose interests he expected them to safeguard as dutiful servants. MacDonbald also set the precedent of disallowing Provincial legislation and twenty-nine Acts were victims in the first decade of the career of the federation. But the Liberal Party, partycularly as represented in the person of Oliver Mowat, Prime Minister of Ontario (1872-1896), strongly protested and fought against MacDonald's wide use of Dominion authority and essentially its powers of disallowance. The Liberals urged the view that within their sphere of jurisdiction, the Provinces were as supreme as the Federal Government within its own. By 1887, the dissatisfaction against the centralist policies of the Federal Government had reached a pitch. In a conference held at Quebec the representatives of the five Provinces met to vindicate the plenary nature of Provincial authority, and agreed to agitate for: (1) curtailment of the federal jurisdiction; (2) abolition of the power of disallowance; (3) recognition of the Lieutenant-Governor as the representative of the King rather than servant of the Federal Government; and (4) each Province should nominate some members to the Senate.

When the Liberal Party assumed office at the Centre in 1896, it adopted a responsive attitude and tried to lessen a fear of centralisation prevalent in the new growing nation. It did not repudiate any of the powers which the British North America (Canada) Act conferred upon the Federal Government. Nor did it set to make those powers become obsolete. But since then the power of disallowance had been more cautiously used, an exceptional rather than a normal expedient or as Brady says, "an extreme medicine of the Constitution." The present position is well explained by Dawson. He says, "Sporadic revivals of disallowance have occurred during the past thirty-five years, but it is a far from being the active agent in assuring to the Dominion that oversight which was contemplated by the Canadians that the true judge of the mistakes and injustices of the provincial legislature is the electorate and not the Dominion Government. Since the Dominion Government has now definitely assumed a federal aspect, it balances divergent interests, thus, subordinating the legal powers to the federal principle in practice."

The conventions of the parliamentary system of government go still further. The 1867 Act empowered the Federal Government, to appoint a Lieutenant-Goverrnor, and by law the Lieutenant-Governor appoints his Ministers who hold office at his pleasure.But the parliamentary system of government demands that the Lieutenant-Governor must appoint his Ministers only those persons who belong to the majority party in the Provincial legislature and command its confidence. The real functionaries are, thus, the choice of the people who returned them in majority at elections and the Federal Government must accept their choice and endorse their policies for which they hold a mandate. In fact, the Federal Government cannot afford to do otherwise as it is itself the choice of the people and it has to appeal to the people at periodic intervals for return to power. This custom of the Constitution renders almost nugatory the intention of the Quebec Conference that the Dominion influence over the Provinces would be effectively exercised through the agency of the Lieutenant-Governors. Similarly, although the Federal Government has the power to make all the important provincial judicial appointments, yet it exercises this authority with due discretion and has not attempted to pack the courts with partisans opposed to Provincial powers. Professor Wheare, accordingly comes to the conclusion that "Canada is politically federal and that no state Government which attempted to stress the unitary elements in the Canadian Constitution at the expense of the federal elements would survive."[10]

Professor Wheare does not entirely rely upon the law of the Constitution for determining whether it is federal or not. The practice of the Constitution, he says, "is more important almost than the law of the Constitution", for a country "may have a federal Constitution, but in practice it may work that Constitutioh in such a way that its government is not federal. Or a country with non-federal Constitution may

10. Wheare, K. C., *Federal Government*, p. 21.

work in such a way that it provides the example of a federal government." Professor Wheare's conclusion is obviously clear. "It seems justifiable to conclude," he says, "that although the Canadian Constitution is quasi-federal in law it is predominantly federal in practice. Or to put it in another way, although Canada has not a federal Constitution, it has a federal government."[11]

Canada has really a federal government. The unitary elements are being so worked that they do not conflict with the federal principle. The Provinces now enjoy wide political and legislative authority. Within the sphere of powers granted to them, they are practically autonomous. The power of disallowing Provincial legislation is sparingly used and is confined only to acts which infringe the principle of legislative power and contravene the interests of the Commonwealth. A Lieutenant-Governor is no longer an instrument of the Central Government. His appointment by the Federal Government is, in fact, an evidence of the federal link and does not mean subordination once he is legally appointed.

Although the Constitution Act, 1982, is not primarily concerned with the allocation of powers in the Canadian federal system, there are two constitutional provisions that will benefit directly the Provinces and their ability to exercise their constitutional responsibilities. The well-accepted practice of using federal revenues to help the less wealthy Provinces, the principle of equalization, is now enshrined in the Constitution. Section 36 in Part III of the Act provides: "without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures together with the Government of Canada and the provincial governments, are committed to (a) promotion of equal opportunities for the well-being of Canadians; (b) furthering economic development to reduce disparity in opportunities; and (c) providing essential public services of reasonable quality to all Canadians." The Federal Government is constitutionally committed to making equalization payments for this purpose to further the commitment.[12]

The other provision constitutionally confirms the exclusive Provincial authority over natural resources and gives the Provinces new powers respecting the inter-Provincial sale of resources and the indirect taxation of non-renewable resources.[13]

CHARTER OF RIGHTS AND FREEDOMS

Entrenchment of Rights

Canadians have traditionally enjoyed extensive human rights and they are the foundation of the Canadian way of life. But few of them had been set down in the form of laws. They had grown steadily and were handed down from generation to generation. In times of danger when the security of the nation was threatened, some of those rights could be temporarily withdrawn. Even under such circumstances the consent of the people was given through their representatives in the Parliament. By incorporating basic human rights and freedoms in the Constitution, the 1982 Act has given them constitutional sanctity. They are guaranteed and in case of any infringement or denial redress can be sought in a court of law. The Charter of Rights and Freedoms enables the courts to determine whether a Federal or Provincial law is commensurate with it and to declare any legislative measures that contravene it. The criterion is that which "can be demonstrably justified in a free and democratic society." The entrenched rights and freedoms can be limited only by rule of law, within limits that are reasonable and can be justified in the context of a free and limited society. It applies to all legislation, past, present or future. This innovation brings the Canadian Constitution closer to the American Constitution on the question of fundamental rights.

However—and this is an innovation—the Canadian Charter of Rights and Freedoms, or the "Carta Canadiana", has what is known as a "notwithstanding" clause applied to a few of its parts. These parts refer to fundamental rights, legal guarantees and equality rights, except for women, where the "notwithstanding" clause does not apply. Parliament and the Provincial Assemblies each acting in their jurisdictions, can derogate from this Charter, provided that they expressly state

11. *Ibid.*
12. Section 36 (2)
13. Section 92 A added immediately after Section 92 of the Constitution Act, 1867 (formerly named the British North America Act, 1867).

in their laws that they are doing so. Such derogation is valid only for five years. To extend its duration, it is necessary to repeat the express declaration required by Section 33. There can be no complications with the democratic rights. They are an integral part of the Constitution, and the legislators can in no manner use the "notwithstanding" clause.

SPECIFIC RIGHTS

The Charter is divided into specific heads and each head enumerates the Rights and Freedoms relevant to it:

Fundamental Freedoms

Many of the liberties spelt out in the Charter are those associated with a free society. These include fundamental freedoms—freedom of conscience, religion, thought, and expression, freedom of the press and other media of communication, freedom to assemble and associate freely. All these fundamental freedoms are guaranteed, but they are subject to the "notwithstanding" clause under which it is possible to derogate from them.

Democratic Rights

Every citizen has the right to vote in an election of members of the House of Commons or of a Legislative Assembly and to be elected as its member. The duration of the House of Commons and a Provincial Assembly is fixed at five years from the date for the return of the writs at a General Election of its members. But in time of real or apprehended war, invasion or insurrection, the life of the House of Commons may be extended by the concerned legislature beyond the specified period of five years, provided such an extension is not opposed by the votes of more than one-third of the members of the House of Commons or the Legislative Assembly as the case may be. The Constitution does not fix the period for which the life of a legislature can be extended. It all depends upon the circumstances then prevailing and the judgment of the concerned Government. But the Constitution does not give a *carte-blanche* to the legislature to extend its life because it imposes a limitation by providing that such a continuation should not be opposed by the votes of more than one-third of the total membership of the House of Commons or the Provincial Legislative Assembly, as the case may be. If more than one-third of the members of the Legislature concerned opposed the extension in its life, the proposal is defeated and its duration does not go beyond the specified term of five years.

The Constitution also provides that there shall be a sitting of Parliament and of each Provincial Assembly at least once every twelve months. Both these provisions are a unique feature of the 1982 Constitution. Duration of the term of the Legislature and summoning of its sessions are the relevant parts of the provisions relating to the Legislature and all the constitutions of the world have followed the same pattern. But the Canadian Constitution enshrines them in the Chapter relating to Fundamental Rights and Freedoms. Section 20 of the British North America (Canada) Act 1867 which has been repealed by the Constitution Act, 1982, ordained: "There shall be a Session of the Parliament of Canada once at least in every year, so that twelve months shall intervene between the last sitting of the Parliament in one Session and its first sitting in the next Session."

Mobility Rights

Freedom of mobility and settlement, prior to the proclamation of 1982 Constitution, was protected in large by the courts, but imperfectly. Mobility Rights are now enshrined in the Constitution and their guarantee is explicit. Every Canadian citizen and every person who has the status of a permanent resident of Canada has the right to move freely from one Province to another, to live and seek a job anywhere in Canada as well as to enter, remain in or leave the country. However, a Province, in which the employment rate is below the national average possesses the right to undertake "affirmative action programmes" for socially and economically disadvantaged individuals. Section 6 (4) provides that the right to move and gain livelihood "do not preclude any law, program (programme) or activity that has its object the amelioration in a province of conditions of individuals in that province who are socially and economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada." It means that a Provincial Legislative Assembly has the constitutional right to prohibit entry and settlement of individuals seeking jobs in a Province in which the rate of unemployment is above the national average till that time when the national average is reached.

Legal Rights

The Constitution guarantees to "everyone" citizen or an alien, the right to life, liberty

and security of person and the right not to be deprived of any such right except in accordance with the principles of fundamental justice. It means that there must be a valid cause prescribed by law that "can be demonstrably justified in a free and democratic society." In case of its capricious application either by executive action under the law or the provisions of law that violate the rule of law and cannot be demonstrably justified the Courts have the right to intervene when approached by the aggrieved party and nullify such action and hold the law itself *ultra vires* of the Constitution. Enforcement of rights is a right by itself and any person whose rights have been infringed or denied can apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just.

The Constitution protects "everyone" against unreasonable search or seizure or arbitrary detention or imprisonment. A person who has been arrested or detained has the right to be informed without unreasonable delay of the charge against him and has also the right to engage a legal counsel and to retain and instruct him. It is the obligation of the arresting or detaining authority to inform the arrested person or the detenu of his right to legal aid. He has also the right to have the validity of his detention determined by way of *habeas corpus* and be released forthwith if the detention is held unlawful.

Any person charged with an offence has the right to be informed without unreasonable delay of the specific offence and to be tried in a court of law within a reasonable time. No one should be compelled to give evidence against himself in a criminal case and he should be presumed innocent until he is proved guilty according to law in a fair and public hearing by an independent and impartial court. The accused person is not to be denied reasonable bail without just cause. Except in the case of an offence under military law tried by a military tribunal, the accused person has a right to be tried by jury where the maximum punishment for the offence is imprisonment for five years or more severe punishment. No person can be found guilty on account of any act or omission, unless, at the time of the act or omision, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognised by the community of nations. If finally acquitted of the offence, the accused person cannot be tried for the same offence again and, if finally found guilty and punished for the offence, he cannot be tried or punished for it again. If found guilty of the offence and if the punishment for the offence has been varied between the time of the commission of the offence and the time of sentencing, the accused has the right to the benefit of the lesser punishment.

Every person has the right not to be subjected to any cruel and unusual treatment or punishment. A witness who testifies in any proceedings has the right not to have any incriminating evidence given by him used to incriminate him in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

As in the case of Fundamental freedoms, Legal rights, too, can be derogated, though both are guaranteed.

Equality Rights

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, "in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." For the first time in the Canadian history, the Constitution recognizes the equality of women. As such women's groups can now challenge laws that discriminate against women. This provision, however, does not rule out "affirmative action" programmes or activities aimed at improving the situation of the disadvantaged individuals or groups. Section 15(2) provides that equality before law and under law and equal protection of law and benefit of law against discrimination "does not preclude any law, program (programme) or activity that has its object the amelioration of conditions of disadvantaged individual because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Because the scope of equality rights is so extensive and affected so many laws, they came into effect three years after patriation (return) of the Constitution to Canada to enable the federal and Provincial Governments to make any necessary adjustments to their laws.

Official Language Rights

Official Language Rights provide every person with the right to use English or French in dealing with institutions of the Canadian Parliament and Federal Government. French and English are the official languages of Canada and have equal status in the institutions of Parliament and the Government of Canada. New Brunswick joins Quebec and Manitoba in providing constitutional protection to the use of French or English in its Legislative, Courts and Parliamentary documents. In New Brunswick citizens have the right to communicate in French or English with any office of the Provincial Government, and the two languages are made official in that Province.

The Constitution also preserves the rights and privileges acquired or enjoyed either before or after the commencement of the Charter of Rights and Freedoms with respect to any language that is not English or French.

The Constitution also preserves any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of the Charter with respect to any language that is not English or French.

Minority Language Education Rights

A Canadian citizen educated in Canada in English may send his or her children to a school in English in Quebec. In addition, a Canadian citizen who has a child being educated in English in Canada may continue to send any of his or her children to a school in English if she or he moves to Quebec.

The above provisions apply to the French minority in the other nine Provinces. In addition, the other nine Provinces have agreed that any Canadian citizen whose mother tongue is French will be entitled to send his or her children to a school in French. This right has specially been provided to enable Canadians who have to move around the country, or English or French-speaking minorities living in a Province of another language group to have their children educated in their own language.

Enforcement of Rights

Any person whose rights or freedoms, as guaranteed by the Charter in Part V of the Constitution, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. Where in such proceedings a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter, the evidence shall be excluded if it it established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

The Charter includes certain rights and freedoms under the caption General:

(1) Aboriginal rights and freedoms are not affected by the provisions of the Charter. Section 25 states that the guarantees of certain rights and freedoms incorporated in the Charter of Rights and Freedoms "shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including—

(a) any rights or freedoms that have been recognised by the Royal Proclamation of October 7, 1963; and

(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement."

In addition, Section 35 of Part II dealing with Rights of the Aboriginal Peoples of Canada provides that the existing aboriginal and treaty rights of the aboriginal peoples of Canada are recognised and affirmed. The aboriginal peoples include the Indian, Inuit and Metis of Canada.

(2) The guarantees of this Charter of certain rights and freedoms are not to be construed as denying the existence of any other rights or freedoms that exist in Canada. It means that in addition to the rights and freedoms contained in the Charter of Rights and Freedoms there exist other rights as well which have that much sanctity as the rights forming part of the Charter. The only difference between the two is that the latter are not guaranteed rights and, consequently, they cannot be enforced as provided in Section 24.

(3) Canada is a multicultural State and while interpreting any provision of the Charter this aspect would essentially be kept in view. Section 27 provides that the Charter "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of the Canadians."

(4) The right to equality extends to all Canadian citizens without discrimination based on

race, colour, religion, sex, age or mental or physical disability. But at the same time Section 15 dealing with equality rights places a bar of "affirmative action" and as the scope of equality clauses is extensive affecting so many laws, these rights were to go into effect three years after the return of the Constitution to Canada. But this bar did not apply to the equality of women with men. It immediately went into effect. Section 28 provides, "Notwithstanding anything in this Chapter, the rights and freedoms referred in it are guaranteed equally to male and female persons."

(5) No provision of the Charter on Rights and Freedoms abrogates or derogates from any rights or privileges guaranteed by or under the 1982 Constitution of Canada in respect of denominational, separate or dissentient schools.

(6) Finally, as a measure of abundant caution and to avoid any kind of doubt Section 31 provides: "Nothing in this Charter extends the legislative powers of any body or authority."

Canada demonstrated successfully how federal system of governance can be combined with the theory and practice of parliamentary government. Earlier in the United States, federalism co-existed with a Presidential system of government. The Indian constitution makers benefitted much from Canadian experience and Joined the concept of federation to a parliamentary type of regime both at the centre and the constituent units.

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CHAPTER II

The Executive

The Crown

The Government in Canada proceeds from the Crown with a capital letter; and this new Crown be of the British North America Act 1867, (now the Constitution Act, 1867) stated: that "the Provinces of....have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom.... with a Constitution similar in principle to that of the United Kingdom." The Constitution of the United Kingdom is a body of rules indicating the structure and functions of political institutions and the principles governing their operation. These rules and principles of political governance lie scattered in the various Charters, Statutes, Judicial decisions, usages and traditions, and all mark a steady transference of power from the King as a person to a complicated impersonal organisation called the Crown. The King is still there and legally all government radiates from the person of the Monarch but in actual practice the King has become the Crown. The King does not exercise the powers which belong to the Crown on his own initiative and authority. He does so at the behest of those who exercise the will of the people, that is, Ministers responsible to Parliament. The King, Ministers and Parliament make a synthesis of supreme authority and it is called the Crown. The principles governing the operation of all the three political institutions essentially embody the British Constitution. The nature of the British Constitution has been beautifully summed up in a fairy tale and it runs: "once upon a time there was a King who was very important and who did very big and very important things. He owned a nice shiny crown, which he would wear on especially grand occasion, but most of the time he kept it on a red velvet cushion. Then somebody made a Magic. The Crown was carefully stored in the Tower; the King moved over to the cushion and was transformed into a special kind of crown with a capital letter; and this new Crown became in the process something else; no one knows exactly what, for it is one thing today, another thing tomorrow, and two or three things the day after that. The name given to the Magic is the Constitutional Development."

Her Majesty Elizabeth the Second, is the Queen of Canada, Australia and other Dominion countries, and the reigning Monarch of Britain. In fact, she is several monarchs wrapped up in one person, but each is completely separate from all the rest. She is the Queen of Canada not because she is the Queen of the United Kingdom, but because she is the Queen of Canada separately. At each step of the evolutionary process of constitutional development in Canada, the relationship of the Crown to Canada was altered to meet the aspirations of the growing nations until the present association emerged in which Elizabeth the Second is the Queen of Canada as distinct from her status as Monarch of the United Kingdom. Her Majesty is simply a symbol, the symbol of Canada's free association with British and the other Commonwealth nations, and a symbol of the history and traditions which a majority of the Canadian people revere.

In December 1952, it was decided by the Prime Ministers of the Commonwealth countries, meeting in London, to establish new forms of title for each country. The title for Canada was approved by Parliament and established by a Royal Proclamation on May 29, 1953. The title of the Queen, so far as Canada is concerned, now is:

> "Elizabeth the Second, by the Grace of God of the United Kindgom, Canada and Her other Realms and Territories Queen, Head of the Commonwealth, Defenders of the Faith;"

In fact, Britain had herself consistently encouraged this gradual advance to partnership, "possibly because she had learned her lesson the hard way in the days of the Third George, and that this attitude, more than any other factor, is responsible for Canada's retention of the symbol of the Crown as the tie which binds the partnership." When the Canadians desired a Constitution similar in principle to that of the United Kingdom what they had in mind were the Monarchy, a Cabinet to advise it, a Parliament consisting of two Houses and the Cabinet

responsible to its representative Chamber, the law courts and the common law.

The functions of the Canadian Crown, which are substantially the same as those of the Queen in relation to the Government of Britain, are generally discharged by her representative the Governor-General. A few Canadian prerogative powers, such as the granting of honours and awards and the appointment of ambassadors and ministers plenipotentiary, are dealt with by the Queen personally; most are, however, performed on her behalf by the Governor-General, and in either case the prerogative is exercised on the advice of the Government of Canada.

GOVERNOR-GENERAL

Appointment and Term

The Monarch of Canada occupies the Canadian throne, but the permanent home of the occupant is not Canada but Britain. As the Monarch cannot reign herself from a distant land which is her permanent home, she appoints a personal representative to act on her behalf and he is the Governor-General of Canada. Formerly, the Governor-General was appointed by the Sovereign on the advice of the Colonial Secretary, a British Minister of the Crown. In 1890, the old practice was altered. The Dominion Government was consulted before making the appointment, though this procedure had not invariably been followed, as in 1916 when the Duke of Devonshire was appointed without any preliminary consultation. The Imperial Conference of 1926 made a revolutionary change. It was decided at the Conference that if the Governor-General "is not the representative or agent of His Majesty's Government in Britain or of any Department of that Government," the British Government must not have to do with anything in making the selection. Since then the appointment of the Governor-General had been made by the Dominion Government. The Prime Minister of Canada recommended the appointment to the King or the Queen and the advice so tendered was invariably accepted. Britain simply checked up the availability of the person so advised to be appointed if he happened to be her national in Britain. In 1936, Prime Minister Bennet devised another method. When Lord Tweedsmuir's name was being considered, Bennet first discussed the matter with the Leader of the Opposition, Mackenzie King. His object was to make the appointment non-partisan in character by carrying the approval of the leaders of both major political parties. The procedure was hoped to become a practice, but the appointment in 1952 of Vincent Massey, the first Canadian to be appointed to that office, was widely criticised. Massey was prominently identified with the Liberal Party and he was once a Cabinet member when that Party was in office. Many people in Canada did not view it a healthy practice of appointing a Governor-General from among the Canadians themselves. They feared, remarked Leslie Robert, "that once the appointment of one of their own has became accepted practice, little time will elapse before the Governor-Generalship becomes a political plum—the ripest in the gift of government."[1] But with the appointment of Roland Michener, it appeared that this objection did not carry much significance. Michener succeeded General George P. Vainer who died on March 5, 1967 and was the third Canadian to become his country's Governor-General. Since then the Governor-General has invariably been a Canadian.

The term of office of the Governor-General. writes Dawson, "may be simply, if somewhat ambiguously, stated as being officially recognised as six years, customarily treated as five years, while on occasion it has been seven years."[2] Therefore, the Governor-General traditionally serves for a term of five years.[3] He may be removed from office by the Queen acting on the advice tendered by the Canadian Cabinet.

In the event of the death or incapacity or, generally, the absence from Canada of the Governor-General, the powers and authorities granted to him are vested in the Chief Justice of Canada as "Administrator." In the event of the latter's death, incapacity, removal or absence, the powers are vested in the Senior Judge for the time being of the Supreme Court of Canada.

Powers of the Governor-General

The powers of the Governor-General are extensive and he exercises his authority under the Letters Patent constituting the office of the Governor-General, and the provisions of the Constitution Act, 1867, (formerly British North

1. Leslie Robert, *Canada, the Golden Hinge*, p. 58.
2. Dawson, R. M., *The Government of Canada*, p. 176.
3. *Reference Papers No. 70.* Information Division, Department of External Affairs, Ottawa, Canada.

America Act). But, like his master, the Monarch, the Governor-General has ceased to rule now and he has personally nothing to do with the affairs of government. The actual exercise of powers and rights associated with the office of the representative of the Monarch belong to Her Majesty's responsible Ministers in Canada. "The Governor-General," writes Dawson: "has tended to follow the same path which had been marked out a few generations earlier by his august principal and he now shares substantially the same disabilities. He is a legal survivor who has contrived to remain a political necessity—the once supreme chief whose powers have largely passed into other hands, yet who has nevertheless retained a substantial residue of his former ascendancy and importance."[4]

The British North America Act, 1867, vested the Executive government and authority in the Crown[5] to be exercised by the Governor-General with the aid and advice of a Council chosen and summoned by him and liable to be removed by him at his pleasure.[6] But law is not practice and the Executive power is actually exercised in the Queen's name by Ministers who derive their authority from the Federal Parliament and are responsible to it for the use they make of their powers. As a constitutional head the way is carved out for the Governor-General by the established practices of the parliamentary system of government, which the British North America Act, 1867 established in Canada similar in principle to that of the United Kingdom. He follows the usual course of summoning the leader of the majority party in the House of Commons and entrusts him with the duty of forming the Council of Ministers and the Ministers remain in office so long as they command the confidence of the House of Commons. The constitutional position of the Governor-General was explained in a formal statement by the Imperial Conference in 1926. The statement affirmed that the Governor-General of a Dominion was the "representative of the Crown and not of any department of the British Government, and that his position in relation to the administration of public affairs in the Dominion was essentially the same as that of His Majesty the King in Great Britain." The Governor-General has nothing to do with the determination and execution of the policy, and he does not take part in the deliberations of the Ministers, that is, Cabinet meetings. The Duke of Argyll (1878-83) discontinued attending meetings of the Cabinet and since then this practice has been invariably followed.

The Governor-General is the Commander-in Chief of the land, naval and air forces of the Federation. He appoints representatives of Canada to the United Nations and signs treaties of minor importance which are not signed by the Crown directly. He also appoints and receives those ordinary agents and ministers who are not appointed and received by the Government directly. Till 1926 the Governor-General performed certain ambassadorial functions on behalf of the British Government and was charged with the duty of guarding the wider interests of the Empire. But the Imperial Conference of 1926 not only clarified the position of the Governor-General with relation to the government of a Dominion, but it also declared his complete separation from the British government. Accordingly, in 1928, all such functions of the Governor-General were transferred to the High Commissioner stationed in Canada as representative of the Government in London.

The Governor-General appoints, according to law, the Lieutenant-Governors of the Provinces and can remove them from office as well. In practice, all such appointments and dismissals are made by the Federal Ministry. The Governor-General also appoints the Speaker of the Senate, the Judges of the Supreme Court, Provincial Courts, Commissioners, justices of the peace and officers of various other categories. And like his various other acts, these appointing functions are really those of his duly constituted Ministers responsible to the House of Commons.

The Governor-General summons, prorogues and dissolves Parliament. But like the various other powers of the Governor-General, these are also his nominal powers. The Bying episode of 1926, finally decided that the right to ask for dissolution belongs to the Prime Minister and the Governor-General cannot refuse it.The power of the Governorr-General to veto a Bill or to reserve it for the assent of Her Majesty is an obsolete practice now. The Impetial Conference of 1926, and the Conference on the

4. Dawson, R. M., *The Government of Canada*, p.165.
5. Article 9, North America Act, 1867.
6. Article 11.

Operation of Dominion Legislation, and Merchant Shipping Legislation (1929) definitely decided that the disallowance of Dominion legislatioh by British authorities and reservation by the Governor-General did not conform to the equal status of the autonomous communities within the British Empire. The explicit obligation placed by the British North America Act, 1867, to keep the British Government informed of the Acts passed by the Canadian Parliament was faithfully observed until 1942, when it was quietly discontinued. This was followed in 1947 by the passage of an Act amending the Canadian Statute which had provided for transmission of copies of current Acts to the Governor-General and to the British Government. The Constitution Act, 1982 repeals this part of the Act.

Such are, then, the powers of the Governor- General. According to law there is no sphere of administration where the authority of the Governor-General does not intervene. But in practical politics Lord Bying's episode finished once for all the controversy and conflict of opinion as to the exercise of powers by the Governor-General, and the Imperial Conference of 1926 vindicated his constitutional position. There are, however, certain functions which the Governor-General does not exercise on ministerial advice. The most important of them is the appointment of a Prime Minister. No one else except the Governor-General can commission a new Premier in the form required by the established custom of the parliamentary system of government. The task of the Governor-General is simple, if the party commanding parliamentary majority has an accredited leader. But if the office becomes vacant, because of a sudden death or resignation of the incumbent or when party dissension may make the office of the Prime Minister to fall vacant and there is no obvious leader, the Governor-General has, then, the discretion to select a person who may command the confidence of a stable majority in the House of Commons and be in a position to form government. He may even seek the advice of those whom the Governor-General feels can give some advice, as Lord Aberdeen did in 1897, in his search for a successor to Sir John Thompson. The Governor-General may adopt another procedure by tapping the potential Prime Minister and discover for himself who can form a Cabinet. In 1896, Lord Aberdeen, after first sounding out Sir Donald Smith, eventually commissioned Sir Charles Tupper to succeed Sir Mackenzie Bowell. Aside these two occasions, the Governor-General had not the opportunity to exercise his judgment in selecting the Prime Minister, but the contigency is still there and it may happen as it did in 1916 and 1923 in Britain or as it occured in Australia in July, 1945. Then, he has the prerogative to refuse to grant a dissolution of the House of Commons and the right to dismiss a government. The Governor-General's discretion is, however, closely regulated by previous usage and "the counsel of constitutional doctrine, and rarely involves more than the formal recognition of an existing situation."

The second function of the Governor-General is that he acts as a mediator and uses his influence to settle political disputes between political leaders whenever occasion may demand it. As the Governor-General wields no political power his advice is deemed valuable and generally accepted. The Duke of Devonshire in 1917, summoned Sir Robert Borden, Sir Wilfrid Laurier, and four others to a meeting at Government House to discuss and amicably decide the conflicting issues regarding conscription, postponement of elections during War, and the possibilities of forming a coalition government. This is how the King intervened in Britain in 1914 in his efforts to secure agreement on the Home Rule Bill. The Governors-General have sometimes intervened to settle quarrels between the Dominion and a Province, as Lord Dufferin endeavoured to remove the bitterness between British Columbia and the Dominion immediately after the latter's membership of the federation. Twenty years later Lord Aberdeen held a series of interviews with the Premier and Attorney-General of Manitoba.

Governors-General have also been expected at times to act as quasi-diplomatic agents of their country. In early days, Governors-General paid official visits to the United States with a definite diplomatic purpose and under instructions from the Government in London. Today, their visits are neither diplomatic nor are undertaken on the instructions of the British Government. They are goodwill visits to strengthen the ties of friendliness between the two neighboring countries undertaken with the approval of the Canadian Government. All the same, as Dawson points out, "It is, indeed, probable that these social calls are still occasionally used to review unofficially and tenta-

tively matters which are of common interest to the two nations, although their usefulness for purposes of diplomatic intercourse is obviously restricted.''

The Governor-General, like the King of Britain, is also an important part of the social structure and he wields a great social influence. His patronage is an enormous asset to any cause and ensures for popular support. His name is always associated with multifarious activities and various fields of art, music, literature, theatre, social service, youth movement, etc., which are organised under his patronage. These ''dignified'' functions, as Bagehot described these are more important than the government functions.

Closely connected with the social activities are the Governor- General's ceremonial duties as the representative Chief Executive Head of the State. He opens Parliament, receives foreign diplomatic agents, and he is Canada's busiest host. He is also Canada's most travelled VIP and goes on tours throughout the country once or twice a year. The ceremonial functions of the Governor-General have been graphically described by Leslie Roberts. He writes: ''the Governor-General receives, dines and wines foreign and domestic celebrities at Government House, his official residence at Ottawa. He pins medals on heroes and welcomes visiting celebrities. He travels the country from end to end unveiling monuments, opening hospitals, launching charity drives, and taking his ease with the war veterans in their sanctuaries. He is primarily a goodwill ambassador, but it is not goodwill for Britain that the Governor-General works to create, but goodwill between Canadians and goodwill toward Canada on the part of the nation's distinguished and official guests,''

The Cabinet government, in short, presupposes the presence of some titular head of the State, some central and impartial figure, and the Governor-General fulfils that purpose as the representative of the Queen. His position is very often compared and made analogous to that of the King in Britain. The influence of the Governor-General is not negotiable. But there is a subtle distinction between the role of the King and his representative. The Governor-General is the nominee of the Canadian Government, and since he comes and goes within a relatively short period of time, he cannot enjoy the national prestige of the Monarch himself. The King is the chief of the nation, he is everybody's King and provides a useful focus for patriotism. People live and die for the Monarch. He personifies the State. ''We condemn the government,'' says Jennings, ''and cheer the king.'' The Governor-General is, as Sir Robert Borden not inaptly described him, ''a nominated President'' who can seldom appeal to popular sentiment in the same magnetic way as the Monarch. ''However much he may graciously act as the King himself would act, he is still a substitute. Consequently, he loses much as a potent symbol and mirror of the nation. For such a symbol Canadians must look beyond him to the king in person.'' The Governor-General may offer informal counsel to his Ministers and like the Monarch he has the right to be consulted, the right to encourage and the right to warn,but he has not the same continued and ripe experience of life-time as that of the King. The King acquires political knowledge and experience, which makes him a mentor and a wise Minister is not only obliged but positively desires to consult him. After a short span of office, the Governor-General goes into oblivion.

THE CABINET

The Privy Council and the Cabinet

In a parliamentary system of government cabinet is the motive power of all political action. It is the magnet of policy and the supreme directing authority which co-ordinates and controls the whole of executive government, and integrates and guides the work of the Legislature. Yet, as in Britain, it has no legal status in Canada. It is an extra-constitutional body, a committee of Queen's Privy Council, whose acts are formally made the actions of the Privy Council which body has existence in law.[7] The whole machinery of the cabinet system is based upon conventions, unwritten but always recognised and stated with almost precision as the rules of law. It is by convention, that the members of the Cabinet are members of either House of Parliament and the Cabinet resigns office when it no longer holds the confidence of the House of Commons.

The British North America Act, 1867, now the Constitution Act, 1867, provides for the Privy Council. Section II states that ''there shall be a council to aid and advise in the government of Canada, to be styled the Queen's

7. Articles 11 and 12, North America (Constitution) Act, 1867.

Privy Council for Canada; and the persons who are to be Members of that Council shall be from time to time chosen and summoned by the Governor- General and sworn in as Privy Councillors, and members thereof may from time to time be removed by the Governor-General." The legal body, therefore, to be constituted for aid and advice in the Government of Canada is the Privy Council. It is chosen and summoned by the Governor-General and is subject to removal by him. But in practice, the Privy Council as a whole does not aid and advise the Governor-General. Nor is it removed by him as a whole. The real advisers of the Governor-General are the members of the Cabinet, the active part of the Privy Council, and they aid and advise him in the Government of Canada only by custom. All members of the Cabinet are, no doubt, members of the Privy Council, but all members of the Privy Council are not members of the Cabinet. The Privy Council consists chiefly of present and former ministers of the Crown and they generally retain their membership for life. In 1953 the Chief Justice of Canada, the Speaker of the House of Commons and the Senate, and the Leader of the Opposition were all made members of the Privy Council before they left for coronation of Queen Elizabeth to form a part of Canada's official delegation.

The Privy Council as a whole holds no meeting and this practice has been followed ever since 1867, except only for two occasions. It met for the first time in 1947, to receive the formal announcement by the King of his consent to the marriage of princess (now Queen) Elizabeth, and for the second time in 1952, to hear the proclamation of the accession of Queen Elizabeth on the death of her father, George VI. The Privy Council does not meet as a functioning body, and its constitutional responsibilities as adviser to the Crown are exclusively performed by Ministers who constitute the Cabinet of the day. In this way, Privy Council and Cabinet are two aspects of the same constitutional organism. In practice most of the executive powers exercised by the Governor-General-in-Council, such as, the making of Orders-in-Council, are performed by Cabinet resolving itself into a sub-committee of the Privy Council. The resulting Orders-in-Council are then signed by the Governor-General.

The Ministry and the Cabinet

The Cabinet and the Ministry in Canada are usually treated as if they are synonymous, and the fact is that during the large part of the Canadian history there had been no difference between the two. But there does exist a difference between them as it is in Britain, because not all the members of the Government formed by a Prime Minister make the Cabinet. A Cabinet consists of a select circle of colleagues of the Prime Minister who meet together from time to time to decide matters of high policy. The number of Ministers not in the Cabinet had remained till recently absolutely insignificant and it is only since the Second World War that this "penumbral group" has become fairly large. Before the War there used to be one or more members. In 1943, out of a total of twenty-seven members of the Government, twenty were in the Cabinet and seven not in the Cabinet, and in 1954 the number of the members not in the Cabinet increased to eleven. Since then this level has been maintained.

It means that Ministers in Canada, too, are not alike in status and they differ in importance. The first group comprised the great bulk of the personnel of the Cabinet, usually fourteen or fifteen in number, who "head up the government" and are also the immediate associates of the Prime Minister. Then, come the Ministers without portfolio, three or four, who are surely the members of the Cabinet, but are not the political heads of the Departments of administration. Britain, on the other hand, has not liked such a category of Ministers, though from 1915 to 1921 ten cases occurred of Ministers in the Cabinet without Portfolio. It ended in 1921 after ruthless criticism in the House of Commons. Baldwin revived it in 1935, but just for a brief period. In Canada it is a usual practice to have ministers without portfolio and there are one or two others who "may for a wide variety of reasons be similarly honoured."

Finally, is "the penumbral group" which has recently become fairly large. The most numerous of this quasi-ministerial group are the recently created parliamentary assistants, who are members of the House of Commons appointed to relieve the Cabinet Ministers of some of their less important duties. They are members of Parliament and they come and go out of office as the Cabinet Ministers do, but

they have no place in the meetings of the Cabinet and have nothing to do with the determination of policy. Nor do they head up the Departments of administration. They may be considered analogous to "Junior Ministers" in Britain.

A Canadian Cabinet differs from the British in its composition, but it is strikingly like the British in the thorough manner in which it accepts the pre-eminence of the Prime Minister along with the rules of homogeneity, collective responsibility and secrecy. The Cabinet government means party government and solidarity of the government demands its political homogeneity so that as a team all should play the game of politics under the captaincy of the Prime Minister. Like Britain, Canada hates coalition government and since 1867 there had been only one instance of a coalition Government when a Union Government was formed during the First World War to enforce the terms of the Conscription Act of 1917. The principle of homogeneity in government had such an impress on the mind of the Canadians that they have carried it through with unfaltering conviction. "There is something more required to make a strong administration," wrote Joseph How over a hundred years ago, "than nine men treating each other courteously at a round table. There is the assurance of good faith—towards each other—of common sentiments, and kindly feelings propagated through the friends of each, in society, in the Legislature and the Press, until a great party is formed....which secures a steady working majority to sustain their policy and carry their measures."

But in the selection of his colleagues, the Canadian Prime Minister does not exercise an unrestricted choice as the British Prime Minister does. The Canadian Cabinet is always designed to represent the principal races, religions and regions of the country. The representativeness of a member is sometimes much more evident than his ability. "The inevitable consequence is," as Dawson remarks, "that the choice of the Prime Minister is seriously restricted and he is often compelled to push merit to one side in making some of his selections." The first requisite of Cabinet composition is that every Province must have, if at all possible, at least one representative in the Cabinet. It makes the Cabinet federalised. This practice was begun while constituting the first Dominion Cabinet and since then it has hardened into a rigid convention.

The convention that each Province, if at all possible, must have at least one representative in the Cabinet makes another convention almost mandatory, namely, that the two large Provinces must each be given more than one representative. An effort is usually made to obtain at least one Protestant English-Speaking representative from Quebec and three and even four French. This gives to Quebec the minimum of four members. Ontario must also have four, and possibly five members and one of them should be a Roman Catholic of Irish extraction. "Provincial representation," remarks Dawson, "has frequently been further elaborated in that a few portfolios have been commonly recognised as the special preserve of certain areas." This kind of conscious and planned representativeness is deemed imperative in order to strengthen the Executive in a country having diverse religious, linguistic and economic interests. It helps to ensure that in reaching decisions the Cabinet will hear and discuss all the major interests and harmonise them in such a way as to satisfy all without jeopardising the national interests. "I feel," remarked Mackenzie King in 1922, "that the whole purpose of confederation itself would be menaced if any great body of opinion, any considerable section of this Dominion of Canada, should have reason to think that it was without due representation in the shaping of national policies."

Ministerial Responsibility

The Cabinet must speak as one on all questions of Government policy. A Minister who cannot support that policy must resign. Each Minister of a department is answerable to the House of Commons for that Department and the whole cabinet is answerable to the House of Commons for Government policy and administration generally. If the Cabinet is defeated in the House of Commons on a motion of want of confidence, it must either resign office or seek dissolution of Parliament.[8] Defeat of a major Government Bill is ordinarily considered as a vote of want of confidence, and leads to the same consequence—when the Governor-General will summon the leader of the Opposition and commands him to form a Cabinet or the outgoing Prime Minister may seek dissolution of the House of Commons. But

8. Joe Clark's Government resigned in December 1979 and the House of Commons was dissolved.

Cabinet can choose to consider any such defeat not decisive. It is open to the House of Commons to vote straight want of confidence.

The Cabinet forms a link between the Governor-General and Parliament. It is, for virtually all purposes, the real executive. The Cabinet's primary responsibility in the Canadian political system is to determine priorities among the demands expressed by the people (or discerned by the Government) and to define policies to meet those demands. The Cabinet is responsible for the administration of all Government Departments, prepares by far the greater part of the legislative programme of Parliament and exercises substantial control over all matters of finance—subject to Parliamentary approval of the expenditure of public funds.

THE PRIME MINISTER

Jennings describes the Prime Minister of Britain "as the keystone of the Constitution." The position of the Canadian Prime Minister is exactly the same, for like his prototype in Britain, he is the most powerful man in the country. He forms the Cabinet; he can alter it or destroy it. "The Government," to put it in the words of Greaves, "is the master of the country and he is the master of the government." And yet the office of the Prime Minister, like various other institutions in Canada, is not known to law. The Cabinet system of government pre-supposes the per-eminence and leadership of one single person and he is the Prime Minister. There are no legal powers which may determine the extent of his powers, but constitutional conventions, upon which is firmly erected the mechanism of government, give him the whole weight of government. Abolish the institution of the Prime Minister or diminish any part of his powers, the entire political structure would be destroyed.

The choice of the Prime Minister, as stated before, is obvious. The Governor-General summons a recognised leader of a political party having a clear majority in the House of Commons and that leader becomes the Prime Minister. But on occasions when the choice is neither obvious nor simple, as in the event of a sudden death or resignation of the Prime Minister or party dissensions, the Governor-General has some discretion in the selection of a Prime Minister. But such occasions do not occur frequently and since 1896, the Governor-General has not been called upon to use his own judgment in selecting a Prime Minister. It does not, however, mean that the power of the Governor-General has become obsolete. Dawson points out that "the conscription crisis in Canada in 1944 might easily have resulted in the Governor-General being compelled to choose a successor to Mr. Mackenzie King."

Powers of the Prime Minister

The powers of the Prime Minister, said Arthur Meighen, "are very great. The functions and duties of a Prime Minister in Parliament are not only important, they are supreme in their importance." Talking about the powers of the British Prime Minister Lord Oxford and Asquith, himself the occupant of that office in the first decade and a half of the present century, said, "the office is what its holder chooses to make it," and only a few holders exhibit any marked desire to lightly view their responsibilities and duties as heads of government.

The Prime Minister is the corner-stone of the Constitution and in his hand is the key of government. The Prime Minister makes the government, allocates offices, and has unabridged power of reshuffling or dismissing his colleagues. In the selection of his colleagues, the choice of the Prime Minister, as said before, is seriously limited, but once the Ministry has been formed the control of the Prime Minister over its members is unchallengeable. It is purely the personal authority of the Prime Minister to ask a colleague to resign or to accept another office. While referring to the question of ministerial responsibility, Professor Dawson writes, "The members of the Canadian Cabinet acknowledge three separate and distinct responsibilities: responsibility to the Governor-General, which is now rarely invoked in any aggressive sense; a responsibility to the Prime Minister and to one another, which produces what is called the 'solidarity' of the Cabinet; and a responsibility, both individual and collective, to the House of Commons."[9]

It is from Lord Argyll's time that the Prime Minister presides over the meetings of the Cabinet and as the Chairman of the Cabinet he attracts, like the British Prime Minister, a special kind of loyalty. He exercises a casting vote and it is inherent in the Chairman. If there arises difference of opinion in Cabinet discussions, the Prime Minister is the major influence in helping to arrive at decisions. Then, he determines the Cabinet agenda and thereby accepts or rejects proposals for discussion put forward by Cabinet Ministers. In this way, the Prime Minister leads the Cabinet. As the leader and guide of the Cabinet, the Prime Minister is al-

9. Dawson, R. M., *The Government of Canada*, p. 205.

ways consulted by every Minister before an important proposal is put forward. In fact, he is the chief co-ordinator of the policies of the several Ministers and Ministries.

The Prime Minister, as the leader of the parliamentary majority, guides the deliberations of Parliament. He leads the House of Commons, makes all principal announcements of policy and business, answers all questions on departmental affairs and upon critical issues, initiates or intervenes in debates of general importance, and corrects the errors of omission and commission of his colleagues. He apportions the time of the House of Commons and submits the measures of his Government for its approval.

The source of the authority of the Prime Minister lies in his "prerogative" to recommend the dissolution of Parliament. This prerogative, which in most circumstances permits him to precipitate an election, is a source of considerable power both in his dealings with his colleagues and with the other parties in the House of Commons.

Another source of the Prime Minister's authority derives from the appointments he recommends, including Privy Councillors, Cabinet Ministers, Lieutenant Governors of Provinces, Speaker of the Senate, Chief Justices of all federally-appointed Courts, Senators and certain senior executives of the Public Service. The Prime Minister also recommends the appointment of a new Governor-General to the Monarch, although this normally follows consultation with his Cabinet.

The Prime Minister is the leader of the parliamentary majority party, and, like the British Prime Minister, he may on special occasions man the entire policy. He is the link between the Governor-General and the Cabinet on matters of public concern and is in a special sense the chief adviser of the former. He also has the primary responsibility for the Council of Ministers advising the Governor-General when Parliament should be convened and when it should be dissolved. The Prime Minister may, also, attend and participate in international conferences or meetings and conduct relations of Cabinet rank with the Common wealth countries.

Position of the Prime Minister

The most apt description of the position of the British Prime Minister is the one given by Jennings, though Lord Morley's description that he is *primus inter pares* has now become classical. Dawson says that the Canadian Prime Minister "cannot be first among equals for the very excellent reason that he has no equals."[10] The actual authority of the Prime Minister is, indeced, great and his powers potentially enormous. One who appoints and can dismiss his colleagues and is, in fact, though not in law, the working head of the State, he can have no peers. The Prime Minister, therefore, "is, rather, a sun around which planets revolve."

But the Prime Minister's position is bound up with the party. So long as he retains the hold on his party, he is able, within limits, to dictate his policy. But a hold on the party has also an important reference to the relationship of the Prime Minister with his colleagues in the Cabinet. Dawson remarks that the quotation *primus inter pares* "contains, however, some truth: it calls attention to one very important aspect of this relationship, namely, that the other ministers are the colleagues of their chief and not his obedient and unquestioning servants."[11] A Prime Minister who treats his colleagues as his subordinates and issues orders to his Ministers or interferes persistently in their departmental work heads towards his downfall. Prime Minister Bowell attempted such an attitude and unnecessarily began interfering in the departmental work of their ministries with the result that seven members of his Ministry chose to rebel and he was compelled to agree to the terms dictated by them. Commenting on this outstanding Cabinet rebellion in Canadian history, Dawson remarks, "All members of the Cabinet are responsible to the House; and while they gladly acknowledge the leadership of the Prime Minister and will, in fact, usually bow to his decisions, they can never completely surrender their individual judgment or responsibility."[12] The office of the Prime Minister is, as Jennings says, necessarily what the holder chooses to make it and what other ministers allow him to make of it. His power and prestige essentially depends upon his personality and his personality significantly counts in leading the Cabinet, the Parliament and the nation.

SUGGESTED READINGS

1. Dawson, R-M (ed.) *The Government of Canada.*
2. Hutchinson, B. *Mr. Prime Minister, 1867-1966.*
3. Ricker, J.C., *How Are We Government?*
4. Saywell, J.T., *The office of Lieutenant-Governor.*

CHAPTER III

Parliament

The Parliament

The federal legislative authority is vested in Parliament of Canada, consisting of the Queen, an Upper House styled the Senate and Lower House known as the House of Commons. The Queen is represented by the Governor-General. The part of the Governor- General in the process of legislation has become little more than formal, for he must follow the advice of his Cabinet. This is the way of the parliamentary system of government. The Senate and the House of Commons are two different institutions having different functions and different characteristics. The Senate is in theory an independent legislative body and the British North America (Constitution) Act, 1867, endowed it with co-equal powers, but in practice it usually surrenders before a potent and consistent pressure of public opinion reflected in the votes of the Commons. Democracy demands that the Upper Chamber must not persist, though it should resist, and in strict obedience to this democratic principle the Canadian Senate has cautiously avoided a clash with the popular Chamber. It has, in fact, always submitted to the wishes of the House of Commons. It is really a recording Chamber and Parliament is surely the House of Commons. Yet it is the joint action of the Governor-General, the Senate, and the House of Commons, which law requires, to make legislation possible.

Under section 91 of the Constitution Act, 1867 (formerly the British North America Act, 1867), as amended, the legislative authority of the Parliament of Canada extends to the making of laws for the peace, order and good government of Canada. It includes authority to legislate[1] in respect of: the public debt and property; the regulation of trade and commerce; unemployment; insurance; the raising of money by any mode or taxation; the borrowing of money on the public credit; postal service; the census and naval service, and defence; the fixing and providing for the salaries and allowances of civil and other officers of the Government of Canada; beacons, buoys, lighthouses, and Sable Island; navigation and shipping; quarantine and the establishment and maintenance of marine hospitals; sea coast and inland fisheries; ferries between a Province and any British or foreign country or between two Provinces; currency and coinage; banking, incorporation of banks and the issue of paper money; savings banks; weights and measures; bills of exchange and promissory notes; interests; legal tenders; bankruptcy and insolvency; patents of invention and discovery; copyright; Indians and lands reserved for the Indians; naturalization and aliens; marriage and divorce; the criminal law except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters; the establishment, maintenance and management of penitentiaries. The Dominion Government also exercises all powers which are not specifically granted to the Provinces that is, residuary powers.

In addition, under Section 95 Parliament of Canada may make laws in relation to agriculture and immigration concurrently with Provincial Legislatures, although in the event of conflict, federal legislation is paramount.

THE SENATE

Bicameralism a Necessity

The democratic demand for bicameralism and more so in a federal polity was fully recognised and the British North America (Constitution) Act, 1867, recognizably provided for one. But the Senate in Canada, unlike its counterpart in the United States, was not planned to perform a strict federal function. Curiously enough, there was only one suggestion from the delegates of Prince Edward Island, at the Quebec Conference, that representation in the Up-

1. Clause 1 of Section 91 of the North America Act, 1867 in respect of amendment of the Constitution was repealed by the Constitution Act, 1982.

per Chamber should be on the strictly federal basis of equal representation of all the constituent units, big or small. Even this proposal was substantially modified by its proposer almost as soon as it was put forward and today Provinces, large and small, are much less concerned with representation into the Senate than representation into the Cabinet. "The most likely explanation of this lack of assertiveness on the part of the small provinces," observes Dawson, "is that the Conference (Quebec) regarded this feature of the American Constitution as one of the grave dangers implicit in the doctrine of State rights."

Another departure from the federal principle was the mode of appointment of the members of the Senate. The American experience with an elected Upper Chamber had not impressed the delegates of the Quebec Conference. They were convinced that inasmuch as responsible government was identified with the Lower Chamber, it was not desirable to create a possible rival by making the Upper Chamber as an elected body. The Conference, therefore, decided to have the members of the Senate appointed for life by the Governor-General.

And, then, the Senate was intended to be "the minor legislative partner"; a revising and restraining body. Sir John MacDonald affirmed at the Quebec Conference that the Senate "must be an independent House, having a free action of its own, for it is only valuable as being a regulating body, calmly considering the legislation initiated by the popular branch, and preventing any hasty or ill-considered legislation which may come from that body, but it will never set itself in opposition against the deliberate and understood wishes of the people." The Senate was, also, intended to represent property and conservatism. In the sixties of the last century when the constitution for the union was being discussed, there existed much distrust of "pure democracy." MacDonald and his associates were anxious to preserve minority rights and to erect bulwarks against the unheeded democratic tide. They desired to establish a constitutional system wherein "marked popular majorities" would not solely dominate, and "the sudden gusts of popular passion" would be controlled. "The right of minority," remarked Sir John, "must be protected, and the rich are always fewer in number than the less rich."[2]

The authors of the Canadian Constitution, therefore, sought to establish a Second Chamber which should reflect the will, not of more numbers, but of those with special position. Sir John MacDonald claimed that all colonial leaders at the Quebec Conference believed that the basic principles of the British Constitution should be conserved, "namely, that classes and property should be represented as well as numbers." And in accepting an appointed Chamber with distinct property qualification, the Senate was brought closer to the House of Lords and ensured, as Brady remarks, "the nineteenth century Whig ideal of a balanced representation of social interests."[3]

Composition and Term

From an original membership of 72, the Senate now has 104 members. The break up is 24 members from each of the four regions and six from New Foundland. The division into four regions is: (1) Ontario; (2) Quebec; (3) the Maritime provinces (10 Senators are allotted to Nova Scotia, 10 to New Brunswick and 4 to Prince Edward Island); and 24 the Western Provinces (6 Senators being allotted to each of the four Provinces of Mantioba. British Columbia, Alberta and Saskatchewan). Two Senators represent the Yokon and the North-West Territories. If at any time on the recommendation of the Governor-General the Queen thinks fit that four or eight members be added to the Senate, the Governor-General may appoint them, but the number of Senators must not at any time exceed 118. That is the legal maximum limit of membership of the Senate.

Section 23 of the North America (Constitution) Act, 1867, provided that a Senator must be at least thirty years of age, a natural-born or naturalised subject of the Queen, resident within the Province in which he is appointed and possesses property real or personal, to the value of four thousand dollars. In the case of Quebec, he must be a resident of the electoral district for which he is appointed. A Senator loses his seat for any of the following reasons: (i) if for two consecutive sessions of Parliament, he fails to attend the Senate; (ii) if he takes an oath of allegiance or makes a declaration of allegiance to a foreign power or does an

2. Refer to Alexander Brady's *Democracy in the Dominions*, p. 71.
3. *Ibid.*, p. 72.

act whereby he becomes a subject or a citizen of a foreign power; (iii) if he becomes bankrupt or insolvent or a public defaulter; (iv) if he is attained of treason or convicted of felony or of any infamous crime; (v) if he ceases to be a resident of the Province by shifting to some other; and (vi) if he resigns his seat in the Senate.

Senators are appointed by the Governor-General, who acts on the recommendation of the Prime Minister. Originally, they were appointed for life, but in 1965, a mandatory retirement age of 75 was set. "Senatorship has been invariably regarded", writes Dawson, "as the choicest plums in the patronage basket, and they have been used without compunction as rewards of faithful party service." Appointments are made, as a rule purely on party lines, although every Prime Minister admits that the system is unsatisfactory as it promotes narrow party interests. And yet every Prime Minister continues with it. There is only one solitary example when Sir John A. MacDonald appointed an opponent, John MacDonald, a Liberal. Party appointments undermine the efficiency of the Senate. Summing up the system of appointments, Dawson says: "There is no doubt that many of those appointed are a credit to the Senate; there is no doubt that the system is most useful as an instrument of party discipline and service; but there is equally no doubt that the chief purpose underlying these appointments is not the public good, but party patronage and advantage, and that this is reflected in the general low regard in which the Senate is popularly held."

Powers of the Senate

The British North America Act, 1867, (now the Constitution Act, 1867) does not define or limit the powers of the Senate excepting that the House of Commons has the sole power to originate all Bills for the raising or spending of money. The absence of any specific provision gives to the Senate co-equal legislative power with the Commons. But taking into consideration the intentions of the framers of the Constitution that the Senate was to act as a revising and restraining body to deal with possible errors or impulses of the Commons, and the fact that the Ministry is responsible to the Lower House as the prime guardian of expenditure, and survives only as long as it commands support from that House, the Ministry introduces all important legislation and defends its policies in the House of Commons. There is another important reason for the exclusion of the Senate. Since the twenties of the present century and as a result of the precedent set by Mackenzie King, only one Minister and that too without Portfolio sits in the Senate. This fact reduces the significance of the Senate in the enactment of laws and in the control of policy. Ministers introduce all important legislation in the Commons where they sit as members and are able to defend such legislation.

The tendency of Ministers to introduce all their measures in the House of Commons has, thus, deprived the Senate of any major part in the initiation of legislation. During recent years there has been an extraordinary change and between 1946-53, 138 Bills were introduced in the Senate as compared with 36 between 1924-45. The explanation of this increase lies in the fact that between 1946- 53, "Parliament has been overhauling and consolidating the bulk of the Canadian Statutes, and the Cabinet has generously allowed the Senate to participate in this very arduous labour." But this practice, Prof. Dawson observes, "cannot be extended indefinitely, if for no other reason than that the really able, energetic, and willing Senators are relatively few."[4] Private Bills usually originate in the Senate.

But once Bills reach the Senate, after they have passed the Commons, its effective participation ensures by proposing amendments or rejecting the entire Bill, if the Senators so desire. The Senate has never taken the position that its powers of rejection and amendment are absolute and independent of public opinion, "but it has ventured to oppose the Commons on the ground that the measure was not only inadvisable but that the Lower House had no popular mandate for this particular proposal." It rejected the Old Age Pension Bill in 1926, but accepted it next year because the Bill had received the mandate of the electorate at the new General Election and the government initiating it had been returned to office. There has, thus, established a sort of 'mandatory convention', as in Britain. Both the Senate and the Lords do not reject a Bill on which the mandate of the electorate has been obtained.

In revising Bills the Senate does really

4. Dawson, R. M., *The Government of Canada*, p. 343.

useful work. Bills are often sent from the Commons badly drafted, hastily assembled, and, in some instances, almost unworkable. Senators have more leisure and fewer distratctions than the members of the House of Commons. The talent and wider experience of some Senators make it possible for them to improve the Bills in a logical shape and draftsmanship. Then, they have no specific electorate to placate and they speak less to the gallery, for in truth there is seldom a gallery in the Senate. The investigatory work of the Senate's Standing Committees and Special Committees is also often distinguished. Detailed examination of the measures before the Senate is done in the Standing Committees at which the public may be invited to present their views and even members of the Cabinet may appear to give information and explain a particular proposal.

With regard to financial measures the British North America (Constitution) Act, 1867 definitely states that Money Bills originate in the House of Commons.[5] The Senate's power to amend them is a matter of dispute between the two Chambers. The Act itself is silent on this point. The House of Commons, taking precedent from its counterpart in Britain, asserts that the Senate has no power to amend Money Bills. "All aids and supplies granted to His Majesty by Parliament of Canada, are the sole gift of the House of Commons, and all Bills for granting such aids and supplies ought to begin with the House, as it is the undoubted Right of the House, to direct, limit, and appoint in all such Bills, the ends, purposes, considerations, limitations and qualifications of such grants which are not alterable by the Senate."[6] The Senate has "indignantly rejected" this right of the House of Commons. It has been maintained that such a power to be exclusively exercised by the Commons is an addition to the Constitution. The Senate argues that when the British North America (Constitution) Act, 1867, explicitly refers to the origin of Money Bills in the House of Commons, the omission in the Act with regard to amendment or rejection of Money Bills by the Senate is conclusive evidence that the framers of the law had no intention to place any restriction on the power of the Senate. The Senate has also urged that if it is to act as the guardian of the Provincial rights, it must possess the power to interfere in financial legislations that is detrimental to Provincial interests.

But these are only theoretical arguments. In practice the Senate has repeatedly amended Money Bills. "At such times," writes Professor Dawson, "it has not been at all uncommon for the Lower House to acquiesce in the Senate's amendments while adding the quite futile clause that the incident was not to be considered as precedent."[7] The Senate does not openly reject a pure Money Bill. It amends it, but when it puts amendments which are not acceptable to the Commons, it is tantamount to its power of rejection. And here the power of the Senate is superior to that of the House of Lords, which functions under constitutional limitations, as provided in the Act of 1911 amended in 1949.

Apart from its legislative and financial functions, the Senate has successfully conducted investigations at different times into current political and social problems. A Special Committee of the Senate held an inquiry in 1946, into the operation of the War Income-Tax Act and Excess Profits Tax Act and it did the job admirably well. Such inquiries can most fruitfully be conducted by the Senate, and every year there are innumerable inquiries which demand some scrutiny and drastic overhauling, and the Senate has the leisure, ability and freedom to investigate them.

The Senate was intended to be the "minor legislative partner" and this intention of the Constitution-makers finds expression in the two constitutional provisions. One relates to the composition of the House of Commons which provides that it will be an elected Chamber. Whatever be the reasons for an appointive Senate, this single provision gives to the Commons unquestioned position of eminence and authority as a representative Chamber. An elected Chamber is the mirror of public opinion and it must translate into practice the policy which has been endorsed by the people at the General Election. This is the first principle of a democratic government. Secondly, representation and taxation go together. Section 53 of the British North America (Constitution) Act, 1867,

5. Section 53.
6. House of Commons Standing Orders and Rules, No. 61.
7. Dawson, R. M. *Government of Canada*, p. 349.

gives powers to the House of Commons by providing that all Bills for the raising or spending of money shall originate in the House of Commons.

Apart from these two constitutional provisions, the eminence and authority of the House of Commons, and, consequently, weakness of the Senate, depends upon the practices of the parliamentary system of government. The essential feature of such a system of government is the responsibility of the Cabinet to the representative Chamber and the Constitution ordains that the Representative Chamber is the House of Commons. Once these three fundamental propositions are put in their proper context the position of the Senate becomes permanently settled, although there may be still room for development and adjustment of the functions which fall within the areas of the two Chambers.

There are certain functional weaknesses of the Senate too. Critics regard it as a sleeping beauty which neither acts as an effective brake to the hasty and ill-considered legislation passed by the Commons nor does it properly serve the purpose of revision. Sir George E. Foster in the course of a debate remarked: "Who on the street asks to know what is the opinion of the Senate upon this or that question ? Who in the press Really takes any trouble to know whether the Senate has any ideas, and if so, what they are upon any branch of legislative concern or upon conditions which require the best and most united work of all in order to arrive at a successful conclusion." There are others who regard the Senate merely as a House of echoes. Sir J. A. Marriot writes, "It will be observed that the Canadian Senate attempts to combine several principles, which if not absolutely contradictory, are clearly distinct. Consequently, it has never possessed either the glamour of an aristocratic and hereditary Chamber, or the strength of an elected assembly or the utility of a Senate representing the federal as opposed to the national idea. Devised with the notion of giving some sort of representation to provincial interests it has, from the first, been manipulated by party leaders to subserve the interests of central executive."

But Professor Dawson is of the opinion that despite the severe handicaps from which the Senate suffers, it has been able to do some genuinely useful work. "It revises and checks legislation sent up from the Commons and it takes by far the greater part of the load of private Bill legislation from overworked Commons. It has, however, not been a conspicuous success in guarding the rights of provincial or other minorities, although this was one of the chief reasons for its creation. Its attitude on social legislation has often been criticised as reactionary, but the evidence on this point is conflicting. The Senate, in short, has its merits, although they fall far short of justifying its continuance in its present form."[8] Professor Alexander Brady says that the relative success or failure of the Senate is a matter of opinion. "Its virtues," he further adds, "have usually been unhonoured or even unrecognised; its defects well publicized. It has failed to rivet on itself wide popular attention and esteem. It is commonly neglected by newspapers and seldom does it influence profoundly policies and legislation."[9] The Senate, as it is, is a weak Chamber and stands no comparison to the eminence, authority and importance of the House of Commons.

The first great handicap placed on the Senate was the system of appointment of its members. "The founders of the Dominion," says Professor Dawson, "accepted as inevitable the fact that if the Cabinet appointed the Senators, it would be for party reasons: but even they could scarcely have expected party gratitude to become so dominant a motive."[10] Except for the original appointments made in 1867, which represented all political groups, the Senatorship has always been a party spoils and it had gone to the orthodox members of the party in office who had served it long and with a meritorious credit. Former members of the House of Commons who had been defeated at the General Election or are "too old to battle further for office," moneyed persons who had liberally contributed to party campaigns, and others who had aided their party receive their reward and they constitute a considerable number of the appointees.

The result is, as Professor Brady remarks, "Whatever the zeal and ability of appointees or the depth of their experience—often they are men of distinguished achievement—they can

8. **Dawson, R. M.**, *Democratic Government in Canada*, pp. 412-13.
9. **Brady, A.**, *Democracy in the Dominions*, p. 72.
10. **Dawson, R. M.**, *Government of Canada*, p. 432.

seldom escape in the public mind from the stigma of receiving a reward rather than a call to service." Leftist parties have been highly critical of such party appointments and have never failed to emphasise the high percentage of Senators who sit on the boards of powerful commercial corporations. Here the Canadian Senate loosely resembles the House of Lords. It has become, like the Lords, a fortress of wealth and, consequently, the Senators are predominantly an economic interest who cannot and do not look to proposals for radical, social and economic reforms with any desirable sympathy. The composition of the Senate, therefore, is fundamentally responsible for the general low regard in which the Chamber is popularly held.

Another result of the composition of the Senate is the "air of superannuated indolence" which Lord Bryce discerned in the House of Lords. Life term of office, which has now been changed into mandatory retirement at 75, inevitably led to a larger number of Senators remaining in the Chamber long after they had passed the age of genuine usefulness. The great bulk of these superannuated members could not perform their duties with the same energy, zeal and effectiveness as youngmen, and the youngmen had no reason to go to the Senate as it gave them no hope to future career. The old men went there with the sense of opening up the last chapter of their career. Sir George E. Foster, after his appointment as a Senator, commented in his diary: "How colourless the Senate—the entering gate coming to extinction."

The Senatorship is, thus, a refuge for those whose active life is almost over,[11] and who are primarily concerned with a pleasant, secure and not very strenuous old age. Gratten O' Leary succinctly put the issue when he said, "the Senatorship isn't a job. It's a title. Also it's a blessing, stroke of good fate; something like drawing a royal straight flush in the biggest pot of the evening, or winning the Calcutta sweep. That's why we think it wrong to think of a Senatorship as a job; and wrong to think of the Senate as a place where people are supposed to work. Pensions aren't given for work."

Here is an obituary, quoted verbatim, of Senator Dessaulles who died in 1930, in his 103rd year, and it bears eloquent testimony on the usefulness or uselessness of the Senate:—

"Senator Dessaulles, dead at St. Hyacinthe, who held a seat in the Senate of Canada since 1907, had a remarkable record. So far is recalled by those around the Senate since he was there, he never once participated in any debate or gave expression to an opinion; but he followed the discussions closely and was there when the division bells rang. He was a kindly old man, held by all parties in venerable respect because of his great age."

The result is clear. The Senate may supply the opportunities to do useful work, but it does not supply at all adequate incentive for work. Political ambition is there dead. But there is the assurance of a secure existence and the salary is ample. There is, thus, "a general sense of futility in the red Chamber; few people listen to the speeches, the usual drama and excitement of politics are lacking, no vital issues hang on the Senate's votes, there are no reputations to be made, there are no fresh, aggressive, stimulating young minds to satisfy."

More fundamental than the above factors is the fact that despite the formal equality of powers of the two Chambers, the Ministry is responsible to the House of Commons and it survives only as long as it commands support from that House. Before the twenties usually one and occasionally two and even three Senators were included in the Cabinet and they were assigned definite portfolios. But Mackenzie King set a precedent and since then there is only one single Minister from the Senate and that, too, without a Portfolio. This reduces the importance of the Senate in the enactment of laws and in the control of policy. Ministers introduce legislation in the House to which they belong and where they can explain and defend their policies and it is in the House of Commons that explanation and defence really matters. The Minister without Portfolio has no portfolio to look after, no policy to defend and no work to account for. It is a sinecure assignment. The Senate and the House of Commons enjoy equal legislative powers, but Money Bills must originate in the House of Commons and its voice is decisive. In case of a deadlock between the two, the Governor-General may appoint four to eight Senators to resolve the deadlock. Since Senate appointments are party appointments, the party

11. In the 1945 Senate thirty-three out of the ninety-five had been over sixty years of age at the time of their appointment and this proportion more or less still continues.

in power will naturally make appointments to facilitate its triumph. The opposition of the Senate to the House of Commons matters nothing in the final analysis.

When all legislation originates in the House of Commons in the early part of a session of Parliament, the Senate has no business to transact. It must either wait or adjourn until the legislation of the session comes before it. "Year after year," complained Senator Arthur Meighen, "the services of this House are allowed to slumber for a good portion of the session." It is not uncommon for the Senate to adjourn for long periods immediately after the passage of the Address in reply to the Speech from the Throne. And when it meets, it functions leisurely and the debates are short. In 1938, for example, the Senate sat for 61 days and in 1939 for only 47 days. The debates generally cover less than 10 pages per day of the Hansard.[12] "While the value of the contributions made by the members of the Canadian Parliament," remarks Professor Dawson, "can scarcely be measured by the convenient method of totalling pages of debate, it is difficult to believe that the Senators have achieved so remarkable a brevity without losing much of the content in the prodigious effects of concentration. A perusal, of their remarks amply confirms the accuracy of this observation."

The Senate has also not succeeded in protecting property, Provincial, and minority rights although these were the original aims for creaing the Upper Chamber in Canada. Professor Mackay has specially gone into this aspect and his conclusions are that the Senate "has no consistent record as an upholder of the rights of the provinces, and the party lines have usually proved stronger than those of the section and province affected." Quebec is the only Province which reposes confidence in the Senate as the protector of its position and culture against encroachment or abuse. Other provinces are much less concerned with representation in the Senate. They are really concerned with representation in the Cabinet, which in Canada is a truly federalised institution. In the maintenance of rights of other minorities, "the Senate has proved," says Prof. Dawson, "to be of moderate but no exceptional service; although its alertness in Private Bill legislation has been of considerable help in protecting private property rights and public interests against the attacks of predatory corporations."

Reforming the Senate

The Senate, thus, suffers from its own handicaps and disabilities. It has been regarded as the weakest second Chamber in the world. All the same, it has been by no means a useless body and the Senators have performed a creditable service in revising and amending legislation. The Senators are frequently charged with partisanship, especially when a majority is hostile to the party then in office. "Yet ordinarily," says Professor Brady, "they are less motivated by party loyalty and less regimented by party discipline than members of the Commons. They are not without partisan spirit, and divide into the Government group and the Opposition, seated to right and left of the Speaker. But they are more impartial in discussing Bills, and in committees pursue their task with impressive care." With no specific electorate to placate, they are less inclined to oppose merely for the sake of partisan end, and speak less to the gallery, for in reality there is seldom a gallery. Being secure in their positions and not being subject to dissolution, like the Lords in Britain the Senators do not speak with one eye on the reactions of their voters to their speeches. They are responsible to no one, but, then, no one is responsible to them. The result is that although the debates in the Senate are usually brief, yet they are based upon ability and experience and often set a high standard of discussion. The Commons take due cognizance of what the Senators say. Even in financial legislation their voice counts. The question of its abolition, accordingly, does not arise. And democracy needs a second Chamber. Unless it is acceptably proved that democracy does not need a second Chamber, it is not democratic to abolish one in Canada.

But there has been from early times a demand for reforming the Senate, as no one has desired to maintain it in its present unsatisfactory condition. The difficulty of devising a second Chamber is no less acute in Canada than in other countries with parliamentary system of governments. In fact, there are certain special difficulties inherent in the Canadian structure of government. The population of the Maritime Provinces is more generously represented in the Senate than any other main section of Canada and they would be unfriendly to any scheme of reform which would tend to reduce the number

12. The official compilation of the proceedings of Parliament.

of its representatives. Quebec will be no less hostile to any consideration of senatorial reform and it has always been suspicious "of every constitutional innovation, traditionally on the defensive, guarding its culture and institutions against inter- ference from English-speaking Canada."

The Inter-Provincial Conference held in 1927, to discuss senatorial reform decisively rejected the proposal for an elective Chamber and accordingly, it continues to be nominated. "Thus, the Senate" Brady remarks, "remains as it is because no strong interests seek, and many would oppose, its reform and the indifference of the multitude gives it security." As a matter of fact, the question of Senate abolition or reform tends to become an issue with the Opposition or Government when the party balance in the Chamber swings the other way. Senate appointments are frequently used to give not only Provincial representation, but also representation to economic, racial and religious groups in the Provinces and Prime Ministers have very often placated the temporary irritations of minorities.

Some measures of reform, however, may not be impossible within the given framework. The Senate could be utilised to better advantage by initiating more bills in it. At the same time, the powers of the Senate should be limited, like the House of Lords, so that it could exercise only suspensive veto over ordinary legislation and exercise no control over Money Bills. Ministers should be permitted to introduce bills and speak in either Chamber, although they would vote only in the Chamber to which they belong, or the practice, as in Britain, may be utilised by placing a number of junior ministers in the Senate, or if more ministers were re-admitted in the Senate their junior ministers may be placed in the Commons.

THE HOUSE OF COMMONS

"The Canadian House of Commons, although it is not the oldest among the legislative Chambers patterned upon Westminster, is the first wherein representatives from federal colonies convened the inheritor of parliamentary traditions from the colonial legislatures which attained responsible government in the nineteenth century, and the forum for some eighty years where men of French and British descent have discussed their common affairs and achieved that delicate balance of interest on which the Canadian national state rests." The House of Commons is the great democratic organ of State government where public will finds expression and exercises its ultimate political power. It is the "grand inquest of the nation" where policies are discussed and legislative measures are hammered and to which body the Executive must turn to justify its public acts and get approval.

Composition and Organisation

The fundamental importance of the House of Commons is derived from its representative character. Canada has today full adult suffrage and, generally speaking, every man and every woman enjoys the right to vote if he or she is eighteen years of age, is a Canadian citizen, has been ordinarily resident in Canada for twelve months preceding the election and has been ordinarily resident in the electoral district at the date of issuing the writ authorising the election. Qualifications for representatives are not given in the North America (Constitution) Act, 1867 but are determined by statute. The present statutory qualifications are simple: The members of the House of Commons must be Canadian citizens and at least twenty-one years of age. Property qualifications disappeared in 1874. All but four of the members are elected from single member constituencies. Two constituencies—Halifax and Queens—elect two members each. The maximum term of the members is five years and the actual duration of membership depends upon the dissolution of Parliament. According to the Constitution Act, 1982, the maximum term may be extended "in time of real or apprehended war, invasion or insurrection....by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons." The usual term is four years. It has, indeed, become a tradition of Canadian political life that no Prime Minister will allow a term to run for the full five years if it can possibly be avoided. This is based on experience as well as on other practical considerations.

Section 37 of the British North America (Constitution) Act, 1867, had provided that the House of Commons shall consist of 181 members. Further, under Section 51, it was enacted that, after the completion of the census of 1871 and each of subsequent decennial census, the representation of the four Provinces should be readjusted. Membership of the House of Com-

mons was accordingly increased from time to time until it reached 255. In 1949, as a result of the Union of New Foundland, provision was made for its representation by seven members. This increased the membership of the House to 262. By Chapter 15 of the Statute of 1952, Parliament of Canada amended Section 51 of the British North America (Constitution) Act, providing for a new method of re-adjustment of representation of the House of Commons. Pursuant to this amendment a new Representation Act was passed, providing for a total of 265 members of the House of Commons. A further change in representation was assented to on March 13, 1975 when the North-West Territories Representation Act was approved. Provision was, accordingly, made for representation of the Yukon Territory by one member and the North-West Territories by two members. The membership of the House of Commons is now 282.

A member of the Canadian House of Commons, unlike his fellow member in Britain, is allowed to resign his seat. Absence from the sitting of the House is penalized. A member is allowed 21 days unexcused absence and for every day missed over that number, $60 is deducted from the total payment of his salary.

The Opposition

The Opposition occupies an essential place in Constitutions based on the British parliamentarry system. Like many other institutions in Canada, such as the Prime Minister and Cabinet, the Opposition, too, is founded on unwritten customs.

The choice of the Canadian electorate not only determines who shall govern Canada, but by deciding which Party receives the second largest number of seats in the House of Commons, it designates which of the major parties becomes the official Opposition. The function of the leader of the Opposition is to offer intelligent and constructive criticism of the Government and its policies. If it succeeds in overthrowing the Government, the leader of the Opposition might form the Government. If Parliament is dissolved on the advice of the Prime Minister and electorate approves the policy of the Opposition by returning it in majority at election its leader becomes the Prime Minister.

Although the position of the leader of the Opposition was not recognized in the British North America Act, 1867, it received statutory acknowledgment in Canada in 1927. The Senate and the House of Commons Act of the year provided for an annual salary to be paid to the leader of the Opposition in addition to the indemnity as a Member of the House. In 1963, the Senate and the House of Commons Act was further amended to provide for an annual allowance to each Member of the House of Commons (other than the Prime Minister or the leader of the Opposition in the House of Commons) who is the leader of a party that has a recognised membership of 12 or more persons in the House.

The function of the Parliamentary Opposition is to offer constructive criticism of the Government of the day, to ensure that Government proposals are carefully reviewed before they pass into law, to ensure the accountability of the Cabinet for the executive policies and activities, and to suggest alternative policies for the governing of Canadians. The final objective of the Opposition is to secure majority in the House; and while this can rarely be obtained by the direct alienation of Government supporters, it could occur as the result of a following General Election.

Parliamentary Procedure

In structure, Rules and Procedure the Canadian House of Commons inherits the British parliamentary customs and usages. The general principle is that whenever a matter of legislative practice or procedure is not modified or replaced by the Canadian House, the usages and the customs of the British House of Commons will be followed.

Immediately after the General Election the Governor-General-in-Council summons the House of Commons and after taking the oath the members proceed to elect their Speaker. The name of the candidate for Speakership is conventionally proposed by the Prime Minister and seconded by a member of the Cabinet and almost invariably the Opposition parties express their approval. In Britain, the Speaker of the last Parliament is normally re-elected irrespective of party changes or his own party affiliation. In Canada, on the other hand, a new Speaker is usually chosen for each Parliament, and he must belong to the Government Party. This practice enables the House to alternate more frequently the Speakers from English and French Canada; the convention being that if the Seaker of one Parliament is of British origin,

the Speaker of the next Parliament must be a French Canadian, and both the Speaker and the Deputy Speaker must not come from the same race.

The duties of the Speaker are as onerous as that of his prototype in Britain. He presides over the deliberations of the House, maintains decorum, puts questions to the House, reads any motion or resolution and protects the person of the Members from insult. He maintains the conduct of debate in accordance with the rules and practices of the House and is the guardian of the powers, the dignities, the liberties and the privileges of the House. The Speaker votes only in case of a tie.

After the election of the Speaker the House breaks, but it reassembles shortly before the time appointed by the Governor-General when the Usher of the Black Rod announces that the Governor-General desires the attendance of the House in the Senate. The Governor-General then reads Speech from the Throne outlining the policy of the Government and the legislation which it intends to bring in Parliament in the coming session. After the Speech had been delivered, the Commons return to their Chamber. The Speech comes before the House for discussion on a Motion of Thanks from the Treasury Benches. It gives an opportunity to the Opposition to offer criticism against the policy of the Government and the Leader of the House—the Prime Minister—gives his explanation for pursuing such a policy. When the House adopts the Motion of thanks, it expresses the confidence in the Government.

The basic procedure in the passage of public Bills is the same, and here, again, Canada follows Britain in making distinction between Government Bills, Private Members' Bills, and Private Bills. The procedure is that Bills receive three readings in the House, three in the Senate, and then go to the Governor-General for his assent, if approved by both the Houses. In case of differences between the two Houses, a conference is held between representatives of each House to discuss and if possible to reconcile the differences. If agreement is not reached, the Governor-General may nominate four to eight Senators to resolve the deadlock; the position similar to one available in Britain to create more peers to resolve the deadlock between the Lords and Commons prior to 1911. The Canadian Committee system also resembles the British Committee system; the Committee of the Whole, the Select Committees, and the Standing Committees. The procedure followed herein is also similar.

Functions of the House

Theoretically, the Commons and the Senate possess co-equal legislative powers. But with the stabilization of the parliamentary government and because of two specific provisions in the British North America (Constitution) Act, 1867, —the Senate is appointive whereas the House is popularly elected, and that all Money Bills must originate in the House of Commons—the Commons has become the pivot of all legislation and the Senate is lost in oblivition. Bills may be introduced in either House, but Bills imposing any charge on the people or making any grant for the services must originate in the House of Commons. The Rules of Procedure lay down that "all aids and supplies granted to His Majecty by the Parliament of Canada are the sole gift of the House of Commons, and all Bills for granting such aid and supplies ought to begin with the House, as it is the undoubted right of the House to direct, limit and appoint in all such Bills the ends, purposes, considerations, conditions, limitations and qualifications of such grants, which are not alterable by the Senate." Money Bills must be introduced by the Ministers.

The House of Commons must invariably ratify all measures which the Cabinet submits, but in the process of making laws it provides an opportunity to discuss and criticise. In fact, the deliberative function is a part of the legislative function of Parliament wherever the parliamentary system of government exists. The most important function of the Opposition is to criticise matters of administration and policy-making and, thereby, to make the Government to defend its intentions and practices. Even the opinion expressed by members of the majority party may carry enough weight to bring about substantial modifications in the Cabinet's proposals. The Opposition may also be able to secure a few modest concessions. No government, whatever be its majority, can remain oblivious of the criticism of the Opposition. A government which neglects the Opposition does so at its own peril, because the lapses of the Government are the opportunities of the Opposition and it uses them to appeal to the public opinion. Nor is the government insensitive to the reactions of its own followers. Signs of unrest

against its policy in the constituencies, amongst interest groups or on the part of a sufficient number of back-benches, may lead to changes in the government's plans and proposals.

The Rules of the House allot most of the time to the Government business and the Government has the sole power to move closure. But the Rules are careful also to provide abundant opportunity for the Opposition to question, criticise and attack. Twenty-five days of each session are specifically allotted to the Opposition to debate any subject it pleases, and on six of these days it can move a motion for want of confidence.

A vital aspect of the critical function of the House of Commons is its power of controlling the Executive, or its powers of general supervision. The responsibility of the Ministry to the House of Commons involves a constant control of the House over the Government. Indeed, control and responsibility go hand in hand. The House of Commons exercises its control in two ways. The first is the constant demand in the House for information about the actions of the Government and this is done through the medium of oral or written questions. The members of the House are given opportunity normally on three days in a week to address questions to Cabinet Ministers concerning various phases of public affairs. Supplementary oral questions are sometimes allowed, but they are not very common, and are definitely not encouraged. The House may conduct investigations into the administration of Departments and, thus, bring out the activities of the Government into the light of publicity.

The second is the criticism that is regularly aimed at the Government. This is done when laws are made and the policy of the Government is under review. The best opportunity for the Opposition to criticise the policy of the Government as a whole is when it debates the Speech from the Throne which incorporates the policy of the Government which it intends to pursue and the legislation it proposes to enact. Discussion of public finance, more especially of proposals for expenditure, offer a very real opportunity for discussion and criticism. If the Opposition, for example, disapproves the Government's foreign policy, it uses the debate on appropriations for the Foreign Office as an occasion for criticism.

In addition to these regularly scheduled debates; the normal occasion for criticism of the Executive is the debate on a motion of adjournment. A member may ask leave to move the adjournment of the House "for purposes of discussing a matter of urgent pubic importance." If the Speaker decides that the matter is urgent and at least twenty members support it, the motion is allowed. If less than twenty but more than five support it, the question of leave is at once referred to the House for a decision. The most direct method of launching an attack on the Cabinet is the motion of no confidence. Motion for a vote of no confidence is really a crucial occasion in the life of the Cabinet, because it decides its fate. As long as a Government can command a comfortable majority, it is not possible for such a motion to get through, still it creates embarrassments in the ranks of the Ministry. Amendment to a Government's motion or an immediate attack on a Government measure inferentially becomes an issue of "no confidence." There are times when a Cabinet may itself take the initiative and demand a vote of confidence from the House as it was done in January, 1926.

The House of Commons is a selective body. It is here that the national talent is exhibited and the members make their mark. The House does not actually pick the Cabinet, but the fact that the Cabinet must always be able to retain the support of a majority of the House gives the Chamber a negative power of choice. The House selects ministers indirectly in yet another way. It provides the rigorous environment in which ministerial talent must prove its worth and establish its right of office. The prospective ministers usually serve an arduous apprenticeship in the House; and while many cease to be serious contenders long before their party comes to power or vacancies occur in the Cabinet, the few able survivors have had ample opportunity to develop their capacity before they are called upon to assume office. And as Professor Laski observes, there is "no alternative method that in any degree approaches it."[13]

The House of Commons educates and leads public opinion on many questions. All that comes before the House of Commons had not been before the people at the time of the General Election and their mandate could not

13. Laski, H. J., *A Grammar of Politics*, p. 300.

be obtained thereupon. Many matters are new and many problems emerge out of the national and international movement of events which could not be anticipated. The House talks, argues, investigates, opposes, decides, and very often postpones action on various matters, and while doing so it arouses interest and helps to create a more enlightened opinion throughout the county. Referring to this process in Britain, and it is equally applicable in Canada, Professor Ivor Jennings says, "So the discussion radiates from Westminster in waves of ever-decreasing elasticity. Arguments are transmitted, prevented, simplified, perhaps distorted. A 'Common opinion' develops, and creates new waves which find their way back to Westminster. They set going new arguments in the smokeroom and more formally in the House. In their turn these arguments produce new rays which go back to the ordinary people. In this way there is a constant intercharge between Parliament and people which does produce a constant assimilation of opinion....The purpose of Parliament is to keep them (the Cabinet) in touch with the public opinion, and to keep public opinion in touch with the problems of government."[14]

Finally, the House of Commons is a unique institution of national importance "which presents in condensed form the different interests, races, religions, classes and occupations, whose ideas and wishes it embodies with approximate exactness." In the land of diversity, as Canada is, it brings unity. The representatives of the people of all shades and opinions, languages and religions, territories and occupations meet together, talk and discuss their viewpoints, hammer the issues and reconcile the differences in order to present the people one single united policy. The House is, thus, to use Mill's phrase, "the nation's committee of grievances and its Congress of opinions," the members of which with their varied experiences and diverse samplings, are genuinely and actively concerned with the promotion of the national welfare. This gives strength to the government of the time and enables the Cabinet to proceed with far more assurance and certainty to work which lies before it. Mackezie King declared in the gloomy days of 1940: "I can say frankly to honourable members that it is a source of comfort rather than the opposite to have Parliament in session at a time such as this. I say that quite sincerely. There is comfort in the sense of knowing that where the situation is as serious as it is, the body of the people's representatives are here and can express freely their views, as can the Government its views and what it is doing, in a manner which it is not possible to do through the press....I would not wish a long period to elapse, with the country and the World in the state in which it now is, without having an opportunity of consulting with the members of Parliament and having them fully informed with respect to what the Government is doing."

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CHAPTER IV

The Federal Judiciary

System of Courts

The system of courts obtainable in Canada possesses certain characteristics which are due to the federal nature of the government. But it has not followed the American idea of what a system of courts should be under a federation. In the United States there are two sets of courts, Federal and State, distinctly constituted and with well demarcated jurisdiction. Within their own field of jurisdiction the Supreme Court of the United States and the Supreme Courts of Appeal in the States are the final Courts of Appeal. In certain circumstances a dispute may be transferred from one to the other. For example, if a case involves the interpretation of the Constitution or a federal statute, it may be transferred from the jurisdiction of a State Court to that of a Federal Court. Such transfers, however, do not make the rule and a case will normally finish in the system in which it originated.

The British North America Act, 1867, (now the Constitution Act, 1867) established two systems of courts, Federal and Provincial, but the dividing line between them is horizontal rather than vertical. Parliament is empowered to create a general court of appeal and may establish any additional courts for the better administration of the laws of Canada."[1] The Provinces exercise jurisdiction over the administration of justice, including the constitution, maintenance and organisation of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts."[2] Procedure in criminal matters is within the competence of the federation. The Federal Government also controls the appointments, the remunerations and the removal of Judges at the Centre and in the Provinces (with a few minor exceptions).[3] The great majority of cases originate in one of the Provincial courts and can go up to the Supreme Court of Canada on appeal, and until 1949 from there to the Judicial Committee of the Privy Council in Britain. The Exchequer Court of Canada, which is a Federal Court, has been given a specialised jurisdiction, and is, accordingly, not like a Federal Court on the American model.

Under Section 99 of the British North America Act, 1867, (Constitution Act, 1867) the Judges of the superior courts hold office during good behaviour but are removable by the Governor-General on an address of the Senate and the House of Commons. By virtue of the British North America Act, 1960, (the Constitution Act, 1960), Judges of superior courts now cease to hold office upon attaining 75 years of age. The tenure of office of county court judges is fixed by the Judges Act as being during good behaviour, and their residence is required to be within the county or union of counties for which the court is generally established.

Federal Judiciary

The Parliament is empowered by Section 101 of the Constitution Act, 1867 (formerly the British North America Act, 1867), to provide, from time to time, for the constitution and organization of a general Court of Appeal for Canada and for the establishment of any additional courts for the better administration of the laws of Canada. Under this provision, Parliament has established the Supreme Court of Canada, Federal Court of Canada, and certain miscellaneous courts.

Supreme Court of Canada

At the apex of the Canadian system of courts is the Supreme Court of Canada, established in 1875 and is now governed by the Supreme Court Act, 1962. The court consists of a Chief Justice, eight puisne judges. Originally, the court consisted of a Chief Justice and five

1. Section 101, The North America Act, 1867 (now the Constituttion Act, 1867).
2: Section 92, sub-section 14, *Ibid.*
3. Sections 96-100, *Ibid.*

judges. The number of Judges was raised to six in 1927 and then to eight in 1949. The Chief Justice and the puisne judges are appointed by the Governor-General-in-Council, and they hold office during good behaviour and are only removable by the Governor-General on address of both the Senate and the House of Commons. They cease to hold office upon attaining the age of 75. The Court sits at Ottawa and exercises general appellate jurisdiction throughout Canada in civil and criminal cases. The Court is also required to consider and advise upon questions, referred to it by the Governor-General-in-Council and it may also advise the Senate and the House of Commons on Private Bills referred to the Court under any rules or orders of the Senate or the House of Commons. It should be noted that the Supreme Court of Canada and the Provincial Courts apply both Federal and Provincial laws and that their division of authority is not coincident with the division of legislative authority between the Federal and provincial Governments.

Generally speaking, in civil cases appeals may be brought from any judgment of the highest court of final resort in a Province only when leave to appeal has been sought and secured either from the highest court of final resort in that Province or from the Supreme Court of Canada itself. In the latter case leave may be granted even when such leave has been refused by any other court, when, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law involved in such question, one that ought to be decided by the Supreme Court. The former automatic right of appeal to the Supreme Court in civil cases where the sum claimed was in excess of $ 10,000 was repealed in January, 1975.

In criminal cases the appellate jurisdiction of the Supreme Court is conferred by Sections 613-624 of the Criminal Code. Aside from cases in which a person stands sentenced to death or in jeopardy of such a sentence, persons convicted of indictable offences may appeal to the Supreme Court only on question of law on which a Judge of the Provincial Court of appeal dissents or on a question of law with leave of the Supreme Court.

Appeals from the Federal Court, primarily the Federal Court of Canada, are regulated by the statutes establishing them. Such appeals may essentially be made only with leave of the Court.

The Supreme Court is also a final Court of Appeal and its judgment is conclusive in matters of constitutional interpretation, and in cases, where validity of Federal and Provincial statutes is in dispute.

The Judicial Committee of the Privy Council was until recently the final court of appeal for Canada for all but criminal cases. This had eclipsed the position of the Canadian Supreme Court. For a very long time, therefore, it had been a growing feeling in Canada that to send appeals to the Judicial Committee of the Privy Council in London was below the dignity of a nation marching towards statehood. Attempts were made on various occasions to abolish it, but this could not be accomplished. When the Statute of Westminster, 1931, removed the limitations on the competency of the Canadian Parliament, criminal appeals were abolished in 1933. An amendment to the British North America Act, passed in 1949 provided an authority for the Parliament of Canada to legislate in respect of constitutional matters and in the same year a Canadian Statute abolished all appeals to the Privy Council and made the Supreme Court a court of final appeal in all cases. Its judgments in all matters are conclusive.

Federal Court of Canada

As a result of a sweeping revision in 1970, the Exchequer Court of Canada, established in 1875, has been replaced by the Federal Court. This Court consists of two divisions, Trial and Appeal, with a total of 12 judges. Both divisions sit throughout Canada. There is a now retirement age of 70 for these judges. They hold office during good behaviour and are only removable by the Governor-General on address of the Senate and House of Commons. The Federal Court of Appeal has as part of its jurisdiction the competence to review all decisions and orders of a judicial or quasi-judicial nature rendered by federal boards or other tribunals, on questions of error in law, excess of jurisdiction, or failure to apply the principles of natural justice. The intent of this reform is to speed up proceedings and to encourage the development of a coherent body of administrative law. The Trial Division's jurisdiction included jurisdiction in respect of such matters as admiralty, patents, customs and excise, and income tax. It also has jurisdiction in claims involving indus-

trial property and in suits involving the Crown in right of Canada. In effect, the Crown in right of Canada is now in the same position before the court as an ordinary litigant.

An appeal lies to the Supreme Court of Canada from any judgment of the Federal Court of Appeal with leave of that court when in the opinion of the Court of Appeal, the question involved in the appeal is one that ought to be submitted to the Supreme Court for decision. Further, an appeal to the Supreme Court lies from a final or other judgment or determination of the Federal Court of Appeal, whether or not leave to make such appeal has been refused by the latter Court, when, in the opinion of the Supreme Court, the question involves a matter of public or legal importance. As with civil appeals to the Supreme Court of Canada, the former automatic right to appeal from a judgment of the Federal Court of Appeal in cases in which the amount in controversy exceeded $10,000 was repealed as of January 27, 1975. An appeal to the Supreme Court continues to be from any decisions of the Federal Court of Appeal in the case of a controversy between Canada and a Province or between two or more Provinces.

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CHAPTER V

Political Parties

Party System in Canada

The democratic government as it is understood and practised in Canada simply cannot function without well organised political parties. Like various other institutions inherited from the mother country, the Canadian statesmen in the early days of federation adopted the same pattern of political parties and even gave them the same names—the Conservatives and the Liberals. It does not, however, mean that there had been no other political party beyond the two. Third parties have frequently arisen, but none of them has yet been in a position to challenge effectively the predominance of the Liberals and Conservatives. But the main items in the party programmes were included by a "sheer chance of the cards." Thus, the Conservatives became protectionists and the Liberals opposed such a policy. It is really surprising that in a country inhabited by two races of different languages and religions these differences have not accounted for the division of the parties, although they have occasionally been assisted in the climb to power by skilfully exploiting sectarian and racial jealousies, especially on the issues of bilingualism and denominational schools.

The most important characteristics of the political party system in Canada are, therefore : (1) there is no clear-cut line of division of affinities among the people. Each party commands allegiance from the people in different walks of life. The rich and the less rich, for one can hardly talk of the poor in Canada, the farmers, merchants, manufacturers, shopkeepers, professional men have been found in both the major parties. The Canadian party system is, accordingly, not based upon any distinct ideology. Party membership is the result of chance. (2) The party feelings in Canada do not introduce bitterness in society. No party in Canada can go very far unless it derives support from two or more regional areas in the country and as a consequence of this a national party must take as its primary purpose the reconciliation of the widely scattered aims and interests of a number of these areas and bring together people possessing divergent interests and beliefs. The differences with the parties are, thus, frequently more acute than between the parties themselves. (3) Canada has consistently followed the two-party system and it is only within the past forty years or so that the third parties have emerged. The political parties in Canada have acquired a prominence hitherto unknown. The emergence of the Labour Party and the organisation of the famers into a separate party with definite objects are threatening to the two-party system, as they challenge claims of the other associations to represent adequately the diverse interests within the nation.

Canada has now four political Parties: (1) The Progressive Conservative Party; (2) The Liberal Party; (3) The New Democratic Party: and (4) The Social Credit Party of Canada.

The Progressive Conservative Party

The origin of the Progressive Party, till 1942, known as the Conservative Party, may be traced back in 1857, when a number of separate groups in the Province of Canada brought together a temporary coalition, which proved afterwards to be permanent, under the name of Liberal-Conservative. It was composed of extreme Tories, moderate Liberals from Upper Canada, together with French moderates, and some English-speaking members from Lower Canada. The coalition soon fell under the leadership of John A. MacDonald who by dint of his domineering personality and afterwards by a dogged desire to see confederation established in Canada, was able to weld the members together. He drew members from other groups and Provinces and, thus, formed a genuine political party. So strong a hold it afterwards exercised on the people that the party was able to retain office, with but one five-year interval, until 1896.

The role and outlook of John A. MacDonald and the Conservative Party have been compared to those of Hamilton and the Federalists in the United States. This is correct, and MacDonald and his successors in the leadership of the Conservative Party often paid genuine tributes to Hamiltonian doctrines. Like the Federalists, the Conservatives stood for centralisation, identified themselves with the propertied, commercial and industrial interests, and above all with these interests succeeded in solving the practical task of nation-making. The centralising influence and the policy of unifying the people of diverse interests, origins and beliefs into one single whole found expression in the national policy of a protective tariff, in the construction of the trans-continental railway, and in many other policies which were directed towards that end. Economic nationalism was, therefore, considered the best means of welding the people in a community of different interests and aspirations. And this continues to be the policy of the party even now and its programme includes schemes of social insurance, abolition of child labour, fixing of minimum wages and maximum hours of work.

In May 1979 General Election the Progressive Conservative Party won 136 seats in a 282-member House of Commons and formed the minority government, ending 16 years of Liberal Party's rule. But the minority Government was defeated after nine months in office and new elections were held in February 1980. The Progressive Conservatives could secure only 101 seats and, consequently, made way for the Liberal Party to form the government.

The Liberal Party

The origin of the Liberal Party remains hazy, but it, undoubtedly, goes back to the early reformers who fought for responsible government. After the establishment of the Confederation, however, the separate elements in the Provinces did not put any energetic effort to combine themselves and constitute a genuine political party. Many of the Liberals had opposed the confederation and when it came into being, they became lukewarm. But the centralizing policy of the Conservative Government forced them to defend the rights of the provinces. The Liberals, or the Clear Grits, as they were called in Upper Canada, were inspired by Jeffersonian ideas and his Anti-Federalist party. There was another close resemblance between the Liberals and the Anti-Federalists. Both were based on frontier agrarian democracy with distinct radical tendencies. "The Clear Grits were indeed," writes Prof. Dawson, "definitely influenced by the successors to the Jeffersonians, the Jacksonian Democrats. They were opposed to wealth and privilege in any form, and they favoured soft money, universal suffrage, frequent elections, and various other 'republican' measures well known south of the border." Another group which was affiliated with the Liberals was the Rouge party from Quebec. It was anti-clerical and had aroused the opposition of the Roman Catholic Church and after Confederation it had definitely declined in size and importance. To these two elements were joined some reformers, secessionists and independents from New Brunswick and Nova Scotia.

The first Liberal Government came into power in 1973, after the Pacific Scandal, when all the three groups, the Clear Grits, Quebec Rouge, and the Progressive Liberals, combined together under the leadership of Alexander Mackenzie, although the groups acknowledged also a separate allegiance to their own leaders. Various factors were responsible for the defeat of the disunited Liberals and their remaining in the wilderness for about almost two decades. When Laurier became the Liberal leader in 1887, he welded the different groups and made a genuine national party. Laurier had realized the urgent need for national unity. "Brilliant in speech, masterly in tactics, Laurier warned his countrymen from the Conservative loyalty, attached them to his own Gladstonian Liberalism, and sought no less skilfully than MacDonald to win support through the whole country by emphasizing the policies of material expansion. He exalted the spirit of compromise whereby alone a national leader in Canada could survive. Above all, he purged the Liberal creed of anti-clericalism of the Rouge Group, and, thus securely anchored his party in the French Province." Laurier's successor was Mackenzie King and he followed the high ideals and traditions set by his leader with strict fidelity with the result that Mackenzie King could command in Quebec even more unqualified support. And from 1887 to 1948, for full sixty-one years, the Liberal Party had two leaders to shape its destiny whereas the Conservative Party had ten during this period. "From this unbroken continuity of political strategy it derived great prestige and formidable weight." It continues to retain its strength in Quebec and

obtains enough support in other regions and is the most truly national party in Canada. It was ousted from office by the Conservatives in the elections of 1957. The Liberals returned to power in the next General Election and remained in office till May 1979 when the Progressive Conservative Party formed the minority government with 136 seats. But the Liberals were again returned to power in February 1980 General Election with a comfortable majority of 146 seats.

The Liberal Party stands for low tariff and does not advocate the interference of the State in the economic life of the country. It still champions the right of the Provinces and the Sovereign status of Canada within the British Empire. It stands for making trade agreements not only with the members of the British Empire, but also with the foreign countries on the basis of reciprocity. The analysis of the programmes of the Conservative Party and the Liberal Party will reveal that the former stands for economic nationalism whereas the latter for political nationalism and the truth is that political and economic nationalism are merely twin sisters with little difference.

Early in 1978, Prime Minister Pierre Trudeau made public his proposal for a new Constitution which was to be a Canadian-based statute. But the publication of the draft constitutional proposal immediately provoked widespread criticism. After prolonged discussion an agreement was reached between the government of Canada and nine Provincial Governments, in November 1981, to patriate the Canadian Constitution and entrench a Charter of Rights and Freedoms and an amending formula. The resolution on the Constitution was adopted by Parliament in December 1981 and the British Parliament enacted it forthwith. The Proclamation bringing Canada's new Constition Act of 1982 into law was signed by Queen Elizabeth in Ottawa on April 17, 1982. It was Trudeau's personal achievement and a triumph of the Liberal Party as it ended the anachronistic practice of British Parliament amending the Constitution of a sovereign State.

The New Democratic Party

The New Democratic Pary dates from 1961, when the major trade union federations (the Canadian Labour Congress) and the Cooperative Commonwealth Federation party joined forces to launch a new Party. The Cooperative Commonwealth Federation had been founded in 1932 by a group of farmer and labour parties in the Western Provinces. Prior to 1939 the labour movement was industrially and politically weak, and produced no party with sufficient electoral strength to achieve more than a meagre representation in some Provincial legislatures. This was due to the socio-economic causes. In 1932, however, the Cooperative Commonwealth Federation was formed in order to pool together their political interests. The C.C.F. was able to make some general appeal to members of all occupations. It had a socialist programme and contemplated a new social order based upon sweeping economic changes. It advocated socialisation of all financial agencies, transportation, communication, and public utilities, social insurance—covering old age, illness, accident and unemployment—freedom of association, socialistic health services, crop insurance, encouragement of co- operatives, abolition of the Senate, etc. It urged repeal of the Immigration laws and stands for equal rights of citizenship for all irrespective of sex, class, origin, or religion; restoration of civil liberties; and the right of labour to organize itself. The party advocated repeal of taxes on the necessaries of life, taxation on land values, exemption of small income from forms of militarism. The programme of the new party substantially remains the same. In May 1979 General election the New Democratic Pary won 26 seats whereas in February 1980 Elections it increased its strength to 33.

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CHAPTER VI

The Canadian Political System

A Nation in Making

Canada's political tradition represents a fragmented past both structurally and in terms of development. The territories which now constitute Canada were originally the homelands of the native Indian tribes in the eastern, central, southern and western parts of the country as well as of the Eskimos in the cold northern areas which have an arctic climate. The Indian population now numbers 245,000 and the Eskimo population is estimated at 17,000. A tragic element of Canada's colonial history was the systematic genocidal violence directed against the tribal people who were forcibly displaced from their settled areas and compelled to migrate further west and north under threat of mass extermination. Most of these tribes were relatively peaceful and their political organisation was fairly democratic. The tribal chief possessed specified powers and important matters were decided by the tribal council.

The Indian and Eskimo tribes had no notion of private property in land. Land and forests were considered collective possessions of the entire tribe. Agriculture was often managed by women while men generally engaged in hunting and fighting. The Europeans began to occupy their common lands, clearing forests and claiming all such land as their private property. This brought the whites and Indian communities into conflict and defeat and dispersal of the latter who were thus ejected from their age-old, rightful habitat. Most of the Indians and Eskimos, who have survived the white onslaughts, are now confined to the Northwest Territories or Reservations in other Canadian Provinces. Today a Cabinet Ministr in charge of Indian Affairs and Northern Development looks after their welfare and development.

After three centuries of oppression and exploitation, they are gradually being brought into the national mainstream. A vast new autonomous territory of Nunavut has been created from part of Canada's North-west Territories on April 1, 1999 where mostly Eskimo tribes live. About 27,000 residents of this area recently elected a 19-member assembly, which is almost entirely Intuit in character. The assembly has been invested with a wide range of powers over a territory equal in size to Western Europe. Voter turn out in Nunavut topped 80% in temparature of –30°C. This is a big step in the integration of indigeneous communities within the multinational Canadian nation.

Like the United States, Canada is also a nation of immigrants. The territories, constituting Canada now, came under British colonial rule at various times by conquest, cession or settlement. Nova Sctotia was occupied in 1628 by settlement at Port Royal, was ceded back to France in 1632 and was finally returned by the French in 1713, by the Treaty of Utrecht. The Hudson's Bay Company's charter was granted in 1670, which conferred rights over all the territory draining into Hudson Bay. Canada, with all its dependencies, including New Brunswick and Prince Edward Island, was formally ceded to the United Kingdom by France in 1763, Vancouver Island was acquired by the Oregon Boundary Treaty of 1846 and British Colombia was created as a separate British colony in 1858. The British North America Act of 1867 granted the right of self-government for the people of Canada. Adjoining provinces and territories were ceded to the Canadian Confederation in 1869,1871,1873,1905 and 1949. In 1931 Norway formally recognised the Canadian title to Sverdrup group of Arctic islands. Canada now holds sovereign rights over the whole Arctic sector north of the Canadian mainland.

The Canadian nation has been formed by uniting and integrating two major immigrant nationalities—The French and the English. In 1961, 5,540,346 people were of the French origin and 4,195,175 were of the English descent. The total of the people of the British origin, however, was 7,996,669 which included the Scottish and the Irish as well. The rest of the Canadian nation includes people of German,

Scandinavian, Italian, Russian, Ukrainian, Jewish, other European, Chinese, Japanese, other Asian and Negro origin as well. Canada, like the United Sates, can be regarded as a melting-pot of several nationalities. At present, both English and French are recognised as official languages and right to education is available to school-going children through the medium of French as well as English. The Province of Quebec, which has a French-speaking majority, exhibits separatist tendencies. In a referendum held a few years ealier, almost 49% voters wanted independence for Quebec, and are at present being ruled by a Party that stands for Quebec's separation from Canada.

Canada is also divided into a large number of religious sects and denominations. Roman Catholics constitute the largest single denomination (9 million), followed by United Church of Canada (4 million) and Anglican Church (3 million) respectively. Other lesser sects are Presbytarian, Baptist, Lutherani, a Ukranin, Greek Catholic, Greek Orthodox, Jewish etc. Each provincial government is responsible for its education system but the general plan is similar for all provinces. separate elementary and secondary schools for minority groups, mainly Roman Catholic are found everywhere. In general, education is free upto the end of the secondary level. The principal sources of revenue are provincial government grants and direct taxation for school purposes. Except in Quebec the number of private schools is small, their enrolment being just 3% of the total in elementary and secondary grades. The federal government operates schools for Indians and Eskimos with an enrolment of 35,000. An additional 40,000 attend non-federal schools. Canada has many institutions of higher learning, teaching courses in liberal arts, sciences, engineering, medicine etc. Education has been a great instrument of cultural amalgamation and national integration in Canada. At the same time, a system of private elitist education also co-exists with the qualitatively inferior schooling provided by government-aided institutions.

Developed Capitalist Dependency

Some years ago *The National Geographic* wrote about a quiz for school-children of the United States belonging to higher grades in which a majority answered that Canada was a northern state of the USA. They were geographically wrong but not so incorrect in terms of political and economic relationship between these two neighbouring North American nations. Canada, for all practical purposes, can be treated as a developed, industrialisd dependency of its southern, neighbouring capitalist super-power. American multinationals have very substantial investments in various sectors of the Canadian economy. They have played a leading role in the industrial development of Canada. The United States and Canada along with Mexico are the Members of the North American Free Trade Area (NAFTA). This facilitates intimate commercial ties between the two countries. American businessmen, therefore, have a feeling that though Canada is technically a sovereign, independent state, it is fully integrated economically with the United States. Canada is also a military ally of the USA as a founding member of the North Atlantic Treaty Organisation (NATO) led by the United States.

There is probably no better way to make the sovereign-satellite relationship between the United States and Canada intelligible "than by summarising the world-wide scope and character of what is unquestionably the leading United States 'multinational corporation'—Standard O.C of New Jersey.... In terms of dollar assets, Jersey Standard is the largest industrial corporation in the United States.... Jersey's foreign investments were half as large as its domestic investments but its foreign profits were twice as large as its domestic profits.[1] The number of subsidiaries of Standard Oil in the United States was 77 and 37 in Canada. It also had 54 subsidiaries in Europe, 43 in Latin America, 14 in Asia and 9 in Africa. This showed the crucial importance of Canada as an area for the expansion of the foreign assets of Standard Oil, the largest American corporation.

The tremendous scope and diversity of Jersey's foreign operations might give the impression that over the years the company has been a large and consistant exporter of capital. It is not true. Apart from a small initial export of capital several years ago, the expansion of Jersey's foreign asset has been financed from the profits of its foreign operations. These foreign profits have been so large that huge sums have been remitted to the parent company in the United States. Baran and Sweezy have, therefore, concluded: "In a word: Standard Oil

1. Baran and Sweezy, Monopoly Capital, pp. 192-93

of New Jersey is a very large and consistant *importer* of capital."[2]

Legitimate differences of opinion will of course exist as to whether this or that country should be counted as belonging to the American economic empire. Baran and Sweezy offer the following list as being on the conservative side: The United States itself and a few Colonial possessions (notably Puerto Rico and the Pacific Islands); all Latin American countries except Cuba; Canada; four countries in the Near and Middle East; two counries in Africa and East Asia each; four countries in South and Southeast Asia; and one country in Europe. However, Canada as a capitalist dependency has profited most from the American connection in terms of its own economic development.

To begin with, Canada was a colony of France but England displaced her in 1763 as the ruling power in Canada. Till 1800 it was a sparsely populated area. People mere engaged in agriculture, forestry, fishing and fur trade. England supplied their consumer needs. British capital was gradually invested in mines, railways, transport and hydro-electric power. American capital came later entering all sectors of Canadian economy and superseded Britain as the dominant power in promoting the industrial development of Canada. Yet politically Canada remained attached to England in numerous ways. The North America Act of 1867 granted legislative and administrative autonomy to the people of Canada but its foreign policy was continuosly dictated by Great Britain. In the two world wars, Canada joined the war on the side of Great Britain against Germany almost spontaneously. After the second world war, both Britain and Canada act as if they are virtual satellites of the United States.

Taking advantage of England's engagement in the Nepoleonic Wars in Europe, the United states first persuaded Napoleon to sell off the large mid-Western colony of Louisiana and then President Madison declared war on England by attacking Canada. However, with the defeat of France in Europe, England decided to teach the arrogant Americans a lesson. Her naval troops attacked the Eastern coastal cities and even occupied Washington. A peace treaty was signed and the American dream of conquering Canada by force vanished. In 1824, President Monroe proclaimed what has since then become associated with his name the Monroe doctrine. This guaranteed joint Anglo-American domination of Canada, the Caribbean and Latin American countries and non-intervention by other European powers in North and South America. Canada thus emerged as a joint capitalist dependency of both Great Britain and the United States. Gradually, Canadian capital has displaced both British and U.S. capital as the major factor in the country's economy. Canada has, therefore, been accepted as the founder member of the Group-7 consisting of the seven most highly industrialized capitalist countries of the world. Other members of the G-7 are the United States, Germany, Japan, France, Italy and Great Britain.

The Elitist Democracy

With the growth of capitalism in Canada, indigenous as well as foreign-financed, a liberal-democratic polity has also grown on the home turf of the country. In such a system, votes are the nominal source of state power but monetary strength is the real source. This was recognised by Cheffins who pointed out how money played a big role in Canadian elections in view of large constituencies in which the Canadian electorate is divided in terms of the vast area that various candidates have to cover at the time of election campaigns. In election to the House of Commons as well as provisional legislatures, big corporations, including the multinationals, overtly and covertly provide funds to both the major parties viz the Liberal Party and the Progressive Conservative Party and, to a lesser degree, to other parties.

There is an element of contradiction in this system. The votes constituting a larg majority of the population may not own much property and yet they can form trade unions, political parties like the New Democratic Patry or the *Parti Quebecois*, and other mass organisations exercise political influence through them. If they win political power and then jeopardize the vested interests of the economic elites and the wealthy oligarchy, the system will face a crisis unless the dominant class abdicates without a fight. But we may discount this possibility as no privileged group has ever done this in histroy. In the case of Canada, the British-American bourgeoisie would have never allowed this to happen either.

In general, the ruling elite in Canada prefers democratic govenment to any kind of authoritarian rule. Popular endorsement of capitalist, oligarclic rule through a multi-party system gives it a kind of seeming pluralistic legitimacy. This enables Canada's policy to avoid certain real dangers of military or civilian

2. *Ibid*, p. 194

dictatorship which destabilises many functional democratic regimes in Latin America or even Europe.

The capitalists in Canada do not resort to authoritarian methods in dealing with opposition movements. They even permit a separatist *Parti Quebecois* to hold a referendum to decide whether Quebec should stay in Canada or become independent. Similarly, the corporations give concessions to the working class to soften its political radicalism and weaken trade union militancy. Capitalists buy off labour leaders with money and by other means. They, therefore, never challenge the real bastions of oligarchic power in the economy. Labour capital relationship in Canada follows the US pattern rather than the British or European one which is much more conflictual than the North American trend.

For example, the Liberal-Conservative divide in Canada is more akin to the Democratic-Republican cleavage in the United States and much less akin to the Labour-Conservative rupture in the United Kingdom or the Left Right conflict in other European countries. The ruling elite in Canada has created such a machinery of government which checks deadlocks and stalemates that may result in the breakdown of democratic procedures. The number of political parties has been kept limited to prevent the government by unstable coalitions.

Canada has a second chamber, which has no elective element and yet it has a prestigious position in the constitutional system. Corporate funding of political parties makes the House of Commons as well as its government dependent upon and subservient to the moneyed class. Canada's bureaucratic, military and judicial elites, which exercise administrative, coercive and punitive functions, are drawn from the upper and middle strata of Canadian society and are the products of the privileged and elitist schools, colleges and universities not only of Canada but also of the United States, Great Britain and France.

In constitutional theory, the people exercise sovereign power. In actual practice, a relatively small wealthy elite rules supreme in Canada too, like any other capitalist democracy. Even then, democratic institutions are not merely a smoke-screen behind which sit a handful of power-hungry industrialists and financiers making decisions and issuing commands. Reality is much more complex than this. Bissonnette, Dawson, Stanley and Lamontagne have argued that Canada like all other Western democracies should be characterised as a pluralist democracy because all organised groups in Canadian society are capable of exercising influence and pressure on the government's decision-making. But the power of capital and labour as competing social groups to influence the course of administration and legislation is not equal and so Canada's political processes reflect imperfect competition, especially where the role of the elites and the masses is being considered. It is in this sense that we describe the political systems of all advanced capitalist countries, including that of Canada, as embodying the principles of an elitist democray.

There are many writers like Martin and Dawson who dispute the above formulation about the nature of Canadian democracy. According to them, the political system of Canada is highly pluralistic where several thousand freely formed associations coexist and compete for influence. In fact, Canada contains a large number of sub-cultures based on region, religion and ethnic origin. While the government is responsible to the organised public opinion, social structure is much more fragmented and incoherent Canadian society may not be open-ended, but unlike Britain, it has no traditional aristocracy. Yet it has a dominant social class, that forms the ruling elite and, thereby, invalidates the pluralistic thesis.

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