THE CANADIAN BAR ASSOCIATION – ONTARIO
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July 25, 1979

The President
Canadian Bar Association
130 Albert Street
Suite 1700
Ottawa, Ontario
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Dear Mr. President:

I beg leave to file herewith the report prepared by the Ontario Branch on the document "Towards a New Canada - Vers un Canada Nouveau" which document was referred to the Branches for study by actions taken by the General Meeting in Halifax in August, 1978, and by the National Council at Montebello in February, 1979.

Some have suggested that the Ontario Branch wished to file the document and forget it; others suggest the appropriate response to be uncritical adulation of the work of its authors.

The view of the Branch however, was based on three premises:

(a) constitutions should not be the work of small committees of technicians and so-called experts but should emerge gradually from the consensus of the widest possible grouping of citizens;

(b) the Ontario Branch was too large and too diverse in its views to make it possible to prepare any report which could properly be represented as "the view of Ontario";

(c) the Ontario Branch contained many individuals whose points of view on particular aspects of the document would be valuable or representative.

On this basis we solicited the views of a very large number of our members on particular aspects of our document and present herewith these views unedited as a contribution to the further discussion of this vital subject.

We are proud of the response which the Association has been able to obtain in Ontario. Many of the writers possess nationally-recognized qualifications to possess a view on the particular subject to which they address themselves. Many members of the Ontario Council have taken great pains to make a contribution. Many contributions contain ideas and comments which are both original and, I beg to submit, significant in their import.

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With pride therefore, I submit this report representing thousands of hours of work and I am confident that the Association will see fit to order sufficient copies to enable at least one copy to be provided to each of the governments and libraries which received the original document.

Yours very truly,

W.H. Kidd
President - Ontario Branch

COMMENTARY

on

TOWARDS A NEW CANADA

A study by
The Committee on the Constitution of
The Canadian Bar Association

BY

ONTARIO LAWYERS

AND OTHERS

COMPILED
BY
THE CANADIAN BAR ASSOCIATION - ONTARIO
1979

ONTARIO

INDEX OF COMMENTARY

ON

"TOWARDS A NEW CANADA"

COMMENTS BY EUGENE FORSEY ON

"TOWARDS A NEW CANADA"

1. Chapter 1: I do not think we need a new Constitution. What we need are amendments and additions to our present Constitution.

2. Chapter 2: I agree with the general line of this chapter. As to the precise method, a non-lawyer is not well qualified even to state a preference. But if I had to, and were permitted, I'd favour the Victoria Charter formula for this purpose.

3. Chapter 3: I've no objections to the suggested preamble, though I am inclined to think it is a pompous waste of time. However, this is perhaps a place for a good old English principle, "It pleases 'e, and it don't 'urt Oi".

4. Chapter 4: I'm in favour of an entrenched Bill of Rights, though I think it requires very careful drafting. Beyond that, I'm not competent to comment.

5. Chapter 5:

(a) I'm a little doubtful about Recommendation 3(c), notably as applied to British Columbia, Alberta and Saskatchewan, and perhaps to Nova Scotia, P.E.I. and Newfoundland. The Atlantic Provinces are poor, and the practical usefulness of French statutes in Nova Scotia and the Island and Newfoundland is open to doubt. The French-speaking population of the three westernmost provinces is so small as to make the practical usefulness of French statutes doubtful there. I have no personal objection; far from it. But to insist on this provision for all these provinces might raise an unnecessary rumpus there, and impede the adoption of other, more necessary provisions.

(b) There might have to be transitional provisions for Recommendation 4. It may take time to make all this possible all across the country.

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(c) I have the same doubts about the univeral application of Recommendation 6 as about 3(c).

Perhaps the central Government could meet some of the difficulties under 3(c) by subsidizing the poorer or more reluctant provinces.

6. Chapter 6: No comment. I agree with what the report says, but perhaps only because I don't know enough to spot difficulties!

7. Chapter 7:

Recommendations 1 and 2: These (as the row over both Bill C-60 and over this report itself proved) are stirring up a hornet's nest with a short stick. There is no practical reason for them at all.

Recommendation 3 is all right, especially with the cautions mentioned on p.35.

Recommendation 4 falls with 1 and 2.

Recommendation 5 is objectionable. It would remove one of the few safeguards against a province playing ducks and drakes with the Constitution. The present provisions with regard to the appointment, instruction and removal of Lieutenant-Governors were put in by the Fathers of Confederation for sound reasons, which, with the subsequent decentralization of power have become even more cogent. It is worth noting that the American Constitution gives the central authority power to preserve in the States "a republican form of government". Our provisions in respect of the Lieutenant-Governors give our central Government power to preserve, in each province, our system of responsible cabinet government.

Recommendation 6: It follows that I disapprove of this. I think there is a good case for keeping the powers of reservation and disallowance; though, at a pinch, I'd be willing to give these up in return for acceptance of an entrenched Bill of Rights. I should certainly fight hard against giving them up without that quid pro quo.

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8. Chapter 8:

Recommendation 1 is all right.

Recommendation 2 is awful. Why should provincial Governments, which are supposed to deal with matters within provincial jurisdiction, and are supposed to be elected on that basis, represent provincial interests in matters under Dominion jurisdiction? Does anyone propose that each province should have a second chamber made up of Dominion Ministers to represent Dominion interests in matters under provincial jurisdiction? You could make just as good an argument for it, the more so if you are going to abolish the Dominion power of disallowance, which was a means of protecting Dominion interests against provincial legislation (on matters within provincial jurisdiction).

Making the Senators hold office during the pleasure of the provincial Government which appointed them would severely damage the Senate's capacity to revise legislation. But of course the Report does not think there is much need for this function (see p.39, column 1). My experience suggests to me that what the Committee says on this point is nonsense. The "careful screening" given to bills by the public service is demonstrably wholly inadequate.

The members of the Report's Upper House would almost certainly be either (a) people the provincial Government wanted to get out of its way, or its hair, or (b) dedicated anti-Dominion hatchet-men. Is this what the country needs?

Surely the country is already decentralized enough that we don't want to hobble the central Government and Parliament any more than they are at present?

The Report really gives the game away when it says (p.43) that its Upper House "could be in effect an ongoing federal-provincial conference". This betrays a complete misconception of the function of

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June 20, 1979

Andrew Brewin

I heartily endorse the recommendation of the Committee that the Canadian Constitution should include an entrenched Bill of Rights, - what I take to be the main thrust provides for just that.

An entrenched Bill of Rights could guarantee freedom of religion and conscience, freedom of thought, expression and communication and of peaceful assembly and association. It would add to the more conventional freedoms, freedom and openness of information, the right to individual privacy, the right to due process of law, the right not to be subjected to unreasonable searches, the right to a presumption of innocence and to reasonable bail. Above all, it would include the pivotal right to a fair hearing by a duly constituted tribunal.

These rights made explicit in the Canadian Constitution enjoyed without discrimination by reason of race, colour, nationality or ethnic origin, would bolster our democratic society -- universal suffrage could also be provided though the anomalies of present election procedures call for some sort of proportional representation.

There are some who argue that common law rights other than an explicit written constitution afford the best protection for fundamental human rights. But this argument overlooks the educative and inspirational impact of explicit written covenants. They underestimate the importance of a Bill of Rights as an effective legal instrument of enforcement. They bypass the changed conditions and the proliferation of delegated legislative powers which require protection by clear and explicit provisions.

It is no accident that the provincial legislature of British Columbia, Quebec and Newfoundland have provided the most striking attempt to ignore fundamental rights in Canadian history. The War Measures Act is a different matter and requires separate discussions as to limitations thought desirable upon its invocation.

However, the Committee report gives only partial reference to economic cultural and scientific rights as distinct from political and civil rights. It will be recalled that the Universal Declaration of Human Rights covers both types of rights - economic as well as political. The United Nations in separating the political rights which can be immediately implemented in the Covenant, preserves the distinction between the two types of rights contemplated in the charter. The Protocol on economic scientific and cultural rights can only be implemented by a gradual legislative process.

This does not mean that economic rights should be ignored. The right to work in fair conditions, the right to health, the right to holidays and reasonable leisure are as important as some of the political rights; they should go together. I welcome the suggestion that a preamble to the Canadian Constitution referring to economic rights is essential. They are part of the basic purpose of Canadian society as nearly a million Canadians who are unemployed could testify who would enjoy political rights but be deprived of economic rights.

The Canadians deprived of basic economic rights are apt to undervalue political rights if any constitutional document appears as a mere recital of political rights. Reference to economic rights is essential from an educative point of view. The Universal Declaration of Human Rights covers both types of

good. You have to increase the size of the Senate, leaving the Atlantic and central provinces with their existing 78 members, and giving extra seats to the West. Even then you'd have to face the problem raised by the report's "Quebec's ratio should not be reduced" (my emphasis). So much for the genial: "The particular division is not critical".

9. Chapter 9: I have no quarrel with the first four recommendations, or No. 7, which would simply preserve and entrench what we have.

I do not at all like Recommendation 6, but am not competent to say more on this.

I am startled, and mystified, by the interpretation of section 99 of the BNA Act suggested at the beginning of the last paragraph on p.53.

10. Chapter 10:

Recommendations 1 and 2 are all right.

Recommendation 3 is, in my opinion, bad, for reasons I have set out at length, elsewhere, publicly. Lobbying! And the idea of a collection of provincial nonentities-cum-hatchet-men (or a committee of them) deciding who should or should not become a judge of the Supreme Court of Canada horrifies me.

11. Chapter 11: Note well the statement near the top of column 1 of p.65: "in fact, the powers of the provinces to interfere with the Canadian national market are greater than that (sic) of the constituent states of the European Economic Community."

Recommendation 1 is very vague.

Recommendation 2 would appear to leave things much as they are.

The others look all right (I particularly like 5 and 6), except that there is no mention of the residual power. But that, apparently, comes later.

12. Chapter 12: Looks all right (the list of recommendations; I have not read the rest of it).

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13. Chapter 13: I can swallow this.

14. Chapter 14: No objections, except that I'd prefer federal paramountcy under 4.

15. Chapter 15: I jib at the parts about ratification by the proposed (cuckoo) Upper House, or any other Upper House.

16. Chapter 16: I agree.

17. Chapter 17: I prefer the recommendation of the 1972 Committee.

18. Chapter 18: I agree, in general; though what about the near-banks or pseudo-trust companies?

19. Chapter 19:

Recommendations 1 and 2, yes.

Recommendation 3: No. Leave it as it is.

Recommendation 4: Probably all right, if navigation and shipping left as is.

Recommendation 5: Up to the three-mile limit, all right; the rest, no.

Recommendation 6: Yes, if other things are left alone.

Recommendation 7: No. Keep it purely federal.

Recommendation 8: No. Leave it as it is.

20. Chapter 20:

Recommendations 1, 2 and 4 are all right.

Recommendation 5: No.

Recommendation 3: I could swallow, bar the part about the Upper House.

21. Chapter 21: All right.

22. Chapter 22: All right.

23. Chapter 23: All right.

24. Chapter 24: No objection, if there's a full faith and credit clause; but I'm not really competent to comment on any technical aspect.

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25. Chapter 25:

Recommendation 1: No, no, no. As a good John A. Macdonald man, a thousand times no.

Recommendation 2(a): I suppose this is all right.

(b): No. See above.

(c): Yes.

26. Chapter 26:

Recommendation 1: Yes. In fact, I like them all.

MEMORANDUM

TO: The Canadian Bar Association

FROM: J. A. Langford

DATE: July 9, 1979

RE: The Canadian Constitution

The comments herein refer to the document "Towards a New Canada" and to the parts and sections thereof:

Part 1 - Preliminary

Chapter 1

Although I am in agreement with the first recommendation that there should be a new constitution, the facile way in which virtually all commentators on the state of Canada today slip into the belief that a new constitution would constitute a remedy and perhaps a panacea is frightening and disturbing.

I believe that we need a new constitution because there are a number of adjustments which might conveniently be made in the division of powers and perhaps there should be a change in the composition of the upper house. Principally, however, I believe in the need for a new constitution because the system of responsible government is not working well either at the national level or in the major provinces. I believe it is not working well because the received and understood basis of its working does not correspond with the facts. I believe that the system of responsible government should be clearly spelled out in a new constitution so that no argument would attach to any "rule", and that the substantial proportion of the population who have no experience and sense of the system can have the benefit of a clear statement in the constitutional document.

As for the argument that we need a new constituion because of the strains in federalism, I disagree. I have two reasons for disagreeing.

In the first place a constitution will not solve problems that lie basically in the hearts of the people who must live under the constitution. No constitution can make a people function well together. A constitution can hinder the practice of the body politic but it cannot make for the health of body politic. The various well documented disharmonic tendencies within confederation are entirely attitudinal, and economic. A change in the legal frame-work will not of itself change the attitudes, or the economics. My first reason therefore for rejecting the argument in favor of the first recommendation, although not the recommendation itself, is that a new constitution will not achieve the objectives or remedy the grievances which are suggested. The belief that it will operate to deter citizens from the higher responsibility of simply changing their attitudes. The conflict between the English and French language groups within Canada is the best example of this. No change in the rules would remove the conflict. The conflict can be removed if people in all parts of Canada changed their attitudes. Changing the constitution may represent an exercise which is more easily embraced than a change in attitudes. Thus a change in the constitution is a dangerous diversion tempting leaders away from the real task of encouraging the citizenry to those attitudes and social customs which will create unity.

My second reason for disagreeing with the ratio decidendi of the first recommendation is that the committee do not seem to appreciate how disunifying a quest for a new constitution can be. I believe that we should proceed with deliberation to prepare a new constitution embracing larger and larger groups in the process in order to achieve the elements of consensus. Any rush to write a new document will simply increase the controversy which already exists concerning a number of the major issues. If we want to solve the problem of natural resources or the two cultural groups or Maritime poverty or aboriginal rights we must proceed carefully in a gingerly manner only embracing the task of drawing up contracts or agreements or constitutions when preliminary negotiations suggest that there is a consensus. In this way we should proceed to a new constitution slowly, deliberately, and carefully.

Chapter 2

I believe that I understand the recommendation properly but it ought to be stated a little more clearly in the summary. As I understand the proposition, this constitution should be made entirely in Canada and should come into force as a result of actions taken within Canada. I regard it as essential however, that the new constitution be endorsed by a United Kingdom statute in order that there should be legitimacy.

If there was no United Kingdom statute endorsing the new constitution and we were proceeding by way of unilateral act the result would be revolutionary and there would be a considerable block of non-juring judges and lawyers not to mention others in the population.

Chapter 3 - The Preamble

The Committee argues for an extended pre-amble. The effect of such a recommendation can be seen in the constitutional amendment bill of the Government of Canada which involves a fairly lengthy pre-amble followed by a very long Section 3 containing "a statement of aims of the Canadian Federation."

I disagree with this approach to legal drafting of an organic instrument. A nation is a living organism in the process of constant change. The very specific lengthy pre-amble or statement of aims tends to embarrass over time in that it expresses a more or less agreed view as at the moment as of which it is written. Further a Constitution should be consensual and a great many of the aims, when elaborated are likely to be controversial.

In my opinion the pre-amble to a Constitution should be confined to those matters which are universally agreed, and with the rest of the document should be expressed in short, simple, succinct prose in both English and French. The model ought to be the pre-amble to the Constitution of the United States.

> "We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves in our posterity, do ordain and establish this Constitution for the United States of America."

Chapter 7 - The Executive & Head of State

It is in connection with the subject matter of this chapter that I find myself in the most profound disagreement with the Committee. I believe that they have simply ignored very real and central problems in connection with Canadian Government which should certainly be addressed if we are to go to the work of preparing a new constitution for Canadians.

A constitution must deal with reality. One of the problems with the British North America Act is that it only deals with part of reality and essentially regulates the relationship between the Federal government and the provinces. A new constitution for Canada should deal with all of the reality and it should deal with it in terms which give effect to the real operation of a system.

What then is the reality about the Head of State - Head of Government function in a Western democracy. I believe that the functions can be divided into several convenient headings. Each heading can, in turn, be divided into its formal part and into its efficient part.

The executive in a Western democracy is in charge of the administration of the government. The executive sees to the carrying out of all of the functions of government assigned by the customary law or by the statutes.

This function involves form and substance. Take the matter of appointing people to particular offices. The substance of that matter is the task of choosing the right people and determining their job descriptions and rates of pay. The form of the matter is important too. Documents must be prepared evidencing the status. Often it is useful in human affairs to make a ceremony of appointment in order to underline in a visible way the authority of the new appointee for those over which he is given charge. Often the task assigned is going to be very difficult and the superior who is making the appointment should give heart to the new appointee in the appointment process. All of these are matters of form but because they are matters of form they are not unimportant.

After all we have a lot of forms in connection with calling a person to the Bar. Why not simply send a mimeographed letter? Forms in life play a very significant part in dealing with the emotional content of human character.

In addition to the administrative function the executive is naturally the body or person to propose new laws for consideration by the legislative process. Here again there is both form and substance. The form is the speech which makes the proposal. It really represents the end of one stage of the process and the beginning of the actual legislative process. The substance of the matter is the process prior to that formal speech and formal presentation of a draft. Whether we are speaking of the message which the President sends to Congress or the budget of a Minister of Finance, we are speaking of a formal matter preceded by the work or a great many officials and politically appointed persons.

The executive is in charge of the relations with other sovereign states in the world. This has its forms and its substance. The substance is obvious. The form is just as obvious and can be seen every year in summit meetings and state visits, diplomatic receptions. In democracies it is necessary to convince people to be willing to have regard to the interests of other countries if a treaty is to be made between one's own country and that other country. Public opinion must be enlisted on the side of the bargain. For this purpose the form of the function of foreign relations is of the utmost importance.

The executive has other functions in a democracy. In a democracy it is in control of the armed forces. This is one of the key litmus tests for a democracy. In the non-democratic countries it is generally assumed and probably commonly true that the armed forces may control the civil authority. Here again there is form and substance but it is really precisely analogous to the form and substance issue as it relates to the control of the civil administration of the government.

The executive has ultimate functions in case of emergency in any western country. Here again there is form and substance. In a real emergency the sanction which is normally available to the state in its criminal process, in its command of police and armed forces, may be lacking. It may only be moral authority which is available. It may only be the sense of duty, the sense of compliance, the law abiding sense in the population which will enable governments to function at all. All of these matters relate to form.

The foregoing brief analysis suggests some of the main functions of the executive government while stressing that each has within it, its formal and ceremonial part and the efficient working part. And it has been suggested above that the formal part is more than mere form. It is not a matter like the need for a little red sticker on a legal document in order to provide for the relic of a seal. We humans like our forms and ceremonies. The leadership captures our loyalty, inspires our support, enters into our imagination by these means.

From the foregoing analysis the case for constitutional monarchy can be derived. It begins by resting upon no more than the proposition of division of labour. It is more efficient and less burdonsome if the formal functions are performed by one person while the efficient functions are performed by another. Many writers have commented upon the impossibility of the task facing the President of the United States who must perform both functions and almost invariably the writers point out the contrast with Britain.

But there is more too it than the simple division of labour argument. If this were the only argument one could hire a bottom level clerk and make him the ceremonial man. But he would not do. The ceremonial man has to be such a person that we would all rather have him present the Stanley Cup or the Grey Cup. The ceremonial man has to be such a man that a newly appointed official is very flattered to be received by him. The executive leadership will be inundated by invitations to grace some occasion by the Presence. The ceremonial person must be such a person that the inviters would rather have him than any other person.

Unless the ceremonial person is such a person as the public would rather have him, the division of labour argument will not work, or it may work poorly.

It is submitted that monarchy in some form is an essential of the social organization of the social animal, man. In this sense I mean monarchy more in the Greek concept of the word than in its current English usage. I mean that we seem to want to have our heros, our people whom we surround with a mystical aura. Whether these heros be movie stars or olympic medalists or pop artists it seems to be part of the nature of man that there be such. We create our "stars."

Now it is submitted that it clogs the system if the efficient head of government assumes some of the star quality. In this respect the office of Prime Minister in Canada is very different from the office of Prime Minister in Britain. The Canadian Prime Minister has slipped into being a star a much greater star than the Governor General. It is submitted that the proper working of the constitutional monarchy should involve the proposition that the star qualities belong to the permanent ceremonial head of government so that the efficient person can be dismissed at will when he no longer is servicable. This is the position which is most conformable to democracy. It is to be noticed in this respect that both major parties in the United Kingdom seem to be able to switch Prime Ministers more readily while in office than do Canadian parties.

So far then I have argued the general proposition that we should have a ceremonial head of state and an efficient head of government and that the star qualities should pertain to the head of state.

These general propositions can all be directly related to the Canadian position. And when they are related to the Canadian position it can be readily seen that the system does not work very well now.

It would seem that the efficient head, the Prime Minister, has grown very tall and dominates the entire federal government while the ceremonial person, the Governor General, has receded in our consciousness and has very little of the star quality and is thus unable to be effective in his role, effective in removing a burden from the Prime Minister, effective in deflecting from the Prime Minister stardom so as to make it easier for the people to dismiss a Prime Minister, and effective in being a star capable of being a national unity figure.

Does this matter?

It is submitted that it matters very much indeed. It is a general phenomena of Western Governments to which many writers have addressed much in the way of learned commentary or experience based memoirs that the office of Prime Minister has grown over-mighty and near dictatorial in parlimentary governments and that in all Western countries the executive branch of government has grown over-mighty at the expense of the legislature and the judiciary.

References can easily be produced but I would simply mention Arthur Schlesinger's the "Imperial Presidency," and the lead articles in The Economist of November 5, 1977. A very active literary debate has grown up in the United Kingdom on the issue with some writers such as Michael Foote and Lord Hailsham describing the office of Prime Minister in that country as kind of an elective dictatorship, while a recent former Prime Minister Harold Wilson, with the skills of a one time political science professor has replied and pointed to exaggerations in the Foote case in his recent book "The Governance of Britain."

It seems quite clear that this burgeoning of the executive branch of government and within it in the office of the principal person is a problem.

It is an old problem. Many writers assert that the reason for the development is first radio and then much more significantly television which exposes in a very powerful way the face and apparent personality of a single person whereby that person can appeal over the heads of all of the other political actors who in former pre-electronic times surrounded him and operated as checks on his authority. This attractive case is undoubted part of the truth. But it is fascinating to observe that one of the greatest observers of Western political systems, a kind of modern Aristotle, James Bryce, in his book "Modern Democracies" published in 1920 has a chapter entitled "The Decline of the Legislature."

Bryce wrote before the political use of radio had been achieved.

Bryce argued that there was a fundamental movement towards the expansion in the power of the executive which had come about by reason of the universal franchise coupled with the industrial revolution and the consequent complication in the affairs of government. Whereas the average legislator in 1875 could understand the issues which faced the government, these issues had become indefinitely more complicated by 1920. The executive with its staffs of experts could master these issues. The average legislator could not.

We are therefore dealing with the basic phenomena noticeable in other similar countries, a phenomena which has been operating for three quarters of a century at least. Does it matter?

I submit that it matters very much to Canada. I submit that the development has proceeded farther in Canada than it has in either the United States or in Britain.

In the United States a different system vests inalienable power in the Congress. The developments noted in Schlesinger's Imperial Presidency could only occur with the consent of the Congress. Once Congress was aroused it could always check the executive branch. Ever since the Watergate episode the Congress of the United States has been aroused and is checking the executive branch. Thus while President Carter is far more powerful than the Presidents before the first World War, he is far less powerful than the Presidents of the post World War II group from Trueman through to President Nixon. The development has been retarded in the United States.

In Britain the tradition of somewhat greater independence on the part of members of parliament and of cabinet ministers operates to check the executive. Canadian ministers resign at their peril. They are generally politically dead when they do so. British ministers have resigned and have been resuscitated. British members abstain on occasion, more often than Canadian members with fewer sanctions. It would appear that in Britain the power of the Prime Minister is checked in a major way by the power of the party machines which are independent of complete control by a Prime Minister.

But it is also noticeable that in Britain, the Queen has enormous prestige and this fact operates to limit within a broad range the authority of government elected by the political process. One never knows where these limits are being effected in current times. The Official Secrets Act and Royal discretion prevents the information from being made known. Only now do we find out about the life of King George V but when we find out we notice the significant ways in which the prestige of the crown checks the authority of the Prime Minister in the British context.

None of these phenomena apply to Canada. The Vice-Regal "Crown" does not now have such prestige as to represent a significant check on a Canadian government. The party machinery is too weak to resist when in power, the authority of the Prime Minister. Thus the Canadian Prime Minister is a more powerful Prime Minister in his own context than his U.K. counterpart. Space does not permit an analysis of the position in Australia but for a variety of reasons it is true that the Canadian Prime Minister is much more powerful than his Australian counterpart.

Now it is submitted that this growth in the office of a Canadian Prime Minister who is very close to being an elected dictator whether or not the description is fair for an English Prime Minister, is one of the main sources of national disunity.

It is tright to observe that Canada suffers from disunity. The more important task is to analyse the causes. We can at once admit the problem between the two historic cultural groups.

If one removes this problem and sets it to one side, there is a residue of disunity, an important and large residue which many commentators have noticed.

The conventional analysis of this residue is that it represents the overly great power of the central government coupled with its geographic remoteness from the hinterland. And the conventional wisdom suggests that we need to redivide the powers so that more power will be given to the regions, that is to say to the provinces.

I dissent from this analysis as representing a true major cause of disunity. Or rather I dissent from the cure suggested. It is particularly unfortunate that constitutional discussion is confined in practice to the executive governments of the Federal and Provincial powers. It is obviously in the interests of the Provincial executives to press this proposition.

If disunity is not a result of excessive Federal power, vis a vis the provinces, then what do I assert to be the cause.

I suggest that it lies in the overly great authority and power of the office of the Federal Prime Minister. In effect he wins the election personally, in the eyes of the voters and in the eyes of the media. Consequently he has the mandate. The members in his caucus are mere counters and when they count to a majority his power is unlimited.

But if the mighty Prime Minister has all the power, he then has all the responsibility to deal with all of the problems. Obviously he cannot do so personally. He must operate through delegates.

Increasingly the Ministers are mere delegates of the Prime Minister. Mr. Trudeau's ministers had to clear their speeches with the Privy Council office. They were given assignments to be performed by a certain deadline. In short they were delegates.

And the role of a minister has declined along with the role or a government member of Parliament. If the Prime Minister has the only effective job in government it has become unattractive to be an ordinary member of parliament. This militates against the election of the best type of member and in the long run this process militates against the best type of Cabinet Minister because after all the Cabinet Ministers are drawn from the membership of the Caucus.

The really important delegates of the Prime Minister are in the bureaucracy. It is instructive to note that it is the Prime Minister who appoints all of the deputy ministers. This is the practice both in Ottawa and at Queen's Park. It is the deputy minister, who in the most common case, run the department. And each deputy has his own army of officials with its generals of division, generals of brigade, its colonels, its field officers, its subalterns and its great hosts of NCO's and ordinary troops.

The authority of these officials relevant to cabinet ministers is most easily demonstrated by an examination of the practices of Canadian lobbyists. As a Corporate lawyer I have to lobby quite often. (As the rule of law recedes and the rule of men grows, the role of the corporate lawyer is to be a craven courtier seeking to ingratiate himself with the all-powerful in order to obtain the exercise of their discretion in his client's favor.) But the need to be economical of time and hence of client's fees dictates a need to lobby where it will do the most good. This is almost never at the ministerial level. On every issue there will be one or two officials whose support is almost all that is needed, and whose opposition can only infrequently be overcome.

Now the whole official class is effectively loyal to the Prime Minister and is fundamentally appointed by him. He is the sun and they are satellites who merely reflect his authority.

Unfortunately there are too many such delegates for the Prime Minister to control. Mr. Trudeau attempted through the reorganization of his cabinet to obtain control. Ironically the only result of his effort was to create a new and all powerful bureaucracy on top of all the other bureaucracies. The man who sought to deal with the tendancy only made it worse.

The power of the Prime Minister is such that whenever he turns his attention upon any particular area of government he can command all authority. But when his attention is directed to a particular area, the other areas function on their own. Their only allegience is to the Prime Minister. His attention is diverted. There is no other effective authority over their operation.

These officials tend, in their most powerful component parts, to live in Ottawa in a society in which they are dominant. They become rather like the class of officials in the old imperial China and hence it was very natural that the term "Mandarin" would be used to describe them.

The metaphor "body politic" is old English. To enhance the metaphor let us suggest that government produces clothing for the body politic. It is suggested that the present system of irresponsible officials providing the product government for the most part from day to day means that the representative element in Canadian government has virtually died, and that, in its absence the suit of clothes does not fit well the Canadian body politic. In the result there is alienation from government.

Many observers find this alienation from coast to coast. All too often, they attribute it to the problem of the location of legislative power. But if they would examine more closely they would find the same alienation from the provincial government among citizens in Ontario.

It is submitted that it is this alienation which represents the other problem producing disunity. This alienation produces ultimate disunity. The body politic falls apart into a great many disparite elements. The invention of representative government centuries ago was designed to cope with this type of alienation. Somehow we must revive representative government in Canada. In the big provinces as well as in the Federal government we need to have a legislature with more authority over the Prime Minister and over the cabinet. If we can achieve this we will obtain better representatives and hence stronger ministers in the long run. When we have achieved that each of us is more apt to identify with some one individual in the powerful and central executive group and hence each of us is less apt to be alienated from the executive government or from government in general.

How does this relate to the problem of the executive?

It is submitted that the Committee recommendation would diminish the role of the Queen. She is a star and although she lives 3,000 miles away from the centre of Canada and farther from its western regions, she has a potential role which could be enhanced. If this is impracticable in political terms and we must move towards an elected head of state, we must accept the consequence that the elected head of state will be a less efficient ceremonial person less capable of performing the theoretical functions which can be seen in practice performed by the Queen in London. And if our great problem is an overly powerful Prime Minister, is it wise to diminish the check on his authority represented by the potentiality in the star quality of the Queen? Is it wise to invent a new "president" to whose office no traditional aura attaches, unless we at the same time write into our Constitution checks on the authority of the Prime Minister. We have too big a Prime Minister. Should we cut down the person to whom he nominally owes allegience. It is submitted that the rebalancing and retuning of Canadian government involves far more significant matters than the division of power between the Federal government and the provinces. It involves the strengthening of the representative element. It involves the strengthening of the ceremonial head of state element, and finally it involves some limit on the authority of the Prime Minister.

I fault the report for not dealing with this matter.

It is instructive to note that the continental models of parliamentary government all spell out limits on the office of Prime Minister and they all spell out the same limits. It is the limit which I would propose for Canada.

How do we get rid of a Prime Minister? Well of course we can defeat his party in an election. This is true on the continent as well. But if this is all then we have an elected dictator. We must have a mechanism between elections.

The theoretical mechanism of a want of confidence vote only operates when there is a minority government. It is just as much needed when there is a majority government. Why does it not operate.

To some extent it does not operate for lack of moral character on the part of members of parliament.

There are two particular systems in operation which tend to reduce the quality of members of parliament. The one system is the redistribution process which in its crude worship of mere arithmetic has operated to cut up ridings and ignore communities in the major cities of Canada.

In the result a riding is an artificial entity which elects of necessity a carpetbagger rather than a community figure. Such a carpetbagger never feels secure in the allegience of his artificial constituency. Thus the prospect of an election terrifies him. He is unapt to run the risk by voting against the government, if he is a government member.

The other phenomena which lowers the qualities of members is the length of sessions. Up until 1957 a parliamentary system commenced some time after New Year and was generally through by about the 1st of July. There upon members returned from whence they came and renewed their contacts with the people. Since 1957 it has become a full time job. At the moment of their first election a member has some knowledge of his constituency. This knowledge grows out of date from that moment on and a member increasingly becomes drawn into the Ottawa cockpit and becomes another satellite to the sun of the Prime Minister.

If we are to strengthen the House of Commons we must address the process of redistribution and the length of sessions.

But in the continental systems notice is taken of the power of dissolution. It is the power of dissolution which is the sanction which enables the Prime Minister to control the members in his own caucus. There are episodes known to the writer in both the Diefenbaker and Robarts governments in which a sufficient group of government members to defeat a bill were in a state of rebellion concerning the bill and were brought to heel by a threat of dissolution crudely and directly expressed.

Now on the continent the Prime Minister does not have the right to call elections. When a continental Prime Minister is defeated on a vote of confidence he is obliged to resign. A vote of confidence is a defined process and not merely any vote on any bill. Defeats on ordinary bills do not entail any consequence other than the non-passage of the particular item of legislation. The Prime Minister resigns when he is defeated on a vote of confidence and the head of state chooses a new Prime Minister. If the head of state is unable, after a certain time limit, to obtain a new Prime Minister who can win a vote of confidence, and thus be confirmed in office, he, not the interim caretaker Prime Minister has the discretion to call an election.

The foregoing rambling arguments come simply to this. Before we tamper with the present operation of the head of state function in Canada, we must propose rules which would control the Prime Minister and check his ultimate authority, and we must propose means to enhance the role of a member of parliament.

Ontario

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on
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June 20, 1979

W. H. Kidd
c/o The Canadian Bar Association
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80 Richmond Street W.
Toronto, Ontario
M5H 2H4

My dear Mr. Kidd;

Enclosed herewith is a memorandum of my views on Chapters 1 and 2 of the report of the Committee of the Canadian Bar Association on the Constitution, as requested in your letter of May 23rd.

Yours sincerely,

J. C. McRuer

JCM:vv
Encl.

MEMORANDUN FROM HON. J. C. McRUER

RE: Canadian Bar Association Report on the Canadian Constitution

I have been asked to give my views as to Chapers 1 and 2 of the Report of the Committee of the Canadian Bar Association on the Canadian Constitution.

CHAPTER 1

"There should be a new Constitution to meet the aspirations and present day needs of the people of Canada."

I do not think there should be a new Constitution. I would put it this way. The Constitution of Canada as set out in the British North America Act and amendments thereto should be revised to meet the present day needs of the people of Canada.

The recommendations contained in the report cannot be usefully considered apart from the recommendations contained in Chapter 26 which does not come within my terms of reference.

However, I will venture this far. I think it is an exercise in futility to consider "a new Constitution" or any substantial changes in the present Constitution until there is agreement on an amending formula. When this is accomplished attention may be given to other recommendations in the report which contain many contentious matters.

I do not think it would be wise to embark on any comprehensive changes in the Constitution at this time. In my view the Constitution is basically sound. It has had 110 years of judicial interpretation. From time to time weaknesses have been worked out by agreement and it is inevitable that in any new Constitution it would still "be necessary to have agreement on its application to developing situations".

A new Constitution would involve endless litigation concerning the interpretation of words used leaving the constitutional relations of Canadians in great uncertainty for many years.

Much of Chapter 1 is devoted to "unity in Canada". Everyone will agree that "unity in Canada" is an urgent matter but I think it is questionable that unity can be imposed by constitutional law.

It is stated, "With the necessary political will Canadians might well be able to solve the present problems of national unity by means of the flexible instruments that the present Constitution provides. But there comes a time when it is best to start afresh; to set forth in a new instrument the values we all share as citizens, to define the basic accommodations that must be made as a precondition of our continuation

as a nation and to restate and redefine our structures of government under the light of modern conditions." I do not think that time has come. The present Constitution was built on reasoned discussion, compromise and a will to understand the basic regional demands. It has been amended from time to time to meet changes in these demands. Those regional demands have changed and will change from time to time. To embark on a fresh voyage of discovery would surely be a flight from the ills we have to the those we know not of.

It is said, "the existing Constitution is woefully weak in any symbolism that helps to tie a people together by identifying what their country means to them and what they can expect of its institutions."

Frankly, I do not think that constitutional symbolism will do much to unify Canada unless there exists in the hearts of Canadians a sense of general respect for the ideals, cultures and sensitivities of their fellow Canadians and particularly the use of French and English as the principal languages in Canada. It may well be that some colourful language in the Constitution might tend to assist young Canadians in developing a Canadian nationalism. But it may be questioned whether nationalism is what we want in Canada today. I would suggest that what we want is a sympathetic understanding of our differences rather than an attempt to extinguish our differences. I think the Canadian Constitution was an attempt to attain a legal embodiment of recognition and understanding of the differences that exist.

I agree that the Constitution of Canada should not be a statute of another country.

I do not agree with the Committee that a new Constitution should be adopted, "by action taken entirely in Canada". Nor the reasons expressed, "In our view the dramatic gesture of self-assertion involved in proclaiming our own Constitution independently of any other country would, at this time, constitute a significant step in promoting throughout this country confidence, pride and a strong sense of Canadian identity." That would be revolutionary and illegal.

I suggest that it would be better to proceed in this way. Take the present Constitution as a basis together with appropriate provisions recognizing English and French as the two languages of Canada. The Provinces and the Federal Government agree on an amending formula. Then all legislatures of the Provinces and Parliament, with appropriate recitals, enact statutes in their respectful jurisdictions each declared to come into effect when the British North America Act and amendments thereto are repealed. That having been accomplished the Provinces and the Federal Government can then apply their minds to working out the Constitutional needs of the future.

Since the specifically enumerated items set out on Page 3 of Chapter 1 are to be dealt with by others, I refrain from commenting on them.

JCMcR/ra
June 14/79

HOWELL FLEMING BARK CROOK [redacted] RISHOR & WHITE

BARRISTERS, SOLICITORS & NOTARIES

ALTER HAROLD HOWELL Q C
EXANDER FLEMING Q C
ALTER DONALD BARK Q C
ORMAN JOSEPH CROOK Q C
[redacted]
ARR GEORGE RISHOR B A Sc LL B
ONALD DUNCAN WHITE B A LL B
ARGARET WENDY ROBSON LL B
WARREN CALDWELL B A M A LL B
OBERT E PARENHAM B A LL B
OHN J CROOK B A LL B

THE LATE EDWARD ARMOUR PECK K C (1858 - 1947)
THE LATE VINCENT JOSEPH McELDERRY Q C (1883 - 1962)
THE LATE FRANCIS DEAN KERR Q C (1871 - 1963)

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PLEASE REFER REPLY TO:

W. H. HOWELL, Q.C.

June 26, 1979

Mr. W. H. Kidd, Q.C.
President, Ontario Branch
Canadian Bar Association
Suite 404
80 Richmond Street West
Toronto, Ontario
M5H 2A4

Dear Cappy:

I received your letter of May 23, 1979 regarding the change of Constitution and I enclose herewith two copies of my views on Chapter 3, "The Preamble."

I think you struck on a good idea to have different people express views on each chapter rather than having a few people express a complete critique of the whole report. In this way you have reflected the true Canadian nature which is a multiplicity of views and opinions depending on each ones situation.

It would be interesting to read the final total collection of reviews and I trust that all will contribute to a successful report from our Ontario Branch.

I have not affixed my name to my paper but feel free to do so if you want to have my views identified.

Keep up the good work.

Regards,

WALTER H. HOWELL

WHH/wdallin
Encl.

"TOWARDS A NEW CANADA"

Observations on Chapter 3 - The Preamble

The concept of "Federalism" has different meanings to different people depending on whether one favours a strong centralist body concerned with the general welfare and happiness and prosperity of the whole group or a number of smaller nation states each vying to outdo and surpass the others and gradually assume the controlling role, either individually or in cliques, over the whole group.

I favour a strong centralist body, a sovereign as head of state (probably elected) and complete freedom of trade, travel and association among all parts of the whole group.

The first five attributes in paragraph number two of the recommendations in Chapter 3 are more or less self-evident but I believe that the sixth attribute, namely

> "Adherence to a federal system that can achieve common aims and purposes while respecting cultural and regional diversities, and in which the need for collaboration by the various governments through adequate mechanisms of consultation and co-operation is recognized."

is the most important and critical statement in the preamble.

Geographically Canada consists of five main regions, namely the Western Mountains and Coast, the Prairies, Ontario, Quebec, and the Atlantic Provinces but, unfortunately, is fractured into ten provinces or governing units. Additionally, the far west and

...2...

the Prairies seem to look north and south, Ontario and Quebec look all over and the Atlantic provinces feel that they look in vain.

Which brings up the question - Is the concept of a united Canada a pipe-dream?

I believe that there is an underlying pride in Canada among most Canadians but it is constantly being overshadowed by our huge but friendly neighbour to the south and it takes a continuing real effort to remind ourselves that we are Canadians.

Our Constitution should remind Canadians that we have a mission to preserve freedom as well as a goal to improve the lot of society as a whole. There must be freedom for the individual to aspire, freedom from government interference in our lives and our business and the goal of providing a happy, healthy life to all Canadians through team work and co-operation.

The drama and significance of a new Constitution must be brought to the man in the street so that he will feel part of it and feel able to contribute to it and not view it as "something away out there."

As each new generation comes along it develops new requisites and opinions and our society will always be in a state of flux and the Constitution must be broad enough and deep enough to continue to work for Canadians in all situations.

ANDREW BREWIN
Wakefield Post Office
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June 22, 1979

Mr. W.H. Kidd, Barrister,
Canadian Bar Association - Ontario,
Suite 404,
80 Richmond Street West,
Toronto, Ontario.
M5H 2A4

Dear Mr. Kidd:

Thank you for sending me "Towards a New Canada" the report of the Committee on the Constitution, of the Canadian Bar Association.

I have, as requested, studied the recommendations contained in C.4 - Fundamental Rights and C.23 - Citizenship Immigration and Aliens, and I enclose what I hope will be useful comments, although no doubt you and your colleagues will appreciate, as I do, the enormous potential scope of the subjects and the rather fragmentary attention I have given to each of them.

Yours sincerely,

Andrew Brewin

per/ Andrew Brewin.

rights as does the Constitution of France, Japan, the Federal Republic of Germany, Denmark and Yugoslavia - so should a new Canadian constitutional charter.

The Committee recommendation as drafted contain a number of important points hitherto absent from such drafts. Recommendation 4:7 contains, for example, a recognition of the right to public information. This is highly commendable but I recommend that in light of actual experience, a clause should be added that the final determination whether the public or any member are being improperly deprived of such a right should rest with the judiciary. The argument that this is a matter for parliament or the legislatures to decide is highly spacious. This would make government officials and bureaucrats judges in their own cause. It would defeat the whole purpose of "freedom of information" which is essential to an open democratic system of government.

Views on recommendations of C.B.A. 23 - Citizenship, Immigration and Aliens.

The proposal is made to include in the Constitution a provision that no law shall in a discriminatory manner impede free movement within the country of citizens or other persons lawfully in the country. This recognizes, as it should, the right of free movement of Canadian citizens and residents within Canada. It is suggested that the words "in a discriminatory manner" are unnecessary. The right to admit aliens and immigrants and to require them to leave Canada is inherent in the federal sovereignty over aliens and immigration. The Canadian Constitution should, as the 14th Amendment of the U.S.A. Constitution does and Article 37 of the basic law of West Germany, not to mention the existing Canadian Bill of Rights, guarantee free movement within the country subject to the constitutional federal right to make laws effecting

entry or deportation which in turn must be guaranteed by certain procedural rules formerly prescribed by the Immigration Act. This would not be inconsistent with concurrent federal and provincial powers with federal paramouncy. Nor would it prohibit arrangements for greater participation by federal authorities in the provision of special services for immigrants. The practice of increased federal/provincial collaboration is encouraged by the present distribution of constitutional powers.

The federal jurisdiction in regard to aliens should not be changed constitutionally but certain recognition by statute of the rights of aliens should be protected procedurally.

The Premier
of Ontario

Parliament Buildings
Queen's Park
Toronto Ontario
965-1941

June 12, 1979

Dear Mr. Kidd:

I have your letter of May 23 requesting my views on the recommendations in Chapter 4 of "Towards a New Canada".

As a lawyer and as a Canadian, I am gratified by your invitation to contribute my personal views. You will appreciate, however, that as the leader of a government which is participating in federal-provincial discussions on constitutional reform, it would be inappropriate for me to comment as requested.

The general principles governing Ontario's approach in the intergovernmental discussions seeking a renewed constitution for Canada were set forth in the Speech from the Throne which launched the current Session of the Legislative Assembly on March 6th last. On the specific question of fundamental rights, Ontario has declared itself in favour of the entrenchment of democratic rights and, to some extent, legal rights. Further negotiation will be required to achieve agreement on the content of the proposed "charter of rights" and, indeed, on the principle of the entrenchment of such a charter.

May I add in closing that we have read with interest the studies and reports prepared by various groups in society, as independent contributions to this critically important national debate. In this regard, the Report of

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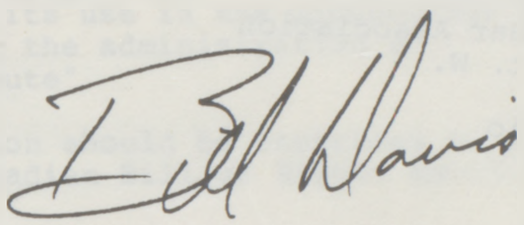
the Canadian Bar Association's Committee on the Constitution has been a particularly valuable contribution.

Sincerely,



William G. Davis

Mr. W. H. Kidd,
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Suite 404,
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Toronto, Ontario.
M5H 2A4

June 26, 1979

Mr. W. H. Kidd
The Canadian Bar Association
80 Richmond St. W.
Suite 404
TORONTO,Ontario

Dear Sir:

In response to your letter of May 23rd I wish to set out my views with respect to Chapter 4 of the Report of the Committee on the Constitution of the Canadian Bar Association, "Fundamental Rights".

While I support the conclusions of the report I am concerned that the intentions of the authors of that report may not be carried into effect if the precise language upon which these intentions are to be founded is not drafted and submitted at the same time as is the report itself, and in addition, I am of the view that in order to provide an effective guarantee, the Bill of Rights should contain the following provisions:

1. A provision for ensuring that a remedy is available when any of the guarantees of the Bill of Rights has been violated.

In Hogan vs The Queen (1974, 26 C.R.N.S. 207 at 215) the Appellant had provided a sample of his breath to a police officer who denied Hogan the right to first consult his lawyer. The admissibility of the evidence thereby obtained was contested. The Supreme Court of Canada per Ritchie, J. held:

> "...I cannot agree that, wherever there has been a breach of one of the provisions of that Bill, it justifies the adoption of the rule of "absolute exclusion" on the American model which is in derogation of the common-law rule long accepted in this country."

In my view the protection and re-inforcement of the fundamental values defined in the Bill of Rights should be considered more important to society than the assurance that a person accused of crime whose fundamental rights have been violated by a person in authority should be convicted on the evidence thereby obtained.

The Canadian Bar Association resolved in Halifax that the Canada Evidence Act be amended to provide as follows:

> "Evidence offered in a criminal prosecution shall be excluded if it was obtained unlawfully, contrary to due process of law, or under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute".

In my view this protection should be enshrined in our Bill of Rights and a breach of the Canadian Bill of Rights should be defined as an indictable offence.

2. The rights guaranteed by the Bill of Rights must be better defined. In Curr vs The Queen (1972, 7 C.C.C. (2d) 181 at 191), Laskin, J. held that:

> "Assuming that 'except by due process of law' provides a means of controlling substantive federal legislation ... compelling reasons ought to be advanced to justify the Court ... to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so ....Those reasons must relate to objective and manageable standards by which a Court should be guided...for myself, I am not prepared in this case to surmise what they might be." (emphasis mine)

At the present time whether or not any of the procedures and substantive law defined in the Criminal Code or indeed in any federal statute are necessarily protected by the Canadian Bill of Rights is open to question. Thus the right to trial by jury, the right to a preliminary hearing, indictment by Grand Jury, the requirement that the onus of proof remain on the Crown, the right not to be compelled to give evidence when a charge has been or is about to be laid, the right to maintain privileged communications between solicitor and client, the right to be free from government monitoring of private communications and mail opening, and the right to be protected from an abuse of process in a criminal proceeding may be subject to statutory revision, judicial interpretation or the exercise of the prosecutor's discretion, and may not be protected by the phrase "due process of law". I know of no simple answer to the problems of definition which the need for "objective and manageable standards" requires. It is unreasonable to propose that the Criminal Code and all federal statutes be frozen.

The precise language of a new Bill of Rights, in my view, is as important as the intentions of the authors in view of the history of judicial interpretation that the present Bill of Rights has generated.

Yours very truly,

Victor S. Paisley

:srw

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June 21, 1979

Ref: File 10/2

Mr. W. H. Kidd
The Canadian Bar Association - Ontario
Suite 404, 80 Richmond Street West
Toronto, Ontario M5H 2A4

Dear Mr. Kidd:

Thank you so very much for giving me the opportunity to participate in The Canadian Bar Association's efforts to secure a comment on various parts of the report, "Towards a New Canada, Committee on the Constitution, The Canadian Bar Association." I am very impressed by the report and in particular the section on which you have asked me to comment.

In fact, I can only endorse the recommendations which have been put forward in Chapter 5. I think it would help immeasurably if english and french were constitutionally entrenched as official languages. As much as the use of other languages can be encouraged and assisted, I do not think there is any possibility of there being a perception that language other than english and french can achieve that position.

I am quite in favour of each province having the power to chose its own official language as long as the position outlined in recommendation 3. holds that, "any person should have the right to use english or french in the federal and provincial legislatures and the territorial councils." As well, it should be possible for people to make use of either language in all the published reports and documents and this is certainly made possible through recommendations 3. (b) and 3. (c).

...../2

Mr. W. H. Kidd
The Canadian Bar Association

I am much less capable of assessing the full impact of recommendation 4. I am a little concerned that the right of an individual to be tried in his own province or municipality might have to be infringed if in fact there was to be provided all the legal services outlined in both english and french. Nevertheless, the basic statement of that recommendation is one with which I can agree.

My congratulations to The Canadian Bar Association and its contribution to the debate which must be a central one in Canada for the next number of years.

Yours sincerely,

Walter G. Pitman

Walter G. Pitman
President

/lp

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Assemblée Legislative Assembly

Toronto
June 22, 1979

Mr. W.H. Kidd,
The Canadian Bar Association - Ontario,
Suite 404 - 80 Richmond Street W.,
TORONTO, Ontario,
M5H 2A4

Dear Mr. Kidd,

Thank you for your letter of May the 23rd, 1979.

I have reviewed the question of language rights in the report of the Canadian Bar Association and I agree with most of the recommendations. Basic language guarantees for minority groups must be guaranteed by the Constitution and not by the provincial legislatures as suggested in the Pépin-Robarts Report.

For practical reasons, recommendations 3c, 4b and 6 could be more acceptable if they were not mandatory to all provinces. What I am trying to say is that language guarantees should, in some measure, reflect need and numbers without such services to become practical and not just an academic exercise where they are not necessary.

For some of the provinces such as Ontario, Quebec and New Brunswick, I would suggest that there should be some flexibility in the Constitution to allow such provinces to guarantee services of a wider range than what you have in your recommendations, such as Health and Municipal services.

In closing, may I say that I was very impressed by the initiative of the Canadian Bar Association and in some ways, it is unfortunate that many of your valid recommendations were lost in the shuffle in the debate over the question of the monarchy.

Yours very truly,

Albert J. Roy, Q.C.,
M.P.P. Ottawa-East

AJR/cp

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M E M O R A N D U M

TO: MPW

FROM: FAD

RE: Towards a New Canada - Constitutional Objectives
Chapter 6 - Regional Disparities

DATE: June 15th, 1979

I was pleased and somewhat flattered when you recently requested I review Chapter 6 of the draft C.B.A. Constitution. I could imagine nothing more innocuous than "the alleviation of regional economic disparities".

This windmill is really not worth tilting, but the only people who vex me more than those who advance absurd arguments are those who advance meritorious arguments for the wrong reasons. I have not, since my reading in college days of "A Modest Proposal" by Swift encountered a greater example of the illicit linkage of specious thought to produce arrant banality. I hope that the cogency (or want of it) of this chapter is not a marginal indication of the merits (or want of it) of the rest of this essay.

If the author of the chapter were familiar with the ancient Greek syllogism, he would have stated his hypothesis thus:

Major Premise

Canada is a union of provinces.

Minor Premise

Provinces should help one another.

Conclusion

Canada was formed so that the provinces could help one another.

...../2

It really will not matter if some day, a Canadian constitution sets out the recommendations indicated in this chapter. It is only to be regretted if that step is taken on the basis of the reasoning and logic of the person who compiled this chapter. It is a preposterous prevarication to endeavour to assert that peoples band together to help the weak and afflicted and even if they did, to express such a mundane motivation in a document so sacred as a constitution is to sully the ennobling motives which should be asserted in a constitution as the reason for coming together, for example, to end oppression and tyranny and provide freedom of thought, etc.

Ond hundred twelve years ago, it was stated in the preamble to the B.N.A. Act "such a union would conduce to the welfare of the provinces and promote the interests of the British empire". That is why the provinces came together. The "welfare of the provinces" that is spoken of is protection from American take-over and that word "welfare" has nothing to do with the "welfare" system that the writer is speaking about in this chapter.

It is only because the matter is of no consequence that one does not assail this attempt to pass it off as a justification for restating our constitutional purpose. What is annoying is the manner in which an effort is made to persuade that it should be stated in the constitution. The fiction of the writer's approach is manifest in the lack of structure in his argument. The irritating smugness with which the writer flits from one self-evident truth to another is an ephemeral stratagem to obfuscate his preposterously unsubstantiated hypothesis.

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It is apparent that the relationship of regional disparities and the creation of Canada is one where each is "chicken and egg". It is uncertain whether the writer is struggling to say that in the first instance the provinces united to alleviate regional disparities, or now that they are together, to be consistent with the "universal declaration of human rights" we may as well be committed to the alleviation of regional disparities.

It is offensive to me for anyone to suggest "that equality of economic opportunity is probably as important to the average individual as freedom of speech, association and religion". So is motherhood and goat's milk and it is not suggested that we write them into the constitution. I refuse to believe that people band together in order that they may properly handicap one another for a competitive economic race. It seem as sociologically absurd as its correlative "like forces repel".

If anybody really thought about it, I suppose he would concede that at the time of union, it was thought that various areas of Canada could exchange their surplus resources with each other and thereby enhance all. This is far removed from assuming that one area should continue making welfare payments or refraining from competing with another area of Canada.

In conclusion, when Canada was actually formed, the founders were not so foolish to say 'we are getting together to alleviate regional economic disparities' and anyone who endeavours to persuade me that the reason our constitution should be restated is because of that concern is going to have a great deal of difficulty and will require an approach to logic other than is as featured here.

****

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Charles G. Cowper, Q.C.
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K. G. R. Gwynne-Timothy, Q.C.
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July 5, 1979

W. H. Kidd, Esq.
The Canadian Bar Association - Ontario
404 - 80 Richmond Street West
Toronto, Ontario M5H 2A4

Dear Mr. Kidd:

I have your letter of May 23, 1979 in which you have asked me to re-read and give my views on Chapter 6 of "Towards a New Canada".

Let me say immediately that I agree with the philosophy underlying the chapter - that is, that regional disparaties should be eased by assistance to the have-not areas of the country. The difficulty, it seems to me, is in the statement of this policy.

Historically, Constitutional legislation tends to be extremely difficult to vary or amend while economic conditions can change rapidly. I understand, for instance, that the Province of Alberta defaulted on its bonds in the 1930s and it is now among the richest of the provinces on a per capita basis. It is not possible to predict what the impact of the Sable Island gas discoveries will have on the economy of Nova Scotia but it could be dramatic and, if so, could very easily lift that province from its present "have-not" status. Similarly, the present searches for oil, gas and uranium may have impact on Saskatchewan.

For this reason, it seems to me the most that should be stated in a Constitutional document is a general statement of the philosophy contained in Chapter 6.

Yours truly,

K. G. R. Gwynne-Timothy

KGT:ja

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PLEASE REFER TO D.M. Harley, Q.C.

July 17, 1979

Mr. W.H. Kidd, Q.C.,
President, Ontario Branch,
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80 Richmond Street West,
Toronto, Ontario.
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Dear Cappy:

As requested in your letter to me of May 23rd, I have pleasure in enclosing two copies of my comments on chapter 6 on regional disparities.

Yours sincerely,

D.M. Harley.

TOWARDS A NEW CANADA

Chapter 6

REGIONAL DISPARITIES

Comments of David M. Harley, Q.C.

Chapter 6 contains the unanimous recommendation of the Committee that the redress of regional disparities be affirmatively stated as an objective of the new Constitution. This constitutional objective, absent in the BNA Act, should be set out in both the preamble and the operative part of the Constitution.

What is meant by regional disparity? The report provides some clues. A regional disparity would exist if the opportunities for jobs, or the level of essential public services, or the rate of economic development in a province or group of provinces is significantly below that in the wealthier provinces of Canada. These disparities exist and, I believe, show every sign of continuing to exist well into the future. The report comments favourably on the measures adopted by federal governments since the 1930's to alleviate disparities. Agreements for equalization payments to the provinces, use of the federal spending power to support projects in the poorer provinces and payments for unemployment insurance are examples. The Committee recommends that they be placed upon a firm legal foundation in any new Constitution.

I support the recommendations made by the Committee in this area. The redress of regional disparities within Canada is, in my view, an objective of the highest priority. But how is that objective to be attained? The report touches upon several important considerations such as the need for programmes which encourage economic development, the importance of equalization payments and the need for better communication and cooperation between the federal and provincial governments in designing and implementing programmes. But beyond a discussion of these matters, there is very little in the way of specific recommendations. Unlike the other constitutional objectives, fundamental rights and language rights, which are to be buttressed by the courts and specific guarantees, the redress of regional disparities remains in the realm of good intentions. The Committee considered but rejected the suggestion that the regional disparity objective be enforceable by action in the courts.

In my view any new constitution requires teeth in this area. I question whether the mere statement of a constitutional objective and the pressure of public opinion are adequate. The 1979 report of the Task Force on Canadian Unity (Pepin-Robarts) adopted a bolder stance. It recommended that the principle of equalization be entrenched in a new Constitution. Laws which violate this entrenched right could be declared inoperative or invalid by the courts. I support this recommendation. In my view, a concise statement of the

objective of redressing regional disparities could be devised and the Supreme Court called upon to play the role of interpreter, a role which is assigned to it by the Committee in chapter 4.

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COMMENTS ON REPORT OF THE COMMITTEE ON THE CONSTITUTION - C.B.A.

CHAPTER 6 - REGIONAL DISPARITIES

1. The underlying thesis of the report appears to be that a new Canadian constitution should strengthen and broaden the legislative scope of the provinces and in particular to give the provinces the residual legislative jurisdiction. The effect of this provision will be that the federal government will be weakened in order to placate the provinces. The restriction or limiting of existing federal powers may lead to an eventual breakdown of the Canadian Federation. It is a trite observation that the world is shrinking because of improvements in the technology and the depletion of its resources. If it is a legitimate national goal to maintain and develop a prosperous economy and a healthy political climate, then the ordinary citizen should identify with and give loyalty to the nation as a whole rather than to the smaller geographical unit (the provinces).

2. It is the function of a constitution to provide the structures and to state the mechanisms and procedures under which the affairs of the country are to be governed. The constitution should provide for the widest possible freedom of the individual. Good government is more likely to result from a lack of legislation rather than from an abundance of it. The alleviation of regional disparity will best be accomplished through individuals in their regions making the best use of their resources, including their human resources. There is no reason to suppose that government intervention aimed at relieving regional disparities

will be effective. Indeed, we have numerous examples to demonstrate that government projects and government investments undertaken for that very purpose result in monumental waste with no longterm benefits accruing to the "poorer regions".

3. There is very little if any reason to include in a national constitution a section on regional disparity, even in the context of the report of this committee. If a constitution were to provide that the central government had the residual legislative power, then there would be no reason whatsoever to include a section making it imperative that the governments tilt at this windmill with unceasing attention. Such a provision is to invite endless hassles and disaffection. The present constitution makes no such requirements, however governments and citizens have recognized that regional disparities exist and our present constitution has not hindered government entering into financial arrangements and launching projects (spending money) for the purpose of relieving regional disparities. As has been stated, such activity has not always been successful and it is unlikely that this sort of undertaking will be more successful if there is a section in the constitution as recommended in this committee's report.

4. Whatever the fundamental purpose of a constitution may be, I can find no merit nor justification and do not concur in this committee's recommendation #1, "The alleviation of regional economic disparities should be a fundamental purpose of the constitution."

5. Recommendation #2 of the said chapter is a statement of harmless platitutes and might be included provided that the constitution itself contains no more than a few simple words of intent. It is not proper for a constitution to attempt to fix a government with an absolute responsibility of continually engaging in attempts to achieve the impossible.

6. Recommendation #3 might be dealt with shortly in the section dealing with fiscal policy and division of taxing powers and does not warrant a section of its own.

7. Recommendation #4 is excess verbiage.

****

LANG, MICHENER, CRANSTON, FARQUHARSON & WRIGHT

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DONALD J. WRIGHT Q.C.

June 13, 1979

Dear Mr. Kidd:

I have been travelling about too much to give a considered reply to your request of May 23. At this time I think the best I could do would be to send you the statement which I prepared and delivered to the Special Senate Committee on the Constitution on 21st November last. It appears at the beginning of the transcript of the evidence that morning, which gives the whole discussion and, I think, reports fairly accurately my thoughts about the Crown and the Governor General as elements of the executive in our parliamentary system of government.

I hope this will be useful. Additional copies can be obtained from:

Canadian Government Printing Office,
Supply and Services Canada,
45 Sacre-Coeur Boulevard,
Hull, Quebec, KiA 0S7.

With kind regards,

Yours sincerely,

Roland Michener

Mr. W. H. Kidd,
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July 13, 1979

Mr. W.H.Kidd,
c/o The Canadian Bar Association-Ontario,
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80 Richmond St.W.,
Toronto, Ont.
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Dear Sir,

I am writing in answer to your letter of May 23rd requesting my views on the recommendations contained in "The Upper House" - Chapter 8 of the Canadian Bar Association Report on a new constitution for Canada. My comments are necessarily based on my observations as a member of the Senate since 1971 and, prior to that, as special counsel to the federal or to a provincial government at Federal-Provincial Conferences over a period of more than thirty years.

The principal recommendation of the Report with respect to an Upper House is that it consist exclusively of nominees of the provincial governments who would hold office during pleasure. Provincial ministers and permanent officials would be eligible for appointment. Federal ministers would have the right to attend and to speak but would have no power to vote. This would transplant to Canada a Bundesrat on the West German model in place of the Senate, although the Report recognizes that "much of the German experience is inapplicable and would require considerable adaptation to fit the Canadian context." It is a proposal with which I strongly disagree.

cont'd.....2

I find it strange that the West German Bundesrat should suddenly emerge as the model for an institutional solution to federal-provincial problems in Canada. The proposal fails to take account of the special features which differentiate West German federalism from our own. Moreover, it does not reflect practical experience in the operation of Canadian federalism.

The German system is "executive-legislative federalism." Legislation is almost exclusively the domain of the central government but the administration and execution of the laws, both federal and state, are the responsibility of the Laender, i.e. the states. The bulk of the civil servants in the Republic are officials not of the central government, which employs about 300,000, but of the Laender with more than 1,400,000. The composition of the Bundesrat, whose members are ministers of the Laender governments acting on instructions of those governments, reflects this horizontal division of powers, which, of course, differs basically from the vertical division in Canada and most other federations. The Bundesrat also reflects the constitutional history of German federations with states which for a long time were almost independent principalities. Bavaria, for example, had its own King until 1918. Considering the basic differences between West German federalism and its history and those of Canada, I cannot see a Bundesrat type of Upper House fitting into our parliamentary system. With the provincial executive power in a position to curb the federal legislative process, our system would be unworkable.

The Report sees the reconstituted Upper House as "an ongoing federal-provincial conference" for "co-ordination of policy on a continuing basis" in place of the Federal-Provincial Conferences of First Ministers and ministers. I am afraid that this is based on simplistic reasoning. It is politically unrealistic to expect provincial premiers to abdicate their role in federal-provincial matters in favour of their nominees in the

cont'd.....3

Upper House. Nor should they. Negotiations and agreements on such matters are properly the role of the governments responsible to their respective legislative bodies and electorates. The Federal-Provincial Conferences of Prime Ministers and ministers meet the requirements of popular election, regional representation, and understanding of the issues involved. It is significant that even in West Germany, with the Bundesrat as constituted, there are frequent conferences between the central and state governments corresponding to our Federal-Provincial Conferences. The belief that problems would be solved more easily and confrontation avoided by a transfer of the functions of such conferences in Canada to a public forum composed exclusively of nominees of the provincial governments with federal "spokesmen" who have no vote, is completely unrealistic. Experience teaches that negotiation in a public forum between politicians elected at different levels does not lessen confrontation but promotes it.

The powers and functions recommended for the new Upper House would give a direct voice in federal decision-making to the provincial governments. Considering that the Constitution sets up a federal system in which different roles are assigned to the federal and provincial governments respectively, it would mean a radical change in the system if the governments elected to deal with matters within provincial jurisdiction are empowered by their exclusive control of the Upper House to intervene in and obstruct the exercise of its constitutional jurisdiction by the federal government. The effect can only be to weaken the federal government by making it difficult for it to act in the national interest, which it is elected to do. I doubt that this is in the best interests of Canada.

While I disagree with the particular change recommended in the Report, I want to make it clear that I believe that Senate reform is necessary.

cont'd.....4

I suggest, for example, that:

1. Serious consideration should be given to the recommendation in the 1972 report of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada that all Senators continue to be appointed by the Federal Government but that one-half from each Province or Territory be chosen from a panel of nominees submitted by the appropriate Provincial or Territorial Government.

2. Appointments should be made for a fixed term of ten years which would be renewable.

3. Opposition parties should be guaranteed a minimum representation, the appointments to be made in consultation with the leaders of the respective political parties.

4. The present absolute veto power of the Senate should be reduced to a suspensive veto as recommended in the report of the above-mentioned Joint Committee.

I suggest the foregoing not as an all-inclusive reform programme but as examples of reforms which could make the Senate a more effective institution within our federal system as it is or as it may be renewed.

Yours very truly,

H. Carl Goldenberg

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June 22, 1979

Canadian Bar Association
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Attention: W.H. Kidd, Esq.

Dear Sirs:

This statement is in answer to your letter dated May 23rd 1979 in which you ask me for my comment on the recommendations contained in the report made by the Committee on the Constitution set up by the Canadian Bar Association (hereinafter referred to as "Bar Committee Report"), more particularly in relation to Chapter 8 thereof entitled "The Upper House".

In essence the terms and conditions enumerated in Chapter 8 of the Bar Committee Report embracing as it does the recommendations of the said Committee, proposes the abolition of the existing Senate or Upper House created under the B.N.A. Act. The recommendations as to the power of appointment, tenure of office and powers differ completely from the provisions governing the present functioning of The Senate or The Upper House. The only feature retained is that The Upper House shall be nominative and not elective.

Recommendations 1 and 2

The power of appointment of members to The Upper House is recommended to be conferred on the governments of the provinces. This, in my view, is unsound. Federal authority should control its own institutions and, therefore, the right to make appointments to federal institutions.

The virtues claimed for such power of appointment to be exercised by the provincial governments, namely, to assure effective representation to the provinces and to protect regional and provincial interests is illusory. A substantial number of the members of the existing Senate are former federal members and ministers. In each case, such person was elected by the people of one of the provinces and as a minister regionally selected as such minister by the

federal authority. Other members of the Senate are in part former elected members and/or ministers of provincial legislatures.

It is little more than a hundred yards along the main corridor of the Centre Block, Parliament Buildings, from the Chambers of the House of Commons to the Senate Chamber. It is difficult to appreciate how that short walk should transform a former elected federal member or minister from one truly representative of the people and regions of Canada to one who in such walk has lost the quality to be a regional representative. This statement would equally apply to elected members and ministers of the provincial legislatures.

The Senate membership was made up in 1978 as follows: 28% had been members of the House of Commons; while 24% had provincial legislature experience, 8% of whom had served in provincial cabinets which includes 6 ex-Provincial Premiers and 7 leaders of Provincial political parties who sat in opposition.

In the light of this analysis, who can say that public appreciation, understanding of public interest and of regional and minority interests are not possessed by members of the Senate in carrying out the duties of their office. The effort at downgrading Senators because they are appointed by the federal government is a thoughtless statement. The allegation that the Senate is "institutionally weak" is an indication of intellectual poverty in the search for criticism of the Senate. Whatever is the special quality of appointment by provincial governments of members to the proposed Upper House is not evident from the data in support of recommendations of the Bar Committee. Certainly for anyone who is ready to observe or read and to be informed the Senate at work as an institution has a great and continuing value in the public interest that cannot be achieved by an Upper House created in the terms of the recommendations of the Bar Committee Report. It is not suggested, I assume, that appointment to an Upper House by provincial governments is tantamount to a ceremony of endowing the appointees with special gifts of discernment and foresight to detect any significant regional impact in any federal government legislation that may not be possessed to at least the same degree by federal government appointees to the Senate. The roots or source from which appointees are drawn, are the same, namely designated regions of Canada described as Provinces of Canada.

The provisions as to appointments to membership in an Upper House being made at the pleasure of the governments of the provinces must mean "of each provincial government". Election days are not uniform in all the provinces. Accordingly, such appointments to membership are subject to voting day changes in the thinking and decisions from time to time of provincial governments even though their respective political designations may continue. The appointment, therefore, to an Upper House in these circumstances being at the pleasure of each provincial government would seem to make necessary, a revolving-door policy to such an Upper House to accommodate the movement of members in and out of such House as each provincial government exercises its rights to terminate appointments at pleasure and make new appointments. United effective action in such circumstances in respect of national or regional interests, would appear to be beyond the fondest hope of the most optimistic person.

For the reasons stated above, I see no value in the change from the institution known as the Senate and the creation of a replacement body to be known as an Upper House with the changes in function recommended and the new powers to be provided.

Recommendation 3

There is only a generalization as to how representation in such an Upper House shall be determined. Do the provincial governments act in concert in their selection of membership or, is each province to be allocated a fixed number of members of such Upper House on the basis of population? How is it proposed to reflect the regional linguistic and population factors? There is nothing to be found in paragraph 3 of the recommendations on this point except generalization and suggestion and possibly pious assumptions that the various political parties making up the various provincial governments can find accord. On this point it is to be presumed that provincial governments representing differing political views and policies will exercise their power of appointment in line with their political views and policies. Provincial governments bearing the same political designation have shown no unanimity among themselves in the various conferences of the First Ministers. This situation offers no assurance of certainty and stability in the representation of the various provinces and the advancement of provincial objectives or protection of provincial rights nor can there be any assurance that the need for federal priorities will be fully understood and appreciated.

Recommendation 4

Provides that "the Federal Government should have the power to name spokesmen to the Upper House, but they should have no vote". The purpose of such provision is difficult to follow and in such circumstances the ability to have representation by "spokesmen" in the Upper House who are not members in order that they may have an opportunity to discuss and promote federal legislation is to say the least of doubtful value. There is a provision in the present rules of the Senate under which a Minister may appear in the Senate to explain and promote legislation for which he is responsible and in the course of such presentation, to answer questions. This is a much more definite provision than what is inherent in the word "spokesmen".

G E N E R A L

RECOMMENDATION 5

DEALING WITH THE FUNCTIONS OF THE UPPER HOUSE

In paragraph 5 of the said Recommendations re an Upper House, special powers are proposed to be provided for the Upper House. In this connection, provincial legislatures already have wide powers to legislate respecting matters of provincial interest. Accordingly, the governments of the provinces have wide authority in their own right to protect the powers granted to them under the B.N.A. Act. What is being attempted in these recommendations is to extend or to carve out areas of so-called provincial interests in relation "to legislation on matters that are and should be within federal competence that may have a very different impact on various regions". The words in quotation are in Chapter 8 of the Bar Committee Report under the heading "Background and Purposes" (p.38) and the subject matters of tariffs, transportation and monetary policy are used to illustrate what is being aimed at.

This is the new role that is put forward on behalf of the provinces. An institution to be called the Upper House containing only appointees of the various provincial governments is to be the protector and guardian of provincial rights against Federal legislation that may, in its opinion, have a significant regional impact. Special powers are proposed to be given to such Upper House to restrict the exercise of such legislative power by the Federal Government even if it is competent for the Federal Government so to legislate.

Has thought been given to the reaction of Parliament as presently constituted in respect of the essential characteristics of the recommendations contained in paragraph 5, namely, the proposed restriction on Federal power to exercise its present specific jurisdiction to legislate in respect of areas of regional interests and in a way that may have some significant impact on one or more or all of the provinces? What can be hoped for by way of response of the Federal Government, including the Senate, to the proposed restrictions in the scope of its powers or to the abolition of the present Senate? A Federal Government Bill was introduced in the last Session of the Parliament that was dissolved in May 1979 aimed at changing the powers and direction of the Senate, including the abolition of the present Senate. While it is acknowledged in the supporting data in Chapter 8 to the Report and that "the Senate has undertaken sometimes alone, sometimes jointly with the House of Commons, a very useful investigative and research role", and reference is made to the Joint Committee's

Report on the Constitution, the Bar Committee Report states that the work done currently by the Senate is useful, if not crucial, but should make way for an institution having specific regional considerations.

Any reasonable study and analysis of the work done by the Senate in reviewing legislation to date will disclose that there were involved in such consideration aspects of regional interests in Health and Welfare, Resource Taxation, Manufacturing Operations and Taxation, Research and Telecommunications, etc. Accordingly, there exists in the Senate, the experience and judgment and capacity that such subjects require. Is it really expected enacting the so-called powers recommended to be possessed by the Upper House will, of itself, educate the members appointed by the various Provincial governments in their duties of office or that the source of their appointment will fully equip them for such tasks?

The Bar Committee Report provides priority for powers to be given to an Upper House to deal with Federal legislation having a significant regional impact, but it fails completely to recognize the importance of a review of all other Federal legislation and the experience and capacity of the Senate in relation thereto which has been demonstrated in its amendments and revisions of House of Commons Bills affecting the rights of Canadians and taxpayers in their daily lives yet not within the scope of the issue of provincial rights as viewed by the Bar Committee Report.

It would not appear from the Bar Committee Report that any consideration was given to the Report of the Special Committee of the Senate on the Constitution. Nevertheless, individuals who are acknowledged as responsible and leaders in the public life of Canada appeared before that Committee and expressed their views based on their experience and judgment on the proposed changes in the constitution, including, the abolition of the Senate and its replacement by another form of Upper House.

In describing the principal function of the Upper House it is proposed in the Recommendations that the Upper House simply have the power to amend or reject any legislation and the House of Commons have the clear power to override a veto in the Upper House and to re-enact such legislation without its Assent if it deemed that the Upper House was unduly delaying legislation. In view of the special powers for the

Upper House, also provided in the said recommendations it can be concluded that this right to amend or reject and the right in the House of Commons to override a veto refers to any legislation other than such as may have significant regional impact.

In my opinion such recommendation to abandon the right to a veto in relation to any Federal legislation that has no significant regional impact is not in the public interest, and in fact, is prejudicial to the public interest.

It would appear, therefore, that the Upper House is to have two functions:

(a) power to amend or reject by a majority vote any legislation that does not have a significant regional impact; and

(b) special powers in relation to legislation that has a significant regional impact.

Number (a) above is subject to the right of the Federal Government to re-enact and pass into law such proposed legislation where such legislation is amended or rejected by the Upper House without further reference to or any right of action by the Upper House if it is deemed by the House of Commons that the Upper House was unduly delaying this legislation - p.43 of the Bar Committee Report. Such determination of undue delay represents an arbitrary decision of the House of Commons made with no power given to challenge such determination.

However, the above decision to be made by the House of Commons is not included by way of qualification of the recommendation in the Bar Committee Report as to the overriding power of the House of Commons.

We now come to the scheme put forward in the said Recommendations and forming the real basis for the proposed functioning of the Upper House. In essence there is to be no power of veto in the Upper House dealing with legislation coming to it from the House of Commons that does not have significant regional impact. Such determination is a matter for decision by the Upper House.

However, the real problem will arise if the Upper House determines that particular legislation coming forward from the House of Commons has significant regional impact. Special powers are recommended for the Upper House when such determination is made and approval by the Upper House is sought of such legislation.

Such provision removes any real value to the right of review of legislation relating to regional interests, unless it may be said that such Federal legislation has a significant regional impact. On the other hand, the power of the Senate entitles it to review all Federal legislation passed by the House of Commons and to amend or reject the same.

This right to veto is a strong and forceful right and persuasive as well in any subsequent review by the House of Commons of amendments proposed by the Senate. To become law, both Houses of Parliament must approve any proposed legislation. It should be noted too, that the Senate may initiate legislation on other than money Bills.

By way of illustration of action by the Senate, when the revision of the Criminal Code was proposed in 1952, the Bill was introduced in the Senate and in the course of its study about 116 amendments were made. The House of Commons studied this Bill with those proposed amendments but the Bill died on the Order Paper when Parliament prorogued. The Bill with the amendments was re-introduced in the Commons in 1953. It was passed by the Commons but additional amendments, about 26 in number, were made in the Senate which were accepted by the Commons and the Bill became law.

The House of Commons passed a Bill entitled, The Investment Companies Act following the Atlantic Finance Co. failure. The Senate re-drew the Bill because of its many inadequacies and the revised Bill was accepted by the House of Commons and came into force.

In 1974-1975 the Senate made substantial amendments to the new Canada Business Corporations Act which were accepted by the House of Commons and the Bill received Royal Assent.

A new Bankruptcy Bill after earlier introduction in the House of Commons was introduced in the Senate. Over 100 amendments were made in the course of the Senate study of the Bill. The Bill was re-introduced in the Senate in 1979 but died on the Order Paper on dissolution of Parliament.

These are a few of the many instances of review of proposed legislation by the Senate and of the introduction of Bills in the Senate

THESE SUBJECTS AND SPECIAL POWERS RELATING THERETO:

(a) shared-cost programs with the Provinces;

(b) measures to regulate intraprovincial trade declared to be essential for the management of national or international trade;

(c) general economic objectives binding on the provinces;

(d) a declaration that a work is for the general advantage of Canada;

(e) use of emergency power in matters other than was, invasion or insurrection;

(f) a role in the nature of a continuing federal provincial conference;

(g) ratification of treaties respecting matters predominantly within provincial legislative authority and multilateral trade treaties;

(h) consent required to appointment of Supreme Court of Canada judges via a judiciary committee of the Upper House working in camera.

Subparagraphs (a) to (d) inclusive, would require 2/3 majority of the Upper House for any effective action by it on Federal legislation having significant regional impact passed by the House of Commons. This power could restrict and stultify any action by the House of Commons on these subjects even though the Federal Government presently possesses the necessary authority and jurisdiction to act. An Upper House consisting entirely of members appointed by provincial governments under this power could withhold any action on such legislation by failing to vote a 2/3 majority of the Upper House in support of such legislation. This result could be achieved by concerted inaction or by lack of attendance. In effect, this power provides an absolute veto in the hands of a provincially-controlled Upper House. It represents an effective way of amending the B.N.A. Act without a direct frontal assault on the Constitution. Federal legislative action provided for in the Constitution could be completely frustrated.

Shared-cost programs (referred to in (a)) with the Provinces would require agreement by the Federal government to change existing arrangements and to provide legislation where such existing agreements and arrangements had been ratified by statute. It is obvious that this subject is more properly a matter for discussion and consideration and decision, if possible, at a Conference of First Ministers. Such shared-cost programs are usually administered by the Provinces and the determination of recognized costs and percentages thereof to be borne by the Provinces and Federal Government respectively and the respective roles of the parties of necessity require to be spelled out by agreement among the parties. Agreements freely reached by the Provinces and the Federal authority is the only reasonable way to resolve issues inherent in the consideration of subjects of this nature.

No arbitrary rules can be provided such as the recommended 2/3 majority of the Upper House to achieve the described national consensus in the matter of spending power. Agreements on such shared-cost programs have been reached notwithstanding the fact that the provinces may, in some cases, have initiated the legislation creating such programs. Federal grants or contributions of Federal money to share such costs must be by agreement between the Federal authority and the provincial government. There is inherent in the phrase "shared-cost programs" agreement to participate in the cost thereof. The Provincial governments cannot draw on the Federal money chest without the agreement of the Federal Government, nor should it be able to dictate the terms of cost-sharing other than by agreement. This subject cannot be in any way under the control or dictation of an Upper House peopled exclusively by appointees of Provincial governments.

Special power referred to in (b) is also recommended to be given to the proposed Upper House to deal with "measures to regulate intraprovincial trade declared to be essential for the management of national or international trade". Intra-provincial trade as part of the management of national or international trade is a federal responsibility and changes in the management of such trade as they may affect intraprovincial trade can only be dealt with as of right by the Federal Government.

This proposed special power means that a House of Commons Bill dealing with this subject must be passed by at least 2/3 majority of the Upper House to bring such "measures to regulate" into force. This special power would constitute a restriction on Federal Government exercise of its undoubted authority in this field by the Upper House and appears to be designed to force bargaining to lessen the scope of Federal power in this area.

PARTICULAR COMMENT ON RECOMMENDATION 5 -
PARAGRAPH (c) AS DESIGNATED IN THIS LETTER

Paragraph (c), attracts particular criticism. Thus in (c) the phrase "general economic objectives binding on the Provinces" is too vague to be useful for any discussion of what subject matter is included within such words. One thinks of price control, rationing of supplies, limitation of exports, consumer regulations, competition policy, resources, security, bankruptcy and many other subjects. In some cases the Courts have supported the Federal legislation dealing with such economic objectives on the basis of its being criminal law; in some cases the Federal Government and the various Provincial governments have found a working basis for the two jurisdictions as in the case of "insurance" and other fields. Many such situations have been litigated. But, is an Upper House, the membership of which is appointed solely by the various Provincial Governments and whose tenure of office is at the pleasure of such governments, a proper institution to determine such an issue of interpretation and jurisdiction? One would have to anticipate recourse to the Courts for any finality of interpretation. Even such decision might be by subsequent legislative action negated or the law restated to nullify such decision.

Clearly this subject matter and the requirement of a 2/3 majority vote of the Upper House has no place as a special power of the Upper House to restrict the exercise of Federal power in whatever may be the fields covered by the language used to describe this special power. The scope that interpretation may give to such language is too indefinite a base on which to build such a special power. The additional requirement that such 2/3 majority assent must be renewed annually is unworkable. At the termination date the membership of the Upper House may have substantially changed by reason of Provincial elections or the pleasure of the appointors having changed.

The next proposal is that a declaration that a work is for the general advantage of Canada should require a 2/3 majority of the Upper House. The authority to make such a declaration belongs to the Federal Government. As the Bar Committee Report admits at p.115, "The power for many years proved to be of considerable utility in developing a national system of railways and in fortifying Federal control over intraprovincial communication", more recently this power has been "valuable in the regulation of atomic energy". Again, we are faced with existing Federal control in this field,

the exercise of which, has to date been in the best interest of Canada and its constituent parts. This special power would appear to be the product of an unfounded fear that sometime in the future, the Federal Government might use such power unfairly to the disadvantage of two or more provinces. The subject is very important. The right of the Federal Government to use such power may require immediate action in the public interest. To permit delays that may result from the use of this special power to withhold a 2/3 majority approval by the Upper House in such circumstances is not justified. If it turns out that such step was in excess of what was required it is always possible to retrace such step.

It is true that the Senate enjoys the right to amend or reject any Bill from the House of Commons, and in any event, such Bill cannot become law unless it is passed by both Houses of Parliament, but the Senate is less likely to act arbitrarily than an institution put forward as being the voice of the provinces with a tenure of membership dependent upon the pleasure of the respective provincial governments.

The granting of such special power could lead to litigation of a disturbing and unsettling nature. The Federal Government conceivably could seek unilaterally to secure amendments to the B.N.A. Act to overcome resulting stalemates. Most probably what would occur would be a refusal by the Federal Government to agree to such constitutional changes as might be put forward by the Upper House on behalf of Provincial Governments unless, of course, urgent action was required, in which event political pressure might bring a revision of such proposals so as to deal with the situation as a particular case and not as establishing a precedent.

However, it is wrong in principle to proceed by indirection to create legislatively, the opportunity for amendment of Federal powers under the B.N.A. Act and thereby to endeavour to restrict the scope of such Federal powers as may thereby be so affected by failure of the Upper House to provide a 2/3 majority vote in support of the legislation in question.

Such matters should more properly be subject to study and consideration and decision, if possible, by the parties concerned, namely, the First Ministers in a First Ministers Conference and not by way of granting special powers to the Upper House that could well interfere with Federal Government action and restrict such action. This is not the direction that constitutional bargaining should take.

To appreciate the scope of the potential in this special power for the restriction of Federal power on the basis of significant regional impact one needs only to note that the principal function of the Upper House as recommended by the Bar Committee Report is to review Federal legislation having significant regional impact. It must be assumed that such question will, in the first instance, be determined by the Upper House. If such a determination is challenged by the Federal authority, litigation may follow. Such a result is inherent in every case when the Upper House makes such a determination. Whether its importance is such that litigation will follow in every such case is a matter for speculation. But, in the recommended special powers of this kind the stage is set for such action when one proposes to insert into the Federal Parliamentary system an institution as part of that Federal Parliament whose membership is appointed solely by the Provincial governments and whose tenure is during the pleasure of the Provincial Governments. When one adds such special powers as are recommended by the Bar Committee Report for the Upper House, the opportunity for challenging Federal power and attempting to restrict or limit its exercise is presented. This recommended course of constitutional reform is fraught with danger. This course represents the road to disagreement, discord and litigation. Among reasonable people the route of conferences and full discussion and decisions reached by agreement by the Federal Government and the Provincial Governments is the preferred course. In that direction is the hope for the resolution of the differences between Provincial Governments and Federal Government.

Subparagraphs (e) to (g) inclusive, would appear to require a majority vote for effective action by the Upper House. However, the requirement of action by way of consent or majority support would enable the Upper House to restrict action by the Federal authority notwithstanding the existing authority of the Federal Government on such subject matter. In effect, this power can be a veto and a restriction on the undoubted jurisdiction of the Federal Government. It is true that the Senate enjoys the right to amend or reject a Bill from the House of Commons, but it is less likely to act

arbitrarily than an institution put forward as being the voice of the provinces with the tenure of the members dependent on the pleasure of the respective Provincial governments.

(e) so designated in this statement contains a special power recommended in the Bar Committee Report. This special power requires the support of a majority of the members of the Upper House for legislation coming forward to the said House from the House of Commons for use of the emergency power by the Federal legislative action in matters other than war, invasion or insurrection. Under the opening paragraph of section 91 of the B.N.A. Act and in relation to subjects enumerated in the various items following the said opening paragraph there is a broad field for the exercise of emergency power by legislation of the Federal Government. Then under this special power given to the Upper House a wide range of emergencies would be subject to the requirements of the special power, yet this opening paragraph of said section 91 gives legislative authority to the Parliament of Canada to make laws for the peace, order and good government of Canada subject to certain qualifications. Emergency legislation within the scope of the aforesaid provisions may only be enacted by the Federal Government. Delay in providing the required support could adversely affect the bringing into force of such emergency power.

The circumstances that may give rise to emergency action of the kind referred to herein may embrace such matters as the national interest, the life and safety of the people of Canada, the viability and economic wellbeing of Canada, and the emergency legislation must relate to subjects exclusively within the legislative authority of the Parliament of Canada under the B.N.A. Act. The exercise of this authority in its many aspects and applications must not, in my view, be circumscribed by a limitation of the kind proposed in the special power recommended under the said paragraph (e). If the validity of such legislation is challenged the Federal Government may refer the question of validity to the Courts for their decision. In addition, the provincial governments may seek to challenge in the Courts, the existence of an emergency to support such emergency legislation. Members of the public may seek through action in the Courts a decision on the validity of such emergency legislation. In my opinion, reference of such an issue to the Courts in whatever form such proceedings may take assures protection to all parties concerned as to the validity of the legislative action taken by the Parliament of Canada. No other method of challenge should, in my opinion, exist.

Paragraph (f) as designated in this statement proposes an extraordinary intrusion by the Upper House into the First Ministers' Conference on the subject matter of Federal/Provincial relations in the role of a conciliator. Of course, if the Upper House so desired it might, without any special power, assume an investigative role into such subject matter. This additional suggested role for the Upper House adds nothing, in my view, to the value or attractiveness of such an institution. It simply associates the members of the Upper House with their appointors in advancing a possible common interest. The duty of the Upper House as defined in Recommendations of the Bar Committee Report are to see to it that "special regional considerations are fully aired in an institution created for the purpose" (see p.39 Towards A New Canada). Is it likely in these circumstances that such a conciliator would be in a position to project independence of thought?

Having regard to the fact that the provincial governments are the appointors of the members of the Upper House and that their tenure of office is during pleasure of such provincial governments, there would appear to be some conflict between this role and the role of the Second Chamber or Upper House to review and pass on legislation coming forward from the House of Commons.

Paragraph (g) so designated in this statement proposes a special power under which consent of the Upper House expressed by a majority of its members be required in order to ratify treaties respecting matters predominantly within provincial legislative authority and multi-lateral trade treaties. It has been suggested in the narrative of the Report that such requirements should apply in connection with GATT (General Agreement on Trade and Tariffs).

This subject is within the legislative competency of the Federal Government. The authority to act in such a matter is clearly "the regulation of trade and commerce". Trade treaties including multi-lateral trade treaties involve meetings, discussions and decisions by Canada in association with other countries of the world. The level of such meetings for such trade purposes by custom and practice are carried on between countries. If Canada wishes to establish itself as an international trader it must meet with other trading countries on the recognized and accepted basis.

It is unnecessary for me to add any words as to the value and importance of export trade to Canada. The B.N.A. Act gives the legislative authority to the Parliament of Canada to regulate trade and commerce. Accordingly, legislation required to supplement and confirm agreements between Canada and the other countries must be dealt with by the Parliament of Canada. This is the assurance which the other countries require in the way of confirming action when trade agreements are negotiated. In the present state of international trade and international attitudes in relation to trade agreements and the duties and obligations of the countries proposing to make such trade agreements there should be no restriction such as is proposed on the right of the Parliament of Canada such as is stipulated in this proposed special power. Either Parliament approves, in which event there are resulting binding trade agreements or if a Second Chamber or Upper Houses refuses or delays the passage of implementing legislation no trade agreement results. There is where it must rest, without limitation.

Subparagraph (h) should not in any circumstances be accepted. The method of appointment of Supreme Court of Canada judges presently followed works very well. Such appointments are well considered with the object of securing the most capable and representative persons to fill such positions.

The "in camera" procedure proposed in this sub-paragraph by means of a Judiciary Committee of the Upper House as preliminary to consent by the Upper House to any such appointment is not only unworkable, but is highly undesirable. The writer has had some experience in areas involving proceedings in camera. The end result has been that very quickly after the conclusion of such hearing or meeting what was said and decided became a matter of public knowledge. In my opinion, the most eligible lawyers would not permit their names to be put forward if such a procedure for the appointment of Supreme Court of Canada judges were adopted.

In this statement I have addressed myself to the language of the recommendations and the narrative which is part of the development of the subject matter of Ch. 8, but the relationship between:

> "The power possessed and proposed to be given to the Upper House to amend or reject any Federal legislation subject to the overriding power of the House of Commons to re-enact it without any requirement that the assent of the Upper House must be sought again, and
>
> "the special power proposed to be given to the Upper House in relation to certain Federal legislation whereby the support or consent of a majority of members of such House is required in order that such Federal legislation might be approved".

gives me great concern. A refusal to give majority support or consent to Federal legislation seeking, for instance, emergency powers in a matter other than war, invasion or insurrection represents a rejection of such legislation by the Upper House. Is it intended in such event that the overriding power proposed in the Bar Committee Report may be exercised by the House of Commons and such rejected legislation may be re-enacted without the consent of the Upper House. The narrative discusses the differing views put forward by the members of the Bar Committee on the use of this power. Is it limited to Federal legislation that clearly has other than a significant regional impact? It should be noted that the language used in describing this power is "any legislation". All that appears to be suggested in the narrative at page 44 reads as follows:

> "Joint Rules and Regulations could be developed to indicate the areas of legislation where the Upper House should be heard. If there was no agreement the House of Commons could determine the matter".

The language used in defining the powers respectively of the Upper House and the House of Commons and the effect of a rejection in the above circumstances is not clear and does not afford any resolution of the question. Is it intended that in any circumstances the lack of support or consent by the Upper House ends action on such legislation?

In summary I would like to add a few words of comment to my statement commenting on the various recommendations contained in the Bar Committee Report in relation to the abolition of the Senate and the substitution of an Upper House with special powers in relation to regional matters. It is clear to me that the Bar Committee Report comes out on the side of the provinces. It is also clear that the conclusions and recommendations do not reach the level of a consensus so far as the members of the Special Bar Committee are concerned, nor can it be assumed that there is a consensus on the said recommendations in the Association itself. It is good, however, for Canada and for better understanding by its people of the history and structure of their government that examination and analysis of the processes of government be undertaken from time to time. If nothing substantial results, nevertheless, more Canadians should be better educated on the processes of government and the business of government may perhaps be better understood.

Yours truly,

Salter A. Hayden

SAH:gls

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LANG, MICHENER, CRANSTON, FARQUHARSON & WRIGHT

BARRISTERS & SOLICITORS

June 25th, 1979.

Mr. W. H. Kidd, Q.C.,
The Canadian Bar Association of Ontario,
Suite 404,
80 Richmond Street West,
Toronto, Ontario,
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Dear Cappy:

In response to your letter of May 23rd I have summarized my views on the recommendations contained in "The Upper House" - Chapter 8 of the Report on a new constitution for Canada.

I hope they may prove of some value.

Kindest regards,

Dan -

DAL:cau
Enclosures

VIEW ON CHAPTER 8 - THE UPPER HOUSE
REPORT OF THE COMMITTEE ON THE CONSTITUTION
THE CANADIAN BAR ASSOCIATION

It is very difficult to analyse Chapter 8 in a positive and constructive manner because of the misconceptions and contradictions that quickly become apparent.

To illustrate one need only take two examples which go to the root of the recommendations contained in this chapter.

The chapter states at one point,

> "a strong federal government unfettered by overly strong direct provincial control, seems necessary to balance provincial power that is not itself fettered by mechanisms requiring consideration of wider national interests"

and at another point,

> "one possibility is a centralization or decentralization of power but for reasons we have given those possibilities do not seem to meet the needs of the country"

Notwithstanding these postulates the chapter recommends that the members of the Upper House be appointed by and serve at the pleasure of the governments of the provinces and that such House have power to amend or reject any legislation subject only to an overriding power of the House of Commons to re-enact it and further that the federal government would be required to obtain the consent of a 2/3 majority in the Upper House to enact legislation involving the spending power, interprovincial trade, certain economic objectives and in declaring a work for the general advantage of Canada.

Surely the quotations above are completely contradictory to the recommendations and surely no more effective way could be found to weaken and fetter the federal government and give rein to the forces of decentralization at work today in a country which is already one of the most decentralized federations in the world, than to adopt such recommendations.

It may be surmised that these recommendations have conceptual roots in the long discredited "compact theory" of confederation, but more immediately they seem to arise from an apparent failure to differentiate the respective roles of parliament, the executive and the bureaucracy and the necessity of their distinctiveness. What the recommendations do, in fact, is abolish one of the three components of the federal parliament, namely the Senate, and substitute therefor an agency of the respective provincial executives. To call such a body an "Upper House" of parliament is a travesty. To compound matters, provincial "permanent officials" should be allowed to sit in this "Upper House". When the bureaucracy is directly represented in a parliamentary institution, our parliamentary system as we know it no longer exists. In end result the recommendations would impose the nominees of the ten provincial executives together with members of the ten provincial bureaucracies into the federal parliament with legislative powers and without direct responsibility to any parliamentary body or to an electorate. It is interesting to speculate the reaction of the provinces if the creation of provincial "Upper Houses" federally nominated and likewise empowered be suggested.

Given that conclusion the healthy tensions that do now in fact exist between two federal parliamentary houses and between parliament and the bureaucracy would be transformed and escalated into visible confrontation between, on the one hand, the nominees of the provincial cabinets and their bureaucrats, and, on the other hand, the federal cabinet and the majority party in the House of Commons. Add to that the political posturing implicit in continual open confrontation and the fate of a balanced confederation is not difficult to predict.

It can be supposed that the committee is prepared to go this far to create in its own words "an ongoing federal provincial conference". There are now in existence many instruments for federal-provincial co-ordination including permanent portfolios, departments and secretariats. Ministers, deputy-ministers and officials are meeting regularly. Perhaps some would welcome an "ongoing public forum" but many more would more likely regard it as an anathema and far more likely to disrupt and confound their efforts and problems than otherwise.

Little comfort can be found when the committee reveals its unsophisticated grasp of the political process and says:

> "The process of consultation (between the two Houses) would begin at the time legislation is enacted with full understanding of provincial legislative activity and administrative schemes. Moreover, it would require provincial governments to take responsibility for their views in a national forum. Disagreements could be worked out, and where they could not the people would have the benefit of open debate in a national forum."

By what mechanisms would the process of consultation begin at the time legislation is <u>enacted</u>? Does the Report really

mean to say at the time legislation is introduced? Even so, what assures full understanding of provincial legislative activity and administrative schemes? What provincial government is going to be overly concerned about its views in a national forum in a parliament to which it has no responsibility and whose electorate is only partially and tangentially its own? Surely it will wish to promote its regional and parochial concerns even sometimes at the expense of the national interest. How could disagreements be worked out? Few if any disagreements arise from misunderstanding - they arise because of honestly-held and differing opinions and perspectives. No doubt the people would benefit from open debate but does that solve such disagreements and if so by which of the political or electoral process?

Paragraph 8 proposes that the Upper House have powers to review "legislation having significant regional impact", then goes on to more specifically differentiate its power as between legislation in general and those areas considered particularly sensitive by the provinces. Of necessity these lines are drawn broadly and encompass concerns that are both historical and current and are familiar to about every member of a parliament. Hopefully, the committee suggests that "joint rules and guidelines could be developed where the Upper House should be heard. If there was no agreement the House of Commons could determine the matter" - hardly an auspicious beginning.

If it need be added - one final contradition appears when the committee rejects Upper House approval with respect

to appointments to regulatory bodies as "tending to discourage many good people from considering such positions" while at the same time dismissing that as a consideration with respect to appointments to the Supreme Court of Canada. It is suggested that both matters are imported Unites States' concepts which are quite irrelevant in the Canadian adaptation of the Westminster model.

In a most basic sense Chapter 8 confuses federal-provincial co-ordination with the necessity for regional, cultural and linguistic representation in the federal parliament. They are distinct concerns and while the former oils the machinery of the constitution, the latter is the cement that holds the nation together.

HON. JOHN B. AYLESWORTH, Q.C.

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June 28, 1979

The Canadian Bar Association
Suite 404
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Attention: Mr. W. H. Kidd

Dear Mr. Kidd:

I have read with great interest and carefully considered Chapters 9 and 10, "Judicial Power", as contained in the Report on a new constitution prepared by The Association's Committee.

I agree without reservation with all the recommendations therein approved by a majority of the Committee and, as a Canadian, wish to express my appreciation to the Committee as a whole for the work so well done.

Yours faithfully,

John B. Aylesworth.

JBA:jab

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June 29, 1979

W. H. Kidd, Esq.
The Canadian Bar Association
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Toronto, Ontario
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Dear Mr. Kidd:

I now enclose my comment on chapters 9 and 10.

Yours sincerely,

Brian A. Crane

BAC:gme
Enclosure

COMMENTS ON CHAPTERS 9 AND 10

Judicial Power

On a general level, one might say that the chapters on "Judicial Power" stand for a recognition, albeit in explicit language, of the present constitutional position of the courts and the judiciary. Furthermore, the committee recomends that the independence of the courts should be "enshrined in the Constitution as a fundamental principle of Canadian federalism." Sweeping changes such as the abolition of the Federal Court or the establishment of a dual court system, as in the United States, or the provincial appointment of superior court judges are not recommended.

These positions seem sound and would be supported by most lawyers. One does not recast a judicial system rooted in tradition and precedent unless it is not working well and there is strong agitation for change. In fact, even lesser efforts to change judicial powers, such as the creation of the Divisional Court in Ontario, and the amalgamation of the courts in Alberta, have brought considerable unforeseen difficulties. On the other hand, putting too many constitutional fetters on the courts and judges may indeed inhibit organizational reforms of a system which has a tendency towards inefficiency and antiquated methods.

There are, however, some omissions. The report says little if anything about the criminal law and the present division of powers which gives the provinces responsibility

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over the administration of justice and the central government over criminal law and procedure. Yet here is an area which is of great practical everyday importance. How is it working and should there be constitutional change? In a period in which we have great constitutional issues in this area, as in Hauser and Keable, one would have expected lawyers at least to debate the issue at some length. Perhaps this indicates a lack of interest in the adminsitration of justice as a subject or a failure to evaluate the recommendations in the light of practical problems and concerns.

Section 96 Courts

The committee here opts for the status quo, although not unanimously. Some members apparently felt the need to free up the provinces' ability to reorganize the courts as they see fit. The committee's report is not too clear on what it sees as the options. Here again, a more detailed analysis would have been valuable. As a matter of principle, if the senior judicial appointments (to superior and county courts) remain a federal prerogative, why should not the province have the right to alter the jurisdictional scheme between courts or create new superior courts as it wishes in the interest of better administration.

Judicial Review

The committee recomends that the constitution should guarantee access to the courts to enforce the Bill of Rights and to exercise judicial review. This would be a useful

declaration of what we hope is now the common law position. What is interesting is that a majority of the committee also felt (p.51) that there is no room in our system for privative clauses. If the committee had expressed this differently (for example by restricting its comment to the complete exclusion of review on jurisdictional grounds) the recommendation would be fair. By suggesting that private clauses are bad, the Committee seems to say that the ambit of judicial review should not be cut down by statute, as it has in Canadian Labour Code and in the B.C. Labour Relations Act. This is a bit too reminiscent of Lord Hewart.

Appointment, Delegation and Tenure

The committee, again not unanimously, opts for the appointment of judges by the central government as in Section 96. This is an extremely important federal power and unless the provinces feel otherwise, should be retained. To an extent it is a reflection of the maturity of the federation; it was necessary in 1867 and it is necessary now. In some respects, however, the independence of the judiciary has not been sufficiently insulated from the central bureaucracy. The budgets of the provincial and federal courts and the salaries of judges should be determined and supervised in a manner which is clearly distinct from the bureaucratic process. Recently, the CBA has gone on record criticising Ottawa for failing to raise judicial salaries apparently for reasons of

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political timing. This is a serious question which demands strong and unequivocal action by the Association. Thus, support should be given for the minority of the Committee (p.54) who argued for guarantees against discrimination in salaries and pensions and for the question to be raised by the CBA in other ways.

Supreme Court of Canada

The major recommendations that the Supreme Court of Canada be recognized in the constitution and that it remain a general court of appeal for Canada in all matters are sensible and in accordance with previous studies. Again the arguments are compelling that constitutional questions should come before the whole court and not before a specialized division or constitutional court. The size of the constitutional workload, the tendancy to appoint constitutional "experts" rather than practical lawyers to a specialized court, the collegiality of a court of general jurisdiction are all factors which argue against a special court for constitutional cases. With respect to civil law appeals the report notes that only a small handful of civil law cases are dealt with each year, certainly not enough to support a special civil law court. It thus appears that in practice the court of last resort in civil law cases is the Court of Appeal of Quebec. Nonetheless, consideration might be given in future to appointing four judges from Quebec or, indeed, a judge from outside Quebec who has some background in civil law.

The issues which are significant are the method of appointment and the composition of the Court.

Appointments

In the Canadian federal system the Supreme Court should take its place as one of the great cornerstones of the democratic system. Not only should its position be fully recognized constitutionally but its judges should be given a public position and prestige that they do not, apart from legal circles, now enjoy. The process of appointment is a necessary part of this public position and acceptance. From another point of view, the persons that are chosen must be of the very highest calibre and the appointment process must encourage this. The recommendation of the committee that a person nominated by the central government be approved by the Upper House (which would have provincial representation) has much to commend it. It is in the nature of politics, however, for such a public process to be disruptive and confrontational. It would probably be better to have the choice determined by a federal/provincial council appointed by governments with a right of nomination being reserved to the central government.

Composition

The committee opts for the status quo with three out of the nine judges coming from Quebec. As noted above, it is

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my view that four Quebec judges is a possible solution to the problem of civil law appeals. While most lawyers are confortable with a bench of nine, a larger bench of eleven would probably not be that different in terms of decision making (both nine and eleven are in a sense unwieldy numbers especially if five or six judges participate actively in debate). If eleven suits the needs of the federation, then eleven it should be. The Committee opts for nine on more or less à priori grounds which are not too convincing when the option is only to add a couple of seats. Indeed, it is in the nature of things that judges of a certain age fall ill and decline and at present the court often sits in benches of seven and sometimes five. There is nothing absolute about this and in my view we should not become too hung up on numbers. If we were to expand beyond eleven, however, it would be another thing.

B. A. Crane
Ottawa

June 28, 1979.

COMMENTS ON CHAPTERS 9 and 10

of

TOWARD A NEW CANADA

BY

Arthur Kelly, Q. C.

The necessity for maintaining the independence of the judiciary needs no defence. The whole constitutional framework of Canada depends on it.

While there is little likelihood that judicial independence will be directly attacked by any legislative action, it is essential to it that, with respect to those who are to exercise the judicial function there must be -

(i) Absolute objectivity in their selection and appointment;

(ii) Security of tenure during good behaviour;

(iii) Assurance of adequate time for the proper performance of the duties of office by the adjustment of the number of judges to the current work load;

(iv) Equity in the fixing, from time to time, of their remuneration and allowances.

But the independence must be within the rule of law - it justifies an interpretative role and is jeopardized if Courts lean to or are expected to perform a legislative role.

The existence of two levels of legislative power, Federal or National, and Provincial, here as elsewhere has presented problems with respect to what Courts should interpret and apply the law enacted at one or another of the legislative levels. Canada has been particularly fortunate and its people well served by the fundamental decision that generally one system of Courts is empowered to interpret and apply every law regardless of the enacting body. One contemplates with horror the possibility that in an action concerning some commercial contract, the raising of a provision of the Bills of Exchange Act as a defence, might nullify the jurisdiction of a provincially constituted Court

and decide the issues between the parties to the action.

We have been equally fortunate that the constitutionality of any enactment involves only a decision as to which is the proper legislative body to enact it; nothing is beyond the scope of one or the other of our legislative authority. There is possible danger in an entrenched constitution in that it may unduly limit the scope of Parliament and the legislatures to deal effectively with matters essential to the well being of the Country.

In the adoption of a single system of Courts having jurisdiction to deal with National and Provincial enactments, the objective of advancing simplicity and uniformity in the administration of justice led to assigning the constitution of the Courts to the Provinces and the appointment of judges to Canada. In comparison of other countries, the system has performed satisfactorily. It should not be changed or even tinkered with except where unquestionable improvement may be attainable.

A further reason for caution in approaching changes in the constitution of the Court system is that the present Superior Courts possess an inherent jurisdiction which is enjoyed because they are the successors of the traditional English Courts and inherit a peculiar jurisdiction that is difficult if not impossible to reproduce satisfactorily. Courts, newly created, by statute, lack this inherent jurisdiction which enables the Superior Courts to provide or devise remedies for injustices which the framers of laws have not anticipated would occur.

Since the amendment to the Supreme Court of Canada Act by which appeals may proceed to that Court only leave granted by it or the Court of final resort in the provinces, it appears likely that the Supreme Court of Canada will eventually accept only cases in which a question of law of general public importance is involved rather than those cases in which the issue is the resolution of dispute

between subjects. In these circumstances the role of the Senior Appellate Courts of the Provinces is taking on a new importance - they are becoming to a large extent the Courts of final resort for most issues coming before Provincial Courts.

The preservation of the Superior Courts in the provinces as Courts of general jurisdiction, with a hierarchy of Courts providing but one appeal as a right, appears likely to be the direction in which the administration of justice in Canada should develop.

Specialized Courts have a peculiar attraction in the minds of the public - but their supposed merit is illusory. Save in areas where the parties, by mutual agreement, choose to submit their differences to an adjudicator with special qualifications, usually technical, the proliferation of specialized Courts should be discouraged. Such Courts tend to become tunnel-visioned and are likely to lean towards making law rather than interpreting. The lack of consistant exposure to the broader aspects of human relations reduces the Courts awareness of the narrowness of the specialized field in the totality of situations subject to the impact of law and eventually increases the fragmentation of laws of general application.

The existence of the Federal Court of Canada is compatible with the existence of Provincially constituted Superior Courts. There are areas, including judicial review of Federal Agencies, where the Federal Courts perform a useful function without necessarily any encroachment on the jurisdiction of Superior Courts.

It must be borne in mind that, being a statutory Court, the Federal Court's jurisdiction is confined to the areas committed to it by Parliament and that it must be the responsibility of Parliament (which has created it) to see that its statutory jurisdiction is co-ordinated with that of the Superior Court.

This responsibility must go so far as making impossible that the jurisdication conferred exclusively on the Federal Court, can impinge on a part of a transaction in which other parts fall properly under the jurisdiction of the Superior Courts. It would seem that the Federal Courts jurisdiction should depend upon the whole of the subject matter before the Court being determinable under the provisions of the Statutes of Canada.

The Supreme Court of Canada should be limited in membership for the simple reason that it must always speak as a unit. If the number of members be so large that separate panels may be composed without any one judge being a member of both, its decision may well and most likely will show ambivalence.

There is no magic in the number of 9 but experience seems to indicate that it is a suitable number for the Supreme Court of Canada; it is not too large for the Court to sit en banck and that number cannot provide two panels of five without one common number.

All appeals to the Supreme Court of Canada should continue to be by leave. In the light of the proven reluctance of provincial courts of final resort to grant leave, the Supreme Court of Canada can continue to define its own function in keeping with the exigencies from time to time apparent to it.

I firmly believe that one of the outstanding assurance of the quality of judicial appointment is that, save in the lower provincial courts, they are all made by the same process and that the total responsibility is concentrated in the Minister of Justice and his colleagues in the Cabinet. The fewer persons directly engaged in the process, the greater will be the feeling of responsibility each has in the discharge of the duty. I do not refer to consultation which, obviously, is the only way in which qualifications of possible appointees can be made known to the appointors. But having a body such as the reformed upper house engaged in the process will have undesirable results. In addition to giving a voice in the selection to persons whose

qualification to make a choice may be questionable, it will dilute the accountability of each and to a great extent relieve each individual member of that large body from feeling the same personal responsibility for the appointment. In addition, it would give more opportunity for pressure being brought, either in favour or in opposition to a prospective appointee. Despite all the assurances of secrecy, it would not be achievable with such a large body of people and the result would almost certainly be that the names being considered would become public property - the possibility of this might well discourage some of the best qualified persons from allowing their name to be put forward. It will change the process from an executive one which it should be to a political one which it should not be.

To say that it is more democratic to involve a larger number of people in the actual decision is to fail to appreciate the fact that even in a system built upon democratic principle, the appointment of qualified persons to perform an onerous and demanding function of the administration of justice requires an autocratic rather than a democratic procedure.

For the proper performance of the duties required of Superior Court Judges and Judges of the Supreme Court of Canada, the Courts must be preponderantly composed of persons of proven performance and experience at the Bar. Membership of the Bar is not of itself a guarantee of experience in the practice of the profession of law. It is only through the day to day confrontation with real people having real problems that there comes the wisdom which is an important, if not an essential prelude to the appreciation of the function of one who must decide between the rival contentions of members of the public. It is only through his or her performance at the Bar that the future judge can demonstrate his capacity for the judicial office. For a limited number of appointees, academic performance of a high quality unaccompanied by any actual practical experience may be adequate preparation, but despite their erudition it must be

borne in minde that academic experience is usually in a comparatively narrow field and is confined to dealing with abstract questions of law - it does not expose the academic to face to face dealings with actual people and their problems. The Bench needs seasoned judgment as well as legal knowledge.

Quite apart from what I have said about the unsuitability of the reformed upper house as an instrument in the appointment of judges, I feel strongly that to make mandatory the constitution of such a body on regional basis is a retrograde step. It is bound to introduce into the deliberation of such a body the element of regional interest to the detriment of the primacy of the greater interest of all Canada. It will be difficult if not impossible for the members representing regions to submerge local interest - they will not be allowed to forget them.

To risk this influence affecting the appointment to the Supreme Court of Canada would be to endanger its continual existence as a National Court of recognized preiminence, the members of which must be chosen because of their outstanding qualifications for the post they will occupy.

Great caution must be exercised in what constitutional provisions affect the Courts and particularly the Supreme Court of Canada. At the end of one century the practical conference of 1867 embodied in the British North America Act have lead to the very process of which we are now engaged - considering a constitution for the future. The pace of change has and will continue to accelerate and even if perfection be now achieved, it will not be long before it will seem desirable to vary some of the very ideas which now are more generally accepted.

Since the objective of a written constitution is to reduce the scope of the legislative and judicial process to accomplish variations, and to impose restrictions on changes by the normal legislative process, it is essential

that the freedom of the Supreme Court of Canada to adjust its own function to the requirements of the current times be not inhibited. Numerous examples can be found to the south of us in both Federal and State matters in which the regidity of a written constitution has stullified the orderly development of the judicial process. We should not be over-confident of our ability at this time to anticipate in too much exactitude what the people of Canada will requre of the Courts in the future. There must be room for the necessary growth and adjustment to conditions which are incapable of being foreseen with any degree of accuracy.

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OUR REFERENCE:

May 31, 1979.

DELIVERED

W. H. Kidd, Esq.,
The Canadian Bar Association - Ontario,
Suite 404,
80 Richmond Street West,
TORONTO, Ontario,
M5H 2A4.

Dear Mr. Kidd:

I acknowledge receipt of your letter of May 23 asking for my comments with reference to the recommendations of the Bar Association's Committee on the Constitution relating to "Judicial Power" contained in chapters 9 and 10 of the Report of the Committee.

I am pleased to express my views on the recommendations contained in chapters 9 and 10 and the views which I am expressing are my own and not those of any organization or firm with which I am connected.

I should say at the outset that in my opinion the present provisions in the B.N.A. Act relating to the subject matter of judicial power have proven to be satisfactory and ought not to be tampered with. Should certain aspects of the subject matter of judicial power be entrenched in a new Constitituion the language of the present sections in the B.N.A. Act which have been interpreted by the Supreme Court of Canada should be followed because in my opinion the Supreme Court has in its decisions interpreted those sections in a statesman-like way and I would fear that any new language might be open to some interpretation different from that which the Supreme Court of Canada has given to the relevant sections in the B.N.A. Act.

McCarthy & McCarthy

W. H. Kidd, Esq., May 31, 1979.

Chapter 9 - The Judicial System

1. As to Recommendation 1 I agree that the principle of independence of the Courts should be enshrined in the Constitution. There has long been an accepted convention of our Constitution that the independence of the Courts is at the very basis of the operation of Canadian Federalism and I think it would be desirable that this should be enshrined in the Constitution.

2. As to Recommendation 2 I agree that the Superior Courts of the Province should be entrenched in the Constitution as Courts of general jurisdiction, including judicial review.

3. I agree with Recommendation 3 subject to the refinement of the word "Access". In my view access to the Courts to enforce the Bill of Rights or to exercise judicial review should be limited to persons or corporations who have a direct interest in the subject matter to be brought before the Courts.

4. As to Recommendation 4, I do not agree with the wording of this Recommendation. I would favour entrenching in the Constitution the precise wording of section 91(27) of the B.N.A. Act which confers on the Federal Parliament legislative jurisdiction with respect to the criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters and the precise wording of section 92(14) which confers on the provinces legislative power with respect to "the administration of justice in the Province including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts." The combined effect of section 91(27) and of section 92(14) has been the subject matter of decisions in the Supreme Court of Canada which are eminently satisfactory and I can see no reason to depart from the language used in section 91(27) and section 92(14) of the B.N.A. Act.

5. As to Recommendation 5 I agree that the Courts in Canada should function as a single judicial system and not a dual system of Federal and Provincial Courts.

W. H. Kidd, Esq., May 31, 1979.

6. As to Recommendation 6 I agree that the Federal Parliament should have the power to transfer judicial review functions over Federal agencies to a Federal Superior Court such as the present Federal Court.

However, as to the rest of the Recommendation I would not depart from the present wording of section 101 of the B.N.A. Act which provides that the Parliament of Canada may from time to time provide for the establishment of additional Courts "for the better administration of the laws of Canada". The present section 101 relating to the better administration of the laws of Canada has been considered by the Supreme Court of Canada in McNamara Construction (Western) Limited v. The Queen. In this case the Supreme Court of Canada held that the Parliament of Canada could not create additional Courts except with respect to actions founded upon an existing Federal law. It is not enough to confer jurisdiction on a Federal Court that there is a Statute of Canada providing for the expenditure of monies when the claim asserted in the action by the Crown is merely to enforce a simple contract debt or a simple claim for damages for breach of contract. These matters can better be handled by the Courts of a Province particularly the County and District Courts when the claims involved are comparatively small.

As I have said, as to this Recommendation I would not depart from the present language of section 101 of the B.N.A. Act as interpreted by the Supreme Court of Canada in such cases as McNamara v. The Queen.

7. I entirely agree that the Constitution should provide that the Federal Government should appoint all Superior, County and District Court Judges and all Judges of Federal Courts.

8. I also agree with Recommendation 8.

9. I agree with Recommendation 9 except that I would expand the requirement that in the case of an appointment to the Superior Court of a Province the Judge appointed shall be from the Bar of that Province to appointments to County and District Courts.

W. H. Kidd, Esq., May 31, 1979

10. I agree with Recommendation 10 except that I would provide for the tenure of Superior Court Judges until the age of 75 years as at present. There are many examples of Judges over 70 who because of their experience and developed sense of judgment have rendered and do now render valuable service on the Bench. The present system of supernumary Judges should be retained. The system enables older Judges who may be somewhat tired to pace themselves and yet make a distinct and helpful contribution to the administration of justice.

11. I agree with this Recommendation.

Chapter 10 - The Supreme Court of Canada

1. I agree with Recommendation 1.

2. I agree with Recommendation 2.

3. In my opinion the present method of appointment of Judges to the Supreme Court of Canada by the Governor-General-in-Council has worked satisfactorily and should not be changed. In my view the consent of a Judicial Committee of a reconstituted Upper House is unnecessary and, in any event, I do not think anyone can express an opinion about a Judicial Committee of a reconstituted Upper House until one knows in what respect the Upper House is to be reconstituted.

4. I entirely agree with Recommendation 4 that the Constitution should provide that the Supreme Court of Canada should consist of nine Judges, three of whom should have been members of the Quebec Bar. The size of the Court ought not to be increased. A Court of nine Judges is a large Court and the addition of further members would destroy the collegiality of the Court and the uniformity of decisions.

5. I agree with Recommendation 5.

6. I agree with Recommendation 6 except that in my opinion the Constitution should guarantee that Justices of the Supreme Court of Canada should hold office until age 75. It is particularly important to have Judges on the Supreme Court of Canada who are men of experience and refined judgment

McCarthy & McCarthy

W. H. Kidd, Esq., May 31, 1979.

and I can see no reason whatsoever for requiring retirement at age 70. In my personal recollection some of the best work done by many Judges of the Supreme Court of Canada in their tenure of office has been done by them after they attained the age of 70. There are many Judges who have contributed significantly to the work of the Court after reaching the age of 70 years. It would be invidious to name them but there are several Chief Justices and several puisne Judges who in my experience before the Court gave invaluable service until they reached the age of 75 years.

7. I agree with this Recommendation.

Yours truly,

John J. Robinette.

JJR:MR

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OSGOODE HALL LAW SCHOOL
4700 KEELE STREET, DOWNSVIEW, ONTARIO M3J 2R5

June 29, 1979

Mr. W.H. Kidd
Committee on the Constitution
Canadian Bar Association
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80 Richmond Street West
TORONTO, Ontario M5H 2A4

Dear Mr. Kidd,

Thank you for inviting me to submit my views of the recommendations contained in Chapter 11 ("The Division of Powers") and Chapter 25 ("Residuary and Emergency Powers") of the Committee on the Constitution's final report entitled "Towards a New Canada". I am happy to do so.

I should say at the outset, however, that I have some serious reservations about the basic thrust of the Committee's report--the proposal for "a new Constitution to meet the aspirations and present-day needs of all the people of Canada". Apart from several important but limited constitutional reforms, e.g. an entrenched bill of rights, a restructured upper house, entrenched language rights, I do not believe that anything more ambitious, i.e. a "new constitution", is either socially desirable or politically realizable. I fear that the time and the talents of a good many people will be wasted in this pursuit of the unattainable. I would be happy to develop this point if you so request.

Given this fundamental caveat, my comments on the specific recommendations contained in Chapters 11 and 25 are as follows:

Chapter 11 (The Division of Powers):

With one exception, the recommendations contained in this chapter are, in my opinion, eminently sensible. The one exception is the delegation point (recommendation No. 5). Why shouldn't legislative delegation be permissible? The discussion of this question in the text at pages 66-67 is neither convincing nor satisfactory.

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Mr. W.H. Kidd June 29, 1979

Chapter 25 (Residuary and Emergency Powers):
Again, I find myself in agreement with the Committee's recommendations. Both the proposal to cut down on the "national dimensions" component of the P.O.G.G. power and the proposal to define the federal emergency power explicitly are, in my view, sensible modifications to the metaphysical muddle that now permeates the Peace, Order and Good Government clause.

I hope these brief remarks will be of some assistance to you. Even though I do have the reservations noted above, I cannot but admire and appreciate the efforts of the Committee on the Constitution.

Sincerely,

Edward P. Belobaba
Associate Professor

EPB:th

YORK UNIVERSITY

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May 31, 1979

W.H. Kidd, Esq.,
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Suite 404,
80 Richmond St. W.
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Dear Mr. Kidd,

Thank you for your letter of May 23, 1979.

I am familiar with the report of the Canadian Bar Association's Committee on the Constitution, Towards a New Canada (1978), and I am also familiar with all the other reform proposals which have been put forward in recent years. In my opinion, the Bar Committee's report is far and way the best of the contributions to the reform process. It is well written, well reasoned, and arrives at sensible balanced recommendations. I am in agreement with nearly all of it.

You have asked me to comment specifically on chapter 11 (The Division of Powers) and chapter 25 (Residuary).

With respect to chapter 11, I am in total agreement. I think it is an excellent summary of the principles which should govern the division of powers in Canada's federal system.

With respect to chapter 25, I agree with the limitations proposed for the federal emergency power. With respect to the residuary power generally, the Committee's proposals would represent little change from the status quo, and I think the status quo is satisfactory. The Committee rejects the "national dimensions" test, but says that matters which "extend beyond provincial interests" would be federal. My reaction to this is that there would probably be no change in the law, but the new language would create unnecessary uncertainty and litigation. My preference would be to make no change in the constitution with respect to the residuary powers. However, I do not have any serious objection to the Committee's recommendations even on this point.

I repeat my warm commendation of this outstanding report.

Yours faithfully,

P.W. Hogg
Professor of Law.

PWH/gs

June 28, 1979
Kingston, Ontario

Mr. W.H. Kidd
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Suite 404
80 Richmond Street West
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Dear Mr. Kidd:

Re: Towards a new Canada
(A research study prepared
by the Committee on the
Constitution of The Canadian
Bar Association)

I am writing in response to your letter of May 23 inviting me to offer comments on Chapters 11 and 25 of the Bar Association Committee's constitutional study published almost a year ago now. The Chapters you mention are concerned with the general characteristics of the division of primary legislative powers that lies at the heart of the Canadian federal system--the listing of powers for the federal parliament on the one hand and for the respective provincial legislatures on the other. Chapter 11 deals with the nature of the ordinary division of powers system in general and proposes little change in the system as such. This is without prejudice to proposals in Chapters 12 to 25 for some significant reform and sophistication of the categories of powers that are presently found in the federal and provincial lists respectively. Chapter 25 is a "general system" chapter, along with Chapter 11, because it deals with residuary and emergency powers. Unlike Chapter 11, Chapter 25 does propose some significant changes in the system in the two respects with which it deals.

You have asked me to comment on Chapters 11 and 25, and I now do so briefly. In general, I am in substantial agreement with the description and explanation of the ordinary system for dividing legislative powers given in Chapter 11, a system which we have had since 1867 and which has grown and developed since then by a combination of judicial interpretation and political practice (as the Bar Association Committee points out on page 65).

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Mr. W.H. Kidd
The Canadian Bar
Association--Ontario

June 28, 1979

I share the general approval the Committee expressed in Chapter 11 for the ordinary "two-list" system of dividing powers. I would however just add two comments that may be helpful concerning some necessary implications of this system. First, of course, authoritative judicial interpretation of the various categories of federal and provincial powers is essential, and this necessity arises from the inevitable overlapping of many of the federal and provincial categories of powers. Where, for example, does "Trade and Commerce" stop as a power-conferring phrase for the federal parliament, and "Property and Civil Rights" begin as a power-conferring phrase for the provincial legislatures? My comment is that one cannot speak usefully here of strict construction versus liberal construction of such power-conferring phrases, Liberal construction of federal power-conferring phrases is ipso facto strict construction of the competing provincial power-conferring phrases, and vice versa. The real task of the courts is more delicate and complex. What one wants from them is a balanced interpretation of the competing phrases that allows reasonable scope to both federal and provincial powers. This, I presume, is what the Bar Committee means by a "balanced federalism".

But, no matter how carefully the courts may devote themselves to balanced interpretation of the division of legislative powers, still we are left with other inevitable necessities of our federal system. Certain policy objectives involve both federal and provincial jurisdictions. For example, a comprehensive scheme of legal protection for consumers would require reform of contract law by the provinces and some changes in criminal law by the federal parliament. This sort of thing raises all the issues of what is known as co-operative federalism. The Bar Committee is touching on these problems when it speaks in Chapter 11 of concurrent powers, and also of the need for some delegation of administrative powers between governments. This is a very large topic, and I offer only one comment. I emphasize that the stress in these matters should be on federal-provincial intergovernmental consultations and agreements. If you can get such agreements about which government shall do what with its respective powers and resources, in pursuing policy objectives that cross jurisdictional lines, then divisive issues of conflicting powers and paramountcy can be held to a minimum.

The Bar Association Committee was also aware, of course, that a complete division-of-powers system includes provisions for residuary and emergency powers, and these are the subject of Chapter 25. In these respects, and unlike Chapter 11, the Bar Committee calls for some significant changes in the system. I agree with the Committee's description of the present position and their judgment that it is unsatisfactory. I also agree with their proposals

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Mr. W.H. Kidd
The Canadian Bar
Association--Ontario

June 28, 1979

for change, so, having said these things, it is not necessary for me to comment further. It is worth noting however that, several months later, we find the Pepin-Robarts Task Force on Canadian Unity making substantially the same proposals for change in our constitutional law concerning the definition and use of residuary and emergency powers.

In conclusion, let me say that I regard the whole of the Bar Committee's Report as a constitutional study of great merit and high quality. Moreover, in style and expression it is just about as lucid a document as the difficulty of the subject permits. I do not agree with everything it proposes, but I agree with most of it, and that alone is remarkable. I have been a member of the Canadian Bar Association for over 30 years, and I am proud of the fact that the Committee, with the support of the Canadian Bar Association, has made this valuable contribution to the public debate on critical current issues of Canadian unity.

Yours sincerely,

W.R. Lederman.

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July 9, 1979

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Dear Mr. Kidd:

You have asked me to comment on Chapters 11 and 25 of the Report of the Canadian Bar Association's Committee on the Constitution, relating to the division of powers generally and residuary and emergency powers respectively.

I have read the full report and consider it an excellent document, mainly because it identifies the strengths of our existing constitution, recognizes the fact that a complex equilibrium develops over a century and more of adaptation and interpretation, and advocates carefully considered modification rather than wholesale revision. I fully support this general approach and am constantly surprised at the large numbers of people who seem to believe that problems can be resolved by enacting whole new constitutions.

A central problem of constitutional process is the low level of awareness of the extent to which problems result from the way we think about constitutions, laws, and governments, and not from particular forms of words on paper, structures or processes. By reifing concepts of government we tend to become servants of our own instructions rather than vice versa, and we lose our capacity to organize resources toward the pursuit of defined purposes or the promotion of preferred values. Hence the persistent demand for revision of formal structures.

.../2

Mr. W.H. Kidd
The Canadian Bar
Association--Ontario

July 9, 1979

I see public education and judicial re-education as among the most pressing needs in the process of constitutional development. I will get to those two items shortly, but first I have some particular comments about the two chapters I was asked to comment on.

The phrase "balanced federalism" (p. 64) has a re-assuring ring about it, suggesting that if we just work at it long enough we will reach a state of federal harmony. To induce this kind of thinking is in my view as dangerous as promoting a belief in the perfectability of man. The imbalance originates with ourselves and results from the many conflicting goals we pursue at once. We want a peaceful, pleasant environment to live in but we also want jobs and consumer goods. I see no chance of a sane society, much less a balanced federalism, as long as we try to build on a base of unbridled pursuit of individual wealth and power. In this regard, I am strongly of the opinion that no government that operates a lottery has any moral authority to lead the people towards a new constitutional order.

This is not just diatribe. It is an attempt to illustrate the way we try to ignore root causes of failure by papering over those causes with high-level abstractions like "balanced federalism" and "fundamental freedoms". Certain fundamental values and attitudes must be established in the consciousness of a people before civilized society and good government are possible. We refuse to face these root causes, except at the level of abstractions, because they do not respond to the coercive application of power and wealth. The public discussion we should be having is not going on because we don't quite know how to conduct it. The framework for discussion is set by lawyers and political scientists and is therefore cast in terms that permit application of professional skills and knowledge to the problems. In my opinion this gives us a very narrow view of what constitutions and their reform are about.

Perhaps the most important contribution to this basic level of constitutional discussion was the Report of the Royal Commission on National Development in the Arts, Letters, and Sciences (Massey Report, 1951) and what we should be doing is reviving and continuing the kind of discussion that Report engendered. Mr. Massey and his colleagues spoke of the Group of Seven in terms of cultural values and what the Canadian nation is about. Today much of the interest in Canadian art and values seems to have shifted toward their usefulness for tax-avoidance and hedging against inflation. This is a revealing fact about ourselves.

Mr. W.H. Kidd
The Canadian Bar
Association--Ontario

July 9, 1979

Having expressed my reservations about the framework within which we are discussing the constitution I will make a few specific comments about the Report and then return to the matter of public and judicial attitudes.

A double list of powers makes sense in a country in which elaborate systems of federal and provincial laws have been built around the two lists contained in sections 91 and 92 of the B.N.A. Act. Our whole federal system is permeated with the effects of dual lists and with the particular categories described in them. In my opinion, any change from this model at this time would result in great dislocation and uncertainity.

Concurrency is a useful concept for explaining the inevitable overlap that results from dual lists of legislative powers, but if adopted as a judicial policy in order to avoid perceived confrontation with legislative branches its ultimate effect is a federal system in which everybody can do anything they want to. The recent Supreme Court decision in the McNeil case could be seen as a green light for provincial or municipal opting out of national standards on the fundamental question of free speech. The harm to constitutional values is not irreparable but the decision does suggest that we cannot look to the present Supreme Court for leadership on matters of fundamental constitutional importance. It was open to the court on the authorities available to rule that defining the limits of free speech for purposes of public morality and decency is a function of the criminal law and therefore an exclusive concern of Parliament. The Court's choice not to do so was conditioned by the growing acceptance of a concurrency model of Canadian federalism that largely ignores the important questions of whether there should be limits to concurrency, and why, and by what criteria those limits should be identified.

The Committee's positions on delegation of legislative powers between coordinate legislatures and on special status are sound, in my opinion, because the formal division of legislative powers is the core of the federal structure. Uniformity and stability are important at this level. Our search for flexibility should focus on the structures and processes that rest on this base of divided powers.

Mr. W.H. Kidd
The Canadian Bar
Association--Ontario

July 9, 1979

In Chapter 25, on residuary powers, the Committee seems to want to have it both ways by suggesting a provincial residuary power subject to exceptions. I think I agree with their ideas in terms of results but would express it differently. Since a federal union exists to satisfy common needs that the federating parts could not satisfy by themselves, or at least not nearly so effectively and efficiently, those common needs should be defined as precisely as possible and all else should be left with the provinces. To the extent the latter can be defined it is helpful to do so, but a residuary clause is necessary to catch the rest. The fact is that "property and civil rights in the province" and "matters of a purely local or private nature in the province" have between them served as a provincial residuary power, but wartime needs have driven the courts to give Parliament a limited, pre-emptive residuary power through the emergency doctrine as applied to the "peace, order and good government" clause. The trouble with this has been that emergencies, like the liquor binges that triggered the doctrine, cannot be taken in moderation.

The Committee's solution is a sound one, namely, to include a specific emergency power in the list of federal powers to be involved only for war or comparable crises. However, I would not support the abolition of a federal general power along with this, but would look for a definition of that power which would authorize Parliament to deal with matters of overriding national concern and with the national dimensions of any matter. In other words I would recognize that certain matters are inherently national in scope or character (e.g. aeronautics, radio) and I would also push the aspect doctrine one step forward by recognizing that some matters have both a provincial dimension and a national dimension so that the question is not who may legislate in relation to it but rather what blend of national and local policies will respond to the problems and preserve the federal principle. Energy and environment are good examples of that latter and I think some of the difficulties we experience in trying to deal effectively with problems in such diffuse areas arise from our either--or approach in which we tend to ask which government is entitled to regulate the entire area rather than looking for a national scheme of related federal and provincial aspects and dimensions. In part this results from the fact that while judicial decisions decide no more than is necessary to resolve the controversies that give rise to them, they tend by default to fill much larger vacuums in our constitutional thinking because of the need for some kind of legal guidance in a federal system.

Mr. W.H. Kidd
The Canadian Bar
Association--Ontario

July 9, 1979

Having supported the idea of an emergency power plus a general federal power, I now come full circle and assert that this is precisely what we now have but there is a danger that we will lose it through undue judicial reliance on the emergency doctrine to support global claims made by the central government in legislation like the Anti-Inflation Act, 1975 and the Energy Supplies Emergency Act, 1978. It is clear that the Supreme Court invoked the emergency doctrine in the Anti-Inflation Act reference in order to avoid having to deal with the very difficult but, in my view, proper heads of section 91 which should have been applied in the case, namely, the trade and commerce power and the various powers in relation to the monetary system.

If the Supreme Court next upholds the Energy Supplies Emergency Act, 1978 by invoking the emergency doctrine we will, in my opinion, be well on our way to a distortion of our constitution so great as to render it incapable of responding to the emerging needs of our federal system under changing circumstances.

Here we reach what I consider the greatest single cause of our difficulties in maintaining a viable federalism in terms of the division of legislative powers: the failure of the Supreme Court of Canada and, necessarily, of lower courts, to recognize that constitutional process is not just another form of legal engineering according to stare decisis and the rest of the technical baggage that goes with the adjudication of private rights. It is a high state function requiring judges who have not only technical excellence in the law but a well-developed theory of law and government to enable them to deal effectively with questions for which there are no answers in the legal texts and digests that serve so well in the ordinary adjudication of private rights.

I do not subscribe to the "walking-on-eggs" theory of judicial restraint in Canadian constitutional law. This theory measures the wisdom of the Supreme Court according to its record in avoiding difficult and controversial issues, supposedly because these belong in the political domain and the Court must avoid becoming embroiled in politics. We are now paying the price for the Court's failure, despite the heroic attempt by Mr. Justice Rand, to develop a coherent theory of Canadian constitutional law, including a human rights jurisprudence, in the course of deciding the many constitutional cases that have come before it since it became Canada's final court in 1949.

Mr. W.H. Kidd
The Canadian Bar
Association--Ontario

July 9, 1979

As evidence of this failure, I cite as the most recent example the Hauser case, in which the Supreme Court has held that the Narcotic Control Act, which provides for a maximum penalty of life imprisonment, is not criminal legislation but rather is a regulatory scheme enacted for the peace, order and good government of Canada. This holding enabled the Court to avoid deciding whether the Attorney General of Canada, by his agent, could prosecute Hauser, since the provincial challenge to that right exists only in relation to criminal justice, the administration of which is a subject of legislation reserved exclusively to provincial legislatures.

The Hauser decision, along with a substantial number of others, suggest to me that we are trying to solve through task force and committee reports and constitutional reform a problem which is heavily rooted in the dominant legal thinking in this country. There is in the Canadian legal fraternity a stifling conformity of thought built around a few basic received (and largely unquestioned) dogmas such as legislative supremacy and stare decisis. Our short suit is reasoning from first principles within a coherent philosophy of what law and constitutions are about. I am not suggesting judges muse about legal philosophy on a daily basis but rather that, before they mount the bench they come to grips with some of the "whys" about the law and the constitution and that they spend some part of their working lives thinking about some of the matters that many lawyers are fond of brushing aside by asserting "I don't deal with 'iffy' questions".

We are presently moving towards an entrenched bill of rights in Canada, largely because the Supreme Court has been unwilling to accept the Canadian Bill of Rights as authority for giving judicial protection to fundamental rights and freedoms in the absence of more specific formulations than the Bill provides in section 1. But that does not relate to the division of legislative powers, except at the level of judicial attitudes, and I will therefore not comment on cases like Lavell and Hogan which are perhaps the leading examples of the results that flow from an absence of any coherent theory of constitutional law in our highest court.

The trouble with our Supreme Court began in 1896. That was the year the Judicial Committee of the Privy Council, in deciding the appeal in the Local Prohibitions case, nipped in the bud a developing trend in our Supreme Court towards a responsive and intelligent approach to constitutional adjudication. Go back to the Supreme Court judgments in that case to see the nice blend of

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legal analysis and political, social and economic awareness in the approach of judges drawn from the Canadian legal profession as they sought a framework for interpretation of the B.N.A. Act through changing times and circumstances; then examine the Privy Council decision enunciating the "correct view" and the "true answer". I suggest we need look no further to locate the origin of the sterile approach that has dominated Canadian constitutional law ever since.

I realize that there have been some outstanding exceptions to this dominant approach, in the Judicial Committee as well as in our Supreme Court, and in Canadian judges other than Mr. Justice Rand, but my present view is that the basic approach to constitutional law in Canada has been so inadequate that a frontal attack provides a more suitable starting point for discussion than an incremental critique working out from the inside of the dominant framework of inquiry. I will direct this attack through comments on a selection of judicial decisions which in my view illustrate the serious inadequacy of the framework within which judicial reasoning is conducted in Canadian constitutional law.

The most startling Supreme Court decision of recent years is in my view the Breathalyzer reference of 1969. The case resulted from a decision by the federal cabinet, in exercising its proclaiming power in relation to the Omnibus Bill of 1968-69, to make a significant change in the legislation as enacted in Parliament by proclaiming all of the new breathalyzer law except the provisions that entitled an impaired driving suspect to receive a sample of his own breath as it was tested. In spite of the Privy Council decision in the Liyanage case, which gave a precedent for inferring a separation-of-powers principle from a British constitutional enactment (the Ceylon Constitution Order in Council in that case), and the much earlier Privy Council decision in In Re Initiative and Referendum Act to the effect that Canadian legislatures empowered by the B.N.A. Act may not abdicate their powers to other bodies, the Supreme Court judges in the Breathalyzer case did not even acknowledge a constitutional issue in the case. Instead, they reasoned to their decisions entirely in terms of whether Parliament, in delegating the proclaiming power, had intended to authorize the cabinet (Governor in Council) to alter the substance of the legislation by selective proclamation. Even the four dissenting judges who held the selective proclamation ultra vires did so because of their view that Parliament's use of the word "provision" in the proclaiming authority was intended to mean discrete packages in the Omnibus Bill, not selected parts of those packages.

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The clear implication of this decision is that Parliament could, by choosing appropriate language, delegate to the federal Cabinet any of its plenary powers of legislation it chose. The Court simply ignored the provisions of the B.N.A. Act which define the powers of Parliament and in defining them necessarily limit them. The decision is a striking example of subservience to English legal thinking based on an unwritten constitution in which Parliament is supreme in the full legal sense of that word. The Judicial Committee itself in Liyanage took care to spell out the great difference an unwritten constitution makes for judicial interpretation of the powers and functions of the three branches of government and the extent to which those powers are exclusive.

Two of the great walking-on-eggs decisions of the Supreme Court in recent years are those in Bell Telephone v. Quebec Telephone and Kootenay and Elk Railway v. C.P.R. In the former case Quebec Telephone, a company operating entirely within Quebec but whose system interconnects with Bell Telephone, a Canadian system, contended that the Canadian Transport Commission's authority to set rates did not extend to calls running between the Bell and Quebec telephone systems. When Quebec Telephone sought to prevent such application of C.T.C. rates by Bell through injunction proceedings in the Superior Court of Quebec, Bell argued that the Court had no jurisdiction since the matter involved review or supervision of a federal administrative agency. While the decision signifies only that the Quebec Superior Court has jurisdiction over contractual disputes between Bell and Quebec-Telephone, this characterization of the issue presupposes that the rates charged on a call between, say, Rimouski and Toronto are not within the jurisdiction of the C.T.C. In other words, the theory of the case was that Quebec-Telephone is a local undertaking, subject only to provincial regulation, Bell Telephone is an interconnecting undertaking subject only to federal regulation, and that telephone calls made between the two systems lie within a constitutional no-man's land and are not subject to either federal or provincial regulation but must be set by agreement between the two companies. The same Court that has persistently refused to read into the B.N.A. Act anything not found there in express words has thus conferred on two telephone companies the status of legislatures pro tem for the purpose of setting certain rates. If we go back to the Winner case decided by the Judicial Committee in 1954, the appropriate analysis is that the undertaking of Quebec-Telephone is one and indivisible so that the fact of a regular and substantial interconnection with Ontario and other parts of Canada gives it the character of an interconnecting undertaking which is subject to exclusive federal regulatory control.

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The companion case of Kootenay and Elk Railway v. C.P.R. is equally perplexing. There the Court had before it a railway company incorporated under the laws of British Columbia, whose raison d'etre was to haul coal from Sparwood, B.C. to a point one quarter inch north of the U.S. border. By breathtaking coincidence there happened to be a set of tracks belonging to Burlington Northern, a U.S. railway, just a quarter inch on the other side of the border and in perfect alignment with those of Kootenay and Elk. Thus it was that the purely local undertaking of Kootenay and Elk got the coal to a location from which an international carrier could convey it to Roberts Bank, the bulk-loading port facility near Vancouver.

The Supreme Court held that Kootenay and Elk Railway was a local undertaking properly created under provincial law and not a "line of railways connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province". The main redeeming feature of this case is a vigorous dissent by Mr. Justice Hall in which he refuses to accept the argument that Kootenay and Elk is a local undertaking. After quoting the company's memorandum of association to the effect that the object of the company was "to construct and acquire a railway from Natal to a point three miles west of Roosville immediately north of the Canada United States border, in the Province of British Columbia", Hall, J. remarked that:

> So stated, the real object of the company was concealed from and misrepresented to the Registrar when he issued his certificate of incorporation under the Railway Act of British Columbia...
>
> Throughout the argument the unreality of the whole situation became crystal clear that the Court was being called upon to deal with a wholly fictitious situation dressed up in legalistic terminology and argument involving corporate powers to obscure the realities of what was being proposed.

The point is not that the results of these decisions is bad but rather that the quality of reasoning is such that we are left with nothing to use as material for developing an adequate theory and jurisprudence of the Canadian federal constitution.

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Equally barren of useful analysis are the Supreme Court decisions in the CIGOL and Central Canada Potash cases, in which we are never told why the provincial expropriation of the windfall gains resulting from the sudden jump in world oil prices in 1973, due to OPEC action, was an indirect tax nor why Saskatchewan's scheme of potash marketing regulation bore the character of trade and commerce rather than regulation of the exploitation and conservation of a provincial resource. OPEC hikes oil prices, Saskatchewan producers jump on the band-wagon, the Government of Saskatchewan by legislation revises the terms of sale of Crown minerals (oil) to those producers, and the judicial analysis is that Saskatchewan has imposed a tax whose tendency is to be passed on by the producers to someone else. The Court then orders repayment of the tax, not to the someone else who has paid it but to the producers. There is a certain unreality in the clear implication that it was the Government of Saskatchewan, not OPEC, that created the higher price of Saskatchewan oil on the world market.

The point I am making is that we should consider seriously whether our constitutional difficulties in relation to the division of legislative powers stem less from inadequacies in the B.N.A. Act than from inadequacies in the interpretative framework through which the language of sections 91 and 92 are adapted to the emerging needs of a changing federal system in a changing world. If this is the case, then the main value of the Report of the Bar Association's Committee on the Constitution will lie in the guidance it will offer to judges of the Supreme Court of Canada in identifying the general kind of federal division of powers they might see fit to pursue through the interpretation of the B.N.A. Act. The Report could provide a valuable counterweight to the great weight given by the Supreme Court to cases decided by courts operating in political, social and economic circumstances quite different to those of today. Constitutional law becomes badly under-nourished if forced to live on a diet of leftovers.

Perhaps the best illustration of this obession with stare decisis is the Boardwalk Merchandise Mart case in Alberta. This case came before Mr. Justice Riley after the Supreme Court of Canada had decided in Robertson and Rosetanni that the Lord's Day Act did not infringe the appellants' freedom of religion by compelling them to close their bowling alleys on Sunday. The effects of the Act are purely secular, said Ritchie, J., and do not impose an established religion on anyone. If that is so, reasoned Riley, J. in the Boardwalk case, then the constitutional basis on which the Act survived an earlier constitutional challenge--that it is criminal law because it enjoins profaning the Sabbath--has been

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pulled out from under it by the Supreme Court and the Act has now become ultra vires due to changed notions of public order. Riley, J. was reversed by the Appellate Division of the Alberta Supreme Court, which simply asserted that the Lord's Day Act is not open to constitutional challenge since its validity was confirmed by the Judicial Committee in 1903. Mr. Justice Holmes once made a rather caustic comment about doing something for no reason other than that it has been done that way for the past 150 years.

In summary, the Report of the Bar Association's Committee is a very useful document, but I submit that it is a dangerous illusion to think that the solution to our federal legal problems lies in the enactment of a new constitution based on this or any other document. Subject to any specific amendments that might be needed to effect agreed shifts of legislative power, I think our present constitution provides an adequate basis for a sound federal system. What we lack is an adequate Canadian constitutional theory to guide constitutional process, especially that part of the process that occurs in the courts.

I am attaching a list of citations for the authorities I have referred to, in their order of appearance, in the event you need proper documentation.

Yours sincerely,

(Noel Lyon)
Professor

NL/ma
Enclosure

CITATIONS

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2. Re Anti-Inflation Act, [1976] 2 S.C.R. 373.
3. Hauser v. Attorney General of Canada (unreported as yet--judgment pronounced June '79).
4. Lavell v. Attorney General of Canada, [1974] S.C.R. 1349.
5. Hogan v. The Queen, [1975] 2 S.C.R. 574.
6. A-G Ontario v. A-G Canada (Local Prohibitions) 1896 A.C. 348.
7. In re Provincial Jurisdiction to Pass Prohibitory Liquor Laws (1895), 24 S.C.R. 170.
8. Reference re Criminal Law Amendment Act, 1968-69, (Breathalyzer reference), [1970] S.C.R. 777.
9. Liyanage v. The Queen, [1967] 1 A.C. 259.
10. Re Initiative and Referendum Act, [1919] A.C. 935.
11. Quebec Telephone Co., [1972] S.C.R. 182.
12. Kootenay and Elk Railway v. C.P.R., [1974] S.C.R. 955.
13. Canadian Industrial Gas and Oil Ltd. (CIGOL) v. Government of Saskatchewan, [1978] 2 S.C.R. 545.
14. Central Canada Potash v. Government of Saskatchewan, [1979] 1 S.C.R. 42.
15. Boardwalk Merchandise Mart v. The Queen, [1972] 6 W.W.R. 1, reversed in 31 D.L.R. 452.
16. Roberston and Rosetanni v. The Queen, [1963] S.C.R. 651.

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20th June, 1979

W. H. Kidd, Esq., Q.C.,
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Dear Mr. Kidd:

While, as stated in my letter dated the 11th instant, there is not sufficient time before June 30th to study the entire volume, "Towards a new Canada", I considered that your request that I examine Chapters 12 and 13 should be accorded a high priority. I have, therefore, endeavoured to give them some special study.

I am bound to state at the outset that:-

1. I am opposed to the proposal that Canada should adopt an entirely new constitution. I do not consider that this is politically feasible; I believe that it would delay the whole process of constitutional reform, that while under consideration it will create confusion, and if adopted it will create more confusion and chaos. Why should a century of jurisprudence be scrapped?

2. The goal of repatriation of the Constitution should not be confused with the writing of a new constitution. Repatriation, with a suitable amendment procedure, will be difficult enough to achieve without confusing it with the writing of a new constitution. During my Ottawa days I advocated repatriation as far back as 1948.

3. Certain constitutional amendments are desirable and will command a fairly general consensus of support. The attainment of such amendments should not be delayed or confused by wider and more extreme proposals.

4. I am strongly opposed to numerous proposals advanced by the Committee. I would favour some elements of the report and might find others acceptable when more clearly explained and understood

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but I find some so unacceptable that if I were compelled to vote on the report as a whole I would most certainly vote against it.

5. One of the proposals which I strongly oppose is the one to create an Upper House, consisting of appointees of the Provincial Governments. This proposal if carried into effect would greatly weaken the power and status of the House of Commons, and on that ground alone I would oppose it. Moreover, the Committee proposes to confer on the Upper House such wide powers as would make it altogether too powerful a chamber. Furthermore, experience has shown that the point of view of the provinces can be best expressed directly by their own governments.

It is not practicable to detach Chapters 12 and 13 from the remainder of the report. Any comment which I might make would necessarily be subject to the overriding views I have hereinbefore set forth, and would in some measure depend upon the fate of the other chapters. In general, however, while I find merit in some of the recommendations contained in these two chapters the proposals appear to me to be somewhat rigid and academic at the expense of practicality. On the whole I consider Chapter 12 is somewhat better than Chapter 13.

Subject to the foregoing, I offer the following comments (all necessarily partial, rather than complete) on the various recommendations:-

Chapter 12

(a) I am not in favour of eliminating the limitation "within the province" on the provincial power of taxation.

(b) I fear that the implementation of the proposals in their present sweeping form would signal the return to "the tax jungle", which has had distressing economic effects.

(c) The indiscriminate application of a corporation tax by the ten provinces would greatly restrict the national power to undertake fiscal programmes required to meet changing economic conditions and would greatly hamper the flexibility needed for such purposes.

Chapter 13

(a) This chapter devotes considerable attention to shared cost programmes. In my experience some provinces were always critical of the initiation of shared cost programmes by the federal authority, contending that they were virtually compelled to participate therein even though they could not afford to do so. To entitle them in such cases to receive compensation from the Federal Treasury equal to the amount of money

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they would have received under the programme is in my opinion an invitation to launch farther and farther into costly programmes without fiscal restraint. Moreover, in many such cases it would be irresponsible on the part of the federal authority to pay money directly to the provincial governments without any assurance that the money would be used for purposes similar to those of the programme rejected by any particular province.

(b) To confer power on the Upper House as proposed in Recommendation No. 2 is in my opinion totally unacceptable. The views of the provinces should continue to be expressed by their own governments.

(c) I think the proposals introduce an undesirable rigidity in seeking to codify what is in many cases better left to be determined by agreement between two levels of government in the course of administration.

(d) The provisions respecting interprovincial portability require clarification. I am not convinced that as now expressed they will not trespass on provincial autonomy.

(e) The power to tax is the power to govern. Likewise, the power to spend is the power to govern. Recommendation No. 1, as now expressed, would give the federal authority virtually absolute power.

In summary, it appears to me that the recommendations of the Committee in these two chapters must be approached with caution. I realize that the recommendations are expressed in very condensed form and their complete meaning would appear only when they are reduced into the language of constitutional amendment. Apart from the somewhat negative comments I have set forth above I would find it necessary to say that the recommendations in most other respects require further study and clarification.

Yours sincerely,

Donald M. Fleming

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July 13, 1979

Mr. W. H. Kidd,
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Dear Mr. Kidd:

Thank you for your letter of May 23, 1979 enclosing a copy of the Report of the Canadian Bar Association's Committee on the Constitution, entitled "Towards a new Canada".

In your letter you asked for my comments on the recommendations contained in Chapters 12 and 13 of the Report. You indicated that you would like to receive this by June 30, 1979. I am sorry not to have been able to meet this deadline, but I hope that this response will not prove to be too late to serve your purposes.

My comments on the two chapters referred to above are as follows.

Chapter 12 - Taxing Power

I agree with the basic recommendation that both levels of government should be given broad and overlapping powers of taxation, and that the actual allocation of revenue sources between the federal and provincial governments should be left to be determined in accordance with changing needs. There appears to be quite general agreement that it would

not be desirable to attempt to make a precise allocation of specific taxing powers between the two levels of government since it is not possible to forecast their respective revenue requirements nor the revenue potential of particular forms of taxation for more than a relatively short period of time.

The conclusion that both the federal and provincial legislatures should have access to all major tax fields, subject only to the limitations referred to, implies a willingness to rely on reasonable co-operation between federal and provincial governments in working out satisfactory revenue sharing arrangements. In fact, as stated in the Report, "co-ordinated action by all levels of government is essential".

I agree with the recommendations that the power to levy customs duties should be restricted to the federal Parliament, and that neither the federal Parliament nor the provincial legislatures should have power to levy taxes creating barriers to inter-provincial trade. Consideration might also be given to a further limitation on provincial taxing powers to deny to the provinces not only the power to levy customs duties but also the power to impose any other taxation barriers to international trade. Such a limitation might serve to inhibit provinces from imposing tax on non-residents in such a way as to restrict imports or exports or that would be in conflict with tax treaties entered into with other countries by the federal government.

The Report recommends that provinces should be denied the power to impose "taxes that may have a primary impact outside the province" or which have a "tendency to be automatically passed on by the taxpayer to a person outside the province". I am concerned that an attempt to incorporate in the Constitution a restriction of provincial taxing powers that depends on a

determination of the "primary impact" of the tax or on whether it has "a tendency to be automatically passed on by the taxpayer to a person outside the province" would lead to considerable uncertainty as to the validity of many forms of provincial tax due to the difficulty of determining with any certainty the impact of any given tax. In any event, a constitutional restriction of this kind is probably unnecessary except in the case of taxes that would tend to impose taxation barriers to international or inter-provincial trade. Attempts by a province to impose an excessive burden of tax on non-residents can be expected to be met by retaliation and by loss to the province of business and investment from non-residents.

In this connection, the Report states that:

> "Ordinarily a province should not be empowered to raise a tax from persons outside the province. True the impact of taxes will be spread generally through the operation of economic forces. But certain taxes, e.g., a sales tax at the manufacturer or wholesale level, are themselves passed on to the ultimate consumer outside the province. These should continue to be beyond the provincial taxing power, ..."

While I agree that it would be undesirable for provinces to impose taxes that may have a primary impact outside the province, I question whether the Report is correct when it says: "The courts can be trusted to follow these general principles, particularly since this is precisely what they have sought to achieve through their interpretation of direct and indirect taxation".

The Report questions the advisability of the present restriction on provincial taxes to "direct taxation within the province"

since it tends to result in more complex and thus more expensive forms of taxation. I agree with this, and feel that the constitutional restriction on provincial taxation should be limited only in the manner indicated earlier. Reliance should be placed on the process of federal and provincial consultations and negotiations, and on normal political and economic pressures to prevent duplication and overlapping of provincial and federal taxation and to achieve a satisfactory degree of harmonization of taxing legislation and administration.

The Report states that "attempts to avoid multiple taxation by the provinces have been only marginally successful and have led to an inequitable and extremely complex distribution of taxing powers among the provinces". I question the validity of this statement. While it is true that there have been periodic difficulties, it seems to me that almost all of the serious difficulties that have arisen in the past have been resolved in due course after a period of negotiation. Also, it is not clear to me that the present distribution of taxing powers is excessively complex in the main fields of sales tax, personal and corporation income tax and real property tax. There are, of course, complaints from various provinces concerning specific rules of allocation of taxing jurisdictions, such as the current dispute concerning the formulae for allocation of taxable income subject to corporation income tax. Similarly, disagreements may be expected to continue to arise with respect to the allocation of mineral resource revenue between federal and provincial authorities. However, it seems unlikely to be possible to achieve a permanent settlement of matters of this kind by way of a constitutional amendment.

I agree with the Report's recommendation that property of one level of government should be exempt from taxation by the other.

Chapter 13 - The Federal Spending Power

I agree with the general conclusion that the federal Parliament should continue to have spending power to promote policies that fall within areas of provincial jurisdiction for the various reasons cited in the Report. I am less sure of the need for this power to be expressly spelled out in a new constitution. However, I agree with the Report that, if the constitution is to expressly provide that the federal Parliament should have a general spending power, this should be expressly limited to spending for national purposes and the general welfare of Canada. I also agree that, with the exception of social security and shared cost programs, no more specific restrictions should be spelled out in the constitution. The determination as to whether an expenditure is for "national purposes" and "the general welfare of Canada" must be left to Parliament, subject to a review procedure such as that proposed, under which an Upper House in which the provinces are directly represented would be in a position to require re-enactment by the House of Commons of legislation involving federal spending in an area within provincial jurisdiction of which it disapproved.

In respect of shared cost programs there appears to be general agreement with the Report's recommendation that the federal government should be restrained from initiating programs of this kind in the absence of a "national consensus". There also appears to be

general agreement that the best way to determine whether there is a national consensus would be through a re-constituted Upper House. I do not have any comment concerning the differing proposals as to the method of determining whether a sufficient majority in the Upper House would constitute a "national consensus".

I agree with the proposal that individual provinces should be permitted to opt out of a shared cost program that has been initiated following determination that a national consensus exists, and that such provinces should receive compensation in respect of the funds it would have received under the program. However, I agree with the proposal of the Joint Committee of the Senate and House of Commons on the Constitution that such compensation should be reduced by approximately 1% to take into account the cost of collection of the tax turned over to the provinces in this way. I do not agree with the Report that such a deduction should be regarded as a fiscal penalty. On the other hand, I agree that the compensation should be paid to the provincial government rather than directly to individuals in the opting-out provinces as proposed by the federal government.

I confess I do not fully understand the Report's proposal with respect to portability. If it is assumed that a province may opt out of the shared cost program without establishing a program of its own comparable to that adopted by participating provinces, it is difficult to see how a non-participating province can be expected to provide portability for individuals who move to that province from a participating province.

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In any event, it would seem preferable to leave such matters to negotiation between the federal and provincial governments rather than attempt to deal with them within the constitution.

I agree with the proposals with respect to withdrawal of participation in shared cost programs. I also agree that provinces should be permitted to amend legislation under a shared cost program, although I feel that this and the related portability question should be left for negotiation rather than being dealt with by a specific provision in the constitution.

I agree with the Report's recommendations with respect to the federal government spending programs in areas involving only one or a few provinces.

I trust that the above comments will serve a useful purpose in connection with your report to the Annual Meeting to be held in Calgary in August.

Yours truly,

Kerr Gibson:wm

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July 10, 1979

DELIVERED BY HAND

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Attention: W. H. Kidd, Esq.

Dear Sirs:

Re: Report of the Committee on the Constitution, The Canadian Bar Association

The following are our comments on Chapter 12 of "Towards a New Canada", a research study prepared by the Committee on the Constitution of the Canadian Bar Association.

Recommendation 1 of Chapter 12 of the study states as follows:

> The federal Parliament and the provincial legislatures should each have power to levy taxes by any means of taxation, subject to the following recommendations.

We agree that the Constitution should grant Parliament and the provincial legislatures overlapping taxing powers. However, having said that, we believe that the Constitution should attempt to limit the taxing powers of either, or both, of the federal and provincial government in situations where the imposition of taxes by two levels of government on the same activity

would result in an aggregate tax reaching unconscionable or expropriatory levels.

We recognize, however, that as a practical matter it may be difficult to attain this objective. As a suggestion offering at least some protection to taxpayers, we would recommend the following. In the event that taxing legislation is proposed by the federal or provincial government in a field where a tax is already imposed by the other jurisdiction and the cumulative effect of the two taxes would be to create an unconscionable or expropriatory level of tax the following procedure should be observed. The jurisdiction proposing the new legislation should be required by the Constitution to table the new legislation at a meeting of fiscal representatives of the two jurisdictions immediately after the announcement of its intent to impose the tax. These representatives would be obliged to reach an agreement as to how the particular tax field would be shared so as to avoid the imposition of tax at an unconscionable or expropriatory level. In addition, the jurisdiction proposing to enact the new legislation would be required to make public disclosure of it and its effects. While this second requirement would guarantee no substantive alleviation of unconscionable or expropriatory taxes, it would have the effect of bringing political pressure and public pressure to bear on the jurisdiction seeking to impose the new tax.

Recommendation 2 provides that:

> Only the federal Parliament should have power to levy customs duties.

We agree with this recommendation and have no further comments on it.

Recommendation 3 provides as follows:

> Neither the federal Parliament nor the provincial legislatures should have power to levy taxes creating barriers to inter-provincial trade.

We agree with this recommendation; however, we believe it should be extended in order to also preclude the provinces from passing legislation which has the effect of creating barriers to international trade or significant impediments to Canada's international relationships. In this regard, we also make reference to recommendations made in Chapter 22 of the study.

By way of illustration we cite the recent amendments by the Ontario legislature to The Corporations Tax Act, 1972, which extend liability for Ontario income tax to corporations incorporated outside Canada which carry on business in Ontario, whether or not they have any permanent establishment in Ontario. These amendments may well have the effect of modifying in the Province of Ontario the application of many international tax treaties negotiated and ratified by the federal government.

Most of the tax treaties which Canada has signed with other jurisdictions exempt a foreign corporation from federal income tax in Canada on business profits if the foreign corporation has no permanent establishment in Canada. We understand that this is consistent with the international norm. We believe that provincial action such as that recently taken by Ontario will impair the ability of Canada to negotiate tax treaties with other jurisdictions because assurances could not be given in those treaties that corporations incorporated in foreign jurisdictions will be exempt from income taxation in Canada. This, in our view, is an undesirable practical limitation upon the ability of the federal government to negotiate international tax treaties and the Constitution should address this issue.

Recommendation 4 provides:

> A province should not have power to impose a tax that has a tendency to be automatically passed on by the taxpayer to a person outside the province.

We believe that the provinces should have the power to tax activities taking place within their borders.

While the Committee starts with the premise that the validity of a tax should not be judged by its form, in our view, recommendation 4 would, more than ever, continue to so judge the validity of a tax.

Recommendation 4 of the research study really states in different terms the traditional prohibition against the provinces imposing "indirect taxes" but attempts to impose this limitation only in respect of the taxes being passed on to persons outside the province.

We do not agree that a province should be prohibited from levying a tax merely because the tax will be passed on to persons outside the province. The formulation of a tax in this manner results in the validity of the tax being judged on its form rather than substance.

For example, at page 72 of its study, the Committee refers to the example of a sales tax at the wholesale level and concludes that such tax, to the extent it is being passed on to the ultimate consumer outside the province, should continue to be beyond provincial taxing power. We submit that because the province could collect the desired level of revenue from a manufacturer by an increase in its provincial rate of income tax, the fact that it chooses instead to collect that same revenue on the same activity by means of a sales tax on the manufactured product should not cause the tax so imposed to be invalidated.

We submit that the removal of the limitation upon the right of the province to only levy taxes "within the province" is unwarranted and may have far-reaching consequences.

For example, while recommendation 4 would preclude the province from imposing an indirect tax that would be passed on to a person outside the province it would not preclude the province from levying a tax directly upon a person outside the province.

While we agree that an attempt to limit the ability of governments to impose double tax on the same person on the same base should be made, in our opinion, neither recommendation 4 nor the traditional prohibition against the provinces imposing indirect taxes is an adequate test in itself of the validity of a tax imposed by a province.

As an illustration we cite the decision of the Supreme Court of Canada in Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan et al, /1977/ 6 W.W.R. 607. In this case provincial legislation levying a mineral income tax and a royalty surcharge on the production of crude oil in the province was held to be invalid. One of the grounds for the decision was that the taxes were indirect taxes. If one begins with the premise that the provinces should be permitted to impose taxes on the extraction of their natural resources it is apparent that the Canadian Industrial Gas & Oil Ltd. case should, under the new constitution, be decided differently. However, because there was a finding that the tax was an indirect tax and a further finding that 98% of the crude oil produced in Saskatchewan

was exported, in our view, if the test set out in recommendation 4 of the study were applied to the facts of that case, the tax would still be held to be an invalid exercise of the provincial taxing power.

On a more technical level, we submit that the test set out in recommendation 4 would be very difficult to apply and administer. How frequent must an occurrence be before it can be said that it has a "tendency"? How does one determine whether the tax is "automatically" being passed on? What percentage of the tax must be passed on to persons outside the province before it fails the test in recommendation 4?

We submit that the traditional restriction on the provincial taxing power which limits it to imposing taxes "within the province" should be continued. We further submit that a tax on any activity or person where the activity or person sought to be taxed has a substantial connection with the taxing province and where the purpose of the tax is not to impose a tax outside the province, should be valid.

Finally, recommendation 5 of the study provides as follows:

> Neither the federal Parliament nor the provincial legislatures shall have power to levy a property tax against the other.

We agree with this recommendation as long as the term "provincial legislatures" does not include municipalities. In our opinion,

municipalities should be permitted to levy property taxes against real property owned by the federal government in order to finance municipal services.

We have refrained from commenting on Chapter 13 of the study as we feel that we do not have the requisite knowledge or experience in the area of national shared cost programmes to do so.

We hope that these comments will be of assistance to the Canadian Bar Association in analyzing this research study.

Yours very truly,

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J. George Vesely

/im

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July 3, 1979.

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Dear Cappy:

I am happy to have the opportunity of commenting upon Chapters 12 and 13 of the Report of The Canadian Bar Association Committee on the Constitution.

Chapter 12 is entitled "Fiscal Matters, Taxing Power". In my view this chapter sets out in an excellent manner the federal-provincial situation historically and currently. I am in agreement with the recommendations but would add two limitations to provincial taxing power which I believe is consistent with the recommendations.

The first limitation would be that provincial legislation taxing non-residents should be subject to federal treaties with other sovereign powers. That such a limitation is necessary has become apparent recently. This is illustrated in the following example. Ontario in 1978 by a combination of statutory change and regulation (Corporations Tax Act 1972, Section 2(2) and (3) and Regulation 413 enacted in October 1978 but made retroactive to taxation years ending after December 7, 1977) now taxes non-Canadian corporations carrying on business in Ontario even if such corporations do not have a permanent establishment in Ontario. While the changes are intended to mirror the federal legislation and to the extent it does, it is beneficial and reflects Ontario's recent excellent efforts in this regard, it makes no exception for such non-Canadian corporations in jurisdictions with which Canada has entered treaties for the avoidance of double taxation. The customary feature of such treaties is to tax profits from carrying on business only where such profits are allocable to a permanent establishment in Canada.

In the past, while not formally bound by federal tax treaties, the provinces have generally framed their income tax legislation to accommodate the international treaty concept of permanent establishment.

Ontario's current stance considerably weakens the federal authority's ability to conclude international tax treaties since it cannot guarantee reciprocal tax treatment for a large part of the income tax levied in Canada.

The other limitation required is with respect to provincial taxation of non-residents who receive flows of income from Canada without carrying on business in Canada. For example, interest, royalties, rents, etc.

Again Ontario provides the examples. To achieve indirectly a withholding tax on certain payments to certain non-residents, Ontario adds back 5/14ths of rents, royalties, management fees paid by corporations to non-arm's length non-residents of Canada. The effect is equivalent to a 5% non-resident withholding tax. (Section 14(6) Corporations Tax Act).

In the same vein, by Section 14(5) of the Act, Ontario also imputes interest on loans by corporations to non-residents even where the entire loan has been subject to tax as a deemed dividend under the Income Tax Act Canada.

Argument is sometimes advanced that the provinces should receive a share of non-resident withholding taxes and that such a tax sharing would result in their ceasing such encroachments which weaken the federal power to negotiate tax treaties. In my opinion the argument, for reasons which need not be pursued in detail at this time, has only superficial validity. Suffice to say at this time that a province does not share the tax on dividends or similar payments paid to residents of other provinces by corporations taxed by the first province and there is no more reason they should share in such payments to residents of other countries.

A useful addition to the commentary would be to note the tendency of some provinces in recent years, notably Ontario and the western provinces to unilaterally expand certain taxes in which they have to date had exclusive use with the apparent intention, inter alia, of eroding the federal income tax base since such taxes had traditionally been regarded as deductible for purposes of computing income for federal

purposes. The most notable recent example was the large increases in resource royalties by the western provinces. This move was finally countered by disallowance of all such royalties for federal tax purposes and after a period of great uncertainty for taxpayers, the institution of a flat rate resource allowance for federal tax purposes.

The other notable example is the increasing reliance of Ontario, Quebec, and more recently, B.C., Manitoba and Saskatchewan on the so-called "paid-up capital" tax wherein paid-up capital is for the most part defined to include the indebtedness and retained earnings of corporations. The tax rate in Ontario has been increased sixfold from 1969 and it seems clear that a main reason for increasing such taxes is to place a major portion of the burden on the federal tax base.

There does not, of course, appear to be any constitutional amendment which would prevent such actions, nor do I think if one were possible would it be desirable. Reference to this situation would improve the balance of the presentation.

Chapter 13 is entitled "Fiscal Matters, Spending Power". This chapter also sets out in an excellent manner the federal-provincial situation. I have, however, the following comments.

If the federal spending power were explicitly restricted to national purposes and for the general welfare of Canada (Recommendation 1), I question whether the restriction should be enforceable other than by the right of a province or individual to ask a court to enjoin the federal government from spending otherwise. The federal government should retain its reference right to the Supreme Court of Canada for a determination when a program is in draft stage. This approach would have the merit of the recommendation re federal spending restriction not be tied to the adoption of a new Upper House. In short, I disagree with Recommendation 2 as being too fractious, indefinite and restrictive and time consuming in what may be borderline emergency situations. This approach would also provide a control on an abuse of spending power in connection with programs intended for only one or several provinces.

I agree with the recommendation in respect of right of provinces which they now have to opt out of shared cost programs; however, in my view, the entitlement to compensation recommendation might also raise the alternative of the compensation being the lesser of the amount of money the province

would have received and such amount as can be reasonably estimated to be the amount of revenue raised by the federal taxing power for use in such program. The difficulty in determining the latter amount is not insurmountable.

This alternative which might be considered would at once be more restrictive and less restrictive on the provinces. It would be more restrictive in that the amount of the "in lieu" payment may not be as great as the benefit and would therefore tend to encourage provinces to participate. It would be less restrictive since the payment would not be dependent upon the opting out province instituting a similar program if its government so determined.

Perhaps these comments will be of some interest.

Yours very truly,

RR/mc

Ronald Robertson

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June 30, 1979.

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Dear Mr. Kidd:

You have asked for comments on Chapters 12 and 13 of the Canadian Bar Association's study "Towards a new Canada". These chapters are concerned with the taxing and spending powers of the federal and provincial governments. The problems involved both in getting and in spending money are compounded when the several entities engaged in these activities must share or seek to share major sources of revenue and have or claim to have many of the same responsibilities for spending. Taxation policies and the deployment of the large sums raised through taxation afford a government the means to exercise a tremendous influence on economic, cultural and commercial affairs within the area in which it functions. The exercise of the taxing and spending powers is more complex in a federal state than in a unitary state and in a state where there are wide economic regional differences than in one which is substantially homogeneous. Canada adds yet another dimension, that of ethnic diversity in an acute form.

The combination of political, regional and ethnic disparities that are such conspicuous features of the Canadian scene renders the adjustment of taxing and spending powers to the mutual satisfaction of governments and areas an almost impossible feat.

In Canada there is still another aspect to the fiscal picture that is not unique but most troubling. Ethnic and regional strains have grown to the point that responsible citizens in all fields of activity - commercial, political and cultural - can with apparent equanimity contemplate the prospect of Canada disintegrating as a national entity. Varying degrees of distress are expressed at the thought of this possibility coming to pass but there is yet to arise an Abraham Lincoln who is to say "It cannot happen and I have the will and the power to see that it shall not happen". The most forceful exponent of the thought that it cannot happen has recently been rejected as a political leader. Literally no one in Canada has espoused the policy that the break-up of the country shall not happen and if necessary will be resisted by force. Given the language barrier that separates most Canadians into two groups and the cultural differences that are inherent where two languages prevail, Canada almost could be seen as a political entity held together largely by financial and economic ties and none too securely at that.

This may be overstating the case a bit but the adjustment of the fiscal and monetary policies, hopefully on an amicable basis, of the several governments pushing and shoving within the

geographical whole is a matter of great and immediate importance. The risk must be taken that changing a status quo, cloudy as it is in many respects that has evolved through a long process of political bargaining and judicial interpretation may further weaken the cohesiveness of the country. The power of the national government to maintain the degree of unity the country now has by the exercise of its taxing and spending powers is already attenuated to a degree that many regard as threatening the future of the Canadian nation. Yet the changes proposed all tend to enhance the powers of the provinces. An ancillary problem is that the regional governments have no common mind on what they want. It is very difficult to negotiate with a group which may not have even a majority opinion within itself. Nevertheless tensions within the Confederation have reached the stage that it is impossible to consider doing nothing. Some restatement of the taxing and spending powers is imperative.

That being so, the principles set out in chapter 12 of the study with regard to the taxing powers are eminently acceptable. They are succinctly expressed and it is convenient to set them out in full in this comment. They are:

1. The federal Parliament and the provincial legislatures should each have power to levy taxes by any means of taxation, subject to the following recommendations.

2. Only the federal Parliament should have power to levy customs duties.

3. Neither the federal Parliament nor the provincial legislatures should have power to levy taxes creating barriers to inter-provincial trade.

4. A province should not have power to impose a tax that has a tendency to be automatically passed on by the taxpayer to a person outside the province.

5. Neither the federal Parliament nor the provincial legislatures should have power to levy a property tax against the other.

To state that in principle the national and provincial governments are no longer in a dominant subservient relationship is simply to recognize the political reality of today. At the same time no provincial government that supports the continuation of a Canadian federation, having any real substance, could reject outright the limitations on the provincial powers. Ideally the recommendations are unassailable. Extremely difficult problems arise when attention is given to their implementation. In this regard, the study is open to criticism.

Major issues that must be faced include the following. What are the prospects for agreement on questions such as - what are taxes, should they include marketing levies, lottery revenues and mark-ups on monopoly sales such as liquor - when does a tax have a tendency to be automatically passed on to a person outside the province? If answers can be found to these and other questions of this nature, will it be possible to express the rules in legal language that can be readily understood or will we be faced with the type of misbegotten legislation that has come to characterize the Income Tax Act? Moreover, these and like questions are intensely political in nature reflecting current concerns and responsive to influences that frequently are only dimly understood and are constantly developing. Can they be dealt with in a written

Constitution that is not readily susceptible to amendment.

The Committee's position with respect to these issues is anomalous but would seem to be essentially negative. After a brief discussion, the study simply says "The courts can be trusted to follow these general principles", followed by the cryptic remark "particularly since this is precisely what they have sought to achieve through their interpretation of direct and indirect taxation". The courts themselves and the legal profession might be prepared to affirm this solution to the dilemma of translating general principles into specific rules. There is a widely held opinion, however, that the interpretation of a Constitution expressed in general terms should not be left to the judiciary which inherently is not responsive to political and economic changes in the community and is guided by formal legalistic rules. Moreover, will it be agreeable to the competing jurisdictions that the courts should continue to exercise, as they have for the past eighty or more years, what are essentially legislative powers. In another context the study appears to recognize that entrusting legislative responsibility to the courts is not desirable. In chapter 15 at page 87 it is said:

> "It follows that so basic a matter as the degree of a country's economic integration should not be left to changing judicial philosophy but should be articulated in the Constitution".

The same thought might be expressed with regard to the delineation of taxing and spending powers.

A better practice for the future might well be that of formal intergovernmental consultation and adjustment. The conferences of first ministers which have been a feature of recent constitutional activity may be the first steps towards the development of a new constitutional mechanism to deal with issues arising between and among federal and provincial governments which have hitherto been left for judicial attention 'de faute de mieux'.

The study does go a certain distance in that direction with its proposals regarding a reconstituted Upper House in the federal parliament. Essentially, however, the Upper House would be a reworking of the Senate so far as actual power is concerned and it would, of course, continue to be a federal institution. Whether the Committee considered the feasibility of a federal-provincial body with executive power in stipulated areas, including taxing and spending, is not indicated.

On the spending side, the study focuses on that aspect of the spending power which is defined on page 74 as "...spending by one level of government to promote policies that fall within the legislative powers of the other" and remarks that "Both the federal and provincial governments have exercised this type of power". With regard to federal spending the study proposes limitations, namely, that it should be restricted to national purposes and for the general welfare of Canada. These are eminently acceptable statements of principle but as the study says at page 75: "They are not capable of sufficiently accurate

constitutional definition without far too frequent recourse to judicial settlement". The reservation regarding recourse to the courts is noteworthy in relation to the assumption that the resolution of taxing powers would have to be left to the courts.

As an alternative to judicial settlement of issues arising from alleged excessive use of the federal spending power the study would rely on the braking influence, falling short of a veto power, that would be reposed in the Upper House. As the study recognizes, this raises still further problems which are discussed on page 75, under the heading "Provincial Involvement". Attractive as the idea of a ruminant Upper House may be, the proposal if acted upon would accentuate the divisive propensities inherent in the Canadian political scene. Moreover the spinning out of argument and dispute could put federal programs under unreasonable restraints. There must surely be some point at which the federal parliament can say that it is the elected voice of the whole country and until judicially declared out of bounds its decision as to what is a national purpose for the general welfare of Canada should prevail.

The degree of importance that should be given to the allocation of taxing and spending powers in a confederation such as Canada is a matter about which there can be different opinions. It is certain, however, that the relationship between the central government and local governments can never be mutually satisfactory unless there is agreement on the allocation of these basic powers.

OSLER, HOSKIN & HARCOURT

W. H. Kidd, Esq., Q.C. June 30, 1979.

If there is no will to continue the association, obviously discussion of the terms is pointless. Given the will, the Recommendations advanced in the study on these basic matters lay out a foundation for agreement that should be attractive at both political levels and to both racial groups. The weakness in the study is that it makes no effort to demonstrate the practical application of the broad general principles. It is a real question whether agreement can be reached on principles without a pretty clear understanding of how they will work in practice.

Yours sincerely,

Stuart Thom

ST:kg

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June 29, 1979

W. H. Kidd,
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Dear Cappy:

I have reviewed Chapters 15, 16 and 17 of the CBA study on the Canadian Constitution.

I concur generally with the economic analysis of our confederation and the broad general conclusions respecting the Regulation of Trade in Chapter 15 and Competition in Chapter 16. With respect to securities in Chapter 17, I do not find the study's reasons for exclusive provincial legislative power compelling and I find myself in some sympathy with the minority position in that many securities issues are distributed beyond provincial boundaries. Provincial authority should be retained to the extent there is no distribution to the public and with respect to matters respecting title and conveyancing.

I am opposed to the concept of an Upper House representing the provinces. It would neutralize any federal government initiatives not acceptable to the provinces: in effect giving the provinces a veto over matters which are within the exclusive jurisdiction of the federal government. Any logic in such a proposal collapses when you consider the corrollary of having an Upper House in each province representing the federal government! We elect our provincial legislatures to legislate and oversee the administration of the laws in

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LASH, JOHNSTON

W. H. Kidd June 29, 1979

respect of those matters falling within the legislative jurisdiction of the province. We, the same people, elect members to the House of Commons to perform the same function on the federal level. The federal parliament, Commons and Senate, represent the people, not the provincial governments. The provincial legislature is not elected to participate in matters falling within federal legislative competence.

Our parliament represents the geographic and cultural components of this country and, subject to some aberrations, each caucus in the parliament represents those components. Any government which lacks parliamentary support from a component would be courting political disaster to ignore the interests of that component in setting and implementing its policies.

I would be sympathetic to direct election of the Senate or shorter term appointments to the Senate with constitutional guidelines to the government as to its intended representational character.

Accordingly, recommendations No. 4, 5 and 7 of Chapter 15 should be modified to substitute for the approval of the proposed Upper House the approval of the Federal Parliament.

Sincerely,

DRC/Jm

Donald R. Cameron

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Dear Mr. Kidd:

As requested in your letter of May 23, 1979, I am enclosing my comments on the recommendations of the Committee on the Constitution in Chapter 16 - "Competition". I trust that the form of this is satisfactory but if you wish anything further, please do not hesitate to get in touch with me.

Yours sincerely,

Hamilton

THE CANADIAN BAR ASSOCIATION - ONTARIO

Towards a new Canada

Chapter 16 - Competition

Chapter 16 of the Report of the Committee on the Constitution of the Canadian Bar Association, dealing with "Powers of Government - Economic Powers - Competition", contains the following recommendation:

> "1. The federal Parliament should have exclusive legislative power to regulate competition."

The proposal at pages 96 and 97 of the Report expands this recommendation.

I agree generally with the recommendation. I consider that it is important, for the reasons discussed in the Report, that the jurisdiction of Parliament to enact legislation with respect to competition and restraint of trade should not be limited to powers derived from its criminal law jurisdiction and that there should be unquestioned power to enact regulatory legislation and provide for civil remedies.

I question, however, the proposal that this exclusive power should extend without restriction to both intraprovincial and extraprovincial enterprises to such an extent that provincial legislation, otherwise validly enacted under certain heads of provincial powers, would be rendered invalid. The argument in favour of such an all-embracing power is that restraints on competition even in a local market or local services may be inimical to the attainment of economic efficiency in the nation as a whole. Also, it may be difficult in many cases to find a clear line of demarcation between markets or activities which are of a local nature and those which are national or have extra-provincial effects. On the other hand, it is recognized in Chapter 11, Recommendation 2, that the Constitution should give to the provinces legislative power to regulate the provincial economy and other local matters. It appears to me that there are areas where, in the interests of recognizing the value in the people of a province being able to regulate their own affairs, provincial legislatures should be given the power to determine how and to what extent competition is to be provided for and regulated. If such legislation is enacted, it should prevail over conflicting federal legislation.

The areas of jurisdiction which could be left to the provinces might include such matters as regulation of the professions, trades and conditions of employment. Provincial legislatures could also have jurisdiction over the marketing of natural products produced within the province, insofar as this is related to intraprovincial trade, subject to the general recommendations with respect to the division of power over the regulation of trade discussed in Chapter 15 of the Report.

It appears to me that this protection for provincial legislative power would have to be provided for or recognized in the Constitution. I do not think that it would be adequate to rely, as the last paragraph on page 97 of the Report proposes, upon Parliament and the courts being trusted to confine the federal power within acceptable limits.

The Report proposes at page 96 that the provinces could regulate transactions in legislating respecting consumer protection and contractual relations. This may be appropriate in a Constitution which is intended to give the maximum practicable recognition to the provincial legislative powers where these are directed to intraprovincial trade and other local matters. On the other hand, a multiplicity of different provincial regimes regulating the marketing of products and the provision of services by nation-wide enterprises is expensive and confusing. The relative simplicity involved in one national code of regulation is more efficient and less costly both in terms of bureaucratic overburden and compliance by the producer, distributor or other supplier of goods and services. If there is not to be a single legislative code to govern these matters, at least uniformity is highly desirable and I suggest that there should be an emphasis upon achieving such uniformity in legislation, regulation and administration. There are already a number of examples, such as the fields of insurance, securities legislation, and pension benefits, where this has been possible, with the co-operation of the authorities and legislatures of the several provinces. To this end there should be a clear programme of consultation between governments and there should be effective procedures to facilitate this.

27 June, 1979

(John H. C. Clarry)

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June 6, 1979

Mr. W.H. Kidd, Q.C.,
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Dear Mr. Kidd,

As a member of the Association, I am pleased to offer you my observations concerning the views expressed by the Association's Committee on the Constitution on the subject of "Securities" in Chapter 17. These personal views are the result of observation and participation in the field for some period of time. The same general observations apply to futures contracts, ranging from stock exchange clearing corporation options to commodity futures contracts and their offshoots.

I concur with the Committee's general conclusion that provincial legislatures should retain their exclusive legislative powers respecting securities transactions in the province. I further agree that concurrent or two-tiered regulation must be avoided. That is not to say that there is not a proper role for a federal presence.

Securities regulation in the provinces has four principal elements at present. The registration or licensing process aims at assuring the honesty, good reputation and minimum standards of competence of those permitted to act as securities dealers or advisers. Investors make investment decisions about new issues of securities founded on prospectus information. The privilege of obtaining funding from public investors carries with it a continuing obligation to make regular as well as "timely" disclosure to investors generally aimed at assuring those investors that essential information necessary

to the making of informed judgments is available to all investors and not withheld for the benefit of insiders and their friends. Further assurances of equality of information and treatment are found in the take-over bid and issuer bid rules. They are supported through a range of rights, obligations and remedies, including the responsibility imposed on provincial administrators to oversee the activities of the stock exchanges and the over-the-counter market.

Patently securities markets are national and international as well as regional. Apart from the provisions of the Criminal Code (enforced by the provinces) and in recent years the insider trading rules and take-over bid rules imposed through the federal corporation law on federal companies there has been no federal presence. The provinces, recognizing the need of dealers operating and issuers distributing securities in more than one province, through regular meetings extending back for more than 25 years have achieved substantial uniformity in policy and administration while at the same time reserving and preserving the right to accommodate regional needs and differences. Through this process, the provinces (and more recently the territories) have demonstrated the ability of the regional securities administrators, attuned and sensitive to the needs and concerns of their market-place, to adapt and respond on a real time basis to problems as they arise. This has been made possible, certainly from Quebec west, by the disclosure and administrative tools given to the administrators by Legislatures in the last decade. The administrators have been supported in their purpose by the securities industry anxious to avoid another layer of bureaucracy and the rigidity and delays that follow where there is a large organization whose headquarters, of necessity, must be distant from the marketplaces. The provinces and territories, albeit with goodwill and under the unifying threat during the past decade of federal intervention, have co-operated so that investors in all regions of Canada now have the benefits of the provincial systems.

Having concluded that investor protection and the servicing of the constituents of the capital market

can be more effectively achieved at the provincial level, there is certainly room for reciprocal agreement between the provinces under which, in inter-provincial transactions, a particular securities administrator would be authorized to accept a prospectus, accept a rights issue or even grant exemptions, as agent for one or more of the other provinces where the issuer or applicant wishes to file a prospectus or apply for a similar exemption in more than one province. Ontario's new Securities Act was developed through discussion with all the provinces as a uniform act. I have every expectation that during the next two years it will be adopted by all provinces to the west and be compatible with new legislation being developed in Quebec. The Atlantic provinces appear to have the power to rely on decisions made in other provinces. While the provinces have sought to ease the burden in national filings of prospectuses through the "principal jurisdiction" concept under which the major processing is done through the administrator selected, the administrators do not delegate the discretion vested in them by their Legislatures. It may be that the Australian model, now evolving, bears examination.

In 1967 Ontario made a proposal for what was styled CANSEC (Canadian Securities and Exchange Commission) through which it was proposed that the federal government and the provinces would delegate their authority to this governing body. CANSEC would encompass, on a national basis, the administrations of each of the provinces and, on an intra-provincial matter such as registration, would leave the matter entirely to the existing body. In Australia, where securities regulation has evolved as part of its state corporations law, they are moving ahead with such a scheme - leaving the state organizations in place with some federal co-ordination, with the policy making being done through a council of federal and state ministers and officials. The theoretical model is one which I favour since it avoids two-tiered regulation while preserving substantial regional autonomy. It bears re-examination.

While the need has not been demonstrated to be an urgent one, there is a role which could be played by the federal government in the supervision of the computer assisted national trading system, CATS, presently being developed by the Toronto Stock

Exchange and the computerized depository and clearing facility for securities, the Canadian Depository for Securities, established by the banking, trust company, life insurance and securities industries. The resistance to federal intervention here flows from the fact that membership in these facilities, in due course, may be essential for a securities dealer. Federal intervention might erode the ability of the provinces to effectively regulate through the licensing or registration process.

In closing, I do not agree with the Committee's conclusion that "any inadequacy of provincial regulation is at least partially owing to the lack of resources in many provinces for the investigation and enforcement of securities laws". While that might have been true previously, since 1968 the RCMP has established its commercial crime units in each major centre in Canada. Their initial purpose was to provide this kind of service to securities administrators in the contract provinces (all but Ontario and Quebec) but they have since expanded into all provinces dealing with securities and other forms of commercial crimes on a national or international basis. The fact that major enforcement actions do not take place in some provinces is not through lack of diligence or ability but rather that the nexus of the major problems has been the financial centres of Montreal, Toronto, Calgary and Vancouver.

H. S. Bray, Q.C.,
Vice-Chairman.

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June 22, 1979

Mr. W.H. Kidd
The Canadian Bar Association - Ontario
Suite 404
80 Richmond St. W.
Toronto, Ontario
M5H 2A4

Dear Mr. Kidd:

Thank you for your letter of May 23rd and the enclosure of the report "Towards a New Canada". You have asked for my views on the recommendations in Chapter 17 - "Securities". In brief, I have no difficulties with the recommendations in that chapter. There are other possible approaches one could take (and some may emerge in negotiations) but the recommendations in the chapter are certainly soundly conceived and reasonably based.

I am sorry that I cannot provide you with a lengthier reaction. I have just returned from a two-week French immersion course and I am today commencing packing personal affairs for our move to Montreal which takes place very shortly.

With warmest personal regards, I am

Yours sincerely,

D.L. Johnston
Dean

DLJ:fs

Office of the President

the Permanent

Canada Permanent Trust Company
Canada Permanent Mortgage Corporation

320 Bay Street
Toronto Ontario
M5H 2P6

June 25, 1979

W. H. Kidd, Esq.,
The Canadian Bar Association - Ontario,
Suite 404,
80 Richmond Street West,
Toronto, Ontario.
M5H 2A4.

Dear Sir:

As you requested, I have studied Chapter 18, "The Monetary System", in Towards a New Canada, the report of the Committee on the Constitution for the Canadian Bar Association.

The report, as I read it, is both an argument and an apology for the maintenance of the status quo. I think the future is brighter than that.

Over the 112 years since Confederation, legislation governing the incorporation and operation of financial institutions has developed both federally and provincially in answer to specific needs at various places and times. As these occurred, little attention was paid to the overall monetary system and the constitutional niceties. For example, when trust companies were first incorporated provincially no one could foresee their development into "near-bank" status through the extension of the trust concept into demand deposit banking.

The subject matter is now so complex and so confounded by its historical development, it would seem to be incapable of ever being unravelled except over a similar period of time. However, the development of the Electronic Clearing Systems will force and hasten the unravelling. At the same time, new legislation such as the conversion privileges contained in the proposed new Bank Act will also hasten the process.

The competitive situation, as between the chartered banks and

W. H. Kidd, Esq. June 25, 1979

other financial institutions will be resolved in favour of the banks, and I expect that over the next two decades other institutions will go through an evolutionary rationalization which will see all deposit accepting institutions under the same federal legislation and full monetary regulation and control resting at the federal level.

Yours truly,

Eric J. Brown, Q.C.

/as

HENRY E. LANGFORD
50 HEATH STREET WEST
TORONTO M4V 1T3

June 7th

W. H. Kidd,
Canadian Bar Association,
Toronto, Ont.

Dear Mr. Kidd;

In reply to your letter of May 23rd I am enclosing some comments on "securities" for what they are worth.

So far as "The Monetary System" is concerned I have read the chapter and am in agreement with the recommendations. The material accompanying them seems to be adequate so that I did not think there was anything which I might add which would be particularily useful.

Thanking you for this opportunity to study the Bar report;

Yours truly,

H E Langford

SECURITIES

I find myself in agreement with the minority of the Bar Committee in that I would favor either exclusive Federal jurisdiction over securities or concurrency with Federal paramountcy.

My reasons for this view can be summarized under two headings;a-rational and b- practical. Rationally, authority over securities, in the financial world in which we live, is really only an extension of the Federal authority over money and banking. A hundred years ago when our constitution was prepared the only substantial 'finacial' institutions and dealings were banks and bills of exchange. It was thought, prperly I think, that authority over these matters should be uniform and centralized. This decission has been proven accurate and our very succesful banking system is largely due to this early constutional provision.

In the years since Confederation however we have seen an enormous growth in the securities business stocks, bonds, money markets,stock exchanges, options etc. All of these are interconnected with banking and are an integral part of our financial system. If you therefore think of Securities as a part of the monetary system, as it really is,then the arguments for federal control as well set out in Chapter 18 apply to securities also. In my opinion if we were now drafting a new Constitution for Canada we would rationally include authority over Securities as a part of the financial and monetary jurisdiction to be given to the Federal Parliament.

The practical arguments in favor of united authority are numerous. The steps taken by the existing provincial bodies to cooperate, while good in themselves, are evidence of the awkwardness found in practice with divided authority in a field which is essentially countrywide in nature. Also the efficiency of administation varies enormously with the size of the provinces. This leads to real differences in the protection afforded to investors dependant upon where they live. Unnecessary duplication of function and of jobs also arises from provincial authority.

In considering a matter like securities jurisdiction one must always bear in mind that the only purpose for the legislation is to protect the citizen.

H. E. Langford.

In tis regard a multplicity of authorities, which we now have, is wasteful, confusing and sometimes ineffective. An illistration will show this; suppose a Manitoba resident goes to the Winnipeg office of a Montreal based investment firm and buys shares, through the Toronto Stock Exchange in a federally incorporated Alberta based oil company.(This is not far fetched. Deals akin to this occur daily)At present four or five jurisdictions have control over some part or all of the deal. If the citizen concerned has some complaint to whom should he or she appy? Surely the public would be better served if there were one authority over securities in Canada.

With all due respect to its authors I suggest that the prpos-d recommendation would be clumsy at best and often unworkable in practice. In the example given above, would Manitoba have authority? The agent was certainly retained in that province, but the purchase was in Ontario. With investment firms in every province exchanges of size in four only one can see the real problem of jurisdiction. Surely the interest of the public should dictate that there be one well defined body responsible for control of Securities matters in Canada.

H.E. Langford.

THE METROPOLITAN TRUST COMPANY
350 BAY STREET
TORONTO, CANADA

T. STEWART RIPLEY
CHAIRMAN

June 19, 1979

Mr. W. H. Kidd
The Canadian Bar
Association - Ontario
Suite 404
80 Richmond Street West
TORONTO, Ontario
M5H 2A4

Dear Mr. Kidd:

This is in response to your letter of May 23rd wherein you asked me to give you my views on the recommendations contained in "The Monetary System" - Chapter 18, which I am glad to do.

The report makes four recommendations which, from a practical point of view, seem to provide for a continuation of the status quo in government control and regulation of the monetary system and of deposit-taking financial institutions.

Given the "status quo" aspect, none of the recommendations are particularly controversial, although taken together they can be viewed as inconsistent one with another in a pure sense. The commentary containing the reasoning behind the recommendations tends to point up these inconsistencies, rather than explain them away.

Recommendation 1, for instance, baldly states that the Federal Parliament should have exclusive legislative power respecting the monetary system. The commentary, however, makes clear that the report foresees a continuation of the present system in which both federal and provincial legislation influences the monetary system and the monetary functions of financial intermediaries.

.... 2

Mr. W. H. Kidd June 19, 1979

In fact, recommendations 2 and 3 provide for exclusive legislative power for the federal government in respect of the incorporation, organization and operation of financial intermediaries with federal charters such as banks, and precisely the same exclusive legislative power for provincial governments in respect of financial intermediaries provincially chartered such as provincial trust and mortgage loan companies, credit unions, etc. If the two levels of government are to have exclusive legislative power over the operations of their own financial intermediary incorporations, then obviously both may regulate their respective monetary functions. This is hardly consistent, in the pure sense, with the report's first recommendation.

Near the top of Page 105, the report speaks of the "paramount federal power" over the monetary system. The word "paramount" is, of course, really what the report means when it uses "exclusive" in the first three of its formal recommendations, and I think few in our industry would quarrel with that proposition in the context of monetary policy and operations.

The report also endorses the Economic Council's recommendation that the regulation of financial institutions should be framed on the basis of function rather than their jurisdiction of incorporation. While "Central Control on Functional Lines" -- the theme quoted at the beginning of Chapter 18 - may make a good deal of sense, even the Economic Council, in its study, seemed to recognize that it might well be something more easily said than done. Again though, it is a principle that one would hardly want to take issue with. Indeed we may well see a partial step towards it if the new style "Savings Bank" Legislation comes into being.

One might take issue with the Report's assertion, (middle of first column on page 104) that 'Banks and the provincial financial intermediaries have a second aspect in common, the power to add to the effective money supply ..' Inasmuch as trust and loan companies must clear through and maintain their own accounts with the chartered banks, I cannot see that their power to expand the money supply is in any way comparable with that of the chartered banks, if indeed it exists at all. One could well question the use of arguing the point, however.

.... 3

Mr. W. H. Kidd June 19, 1979

In essence, what the authors of the Constitutional Report are saying is that the existing system is flexible and, above all, expedient! Let's not rock the boat! It is hard to disagree.

Yours very truly,

TSR:mjd
att.

Comments on the recommendations contained in "The Monetary System" - Chapter 18

The report makes four recommendations which, from a practical point of view, seem to provide for a continuation of the status quo in government control and regulation of the monetary system and of deposit-taking financial institutions.

Given the "status quo" aspect, none of the recommendations are particularly controversial, although taken together they can be viewed as inconsistent one with another in a pure sense. The commentary containing the reasoning behind the recommendations tends to point up these inconsistencies, rather than explain them away.

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In fact, recommendations 2 AND 3 provide for exclusive legislative power for the federal government in respect of the incorporation, organization and operation of financial intermediaries with federal charters such as banks, and precisely the same exclusive legislative power for provincial governments in respect of financial intermediaries provincially chartered such as provincial trust and mortgage loan companies, credit unions, etc. If the two levels of government are to have exclusive legislative power over the operations of their own financial intermediary incorporations, then obviously both may regulate their respective monetary functions. This is hardly consistent, in the pure sense, with the report's first recommendation.

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.... 2

Comments on "The Monetary System" - Chapter 18 Continued

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In essence, what the authors of the Constitutional Report are saying is that the existing system is flexible and, above all, expedient! Let's not rock the boat! It is hard to disagree.

T. S. Ripley
President
The Trust Companies Association
of Canada

TELEPHONE
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T. B. O. McKEAG, Q. C.
505 UNIVERSITY AVENUE
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July 18, 1979.

W.H. Kidd, Esq.,
President,
Ontario Branch,
The Canadian Bar Association,
Suite 404, 80 Richmond St. W.,
Toronto, Ontario.
M5H 2A4

Dear Cappy:

In overdue response to your request of May 23, I am pleased to enclose a statement of my personal views on the recommendations contained in Chapter 19 of the Report of the Committee on the Constitution, "Towards a New Canada".

I would like to give credit to A.J. Kovach, one of my lawyer colleagues in Shell, who contributed much of the case and statutory citations that I drew upon.

Yours very truly,

Ollie

T.B.O. McKeag, Q.C.

TBOM:egs

Enclosure

c.c. Mr. A.J. Kovach
Mr. J.A.W. Whiteacre

T.B.O. McKEAG

July, 1979

RESOURCES

General (108)

The recommendation is that it be expressly stated in the Constitution that the provinces have "exclusive jurisdiction to regulate the exploration, exploitation, conservation and management of natural resources on their territory" .... "including requiring that (a resource) be processed in the province and restricting its export outside the province".

Such a provision should diminish the long-standing concerns as to the intrusion of provincial legislation into the federal sphere. An illustration of the current uncertainty are well illustrated among the contrary positions expressed among the judges in Cigol v. A.G. Saskatchewan (1978) 2 SCR 545 on the issue of whether that province's mineral income tax (inter alia) was an improper intrusion into the regulation of interprovincial trade. Constitutional measures that would secure to the provinces not only the legal ownership of resources but also all the incidents of ownership are clearly overdue. A good example of as yet untested legislation that would benefit from the removal of present uncertainty is the Alberta Gas Resources Preservation Act, RSA 1970 Ch. 157.

It is noteworthy that this recommendation has to be read in the context of another chapter - 15, Regulation of Trade: "In truth the search for simple and precise criteria to distinguish between inter-provincial and inter-provincial trade is not easy ... . A first step is to distinguish between (them) in a manner that conforms to the primary obligation of the Federal Parliament to regulate the national economy and of the provinces to regulate local affairs ... . We agree that Parliament should have the power to regulate intra-provincial trade where it declares ... that it is essential to the management of national or international trade."

The Committee goes on to make it clear that such federal intervention could be only with the consent of the province or of a national body on which the provinces are represented.

The Committee's recommendations are comparable to the draft proposals discused at the February, 1979 First Ministers' Conference wherein the provinces may control export as well as exploitation, and federal intervention is permissible only if there is "compelling national interest".

If one considers the case of a resource such as coal, there would be little cause for jurisdictional or political conflict on the issue of whether there is compelling national interest. If the province restricts exports or fixes a base price, the Canadian consumers have alternative supply

sources. However, if the resource is natural gas, the essential needs of a captive and dependent market outside the producing province provide a basis for holding that the federal assumption of jurisdiction is "essential to the management of national trade".

To date, the disputes between the producing provinces and Ottawa have been over the NEB's reluctance to allow exports of gas to the U.S. at a time when there appears to be a surplus. I assume the proposals would allow it to call for provincial resources when they are essential for Canadian consumers, and for that reason I support Recommendations 19.1 and 19.2.

OFFSHORE RESOURCES (19.5)

The proposal to "provincialize" the seabed of the 200-mile continental shelf is good news for the provinces with ocean frontage. The historical fact that Ontario and Quebec were the recipients of northern lands acquired by Canada from the Hudson's Bay Company is cited as a precedent. This is hardly a valid precedent when one considers the barren prospects for northern expansion by the Western provinces, since northern mineral rights would presumably go to the "territory" provinces when they are constituted. The argument that the transfer of control over mineral rights on the continental shelf would be "equivalent treatment" to that

accorded to the prairie provinces in 1930 when they were given control over natural resources within their boundaries is not analogous. Further, I suggest that the statement "that for years before Confederation the provinces bounded by the seas exercised whatever jurisdiction was possible over adjacent areas" begs the very question it implies it is answering: what jurisdiction was possible beyond the seashore? What British colony in North America had the capacity or authority to extend its territory over the sea? It is questionable whether Canada itself had that jurisdiction before it became a sovereign nation. Before that development Westminster enacted the Territorial Waters Jurisdiction Act, 1878 following a leading case (R. v. Keyn (1876) 2 Ex. D. 63) defining the territorial limits of England. That Act specifically included in its legislative purview "the territorial waters of Her Majesty's dominions" clearly evidencing the inclusion of such waters in its legislative competence and the exclusion thereof from that of any then existing province or colony.

The remaining "other considerations" under section 19.5 appear to me to be of a political nature -- notwithstanding the guise of "legal" reasoning under which they are presented. In sum, recommendations 19.5 and 19.6 seem different in substance from the others in chapter 19 which appear to be directed at clarification and definition of legislative powers in order that the provinces have the security and competence flowing from full ownership of their

resources rather than a bare legal title. In contrast, recommendations 19.5 and 19.6 seek to expand provincial control and title over an asset that better opinion considers is owned by the nation as a whole. I am not opposed to whatever accommodation of these assets is appropriate for the good of the nation; I do not, however, favour any disposition thereof under the guise of legal obligation.

I submit that the only valid criterion for assessment of the legal status of the seabed underlying the territorial sea and of the continental shelf lies in the advisory opinion of the Supreme Court of Canada in the B.C. Offshore Reference. The principles stated there should be applied to the historical developments and other relevant considerations appropriate to the issue and the claims of the littoral provinces. In part these principles must include the following considerations from the Supreme Court's opinion: "... the rights in the territorial sea arise by international law and depend upon recognition by other sovereign states. Legislative jurisdiction in relation to the lands in question belongs to Canada which is a sovereign state recognized by international law and thus able to enter into arrangements with other states respecting the rights in the territorial sea." (65 D.L.R. (2d) at 376). The International Convention on the Territorial Sea and Contiguous Zone was signed by Canada, and it, rather than any province, is the party with

recognized rights to explore and exploit natural resources on its continental shelf. It is negotiating demarcation lines with the U.S. (Maine coast) and with France (St. Pierre and Miquelon). It has international responsibility for environmental protection. In my view, ownership of and jurisdiction over the continental shelf to the extent where it is capable of exploitation is (and should remain) vested in the Federal authority in Canada. Any constitutional conflicts to date regarding resource ownership and the exercise of legislative rights in respect thereof by the provinces and the Federal authority aren't a patch on the problems that will arise should the resources of the seabed be transferred to the adjacent provinces. It may, however, be considered ultimately appropriate to convey these rights out of the Federal authority. If that decision is made, I consider it essential that it be arrived at realistically, with full appreciation that something is being given and received as an act of grace, and not, as urged in sections 19.5 and 19.6, as a matter of (illusory) right.

TO: The Canadian Bar Association -- Ontario Branch

FROM: Natural Resources and Energy Section

SUBJECT: Canadian Bar Association - Committee on The Constitution

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The Committee made 8 recommendations covering such subjects as the general control of the natural resources in a province, trade and commerce provisions, fisheries, water resources, off-shore resources, atomic energy and agriculture.

The section has, of late, primarily concerned itself with those natural resources which are energy related. This is due to the obviously high profile achieved in the energy world in recent years and the fact that the most interest shown in the section has come from the lawyers engaged in energy work.

The Federal Government has recently proposed amendments to section 92 of the British North America Act and some of these proposals reflect the recommendations put forward by the Committee.

In particular, The Committee's first recommendation provided that;

> "the Constitution should expressly provide that the provinces have exclusive legislative power respecting the exploration, exploitation, conservation and management of all natural resources in the province."

Federal proposals at the recent Constitutional Conference of First Minister's acceded to this view but only in respect of non-renewable and forestry resources.

With respect to trade and commerce the Committee proposed;

> "our general approach to the interrelationship of resource management and interprovincial and international trade is that the provinces should be treated to control the use of a resource, including requiring that it be processed in the province and restricting its exportation outside the province. Once, however, a resource moves into interprovincial or international commerce it should be subject to the paramount power of the Federal Parliament over trade and commerce."

Again it would seem that the Federal Government is prepared to move in this direction in permitting the legislature of a province to make laws in relation to the export from the province of the primary and initially processed production from non-renewable and forestry resources in the province. This is all subject to a paramount power of the Federal Parliament to over ride the provincial legislation in respect of a "compelling national interest" and provided it does not relate to the regulation of international trade and commerce.

The Committee proposed that:

> "the Federal Parliament and the Provincial Legislature should have concurrent legislative power respecting atomic energy, with Federal paramountcy"

In the fall of 1977 the federal government table bill C-14 (The Nuclear Control Act) which was designed to bring the Atomic Energy Control Act of 1946 up to date.

Positions taken by the provinces have been submitted to the federal government with a view to practically distributing legislative powers in relation to atomic energy and incorporating certain provincial legislation by reference into the federal law.

R.P. Smith

J. A. William Whiteacre, Q.C.

1100 York Centre,
145 King Street West,
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M5H 1J8

March 1st, 1979

John R. Jennings, Esq., Q. C.,
Vice-President,
The Canadian Bar Association - Ontario,
Suite 801,
80 Richmond Street West,
TORONTO, Ontario.
M5H 2A4

Dear John:

Re: The Committee on the Constitution

The Natural Resources and Energy Section has directed its mind only to Chapter 19 of the above Committee's report, in that the responsibilities of this Section and the subject matter of that chapter coincide exactly.

The Report

The report states that all natural resources, including all forms of energy except atomic energy, should fall within the exclusive legislative jurisdiction of the provinces as far as the regulation, exploitation, exploration, conservation and management of them is concerned. The report even specifies that this should be expressly stated in the Constitution.

The report goes so far as to advocate that the provinces should be free to control the use of a resource, including requiring that it be processed in the province and restricting its exploitation outside the province.

The report only calls for federal legislative powers once the resource leaves the province, either interprovincially or internationally.

continued.....

The report, however, sets a separate standard for atomic energy because of "its strategic military character" and because "Parliament also has a major interest in its environmental impact".

Having said that, the report then states that the provinces should have concurrent legislative power respecting atomic energy. Specifically, the report would allow local commercial and non-strategic aspects of atomic energy "as much as possible" to be left to the provinces.

Recommendations

1. The report goes too far in giving the provinces under all circumstances exclusive legislative power over a resource that is within the province. This Section believes that regardless of where the resource happens to be at the time, the Federal Government should have legislative power over it if it is in the national interest that the resource be involved in international trade. That power should extend also to interprovincial trade where a compelling national interest has been established. There should be no absolute provincial authority to restrict the exportation of a resource outside the province.

Atomic Energy

This Section sees no reason for dealing with atomic energy in any manner that is different from other natural resources in that in the event of international trade, the Federal Government would have legislative power in the national interest in any event and in interprovincial trade the Federal Government would have legislative power in the event that a compelling national interest is established.

This Section can not agree that environmental aspects of atomic energy ought to fall within the exclusive legislative power of the Federal Government, notwithstanding the fact that environmental aspects impinge at all stages. This Section is of the opinion that the provinces are sufficiently sophisticated in all environmental matters to assume legislative power over

continued.....

the safe use of atomic energy at all stages within the province.

I hope that this report is of some use to the Branch in its dealings with the association.

This letter forms the basis of the presentation that this Section proposes to make at the forthcoming symposium on the subject.

Yours very truly,

J. A. WILLIAM WHITEACRE, Q. C.

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July 3, 1979

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The Canadian Bar Association
Suite 404
80 Richmond Street West
TORONTO, Ontario
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Dear Mr. Kidd:

As requested by you in your letter of May 23, 1979 I enclose my views on Chapter 20 of the Study "Towards A New Canada".

Yours sincerely,

P. F. M. JONES

PFMJ:nv

"TOWARDS A NEW CANADA" - CHAPTER 20 -

TRANSPORTATION AND OTHER WORKS AND UNDERTAKINGS

You have asked for my views on the recommendations contained in the above chapter, and at the outset I wish to stress that they are not the views of any organization with which I am connected.

The text of the study indicates that the Committee proceeded on two assumptions in drawing up the recommendations that accompany Chapter 20. Firstly, the lines of division between Federal and Provincial power over transportation are satisfactory. Secondly, the Federal power must be seen in the larger context of regulation of international and interprovincial trade: e.g., the Constitution of the United States under which it has been held that the regulation of transport falls within the commerce power.

Upon these assumptions the recommendations contained in the study flow naturally, and, as I share these assumptions, I do not propose any significant criticisms.

In substance the recommendations recognize the difference between interprovincial undertakings (which fall within Federal legislative power) and intraprovincial undertakings (which fall within Provincial legislative power). There will always be a problem in deciding what degree of connection must exist between a transportation undertaking which operates solely within a province and interprovincial transportation to bring the undertaking under Federal legislative authority. This problem the Study leaves to the courts.

The Committee recommends that the power in the Federal Government to declare any work to be for the general advantage of Canada be retained subject to the consent of the two-thirds majority of the Upper House or the consent of the Province where the work is located. The Committee observes that this declaratory power, which has been used extensively except in recent years, has proved very valuable in the efforts of the Federal Government to bring into the fold undertakings which from one point of view are peripheral to the inter-provincial activity where their exclusion could prejudice the effective working of the legislation as a whole. In considering this position it is useful to refer to a parallel recommendation found in Chapter 15 which deals with the economic powers of the Federal Government for the regulation of trade. By this recommendation the Federal Parliament has the power to "harmonize" intra-provincial trade regulations upon a declaration that this is essential to the management of the Canadian economy, again subject to the assent of a two-third majority of the Upper House.

One area where present experience suggests that the provinces could have more say is highway transport. The Committee declined to make any significant changes in the direction increasing Provincial power on the ground that proper management of national transport requires an "intermodal approach - all forms of transportation should be subject to an integrated policy". The Committee recognizes that an energy crisis might require positive legislative steps to increase the utilization of one form of transport, perhaps at the expense of another.

It is unlikely that there will be any quarrel with the recommendations in Chapter 20 although the absence of quarrel does not mean an absence of controversy over the policies which may actually be pursued, or an absence of importance of the subject to Canadian unity. The controversy in future is likely to stem from those areas where the Federal transportation power comes into conflict with provincial objectives in cultural or economic fields. Some of the possible examples of conflict are worth highlighting: a Province

wishing to stimulate northern development may wish to acquire and operate an airline free from restraints which might be imposed by national considerations as seen by the Federal Government; a Province intending to stimulate its shipbuilding industry may compete with Federal programs of assistance to shipbuilders which are aimed to establish specialization in a field of construction of Lake vessels where the natural beneficiaries of such program are shipbuilders in a neighbouring Province; the location of an airport may impede orderly urban development; language usage may bring employees backed by their Provincial Government into conflict with Federal administrators. As the study recognizes:

> "The first thing that is needed for the proper working of the Constitution is an understanding by Canadians of the inevitability of such conflicts, and that it is possible to take one side or the other on any particular issue without calling the whole system into question." (p. 87)

I have only one suggestion to make to the actual wording of the recommendations. In describing the paramount Federal legislative power, paragraph 2 of the recommendations uses the word "regulate". I would suggest that the words "legislate with respect to and" be added so that the whole recommendation reads:

> "The Provincial legislature should have exclusive legislative power to regulate intraprovincial transport undertakings, subject to paramount Federal legislative power to legislate with respect to and regulate water and air navigation and works incidental thereto."

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of July, 1979.

PETER F. M. JONES

MARITIME LAW SECTION OF THE CANADIAN BAR ASSOCIATION (ONTARIO)

COMMENTS ON CANADIAN BAR ASSOCIATION CONSTITUTION COMMITTEE REPORT "TOWARDS A NEW CANADA"

We would say at the outset that the report entitled "Towards a New Canada" is a major piece of work, particularly when one bears in mind the short time available for the study. We have found helpful the general arrangement of the report - in particular the Summary of Recommendations and general background discussion found in pages 14-20 thereof. Taken as a whole, however, the Ontario Maritime Law Section does not agree with the recommendations contained in "Towards a New Canada". Neither does this Section agree with a good number of the individual recommendations. Some recommendations, though, do give rise to comment and these are contained in the Appendix hereto.

We have a few broad comments to make. First of all, we recognize the requirement for a modernization of the Canadian "Constitution". Having said that, we still feel that there is much to be preserved in the British North America Act, 1867 which has served us reasonably well for over a century. There is no doubt that Canada needs a Constitution of Canadian origin containing a workable amending formula. Above all, the reformed or modernized Canadian Constitution must contain a short and simple bill of rights to protect Canadians and be applicable in any province in the country without exception.

Our society has been living and working within the framework of our Constituion for 112 years. In places, it has proven to have defects which should be remedied carefully and in so doing great care should be taken to ensure that the checks and balances already developed in our society not be swept aside. The process of

constitutional reform ought not, in our view, to be used as a tool for curing all the real and apprehended ills of society but rather to update and clarify the important sections of the British North America Act, in particular Sections 91, 92, 101 and 133. There is no doubt in our view that the separation of powers between the Federal Parliament and the Provinces should be clarified. A review of the Report to the Senate in 1939 by the Parliamentary Counsel relating to the British North America Act, 1867 (known commonly as the "O'Connor Report") contains a critical analysis of the interpretation of that Act by the Judicial Committee of the Privy Council. The O'Connor report concluded that the Act had been consistently misinterpreted insofar as the division of powers are concerned, in particular "Property and Civil Rights", and that the intention of the Fathers of Confederation as expressed in the London Resolutions, 1866 was not being fulfilled. A strong argument was made by O'Connor that the intention had always been that there be a central Government charged with matters of common interest to the whole country and local governments charged with the control of local matters in their respective sections. We all know that the legislative power of the provinces has, since that time, been increased enormously through decisions of the Privy Council. The learned Parliamentary Counsel also analyses and argues that Section 92(13) contemplates no more than what it precisely states, that each province may exclusively make laws <u>of merely provincial scope</u> in relation to property and civil rights. This has not been the way it has worked out. The country suffers now, in our view, from too much power in the provinces and the eternal struggle for power in various fields between the Federal Government and the Provinces threatens to break the country

apart. In our view, a strong central government is essential and the residuary power should reside in the Federal Government. To illustrate the point, the Provinces simply do not have the equivalent status of sovereignty as found in the separate States of the United States of America. In Canada, the Provinces are the constituent parts of a Kingdom with sovereignty in the whole. This often appears to be overlooked by the supporters of greater powers being given to the Provinces. The unfortunate choice of the word "Dominion" by the English draughtsman, as opposed to the correct word "Kingdom", to avoid offending the Americans, has contributed to it being forgotten by a large number of Canadians that Canada, as a whole, is indeed a Kingdom. The need for a strong central government appears clear to us and whittling down the federal power does not serve this concept well.

We do not believe that the new Constitution should be prepared and voted upon by elected representatives of the people. Time and time again it has been proven that our political leaders are either unable or unwilling to amend the Constitution. Our view is that it should be prepared by a constituent assembly having with suitable membership the power to draw a definitive Constitution which might either (a) be the subject of a referendum or (b) if duly composed of representatives of the Federal Government and those of the Provinces, be submitted to the Governor in Council.

Our overall impression of "Towards a New Canada" is that the select committee of the Canadian Bar Association appears to be recommending an overly particular Constitution. That is to say, "trying to be all things to all people". There appears to us to be unnecessary particularity and entrenchment and, in many instances,

specific federal legislation could achieve a good deal of the recommendations. Why there is such a stress on entrenchment of detail eludes us. In our judgment, a modernized Canadian Constitution should sound in general principles but it should be prepared in such a way that there will not be dramatic change in all areas. The considerable body of case law developed over the past 112 years ought not to be discarded too lightly, although it does not appear that the members of the present Supreme Court of Canada, as reorganized or otherwise, will give too much weight to some of the decisions of the Judicial Committee, especially those considered by the Lords Haldane and Watson.

We categorically reject the notion of a Canadian Head of State. Our impression is that most Canadians would prefer to remain a Kingdom in the limited monarchy sense that we presently enjoy. It somehow sets Canadians apart from Americans and helps maintain our separate identity, not to mention the vast numbers of Canadians of British heritage with continuing links with the United Kingdom and, in an emotional sense, with the Crown. Perhaps Canadians will have to make up their minds some day by referendum or otherwise whether or not they wish to remain a Kingdom. We do not think that such a fundamental change of having a Canadian Head of State should be thrust upon Canadians by Parliamentary vote. If we are to change to a republic modelled after the United States of America, though remaining within the Commonwealth, it ought to be by overwhelming vote in a national referendum.

In conclusion, since the O'Connor report is one of the few such reports which has given real study to the judicial inter-

pretation of the British North America Act, 1867 by those composing the British Council and the intentions expressed by the so-called Fathers of Confederation and whether they had been lived up to, we commend the learned work to the Canadian Bar Association for further consideration. In particular, we commend the recommendation for the enactment by the Imperial Parliament of a British North America Act Interpretation Act, "which should declare, saving the effect of all things already decided and done, that the true intent of the British North America Act, 1867, is and always has been etcetera, etcetera (as per a formula to be stated in the words of one or more of the decisions of the Judicial Committee rendered before the decision, in 1896, of the Prohibition Case (and that thenceforth the Act should be interpreted and construed accordingly)." (The O'Connor Report, page 13).

APPENDIX 1

"TOWARDS A NEW CANADA" - SUMMARY OF RECOMMENDATIONS (PAGE 149)

I PRELIMINARY

1.1, 2.1-2.3 - Agree.

II CONSTITUTIONAL OBJECTIVES

The Preamble

3.1, 3.2 - Agree.

Fundamental Rights

4.1-4.11 - Agree.

It appears to us that the Federal Government does not need the consent of the Provinces to the inclusion of a Bill of Rights in the new, modernized Constitution. The preamble in the British North America Act, 1867 includes a statement that the Provinces desired to be federally united into one Dominion under the Crown with a Constitution similar in principle to that of the United Kingdom. It is stated on the highest authority that the fundamental documents of the British Constitution consist in Magna Carta, Petition of Right and the Bill of Rights (the Act of Settlement). The constitutional principles in the United Kingdom were well settled by the year 1867, the Second Reform Bill having been enacted. The excellent commentary of Bagehot is helpful particularly in his series on the British Constituion. We believe that a consideration of these aspects will indicate that the Federal Government has derivitive power to enact the Bill of Rights in more modern form. These are rights not to be lightly tampered with and they apply today, as they did in 1867, to citizens of the country as a whole as opposed to the inhabitants of the

individual provinces.

Language Rights

5.1 - Agree.

5.2-5.8 - No comment.

We agree with the concept of guaranteed institutional English and French language rights across the country. That is to say, we believe that all Canadians should be guaranteed the right to use French or English anywhere in the country when dealing with federal and provincial institutions. Obviously, practical considerations must prevail but there should be a sufficient number of French or English civil servants in each capital city of each province who can speak in either, but not necessarily both, English or French to properly deal with inquiries or submissions in the minority language.

Insofar as the Courts are concerned, it appears to us that the provision of simultaneous translation is perfectly good for the purpose. We believe it is far more simple than the costly and difficult provision of Judges, Crown Attorneys and, for that matter, lawyers being proficient in the minority language of the two official languages in each Province.

Generally speaking, we believe that linguistic rights really belong to the field of education. All school curriculum should provide for French as a second language of learning.

Regional Disparities

6.1-6.4 - Agree.

III MAJOR GOVERNMENTAL INSTITUTIONS

The Executive and Head of State

7.1, 7.2 - Disagree.

7.3 - Agree.

7.4-7.6 - Disagree.

The Upper House

8.1 - Agree.

8.2-8.5 - Disagree.

We recognize the need for a reform of the Upper House as it has fallen into disrepute amongst a large segment of the population. Essentially, the Upper House is fundamental to our system of government and it has given much greater service than generally believed. The difficulty is that it has not been properly used. The Senate's most important function is, in our view, to provide a balanced and experienced view of regional and national interests. Because they are appointed by the Governor General on a provincial basis it would appear to be suitable that of the total number of Senators a proper proportion of appointments from both east and west should balance the large membership of Ontario and Quebec Senators. We would prefer, as well, that the non-partisan approach of the Senate be preserved in light of recent U.S. experience where senators vote along party lines and the President can do nothing with vetoes. Canadian senators are essential for our system of government as a check upon the elected representatives of the people. The Senate's contribution has been especially good in its scrutiny of bills sent up from the Lower House. However, constitutional practice and convenience has been not to suffer the Senators holding up"important Parliamentary business". The practice of the House of Commons by its leaders or otherwise has been

to attach the word "money bill" to many bills which should not have that notation (in England the Speaker of the House has to certify that it is, in fact a money bill). Any reform of the Upper House should, in our view, enable them to review real and fanciful "money bills".

Some consideration should be given to the concept of the federal and provincial governments concurring in the appointments to the Senate in order that a proper balance of regional and national interests be preserved.

IV JUDICIAL POWER

The Judicial System

9.1-9.9 - Agree.

9.10 - Disagree.

9.11 - Agree.

There is no doubt of the requirement for a Federal Court in this country to adjudicate upon "laws of Canada". We, therefore, recognize the need for a similar enactment to Section 101 of the British North America Act, 1867. The interests of the maritime community would be best served by a continuing exercise of maritime law jurisdiction by the Federal Court of Canada. While we do want a full and general jurisdiction in maritime matters, this is not a matter for a Constitution and merely requires amendment to the Federal Court Act which, in parts, has been poorly drafted regarding such business. It is sufficient to say in this context that provincial courts, which may have concurrent jurisdiction in a number of areas with that of the Federal Court of Canada in maritime matters, cannot possibly give effective admiralty remedies with the exception of goods landed within the province from abroad.

The Supreme Court of Canada

10.1-10.2 - Agree.

10.3, 10.4 - Disagree.

10.5 - Agree.

10.6 - Disagree.

10.7 - Agree.

We recognize that a trend has developed whereby federally appointed Supreme Court of Canada Judges have been identified with the ruling government of the day. There is something inherently wrong with this as Judges under our system should not be tainted with any political persuasion. Once they do, they fall into disrespect and less weight is given to their Judgments. We see some merit in the Upper House, hopefully composed of apolitical senators, having the right to appoint Supreme Court of Canada Judges. We might also observe generally that the new Constitution in this respect should not be as overly particular as the Committee recommends. The Supreme Court of Canada Act can be amended from time to time to reflect current needs. For instance, we recognize that the Supreme Court of Canada is over-worked and there is a requirement today of probably eleven Judges. If there is need to amend this figure, up or down, in the future then it should be by way of amendment to the Act. So too can the Act provide for removal of Judges and mandatory retirement ages to reflect the conditions of the time.

V THE DIVISION OF POWERS

We have no specific comment on the individual recommendations contained in 11.1-19.8 and 21.1-21.4 other than to say that there is danger in over particularizing.

Transportation and Other Works and Undertakings

20.1, 20.2 - Agree.

20.3 - No comment.

20.4 - Agree.

20.5 - No comment.

This subsection and its equivalents in the other provinces have, of course, an overriding interest in transportation inasmuch as water transportation is most important to the development and economy of Canada as a whole. For that reason, we believe it should be a matter of federal concern with the exception of intra-provincial undertakings. In fact, the whole field of water transportation may expand in the future as Canada may be forced to control some portion of ocean shipping in order to balance the rates of what is financially-subsidized foreign shipping.

VI INTERNATIONAL RELATIONS

22.1-22.4 - Agree.

22.5-22.7 - Disagree.

22.8 - Agree.

The treaty making power of the Federal government ought to be absolute. It is implicit in the Federal system that international obligations must be met. Difficulties obviously arrive when the subject matter falls, in large part, within Provincial competence, like, for example, international labour conventions. Consultation between the Provinces and the Federal Government in these unique areas are essential with Provincial participation in the final Canadian position to be put to the international convention. Any such convention should be signed by the Federal representatives on

a conditional basis reserving the right to consult with the provinces for their consent to a ratification of the convention.

VII CITIZENSHIP, IMMIGRATION AND ALIENS

23.1-23.3 - No comment.

VIII MARRIAGE AND DIVORCE

24.1, 24.2 - No comment.

IX RESIDUARY AND EMERGENCY POWERS

25.1-25.2 - No further comment.

X AMENDMENTS TO THE CONSTITUTION

26.1-26.8 - We consider that due consideration ought to be given to the successful amending formula to be found in the South African and Australian Constitutions which have worked well in practice and which were set up by equivalent statutes of the United Kingdom to that of the British North America Act, 1867.

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June 21, 1979

PLEASE REFER TO: W.L.N. Somerville, Q.C.

W. H. Kidd, Esq.,
President, Ontario Branch,
The Canadian Bar Association,
Suite 404, 80 Richmond St. W.,
Toronto, Ontario,
M5H 2A4.

Dear Cappy:

Thank you for the very simple assignment remitted under cover of your letter dated May 23rd last.

Having received such an uncomplicated task, I thought the least I could do was to forward the enclosure well before your deadline of June 30th.

Best personal regards.

Yours faithfully,

Bill

WLNS:pa
Encl.

M E M O R A N D U M

Re: "TOWARDS A NEW CANADA" - The Power of Government
D. Transportation and Communications - Chapter 20

The overall impression gained from reading this chapter of the Report is that there really is nothing seriously wrong with the division of powers according to the relevant provisions of the B.N.A. Act and the jurisprudence decided thereunder with respect to the subject matter covered in Chapter 20. Notwithstanding, the authors apparently could not resist some tinkering. The value of that contribution is open to question.

Perhaps the reader of this short monograph will share the writer's perplexity when he considers in juxtaposition recommendations 1 and 5 which are reproduced below--

> "1. The federal Parliament should have exclusive legislative power respecting interprovincial and international transport undertakings; transport undertakings should include pipelines and other works for transporting commodities or energy.
>
> "5. The provincial legislatures should have exclusive legislative power respecting any other works or undertakings whether or not they extend beyond the province."

A consideration of the apparent dichotomy is not assisted by a passage from the text outlining the Committee's general approach: "Local control over minor interprovincial transportation enterprises could be dealt with by the provinces following administrative delegation by the federal Parliament." If minor interprovincial transportation does not come within what is contemplated by recommendation No. 5, it is difficult to imagine what might be. If it does come within such category, it is difficult to understand how there would be administrative delegation by the federal Parliament.

All in all, this reviewer considers that we should all be much better off if things within the categories covered by Chapter 20 were left exactly as they are.

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25 June, 1979

The Canadian Bar Association
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Attention: W. H. Kidd

Dear Sirs:

Re: Request for comment on the Report on a New Constitution for Canada Telecommunications - Ch. 21

The Comments which I make are my own views and are not necessarily shared by my telecommunication clients.

Proposal:

Jurisdiction respecting radio, television and cable television should be concurrent with federal paramountcy.

Comments:

This proposal qualifies as the least worst option which the affected parties, the federal and the provincial authorities might accept. There is a great deal that can, and no doubt will, be said against it but it may well be acceptable and that combined with it being an improvement over the status quo is sufficient to warrant its support.

Proposal:

Jurisdiction relative to closed circuit cable television systems should be concurrent with federal paramountcy.

..... 2/

Comments:

I agree with the proposal in that it would further the national purpose if the federal and the provincial authorities extend to it a constructive administration.

Proposal:

Private radio-communications should remain within federal jurisdiction.

Comments:

I concur.

Proposal:

Jurisdiction relative to telephone and other telecommunication services by carriers should be:

(a) exclusively federal over interprovincial rates and services;

and

(b) concurrent over intraprovincial rates and services with federal paramountcy.

Comments:

Inherent in the proposal is two tier regulation; one level being federal and the other provincial subject to federal review. There are many things which can be said against two tier regulation. Without being exhaustive, it is cumbersome, expensive and leads to each regulator being tempted to pass the buck for all less than universally popular decisions to the other. To supplement these problems the result is not even final with the federal government having the right to overrule the other regulator's decisions. It is a proposal that Canadian telecommunications users should not be required either to tolerate or afford. The two tier concept has been tried in the United States and my contacts there indicate that it would only be recommended to Canada on those days on which we have increased the price of our export oil to the U.S. Fortunately the proposal has one very desirable attribute viz, it will, in my view, be completely unacceptable to the provincial authorities and hence will not come into effect.

..... 3/

It is facile to be negative let me attempt to be positive: -

Alternative Proposal (1)

The federal provincial split of jurisdiction in law can remain as it but with the federal authority delegating all the jurisdiction which it has in the subject matter to the provincial regulatory boards. The delegation could be made subject to federal policy objectives such as reasonable long distance rates designed to promote national unity. Federal paramountcy would remain to the extent that the delegation could be withdrawn in the event of the federal policy not being followed. It would follow that the provincial boards would form a co-ordinating board representing all the provincial boards. This board would assure common long distance rates and services. It would not however amount to two tier regulation in that being a creature of the provincial boards it could not pass the buck on difficult matters.

In my view the advantages of this scheme are several:

(a) it avoids two tiers of conflicting regulators;

and

(b) It has the prospect of being acceptable to the provincial authorities since it meets their stated needs and is not radically different than what several provinces do now. It may well commend itself to the federal authority for the efficacy of its essential one tier approach while retaining to the federal authority the right to withdraw delegation upon denial of federal policy.

Alternative Proposal (11)

Jurisdiction relative to telecommunications could be allocated so that a federal regulatory board including stipulated provincial appointees could regulate both inter-provincial and intra-provincial rates and services. This approach has the advantage of single tier regulation representing the interests of both governmental levels. Depending upon the details to be negotiated it might well satisfy the interests of the consumers, the service suppliers and the two levels of government as offering efficient and representative regulation.

There may be many and better ideas to be found. It is my view that any acceptable proposal must include two characteristics both so desireable as to be prerequisities.

..... 4/

First — One level of regulation so that there won't be endless manouvering while one level of government through its regulators tires to fob off the tough decisions onto the other.

and

Second

The proposal must meet the objective of both governmental levels to the degree that they will accept it.

Yours very truly,

Assistant General Counsel
(Ontario)

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June 29, 1979

Mr. W. H. Kidd, Q.C.,
The Canadian Bar Association, Ontario,
Suite 404, 80 Richmond Street West,
Toronto, M5H 2A4

Dear Mr. Kidd:

Re: Towards a New Canada -
Chapter 21: Telecommunications

Thank you for your letter of May 23, inviting me to contribute to the collection of Ontario views on the Report.

I would like to say at the outset that I consider the Report to be a major contribution to the constitutional discussion in Canada. In particular, I believe it explores in far greater detail than other recent reports the central question of the allocation of governmental powers. That fact alone, quite apart from its other virtues, would ensure its stature as a document of the first importance in the present constitutional review.

Chapter 21 comes to grips with the especially sensitive topic of Telecommunications. The Report recognizes that there are a number of competing values which need to be

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weighed in this field, and that many but not all of these competing values can be regarded as examples of the competition between national and provincial interests.

The Report does not deal at any length with concerns relating to sovereignty considerations of the type expressed in the recent report of the Clyne Committee on Telecommunications and Canadian Sovereignty. Those concerns arise from the developments now under way in the field of computer telecommunications. These developments appear to be leading to a situation in which the storage of and access to information through computer and telecommunications facilities will play a central role in the way we carry on our business affairs and in educational matters as well. If we fail to develop a Canadian system for these purposes, we could incur serious risks to our sovereignty and our security. These considerations underline the importance of the issues involved in telecommunications, but they do not, I believe, point the way to any easier methods of resolution than those outlined in the Report.

In presenting specific proposals to deal with broadcasting undertakings (pages 122 and 123), the Report acknowledges a difference of view between the majority of the Committee and the other members. It would be desirable to have further examination of the possibility of reconciling the majority and minority views. The primary reason given for the majority support of federal paramountcy is the perceived need for centrally developed, national broadcasting policies to meet the problems posed by the U.S. While the Report does not elaborate on what ought to be

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involved in such policies, it seems fair to suppose that they would include regulation of the carriage of foreign content and maintenance and carriage of a national communications network. If federal jurisdiction were secured in these two areas of concern (the second of which the minority apparently acknowledged as appropriate) it might be easier to achieve acceptance of the provinces as the appropriate primary authority over broadcasting content in all other respects.

In practice this would mean that the federal government would still have the power to regulate the receipt and distribution of foreign signals and foreign programs and could ensure the carriage of the national network but its jurisdiction would not extend further. This approach might assist in maintaining the integrity of the Canadian broadcasting system while minimizing the risk of a double licencing system.

The Committee recommends (at page 122) against the granting of broadcasting licences to provincial governments for general broadcasting purposes (as opposed to the existing limited permission for independent corporations transmitting educational programming). I am not persuaded that this exclusion is a good idea. It seems to me, that so long as federal government is able to ensure that citizens have access to the national network, there is no need to protect against provincial government participation in general broadcasting.

With respect to closed circuit cable television systems (page 123), the Committee recommends a somewhat different regime

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than for broadcasting. The proposal favours primary jurisdiction to the provinces with the federal government able to legislate only in matters of legitimate national concern. If rules of the sort outlined above in respect of broadcasting were adopted, those rules could also apply to closed circuit cable.

In the area of telephone and other telecommunications services (page 123) the Committee proposes a rationalization of jurisdiction in two ways:

(1) the provinces would have the primary jurisdiction over intraprovincial services and rates (although the federal parliament would also have concurrent and paramount authority, but this would only be exercised "when the national interest called for it") and

(2) the federal parliament would have exclusive jurisdiction over interprovincial rates and services.

This would mean an enhancement of provincial jurisdiction in the first case, and of federal jurisdiction in the second. The reference to a concurrent and paramount role for the federal authority in the first case apparently reflects the Committee's perception that intraprovincial communications may have interprovincial aspects, thus blurring the line sought to be drawn between the two. The report goes on to elaborate on the need for federal-provincial cooperation and consultation to ensure a proper equilibrium.

This difficulty of definition in the field of telecommunications, and the consequent need for a degree of concurrency, are also reflected in parts of the Clyne Committee report and in

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the report of the Task Force on Canadian Unity. Discussion of these questions in general terms pretty quickly reaches its limit: what seems to be needed next is an inventory of the specific types and areas of overlapping concerns and the types of concurrency and/or consultative mechanisms available to deal with the problems. For example, the Clyne Committee's report suggests an examination of the possibility that the provinces should be entitled to appoint members to the CRTC so that long-distance rates could be more rationally regulated.

In this area, another specific question that will require consideration is the effect which jurisdictional allocation will have on the development of the new information services. The Clyne Committee report recommends that the federal government should promote plans for the Telidon system, with participation from the private sector and some provincial governments.

The presence of these new services on the horizon of telecommunications, and their importance to the whole country, should underline the need to avoid a rigid compartmentalizing of jurisdiction which could result in an inability to act.

The CBA Report provides an important review of major jurisdictional questions in the telecommunications field. It would be a welcome development out of that review if attention were now to be focussed on the more specific issues involved in the major areas with a view to mapping out the types of concurrency and/or consultation which would best serve Canadian needs in those situations.

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Mr. W. H. Kidd -

I would like to thank you again for the opportunity to comment and to express my hope that the CBA will carry forward the effort for which the Report provides such a solid basis.

Yours very truly,

J. M. Spence

M.

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5 June 1979

Mr. W.H. Kidd,
The Canadian Bar Association,
Suite 404,
80 Richmond Street West,
Toronto, Ontario,
M5H 2A4

Dear Mr. Kidd,

I am sorry that I have not replied to your request of 23 May concerning the report on a new constitution for Canada as I have been out of town. I was happy to have an opportunity to study the report on which I had, of course, heard reports. I would be happy, as you request, to give you my views on the recommendations contained in chapter 22, 'international relations,' although I do so with a certain reluctance. In the first place I should say that although I have naturally been very much interested in federal-provincial relations and foreign policy I have never considered myself an expert in the field. Secondly, I fear my comments might be rather brief because on first reading I find myself inclined to do little except agree with the proposals and the commentary. Unfortunately, I am faced with a very busy month and will not have the chance to do the research I would like to undertake before commenting but if some general ideas and perspectives would be useful I shall send them along. If you do not consider them worth passing on I would not be at all offended. What I would try to offer would not so much be an Ontario view as a view from abroad.

I shall submit these views in any case before the end of the month as requested.

Yours sincerely,

Gayle Fraser

pp John W. Holmes

JWH:gf

Roger D. Wilson, Q.C.
30th Floor
Toronto-Dominion Bank Tower
Toronto, Canada M5K 1C1

June 27, 1979.

W.H. Kidd, Esq.,
The Canadian Bar
Association - Ontario,
Suite 404,
80 Richmond Street West,
Toronto, Ontario M5H 2A4

Dear Mr. Kidd:

I have your letter of May 23, 1979 asking if I would review the recommendations contained in "International Relations", Chapter 22, of the research study for the Canadian Bar Association and headed "Towards a new Canada"

As you are probably aware, my partners and I gave a great deal of consideration to this particular problem and one of my partners gave evidence before one of the energy authorities in the United States relating to possible actions which could be taken legally by a Canadian province to frustrate a treaty entered into between Canada and the United States in relation to a trans-border pipeline, particularly one of the proposed Alaska pipelines. (That evidence was transcribed and would be available should that evidence be of assistance).

After giving this matter additional consideration, I cannot think of any useful comment which I can make in respect of Chapter 22. The problems which we raised in the above-cited United States evidence appears to be the basis for Recommendation No. 3. The particular solution proposed seems the only one possible under the circumstances unless the provinces were to be given power to enter into internationally binding agreements themselves, a position which would be inconsistent with a continuing federal system in which international sovereignty is vested in the central government.

Yours sincerely,

RDW/emp

Roger D. Wilson

COMMENTS ON CHAPTER 23

of

TOWARDS A NEW CANADA

Committee on the Constitution

The Canadian Bar Association

E: INTERNATIONAL MATTERS

23. Citizenship, Immigration and Aliens

The chapter includes three recommendations dealing with the entry to Canada of citizens of other jurisdictions.

"1. The Constitution should guarantee that no law shall in a discriminatory manner impede the free movement within the country of citizens or other persons lawfully in the country.

2. The federal Parliament should have exclusive legislative power respecting citizenship, naturalization and aliens.

3. The federal Parliament and the provincial legislatures should have concurrent legislative power respecting immigration, with federal paramountcy."

ENTRY TO CANADA

International law, as well as tradition, has been based on the premise that a jurisdiction will exercise what control it can over the entry to that jurisdiction of those

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who are not its citizens.

Jurisdictions which are unable to control such matters will be subject to the controls imposed by some other jurisdiction. Exercise of control over entry is seen as the prerogative of a sovereign state.

For a province of Canada to exercise control at its boundaries is possible, though impractical. It is admitted that at the moment it is very easy to gain entry to Canada along "the longest undefended border in the world". The length of each provincial boundary, especially those of the larger provinces, would make the exercise by the provinces of control over entry difficult and very expensive. It would seem that by virtue of international law, tradition and practicality, entry to Canada should fall within Federal jurisdiction.

If the entry policy is truly national, it will evolve from discussions with the relevant authorities and take into account local and provincial circumstances and conditions such as housing possibilities, work and schooling opportunities, language, community welcome and community services for those who have recently entered Canada. The bulk of the financing of projects now in existence offering assistance to such persons is Federal, while the identifying of the particular need is local. Federal-Provincial consultation not only has proven workable, it makes sense since the local authorities will be closer to the situation and more able to identify needs. The proposed relocation of

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several thousand of the "boat people" from the South China Seas emphasizes the need for this type of consultation.

"Immigration" offices outside the country set up by provinces should emphasize that the minimum conditions imposed upon entry to Canada are Federal.

If entry to Canada is to be under the exclusive control of the Federal government, what of the movement within the country of those non-citizens permitted to enter. The rights of citizens are special and are not extended to non-citizens without completion of a rather formal procedure. Conditions, as suggested in the Report, may be imposed on the free movement within Canada of those permitted entry, - for health or security reasons, or as a result of the consultations with the provincial authorities. There should not be anything offensive about such limitations since the non-citizens are either in the country for short visits as guests or for permanent stay "on probation" as it were until the application for citizenship with its concomitant rights has been accepted.

PARTICIPATION IN CANADA

In a country as large as Canada, it is difficult, as we know, to maintain the incidents of unity. Space, isolation, distance, geographical barriers, ethnic differences, variations in educational systems and opportunities and many other factors make unity a miracle more than a natural. Citizenship brings with it not only obligations, but rights

cont'd.../4

as well, - the right to participate in Canada on all levels and in all aspects, the right to stand for election to certain offices and to govern, the right to vote, the right to protection (e.g. military protection, trade protection). Citizenship granted by any unit smaller than the whole would open the door to friction between the smaller units as well as between the citizens of those units, and very obviously precludes unity, in thought as well as in action. In Canada, the granting of citizenship with its attendant rights and obligations must remain with the federal authority.

Part of the federal responsibility in this regard can be seen to include the offering to prospective citizens of an opportunity to understand the country they propose to adopt, the laws they propose to accept, the customs and traditions which affect daily affairs, even the official language they propose to use, and to ensure that certain minimums of this type of knowledge are attained. While the federal authorities may wish to use provincial facilities, and to refrain from encroaching on areas of provincial jurisdiction, the responsibility should remain federal.

RIGHTS OF OUTSIDERS OUTSIDE CANADA

If one accepts the notion of the sovereignty of a state, no outsider can expect to claim, other than those prescribed by international law or custom, any rights from or in relation to a foreign country. This includes expenditure of public funds, inquiries as to status or

cont'd.../5

acceptability, or assistance of a non-financial nature.

RIGHTS OF OUTSIDERS INSIDE CANADA

Until a person has understood the responsibilities attached to citizenship and been accepted as a citizen, that person can expect limited rights, i.e. a limitation of the right to stay or re-enter, and on any "right" to citizenship, but can expect some of the rights accorded to citizens, i.e. benefits accorded to taxpayers and participants in pension or health plans, education for children, a fair hearing if accused of violating the laws of the federal, provincial or local jurisdiction, and treatment by federal, provincial and local authorities in accordance with that given to citizens.

As we are well aware, the treatment of those within the boundary of a country is a reflection of the maturity of the society within that boundary. One expects policies in this regard to reflect the maturity Canada wishes to be seen to have achieved.

Miriam Kelly

July, 1979

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July 17th, 1979.

W. H. Kidd, Esq., Q.C.,
President,
Ontario Branch,
Canadian Bar Association,
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M5H 2A4

Dear Cappie:

You asked for my comments on Ch. 23 of Towards a new Canada on Citizenship and Immigration.

Actually the Recommendations in that chapter are general enough that there can hardly be any substantive criticism.

It obviously makes good sense for Parliament to have exclusive jurisdiction with respect to Citizenship and Immigration. Otherwise 10 separate criteria might be applied by each of the 10 provinces, which surely would bring confusion and chaos.

The study succinctly states that "Canada is one country and there should, therefore, be one Canadian citizenship".

Also free movement within the country (Recommendation # 1 in the chapter) would be inconsistent with the possibility of 10 separately controlled citizenships.

As to Immigration, one may agree with some concurrency of federal and provincial legislative power with federal paramountcy, particularly with the Quebec interest in immigration policy.

Although you did not ask for my comments on Ch. 7 Head of State, it is respectfully suggested that the following should be considered.

The study in this chapter asserts the premise to be for "promoting throughout this country confidence, pride and a strong sense of Canadian unity".

It does not necessarily follow that such will be achieved by the recommended change.

The recommendation, rather than furthering national unity, may in fact bring the opposite result, i.e., breed more resentment on the part of Canadians who, with some real justification, view the monarchy as an integral part of that individuality and uniqueness that we are presumably seeking in our search for a "Canadian identity".

Thank you for asking for comments.

Yours truly,

DHL:ef

Don Lamont.

YORK UNIVERSITY

OSGOODE HALL LAW SCHOOL

4700 KEELE STREET, DOWNSVIEW, ONTARIO M3J 2R5

31st May, 1979.

The Canadian Bar Association - Ontario,
Suite 404,
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Toronto, Ontario
M5H 2A4

Attention W.H. Kidd, Esq., Q.C.

Dear Sir,

Towards a New Canada - Ch.24 Matrimonial Relations

In reply to your letter dated May 23, 1979 on the above matter, I attach hereto a summary of my views on the recommendations contained in "Marriage and Divorce" - Chapter 24.

As requested, I have written these views on ordinary letter paper.

Trusting that they may be of assistance,

Yours truly,

Alan Grant,
Professor of Law.

AG:r
Enclosure/

TOWARDS A NEW CANADA -
Ch. 24 - MATRIMONIAL RELATIONS

The recommendations of the Committee are admirable and well-reasoned. I agree fully with both.

My comments are restricted to two areas only:

1) The argument in favour of the recommendation can be strengthened in certain respects.

2) Points of detail in the text might be clarified.

On the first issue, it seems to me that any argument in favour of a "national standard" in divorce law being better served by a trans-Canada statute can be even more effectively refuted than is achieved by the present text (p.136). Any survey of the case law shows that even under the present legislation there are regional differences in interpretation, e.g., the cruelty standard demanded by judges in the Maritimes appears to be higher than that demanded in Ontario (which may well accurately reflect different community expectations). Also the Courts' attitude towards judicial "discretion" appears to be different, the Maritimes favouring its retention in divorce law and Ontario arguing for its having been abolished by the 1968 legislation.

It does not, therefore, appear that regional differences are excluded by the federal legislation. No benefit is therefore obtained for the well documented cost of creating constitutional clashes and using the paramountcy doctrine as a somewhat unsatisfactory "tie-breaker" in this context. On the other hand, if both marriage and divorce were within provincial legislative competency, consolidation of family law matters could proceed toward a coherent evolution in each province giving overt effect to regional differences. The Committee's recommendations for resolution of the jurisdictional and recognition problems which would thereby increase, are sensible and realistic. They take care of the major difficulties (constitutional entrenchment of a minimum jurisdictional requirement plus mutual recognition) while recognizing that a complete panacea is impossible - the aberrant cases having to be left for inevitable judicial unravelling.

On the second main issue of clarification of the text I would suggest that p.135 (bottom of page) should make it clear that the extent of federal legislation in the area of capacity has only been to make very slight amendments to the common law of consanguinity and affinity. Further, that following line 4 of the 1st column of p.136 it be made clear that federal legislation did occur and was effective in certain provinces, after Confederation, e.g., in Ontario in 1930, i.e., divorce law did not

solely depend on the law in effect when the provinces joined Confederation. (This point is clarified later, in the second column of p.136 in the last paragraph, first sentence, which makes an inconsistency with the earlier statement.)

Subject to these clarifications, in my view the Committee has made an extremely concise statement of the issues, has penetrated to the heart of the problems and formulated a good design for their successful solution.

FACULTY OF LAW
UNIVERSITY OF TORONTO

Toronto, Canada M5S 1A1

June 29, 1979

W. H. Kidd
Canadian Bar Association - Ontario
Suite 404, 80 Richmond St. W.
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Dear Mr. Kidd:

In your letter of May 23rd you ask for my views on the recommendations contained in Chapter 24, Marriage and Divorce in Towards a new Canada.

The views that I will express are necessarily tentative both because of the pressures of time and the format of Towards a new Canada. To be more specific: the proposal for a new constitution for our country deals with many matters including marriage and divorce; I do not see any reference to the criminal law power. The failure to consider the criminal law power may be significant: The Juvenile Delinquents Act, a federal statute, is based on that power; and under that statute a judge is empowered to remove a child from his home.

The recommendations in Chapter 24 are based on the assumptions that attitudes on marriage and divorce are locally rooted. One may express skepticism. My guess is that attitudes to those matters are more similar between Rosedale and Westmount than they are between the Rosedale section of Toronto and Midland. The stronger ground for providing provincial legislative jurisdiction is that of the possibility of experimentation. One of the advantages of a federal system should be that a province can innovate; if the innovation is successful other provinces can adopt the new scheme. if the innovation is unsuccessful the whole country does not have to suffer.

Whatever be the validity of the assumption in the Report I doubt that acceptance or rejection of the recommendations would make much difference in the happiness of the citizens of this country. It is interesting to note that Australia has moved to a uniform divorce law and that American commentators on our Divorce Act have remarked with envy on the uniformity available because of the B.N.A. Act.

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W. H. Kidd June 29, 1979

In fairness it should be noted that vesting legislative jurisdiction over marriage and divorce in the provinces would perhaps avoid some of the problems that we now have. See, for example, the North Coast in British Columbia.

The crucial question is that discussed in the Report: how does one ensure that a divorce decree granted by the court of one province will be recognized in the courts of other provinces? The solution proposed in the Report - that of a provision in the Constitution requiring recognition if the divorce was granted by a province where one of the parties had a sufficient connection - seems reasonable.

With best wishes for success in your efforts,

Sincerely,

Bernard Green
Professor

BG/

YORK UNIVERSITY

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June 7th, 1979.

Mr. W. H. Kidd,
The Canadian Bar Association, Ontario,
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Toronto, Ontario. M5H 2A4

Dear Mr. Kidd:

It is a pleasure to respond to your invitation to comment on Chapter 24 - Marriage and Divorce of the Report by the Committee on the Constitution. In terms of length I thought it would be unfair to exceed the length of the chapter itself.

The difficulty presented by the chapter is the opposite of most others: it is non-controversial and as I have pointed out in my comments the major recommendation has already been accepted by the provinces. Although the chapter as it stands is, I believe, non-controversial its failing lies in the fact that it is conceptually far more traditional than the new legislation we already have in Ontario and a number of other provinces. This however does not effect the recommendation that legislation in this area should be in the provincial domain.

Some of my other comments go beyond the specific chapter since I am of the opinion that the major problem we now have in dealing with family matters is not so much in the area of legislation as in the area of process and in this regard Chapter 9 (The Judicial System) would not solve, if anything increase, the present fragmentation of court jurisdictions.

As you requested I have simply presented my opinions although I do feel that as far as recommendations are concerned the Ontario view would be fairly unanimous.

With best regards,

Yours sincerely,

J.W. Mohr,
Professor.

TOWARDS A NEW CANADA

Committee on the Constitution, The Canadian Bar Association

COMMENTS ON CHAPTER 24: MARRIAGE AND DIVORCE

Since the publication of the Report there has already been agreement in principle by the provinces to the federal proposal that marriage and divorce should be in the exclusive jurisdiction of the provincial legislatures. The first recommendation of the committee to this effect must therefore be seen as amazingly non-controversial. The second, that at least one of the parties to a divorce must have a substantial connection with the province before a divorce is granted by its courts, is little more than an endorsement of present law and practice.

If one accepts the basic assumptions and the framework of the document as a whole one must admit that the existing situation and proposals for change are succinctly laid out and although one may quibble with the assessment of some of the problems it would not be more than that - a quibble. The fact is that almost all legislation in the area is already provincial and the federal exodus would leave no more of a gap than grounds for divorce which are in need of revision, if not abolition, in any case. The concern about a resultant lack of uniformity for the country as a whole is thus hollow, although by no means unimportant. There are other problems however which are barely

touched upon in the Report and which are not resolved by giving the provinces exclusive jurisdiction in this area.

First, the question of jurisdiction of the courts and appointment of judges. The 'section 96 problem' is not even mentioned in Chapter 24 and if we go to Chapter 9 (The Judicial System) we find little that promises a possible resolution of what this viewer sees as the major problem in the area of family law, at least in a province such as Ontario, where the major legislative framework is already in place: the fragmentation of court jurisdictions and judicial powers. To achieve truly unified family courts would be even more difficult since Chapter 9 not only endorses the status quo but wants to entrench it even further in the new constitution. That the committee itself was not convinced that "...a satisfactory solution to the problem is likely to emerge" from the present experiments in unified family courts is attested to by the admission that the committee "would be favourably disposed to a constitutional amendment to deal with the particular problem". Recommendation 5 of Chapter 9 asserts that "the courts in Canada should function as a single judicial system, ..." on the assumption that this is in fact the case now. That it is only a legal fiction is clearly and drastically demonstrated in the area of family problems.

Secondly, and in line with the first point, the Chapter shows a sharp contrast between a succinct and excellent statement of the law as expounded in textbooks (truly a feat for barely 3 pages) and the weak and distorted assumptions about the empirical

impact of the law in this area. Surely the problem in lack of uniformity would not be 'limping marriages' or illegitimate children of an unrecognized marriage because of a possibly unrecognized divorce in another province. This would be the least of reasons why so many marriages are truly limping and illegitimacy is surely a concept to be rejected in any case. In Ontario, the Children's Law Reform Act (1977) and the Family Law Reform Act (1978) as well as the Child Welfare Act (1979) are already based on a very different concept of family relations and responsibilities, not so much derived from legal status or even contractual notions but from responsibilities incurred in the process of living in a familial context. This new realism which acknowledges the increasing pluralism of family formation are difficult to align with the status concepts such as marriage and divorce.

The Committee cannot be faulted for the common faulty assumption that legislative schemes and judicial decisions tell us in fact what really happens. There is little that is absolute in a decree absolute, as ongoing custody and access disputes show, and non-compliance with maintenance or support orders have been a national disgrace.

In all fairness, these problems are touched upon in Chapter 25 but they are almost impossible to resolve in a framework primarily determined by the division of powers which speaks for a philosophy of possessive individualism. Chapter 11 (the Division of Powers) recognizes that sharing is necessary but

treats it as a residual category in conceptual straightjackets such as concurrency and paramountcy. A Bill of Rights for individuals is matched with a Bill of Powers for divided governments. Social formations such as family and community must inevitably suffer in a system where organizing principles are derived only from the rights of individuals and the power of the state. It is no wonder, and in fact a good sign, that the constitutional debate has so far not captured the popular imagination.

In summary, within the framework of the document as a whole and if one accepts our traditional legal point of view the chapter represents an excellent and well written summary and the recommendations are sensible and convincing. From a social and human point of view, and in view of a new Canada, the very headings of Matrimonial Relations and 'Marriage and Divorce' are outdated. What is at stake now is the development of a legal framework for families which delineates responsibilities for caring and sharing. It may well be said that this is beyond government powers. It is also beyond individual rights. It should not be beyond the conception of a constitution which, if its very nature is to have meaning, must transcend both government and individuals. 'Matrimonial Relations' may be well placed as the last chapter before 'Residuary'. 'Familial Relations' would have to be one of the first chapters in a different kind of constitutional exercise. But this may still be a long way off.

J.W. Mohr

June 11th, 1979.

W.H. Kidd Esq.,Q.C.,
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Dear Mr. Kidd:

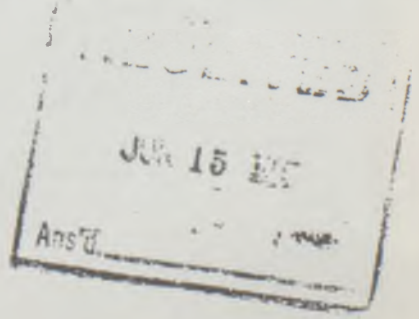
I duly received your letter of May 23rd asking me to give my views on the National Association Committee's report on the Constitution.

I have considered chapter 25 and present my views herewith.

The major change of course is that by and large at present in The British North America Act the residuary powers really fall to the Federal Government under the "Peace Order and Good Government" clause.

It is true that the provinces have some residuary power under the "Property and Civil Rights" clause in the Constitution, but only of course if that field has not been invaded by the Federal Government. Of course this would terminate in the event of the matter going beyond the interest of the province concerned.

The courts have also interpreted the present Constitution so that matters that are of national significance



have generally fallen to be dealt with by the Federal Government, for example radio and television, aeronautics, off shore resources, national capital, atomic energy and internation and interprovincial rivers.

The proposed Constitution would give the Federal Government the right to legislate in any legislative matter which is "clearly beyond provincial interests". I could easily foresee as much litigation involving the interpretation of this clause as we presently have with respect to the "Peace Order and Good Government" clause and the "Property and Civil Rights" clause.

While the aim of the new Constitution may be laudable, nevertheless I really doubt whether it is going to solve any problems that presently arise under The British North America Act.

The Committee states that the bulk of the criticisms of the existing "Peace Order and Good Government" clause has not been aimed at its residuary aspects and they state that many of the critics would concede that a Federal residuary clause is desirable and most would accept the necessity of some kind of an emergency power in the Federal Government over riding the normal power in the Constitution.

The Committee has attempted to deal with emergencies or crises of national significance, but only subject to the following conditions:

(a) that the power can only be invoked by means of a declaration in the operative statute that there exists an emergency or crisis of national significance or in the case of a real or apprehended war invasion or insurrection in an order-in-council bringing an existing operative statute into effect by making a declaration to the same effect;

(b) For matters other than real or apprehended war invasion or insurrection such legislation would have to have the approval of the majority of a "Reconstituted Upper House", whatever that might mean.

(c) The power would be subject to the Bill of Rights entrenched in the Constitution except that the Bill could be suspended by the Federal Government in the case of war, invasion or insurrection. Again I foresee that this could cause considerable litigation as to whether the power exercised by the Federal Government infringed on the Bill of Rights. As I think all of us are aware there is considerable litigation now as to whether any Federal legislation entrenches on the Bill of Rights.

I would not be so bold as to indicate what the provisions of a new Constitution should be, but it seems to me now there is already considerable discussion between the Federal Government and the provinces as to who should have authority over certain matters which apparently would now fall within the Federal Government jurisdiction. I think it is quite clear that there is a diversity of opinion amongst the provinces on this issue. It would seem to me rather presumptuous of The Canadian Bar Association to state its views on a matter which apparently has considerable

W.H. Kidd Esq.,O.C. June 11th, 1979.

significance to the provinces and the Federal Government respectively. Further so far as I can see the present views as to a "Reconstituted Upper House" would seem to be a cumbersome body and whether they could ever agree with a majority would seem to be questionable.

Yours sincerely,

T.R. Wilcox

TRW/vm

Ottawa, Ontario
June 25th, 1979

Mr. W. H. Kidd
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80 Richmond Street West
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Dear Bill:

In response to your letter of May 23rd, I have examined with some care the proposals of the Committee on the Constitution relating to amendments. These proposals are set out in Part VI, Chapter 26, of the Committee's Report.

I agree with the Committee's view that any amendment formula must have a blend of rigidity, flexibility, and regional representation. Given the fact that there has already been considerable study on this critical aspect of the constitution, I feel that the Committee has wisely relied as far as possible on proposals which have already been reviewed at earlier constitutional conferences. While many of us would have the same reservations with regard to the proposals at the Victoria Charter, it is unlikely that any more acceptable formula can be devised at this stage of our history.

I, therefore, support the recommendations made by the Committee relating to amendment as a practical solution to a most complicated question. In fact, I would urge that even if consensus cannot be reached on the other proposals included in the Committee's Report that the recommendation relating to amendment be accepted and the necessary amendments made to the British North America Act as soon as possible. In this way, the ongoing negotiations with regard to a new constitution can be done within a domestic context without the necessity of referring to Westminster whenever changes are in future required.

Yours very truly

John P. Nelligan

JPN/pm