

The Responsible Government of Canada

Introduction

This is a summary of a study I undertook following my intervention to the Supreme Court of Canada and their decision in the Reference concerning the secession of Quebec. The objective of this study was to discover the constitutional framework for the democratic system of government that was established by the Constitution of Canada to reconcile the diversity with the unity of Canada.

Essentially, the Supreme Court responded to the reference by explaining that the secession of a province from Canada, if it is to be accomplished, must be achieved legally, that is, through the political process within the framework of the principles underlying our Constitution.

The Court explains that within this framework, our democratically elected leaders negotiate our constitutional interests with the participation and under the influence of the people to whom they are accountable. The result of this political process will be to ascertain and implement the "sovereign will" of the people by law with the consent of the governed.

The court also states that our Constitution was designed to permit the conciliation of the unity and the diversity of Canada but that the representative and democratic character of our public institutions at the time of confederation were simply assumed in the Constitution of Canada.

Thus, to understand the representative and democratic character of our public institutions created by the constitution of Canada, a review of our political history was required. This review was undertaken to ascertain the constitutional principles and practices developed, first in Great Britain and then in Canada, which defined this character at the time of Confederation.

The British model of Parliamentary Government

The objective of Parliamentary Government is to unite the political will of the people with the rule of government so that the people actually govern themselves as they wish.

The British constitutional model of government, structured to fulfil this objective, evolved considering the nature of man. On the one hand, given the legitimate constitutional freedom to pursue their own wishes and interests, the people will govern themselves seeking economic efficiency and social harmony to maintain a progressive, prosperous and civil society. On the other

hand, this government must be administered by Man, who, given the power to rule his fellow man, will seek, even with the best of intentions, to overrule this constitutional freedom.

The British solution to this conundrum was to create a constitutional balance among the public institutions of government so that, through an efficient and harmonious political process, the influence of a vigorous public opinion is brought to bear on every detail of public affairs.

Gladstone explains the nature of parliamentary government as follows:

The cabinet is the threefold hinge that connects together for action the British Constitution of King... Lords, and Commons.

In the face of the country, the sovereign and the ministers are an absolute unity. The one may concede to the other: but the limits of concessions by the sovereign is at the point where he becomes willing to try the experiment of changing his government; and the limit of concession by the ministers is at the point where they become unwilling to bear, what in all circumstances they must bear while they remain ministers, the undivided responsibility of all that is done in the Crown's name.

(W.E. Gladstone, "Kin Beyond the Sea," North American Review, 127 (1878), pp. 180, 202)

The Evolution of Responsible Government in Canada

The political structure, the democratic mechanism and the balance of powers of the federal system of government for Canada established by the Constitution Act, 1867 are based on the practical experience gained during our constitutional evolution towards "Responsible Government".

Following the Patriote Rebellion and the Insurrection of Upper Canada in 1837, Lord Durham reported that the colonial constitutions were defective. Although the people were represented in the House of Assembly to legislate according to their needs, the Governor was appointed to ensure respect for Her Majesty's confidential instructions. The Governor needed his executive to manipulate the Assembly to enforce these instructions by law. As a result, the executive could dictate the terms for its co-operation in order, finally, to usurp the power of government in all internal affairs. The ensuing struggle for power between the House of Assembly and the Executive government resulted in the denial of the people's constitutional liberty, the corruption of their moral and material values, the inability of government to provide necessary and obvious reforms and the complete disintegration of the State.

In 1840, Upper and Lower Canada were united by the Union Act to form the Province of Canada. The principles that were to ensure the subservience of the executive to the legislative branch of government, so that the "rule of government shall be the well-understood wishes and interests of the people", were adopted by the House of Assembly on September 3, 1841.

These principles guaranteed that the executive government would be responsible to the people by providing that "the chief advisers of the representative of the sovereign, constituting a provincial administration under him [i.e. the Governor General's Executive Council and Cabinet], ought to be men possessed of the confidence of the representatives of the people".

The Union Act entitled the people of both Upper and Lower Canada to an equal number of representatives in the House of Assembly. Given that the people of each of these regions govern themselves in accordance with a customary law, language, public institutions and religion unique to each, the House of Assembly naturally divided itself into two equal sections. The representatives of each section then claimed the right to the rule of government in accordance with their own wishes and interests. Both sections maintained that they each had the right to be constitutionally represented in the Executive Council and Cabinet to guarantee this rule of government.

Thus, when the Governor General of Canada, Lord Elgin, called upon Louis-Hippolyte LaFontaine to form the government, LaFontaine accepted on the condition that Robert Baldwin was given an equivalent position in his Cabinet. Lord Elgin accepted this proposition and requested that the two leaders determine together the representative character of their Cabinet and agree upon a political program, which their coalition government would implement upon its approval by the majority of the united House of Assembly.

The political leaders of each of the two regions were required to agree on a political platform that would satisfy the wishes and interests of their constituents. The effect of this democratic mechanism was to exclude the local interests unique to each of Upper and Lower Canada from a common political platform. Consequently, only the interests common to the two regions were governed by law having effect throughout Canada. The local interests were governed by law having effect only in one or the other region of the province. It followed that this law required only the approval of the representatives elected to the House of Assembly from the region affected by this local law. Thus, was born the federal nature of the rule of law in Canada.

Since the people of each region had the right to be governed according to their own wishes and interests, neither of the two political leaders possessed the authority, from his constituents alone, to govern the union. The Governor General was acknowledged to be the Head of the Executive Government vested with the power to govern, but he had no authority to govern according to his own wishes and interests. The Governor General's role was to sanction the exercise of the powers of the State in accordance with the well-understood wishes and interests of the people as expressed through the advice of his two first ministers possessed of the authority to speak on behalf of the representatives of the people.

This constitutional balance gave him the influence he required to ensure that his government remained constitutional, respectful of the law and in the service of the people.

If the Cabinet thought that the Governor General was abusing his power, they could resign; and, if parliament refused to approve a new Cabinet supporting the Governor General's rule, the

people would decide by voting for one or the other in the ensuing general election. If the Governor General thought his chief advisors were abusing their constitutional authority, he could dismiss them if he could find another leader willing to support his decision. Again, if parliament did not approve this new Cabinet, the people would ultimately be called upon to decide.

The consequence of losing the election were such that this constitutional balance of power constrained the ambitions of all parties to govern in accordance with the legitimate constitutional interests of the people.

This system united the will of the people for action with their executive government. Very shortly, an efficient administration and social harmony were restored.

The moral and material prosperity of Canada then progressed at a phenomenal rate. However, the French-Catholic community tended to seek moral prosperity, whereas the English-Protestant community tended to seek material prosperity, with the result that 75% of the government's expenditures were paid by Upper Canada.

The Upper Canadians increasingly demanded that this injustice be repaired through constitutional reform. After many years of discussion to determine the principles upon which this reform was to be founded, the Assembly resolved to perfect the federal system by establishing local governments for both Upper and Lower Canada; each region would henceforth be financially responsible for the administration and economic consequences of its own local laws. To protect their sovereignty from American expansion, the Assembly also decided to invite the other provinces to join this federal union.

The Maritime Provinces were offered equal representation in the Senate to enable them to lawfully defend their interests in the federation as effectively as the future provinces of Quebec and Ontario. Interested in principle, they agreed to send delegates to Quebec in 1864 to negotiate the details for a union of the provinces under a general government.

In its decision, the Supreme Court of Canada stated that in Quebec City in 1864, the provincial delegates had established the framework of Confederation in 72 resolutions and that all the provincial legislatures had approved this framework as the basis of our Union. The Supreme Court also stated that the provincial delegates subsequently sent to London in early 1867 had reviewed and essentially approved these resolutions and that they had been loyally enacted in law by the Constitution Act, 1867 establishing the Dominion of Canada.

The representative character of the conferences on Confederation was attributed by the fact that the provinces were represented, in principle, by delegates from all the provincial political parties. Thus, the whole range of constitutional interests of the provincial inhabitants was represented in these conferences. Their democratic character was due to the fact that the provincial delegates were charged with the responsibility to gain the approval of all the provincial legislatures and would be held accountable by their constituents to reconcile their legitimate constitutional interests in the constitution of Canada.

The Constitution of Canada

The constitutional framework of the democratic system of government for Canada consists of a political structure, a balance of powers and a democratic mechanism.

The political structure establishes an unbroken chain of authority rising from the people to guarantee the legitimacy of the rule of law. The balance of powers ensures that our government remains constitutional, respectful of the law and in the service of the people. The democratic mechanism establishes an efficient and harmonious process to reconcile the wishes and interests of the people into a mandate which, when approved by Parliament, determines the government to act.

By democratic election the people confide their authority to the members of the House of Commons and to the members of the Provincial Legislatures to represent and protect their prerogative in the exercise of the powers of the State.

The 14th article of Confederation sets out the principle underlying the representative character of the Senate. It states that the Senators shall be appointed upon the nomination of the provincial executive governments "so that all political parties are as nearly as possible fairly represented." Thus, the political capacity of the people regarding their local government is embodied in the Senate. Nothing in our Constitution prevents the provincial political parties from recalling their delegates when they choose to better represent their constituents. In this manner, the provincial political parties are responsible for the conduct of their Senators and the Senate will defend the will of the people in harmony with the local legislatures.

Section 91 of the Constitution of Canada requires the advice and consent of both the Senate and the House of Commons to lawfully enact the law of Canada. It is important to note that section 91 requires not only that both Houses consent to the law of Canada, but also, that both Houses be consulted regarding the advisability of enacting a law. Through this advice, the wishes and interests of the people of Canada are reconciled to exclude purely local interests from the framework of a federal law. This implies the conciliation of the interests of both Houses in a common political program and a coalition Cabinet to conciliate them in the government.

The constitutional representation of this advice to the Governor General is provided for by section 18 of our Constitution. Section 18, confirmed by section 4a of the Parliament of Canada Act, enacts that both the Senate and the House of Commons enjoy the same powers and privileges as those of the House of Commons of Great Britain at the time of Confederation. Given the same privileges, both Houses have an equal right to delegate representatives to the Governor General's Executive council and Cabinet charged with the authority and the responsibility to represent and protect the wishes and interests of their respective constituents in the government of Canada. Also, both Houses have an equal right to revoke this authority and responsibility when they so choose. The effect is to maintain the same dual political structure and the same constitutional

balance between the two Houses of the Parliament of Canada as existed between the two sections of the House of Assembly in the province of Canada.

Section 12 renews the same power, authority and functions the Governor General must exercise to facilitate the conciliation of the unity with the diversity of Canada. Hence, the Governor General must choose a political leader whom he believes is able to command a majority in Parliament to form the government. This leader must associate a leader from the other House to constitute an Executive Council and Cabinet representative of the wishes and interests of both Houses, as well as a political platform that their coalition government undertakes to implement upon its approval by both Houses of Parliament.

Thus, the integrity of the political structure, the constitutional balance and the democratic mechanism of the system of Responsible Government were maintained in the Constitution of Canada to ensure that the "well-understood wishes and interests of the people shall be the rule of government."

This democratic system of government, perfected by Confederation and established by the Constitution of Canada, provides us with the following benefits:

- It maintains responsibility for its government in the hands of the people. It ensures the transparency of the decision-making process to enable them to remove from office those advisers who do not actually represent their wishes and interests or are unable or unwilling to apply them in the government of Canada.
- It unites the authority of the people with the power of the State to establish the legitimate power of the government to act in its name and with its consent.
- It reconciles the unity with the diversity of Canada by excluding the purely local interests, which the people consider to be within the legitimate authority and responsibility of the provincial government.
- It enables the people, for example, to constitute a strong central government to vigorously defend Canada's sovereignty in times of war and to recover these powers in times of peace in order to more vigorously pursue prosperity in accordance with the moral and material values and resources particular to their culture and geography.
- It affords the people the freedom and responsibility to apply new and imaginative solutions to resolve their local concerns. It invites emulation among the provinces to adopt the best solutions that the federation can generate.
- It ensures efficiency, harmony and stability in the government of our federation.

The corruption of our Constitution

In London, before the first Parliament of Canada was assembled, Governor General Lord Monck set aside the federal constitution intended by Confederation and, contrary to the law, offered John A. Macdonald the position of sole Prime Minister in a letter dated May 24, 1867. He states:

(...) in future ... the position of First Minister shall be held by one person who shall be responsible to the Gov. Gen. for the appointment of the other Ministers, and that the system of dual First Ministers which has hitherto prevailed shall be put an end to.

Public Archives of Canada, Macdonald Papers, M.G. 26-A, vol. 51, p 2047-9, spool c-1505, MIKAN# 528612

The consequence of this decision was to corrupt the representative and democratic institutions of Parliament at the very source of power as under the colonial constitutions. The result, then and now, is that the rule of law is no longer established by the people through Parliament.

The rule of law

The principle of the "rule of law" underlies our constitutional government. Albert Venn Dicey, considered the authority on the British constitution, explains that the "rule of law" is merely common law transposed to the public domain. He states:

Powers whatever their extent must be exercised in accordance with the ordinary common law principles which govern the relationships of one Englishman to another.

(A.V. Dicey, Introduction to the Study of the Law of the Constitution, 8th Ed. London, MacMillan, 1915, p. 254)

One of the most fundamental principles of common law is that the law governing private relationships among citizens is established by their contractual agreement. In effect, common law recognizes the capacity, that is, the authority and the responsibility of each individual citizen, to create the law governing his private relations and the jurisdiction of the courts of justice to enforce that law.

The means to lawfully restore the rule of Law in Canada

The people of Canada have the right to be constitutionally represented in the Governor General's Executive Council and Cabinet to represent and advocate their local as well as their general wishes and interests regarding their government in Canada.

The Constitution of Canada was enacted by an Act of the British Parliament specially to guarantee this right. No practice of government, however longstanding and unquestioned, can supersede

the protection of the rights to which the people are entitled under the law of the Canadian Constitution.

According to the rule of law, the authority of the people constitutes the capacity of our governors. Without our authority, they are legally incapable of exercising our political rights. Without our authority, they do not possess the right to occupy their office.

The representatives of the people in the House of Commons are not authorised to select those who are to represent the people's local political will in the Senate. The members of the House of Commons cannot confer on their Leader any greater authority than they themselves have been granted by the people. The Leader of the House of Commons cannot vest an appointee with any more authority than is confided in him by the members of the House of Commons. It follows that the Prime Minister of Canada cannot delegate to the senators he recommends to the Governor General the authority required to exercise the functions of their office. Thus, they do not possess the right to occupy their office.

The same logic applies to the appointment of the Governor General of Canada. The Governor General must be possessed of both the people's local as well as their general authority to sanction the conciliation of the unity with the diversity of Canada. The Governor General must be possessed of the people's undivided authority to sanction the legitimate exercise of the sovereign prerogative with the consent of the governed. It follows that the Leader of the House of Commons alone does not possess the required authority to recommend the Governor General's successor. And if the Governor General is appointed pursuant to this recommendation, then he or she can not be vested with the required authority nor the legal capacity to exercise the Office of the Governor General of Canada.

Section VIII of the Letters Patent constituting the Office of the Governor General of Canada establishes that if the Governor General is incapable of exercising his office, his powers, authorities and functions are devolved to the Chief Justice of the Supreme Court of Canada.

It would therefore be the duty of the Chief Justice of Canada, acting in the interim capacity of "Our Administrator" as defined by these Letters Patent, to restore the rule of law under the Constitution of Canada.

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