

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

24 FEBRUARY 1995

WORKSHOP WITH:

JOE CLARK

2/4/3/9/11

CHAIRPERSON:

Thank you very much ladies and gentlemen for coming along this morning. Many of you will be aware that the right honourable Mr Joe Clark, who is going to hold a discussion with us this morning.

Initially there was a contact group, Yunnis Carrim and in the nature of the Parliamentary procedures and Constitution Assembly days and so on, there was no possibility, in terms of Mr Clark's schedule, of a formal meeting but we felt that it would be a great loss if we missed out on the opportunity of Mr Clark's deep experience of various aspects of the Canadian Constitution and its developments, while he was here in Cape Town for a short while.

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Now because of the, that we are all aware of the pressure from the speaker and chief whips and so on, the intention is Yunnis I think to try to handle our business within a hour. Is that correct?

MR CARRIM:

Yes if that is possible, I mean I think the arrangement is that Mr Clark will speak for about twenty minutes or so and then we will take questions and there is a certain disquiet

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that the meeting is coinciding with the President's speech but on the other hand we recognise the importance in value of having Mr Clark here. We would just like to explain to them we would have had more people here but for the fact that we are meeting a quorum downstairs so you know, please understand there would have been more people had it been a Monday. So shall we try to finish by a quarter past eleven if that is possible.

CHAIRPERSON:

Okay I think we will aim for that, thanks very much. Well without further ado, let me introduce to you briefly Mr Clark.

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Mr Clark has had a long and distinguished and varied career in Canadian politics. He has been amongst other things, leader of the opposition, he was Prime Minister of Canada. He was in fact the youngest Prime Minister that Canada has ever had. He has also been Minister of External Affairs for a considerable period and more recently he has been Minister of Constitutional Affairs and involved in looking at making changes to the, well an exercise that was undertaken in trying to make changes to the Canadian Constitution.

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He is currently involved in assisting the United Nations efforts in relation to matters relating to Cypress and I am quite sure if I had a CV of his, which I do not, there would be many other things one could tell you about Mr Joe Clark. It is a great pleasure to have you here to welcome you to our Parliament, to our country, to our legislative capital city -Cape Town and we look forward to whatever you have to say to us. Thank you.

MR CLARK:

Thank you very much for the privilege of being able to meet with you. I had an opportunity in 1987 for, literally a matter of hours, to commune while I was the Foreign Minister of Canada and in the chair of the Commonwealth Committee on Southern Africa. This is my first visit to South Africa of any time and I am delighted to be here. I have to say, you have heard this before, I am immensely impressed by what you have been able to do with, in recent years, and by the appearance that there is a broad determination to try to keep this going.

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I am very conscious that while there are some parallels and certainly a lot of historic similarities between Canada and

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South Africa, we are very different countries. What may work in Canada may not work here and I want to make clear that what I am seeking to do today is to scribe some aspects of the Canadian reality and not at all prescribe what might apply here. The circumstance that may look to be very similar in Canada and South Africa, may turn out on further examination to be very different and I simply want to make that disclaimer at the beginning.

I was perhaps unusual as a Constitution Minister in Canada 10
in that I am not a lawyer. I felt that was one of the reasons I was accessible because I did not, I do not say that to belittle lawyers, and I am sure there are several of you around the table but I found that one of the challenges I faced when I was asked to try to preside at a negotiation that would bring major changes to our Constitution, was that too often people who had been too long in the Constitutional wars or in the legal wars had a fixed definition, often a limited definition, as to what might work.

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I approached this as a practical politician, a pragmatist faced

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with problems, trying to solve those problems and my sense was that if I could find a consensus among other political leaders, our lawyers were sufficiently adept that they would find a way to put that into Constitutional form. But my interest was in trying to find that kind of arrangement.

Let me describe very quickly the Canadian system, and I am aware of your time constraints, I used to be a party leader, I know the importance of quorums and I understand also the call of that bell.

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In Canada there are formal powers assigned by our Constitution to two levels of government, the federal level and the provincial level. It is important to note that there are no formal powers assigned to the municipal level of government in Canada. Municipalities are creatures of the provincial governments so a city like Toronto which is a massive place, a great influence upon life in Canada, has no standing under the Constitution. It is a creature of the province of Ontario and its powers (I am speaking here in a formal sense) derived from the powers of the provincial government of Ontario.

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The Constitution assigns jurisdictions, there is an assignment of powers in our Constitution. In our Constitution the residual powers rest with the Federal Government. In other words the Constitution was designed to, in the case of Debt, put those powers in the hand of the Federal Government. But originally our Constitution which was first devised in 1867 was accomplished to what is called a "Peace Order and Good Government Cause." When that was drafted there was a sense that the Federal Government could take any action that was justified by considerations of the Peace Order and Good Government of Canada. That was a very broad power at the beginning. It has become an exceedingly narrow power, as time has passed, it has been rarely used. 10

From time to time even recently there have been people suggesting the Federal Government should do things that would in effect be in the jurisdiction assigned to the provinces using the justification of the Peace Order and Good Government Cause. My judgment is that we will not see that happen except in the most extraordinary, those circumstances are in fact they could not contemplate, but it 20

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is important to know in terms of the evolution of a Constitution that when this was put in place, there is the assumption that that power would be at the centre and there was that particular means by which it would be exercised.

One has to be very careful as you know better than most people that words and phrases and what they mean, and no word can be more difficult whether it is Canada or Cypress or South Africa, than the word federation and federalist.

Let me use the Canadian example. We are a federation. 10

We call ourselves a confederation. When we were formed the Prime Minister who had the greatest influence upon our formation wanted a unitary state and he arranged the powers in such a way that as much as possible, it was a unitary state. When I talk about federalism I will be talking about it as Canada operates the system and my view of the nature of federalism is that it is an eminently flexible process that can be applied in different ways and with different implications in different societies. I think one

thing that one cannot do, which is a firm conviction of mine 20

through our own Constitutional discussions, one cannot take something that works in country A and apply it to country

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B because country A is not country B and some of the theories may apply but you cannot holus-bolus transform a system.

We have some fields of concurrent jurisdictions spelled out in our Constitution, agriculture is one of them. They tend to be here in an instant where of most importance of the time the country was formed, naturally enough that being now 130 - some years ago. So, but we do have some fields of concurrent jurisdiction. We have an increasing number of fields of overlapping jurisdiction in which both levels of government can claim to have authority in a particular field. 10

Because we are such a large country, and I would, this is an important factor in the Canadian federation, is the size of our geography, we are the second largest nation in territory in the world after Russia and we are an immense country and that has meant that there has been more duplication of activities than a theorist might draw into a Constitution. 20

But also as the world has changed, as there have been developments of radio, of other modern developments that

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were not contemplated by the Constitution, as new issues like (inaudible) ... that were not contemplated by the original Constitution, there has been increasing overlapping of functions in our country.

It is important to know that in Canada both levels of government, the federal and provincial levels, have the power in tax, or what is not an equal power, the far stronger power to tax is with the National Government but there is a power and a levy tax on the part of the provinces and 10 indeed, part of that power has been delegated to municipalities with respect to property taxes and some other questions, so that they have means of raising some of their own revenues.

Most provinces would not be able to function simply on the revenues that they generate themselves because their tax base, their available tax base, is less large than that of the Federal Government. And that has been a very important factor in Canadian Constitutional History because one of 20 the factors that has driven us towards national programmes, and we have some very successful national programmes, has

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been the power of the Federal Government to raise money, to spend money and by being able to model programmes that would say to a particular province "we think there should be programme X, it is in your jurisdiction, you can say no but if you say yes we will pay for it." That creates a powerful incentive, to have that kind of programme carried forward in the jurisdiction of a province. A classic example is medicare. We have a medical care system in Canada that extends medical care, free medical care to every citizen of Canada. That involves a field of jurisdiction that belongs to a province. It is a national programme with national standards that have to be respected in every part of the province. That would not have been achieved without the use of the spending power. The national government said "we intend to have a national programme of this kind, we have some of the jurisdiction, you have some of the jurisdiction, we have the money, we have the standards, we will give you the money if you will mount programmes that accord to our standards." That is a simplification obviously of a long process but that was how medicare came together and that is how we have been able to secure a range of other important programmes.

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There were some very practical areas of overlap where there have been some very practical resolutions. As Foreign Minister I ensured many of our discussions with respect to international trade treaties and free trade agreement and was involved in an after agreement which subsequently signed with (inaudible) ... Court Magistrates.

Technically the responsibility for international trade and treaties rests exclusively with the National Government. However the responsibility for trade within a province lies 10 with the Provincial Government. For a long time, federal governments have refused to allow Canadian provincial governments to take part in international trade negotiations. But my view was that it is one thing to negotiate a trade treaty, it is another thing to give a fact and if a province had powers to regulate trade within its own boundaries, it could withhold agreement within its own jurisdiction to important parts of a trade treaty that we have negotiated, without me being specific. If we were dealing with rules regarding trucking between Canada and the United States, the 20 province of Ontario would say fine, that is your jurisdiction, you can deal with the trucks across, between Canada and

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the United States but when those trucks move through Ontario they are our business, and so we are not going to give effect to an agreement you concluded in a field that is not in your jurisdiction.

We recognise that we cannot conclude a treaty with the United States, only you can, but we are the only people who can make the treaty work within our own jurisdiction. You could fight about that or you could practically sit down and say we have these different jurisdictions, we have to come together, that is what we did. I brought all the Trade Ministers from the provinces into our negotiations so that they were party to what we signed with the United States and that meant as a practical matter that we did not have the problem arising from jurisdictions in terms of giving effect to the trading arrangements that we put in place. 10

We have developed a very elaborate series of regular federal provincial conferences. Conferences between Ministers of the federal government and Ministers of the provincial government in a particular field, health, natural resources, environment. Those go on in the hundreds in Canada now. 20

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It is important to note and it is a problem that those are among governments, they are not necessarily among parliaments and legislature and there is to some degree a question of responsibility back to a parliament because what happens often, is that a Federal Minister of the environment would go and would sit down with ten Provincial Ministers of the environment, they would come to an agreement among themselves that has not gone through the parliament of Canada or the legislatures of any of the provinces, and yet it was something that worked, and when it was brought back by a Minister in my province in Alberta for example, that Minister would say "I am sure if we did not debate this here but we do have this agreement if you do not support it, the whole thing comes apart." 10

So again there is a strong pressure upon legislatures to agree to what was decided in these kinds of conferences. This has been called executive federalism. It is a good thing if you want to get things done. It is a less good thing if you were very sensitive about Parliamentary responsibility because it puts much more power in the hands of the executives. 20

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But these regular federal provincial conferences are immensely valuable in the practical day to day co-ordination of policy. If you have a national environmental policy and ten provincial environmental policies you obviously have to have co-ordination. That happens from time to time among officials but it is most important that there be these regular federal provincial conferences where these things occur. The results were regularly a discussion of funding, since the federal government has most of the money in these processes. I should say quite emphatically that one of the things that I think there is a widespread relief that we need in Canada, is to have Ministers of Finance of the national government of the provincial governments meeting much more regularly, not just to exchange views but to try to co-ordinate the policies that they are bringing forward. 10

It does not make much sense to have a national budget brought down that would propose, let us say serious fiscal restraint, if the largest province in the country, the next day would bring down a budget that did not enforce fiscal restraint. That would lead to, not chaos but difficulty, and so there is a growing consensus, including among provincial 20

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governments, that there needs to be much more practical co-operation on those kinds of questions.

I think those federal provincial conferences are most effective where both levels of government have some (inaudible) ... jurisdiction. They are least effective where only one side has power. Education in Canada is the power of the provinces. That is increasingly difficult in a modern world where skilled training and all these things are so important for international competitiveness. Yet it is very difficult for the federal government to be able to convene federal provincial conferences on education that have any result because we have no real jurisdiction in that field, and one of the issues a federation always has to face is to identify those questions, those issues which are going to be most important to the success of the country working in the world and ensuring that there is a capacity for the National Government to establish national policy in those fields. That is a problem from time to time with us.

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It has also become the case since power breeds competition that our federal provincial conferences are becoming

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increasingly adversative over the last several years but having said that they nonetheless can work.

It is important to note, with respect to the Constitution itself, that our Constitution, our formal Constitution which covers a lot of what we do, part of it is informal in a great sense but a lot of our Constitution is formal. That formal Constitution can only be amended by the agreement of the federal and the provincial governments. It cannot be amended by one level alone. There needs to be the agreement of both levels in accordance with a particular formula that has been spelled out. That could be very difficult, we have had trouble getting agreement on a lot of our most recent discussions but it is also possible. You made reference to the negotiation I had to chair, we called it the shorter (inaudible) ... town accord negotiation. We did negotiate a very complex detailed Constitutional change, the most comprehensive in the history of a country. We got unanimous agreement, not only from the federal government, and the ten Premiers and the leaders of the two territories which in Canada are not quite provinces, but we also had four Aboriginal groups at the table throughout

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and they agreed unanimously too. We then took the question to a referendum. It was a complicated question. There were a variety of other factors that intervened and the referendum failed so what we were able to agree around the conference table we were not able to get accepted in the country for a variety of reasons.

A couple of things just quickly to add about Canada being a (inaudible) ...

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One, I mentioned that our municipalities have no special powers, that leads to very real anomalies. The municipality of Toronto, municipal district of Toronto has millions of people. The province of Prince Southern Island has this tiny population of perhaps 100,000 people. Logically it makes no sense that this tiny island should have powers under the Constitution that this large city does not but that is one of the anomalies that is in our Constitution.

A second factor to bear in mind is that while it has not happened yet, it is almost certain that there will be established in Canada within the next two or three or four

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years what would be called a Third Order of Government. I do not want to confuse people too much on this but it has to do with our Aboriginal people.

The Aboriginal people in Canada are Indian people who were there before any Europeans or other settlers came and Eskimo or Inuit people who were in the far north, plus a large group called the Maykee people who were the products of unions between Europeans who came and Aboriginal people who were there. That is a complex issue 10 in Canada. The Aboriginal people, our record with Aboriginal people is not a matter of which we are proud. We are trying to change it. Our view is that it can only really be changed if there is a fundamental change in the respect that is accorded the Aboriginal people and there is now, I think, a broad consensus in Canada that that can be accomplished only if there is a formal recognition in the Constitution of what is called the Inherent Right to Self-Government of Aboriginal people within Canada. That is 20 to say something that does not have an international annulation or expression of sovereignty. That is to come. It will be a complicating factor. You should know about

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that simply because it is part of the mix.

The last thing I will say and I have spoken longer than I intended, is about a device that has served us very well in Canada. It is the device of equalisation. We have rich provinces, we have poor provinces. For the last 50 years we have had a law that says richer provinces have to contribute a certain amount of their wealth to the National Government which will distribute that wealth according to a formula that is spelled out and agreed to the poorer 10 provinces.

Now the consequence of that is to maintain roughly the same level of standards of services across the country so that a province like mine which happens to be rich now, would not have services that were way above a province like Dooferblam which happens to be poor now. It is interesting that when the equalisation notion was brought in, my province whose wealth is oil based, had not discovered oil, so when equalisation was brought in my province received 20 help from the Federal Government. A few years later we struck oil and we have been giving help to other people but

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what that shows is that the wealth and the conditions of different parts of a country can change and what is important we have found in Canada, is to have some system that tries to establish a capacity to maintain some equality of services across the board and we do that through the equalisation approach.

I spoke a little longer than I intended but I wanted and I tried to focus on matters that I thought would be of interest to you. I would be pleased to both hear from you on things you think I need to know but also obviously if there are questions that either these remarks have excited or that you might want otherwise to put at me, please (inaudible) ... 10

CHAIRPERSON:

Thank you very much, would you like to push your button. Thank you very much. I am sure there will be many questions and because we have limited time and I am sure there will be many questions, I will ask people please to try and ask questions and not make speeches. They could send speeches to Mr Clark in writing if they wish to do so. Dirk and then Peter and then Ruth. 20

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PROF BASSON:

Very quickly, the thing now which interests us perhaps most about Canada is the financial and fiscal system which is a divided system there and not a joint system. Now perhaps you could just tell us what were the problems with the borrowing of the province's income and whether that went up at a higher rate than the federal did, and whether that is structurally the right to the federation which you have and what type of controls were lacking in the system to develop into that situation?

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MR CLARK:

I will have to check the statistics so this is an impression. My impression is that federal indebtedness has risen more than provincial indebtedness. That is in part because the federal obligation has been to raise money to sustain programmes and what happened, happens to all countries, is that when we were relatively rich we started a lot of programmes and put them in place and when our wealth began to, when we ran into a recession, we had to keep paying for the programmes but not earning the money and since it was the federal government that was putting the money out we were borrowing more.

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Provinces are free to borrow and they are free to borrow on their own or they go naturally as part of the Federation of Canada and that, they have to be a poor province but part of Canada obviously they are a "Parti nance" their belonging to Canada helps them with their credit ratings but a number of our provinces now are having difficulty with their credit ratings. That is more related to the fact that their, that is generally not because they have been imprudent in their spending, that is generally because they are poor provinces anyway and the general recession has impacted more upon their capacity to carry existing services than would be the case in a richer province. 10

CHAIRPERSON: Thank you. Peter Smith and then Ruth.

MR SMITH: Thank you Chair. I wonder Mr Clark whether you could give us a brief word on the Constitutional position in Quebec.

MR CLARK: It is hard to be brief. Let me go back to the beginning. In the beginning there were Aboriginal people in Canada. I say that because that is an issue we still have to take full 20

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account of in our Constitution but in terms of your PM settlement, the French and the English were both there very early and have both been there a long time. There was one battle, the battle of the Plains of Abraham.

The English won but in winning they decided not to treat the French as vanquished and they deliberately insisted that the French who lost would keep their language, keep their religion, keep their land system, keep their cultures. There was a four or five year deviation from that in the middle of the 1800's when there was an attempt made to assimilate the French, force them to speak English. That did not work, it simply failed and good British pragmatism led people to return to the recognition that this large group in Canada was going to have to retain its language and culture for some time. 10

Now that was the case what, up until the 1950's the Quebec population acted like a minority and was not assertive and was prepared to accept secondary position to its interest. Their slogan of their province is "shusudeum" (I remember, past looking, backward looking.) In 1960 a provincial 20

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government was elected in Quebec led by about eight Premieres on lesarge that undertook what was called a quiet revolution and it was a dramatic revolution. The government took control of the schools of Quebec back from the Roman Catholic Church. It took control of the industries of Quebec back from English speaking Canadians and English speaking non-Canadians who controlled it. It set up a series of para statals within their own domain that in effect created Quebec (inaudible) ... and started a quite dramatic change in the capacity of Quebec to function as a society that was not just a culture but was an active growing society. 10

There has been a need to find some way to reflect that in the Canadian Constitution without boring you with all of the details. There are in a sense two approaches to doing that. One is to have national programmes that encourage the protection of the French culture. We have an official languages Act which has only two languages in our case, but it says in effect that French speaking Canadians whenever numbers warrant, have the right to deal with their national government in French, just as English speaking Canadians, 20

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where our numbers warrant have the right to deal with our national government in English and there are other programmes designed to protect the culture and the special nature of Quebec.

The other view is that that special nature is best protected by fortifying and giving special powers to the province of Quebec because that is the one province in Canada where the French speaking minority in the country is the majority in that province. It is important to bear in mind that while most French speaking Canadians live in Quebec, not all do. There are very significant populations aggregating I would think, around a million people in New Brunswick, in Ontario, in other provinces and it is a constant theme of Constitutional contention, Constitutional discussion in Canada as to whether the best protection for that minority lies with a series of federal laws or lies with a combination of federal laws and more power to the province for Quebec is a majority.

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Now without getting into this it is very important for me to emphasise to you that that is very much a unique product of

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a unique Canadian experience. It may or may not have its implications elsewhere but it flows from our distinct history as a country.

You should also know that may be the devil's advocate for a view I do not hold but it is legitimate in Canada. You should also know that that development, some would argue, has contributed to the strength of the separatist impulse in Quebec and that that separatist impulse in Quebec in a sense imperils the whole of the country. I will not elaborate that argument, I do not share that fear but it is a legitimate fear in the debate in Canada.

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CHAIRPERSON:

Thank you. Ruth and then Yunnis.

MS RUTH:

Mr Clark, in your brief introduction you talked about the Federal Government's powers. I will not say you actually passed judgment but you talked about it as if it was useful. The Federal Government could exert pressure on the provinces by suggesting programmes and providing funds for those programmes, but then in the question you responded by saying the Federal Government has become heavily in

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debt and it actually does not have the money that it might require to fund those programmes. You were mentioning something that the Republicans had complained about in America, the unfunded mandates from the central government.

So you know you spoke of it as an advantage and yet you seemed to suggest that there is a disadvantage and in addition to that question, I would like to add on the fact what is the fear, for the question, what is the fear of giving 10 greater power to the province of Quebec rather controlling the power that is given to Quebec through the Federal Government than actually giving that province the power to be more autonomous and express its culture and so on in its own way. Thanks.

MR CLARK:

We Canadians have ambiguous views about central questions and I cannot give you a straight answer to that, to your first question about the powers, the relation between using the spending power to establish national standards and 20 the debt. There is undoubtedly some relation and one of the issues that we are facing now is how we can cut back on

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some of our social programmes to help us deal with our debtors but it is also critically important to say that an overwhelming number of Canadians would believe that the whole population has drawn high value from our social programmes.

If we compare ourselves for example with United States, no one in Canada, this is a remarkable observation, has to fear that getting sick one Tuesday afternoon will ruin all of their lives financially. If they get sick and it is a fatal disease obviously that the disease will kill them but the costs will not and in the comparable country to ourselves, if you get sick on a Tuesday afternoon and your disease is not fatal but takes a long time, you might survive the disease but you will not survive the cost and most Canadians will argue that our social programmes are part of what makes this a distinctive country. 10

We take some pride in the UN judgment which, each year the United Nations judges countries in the world as to which are the best places to live and Canada has consistently been judged the best place in the world to live, partly because of the care we take for our social programmes. 20

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Now part of the debt, I would argue that part of the debt that we are now facing had to do with the fact that a budget I brought in as Prime Minister in 1980 was defeated, and that a very strict fiscal regime that we brought in at that time was departed from. So my spending ensued in the early 1980's that has made our debt much less mandatory and there is no doubt that whoever's fault it was, there is going to have to be some very significant cutting back on the kind of expenditure.

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There is also no doubt that had the Federal Government not forced the provinces into medicare, we would not have the kind of debt that we have. I think most Canadians would say we regret the debt but we treasure the medicare and that is why there is some natural ambiguity. If you want to come back to that question later, we can do that.

With respect to Quebec what is the fear? Let me speak personally. I have no fear of that but I am not necessarily a majority in the country. I believe that special status in one form or another has been part of Canadian Federation but we have done it when we had to do it. We have not set out

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to do it. We have not gone around looking for areas where we would treat province A differently from province B. What we have done is that where is province A fundamentally different from province B and where should that difference be reflected in the Constitution.

My own view is that we are more likely to secure a sense of Quebec feeling at ease in our country if it has more power and more sense of confidence of control over issues that are of fundamental importance to us.

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There are people who fear that and their logic is that once you begin upon that path you are encouraging the stronger province of Quebec to move inexorably towards separation. I happen not to share that view but I respect the view. My view is that if Quebec has that power, has the proof that it is welcome within Canada, that it will see the other advantages of Canada and it will not be tempted into separation. There is no absolute answer to that difference of views but I hope that is a fair description of the two views on that question.

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CHAIRPERSON: Thank you. Yunnis and then Peter (inaudible) ...

MR CARRIM: You refer to, you know, this third order of government with the Aboriginal and other indigenous people. I just wonder if you could elaborate on that and to what extent is the attitude towards Quebec, you know, degree of autonomy granted in the cultural, political and other spheres related to how other people, the Aboriginal and indigenous people are treated in respect of similar concept.

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MR CLARK: The relation is not between the Aboriginal people and Quebec, however there is a controversy and the relation is not there. I think that, certainly my view, and I think it is generally accepted, is that there are two groups in Canada that are significantly more different than others. Quebec is one for historic reasons. The argument really is, is Quebec a distinct society that requires some formal recognition of its distincts? Quebec has been a distinct society since 100 years before the country was formed, part of our history.

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With respect to the Aboriginals the question is, does the fact that it was their land first and the fact that they have

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separate abuse and discrimination subsequently entitle them to a treatment different from people who came after the modern country was born. I think there is now a consensus that the answer to that second question is yes there is that different entitlement and the quest for some time was to find a way in which that could be made to be effective. The Aboriginal people argue and the argument is now accepted that their rights do not flow from our Constitution. Their rights precede our Constitution. They were there first. Consequently it is an inherent right, it is a right to govern 10 themselves that they brought into the modern community of Canada and they make the point that they were governing themselves with great success before we came along which is to some degree arguable but certainly not fundamentally arguable.

That position had been resisted for a long time for two reasons. One, it could complicate life enormously for Constitutions. What do you do with literally thousands of Aboriginal communities who would be exercising and 20 applying rights to self-government across the country but secondly there was a very real concern that I used to hold

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when I was the Foreign Minister about the international expression of self-government. Would it mean that Canada could no longer act for all citizens including Aboriginals who were in our country. We resolved that in the Shorter Town Accord by an agreement including by the Aboriginals that it would be an inherent right to self-government within Canada.

Now what does that mean? First of all it is important to bear in mind that our Aboriginal traditions vary sharply. I 10 mentioned at the beginning there were three categories broadly speaking of Aboriginal people. They are the Innuit, the Eskimos, there are the Indians who have status under the Constitution, there are the Maykee who do not have status under the Constitution. Let us deal with the Indians for starters. Their traditions vary widely. There are Haida Indians on the West Coast of Canada who have been fishing people for generations and generations and centuries and who are not mobile. They are not a migratory people. They have villages, they have been fishing in the same areas 20 for a long time.

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There are the Northern Que who are highly migratory, who have always moved to hunt and to fish. There are a variety of other, thousands of other Indian perhaps. Self-government for the Haida people, stationary, fishing people, would take different forms than self-government for the Que people who are migratory, hunting people. What does this mean in practice? What it means in practice is that we have to establish a right and then work out on case by case basis how that would apply in particular circumstances.

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When I had to take this to a referendum I was talking theory and I lost partly because people had legitimate questions about this. They kept saying "what are you doing, how are you going to make a social welfare system in the city of Calgary work if the Stoney Indians who also live in the city of Calgary have a right to a different form of social welfare?" I did not have an adequate answer for the question.

Now, and this is only two years, now we have 15 or 20 concrete examples of circumstances in which, in one case (inaudible) ... it has to do with the Involute Innuit, the

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Gwitchen Indians and the non-Aboriginal town of Inuviek in our Northwest Territories. Those three different groups have put together a form of self-government. The Gwitchen and the Inuvialuit own a lot of land around the city, rich land, oil is under the land, land worth (inaudible) The city of Inuvik, a small city, it is a town of Inuviek has services. A question arose as to whether or not the Inuvialuit Corporation was going to set up a new suburb by itself, bring in sewerage services etc. etc.

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Leaders of the three communities sat down and said this is silly, we have got a centre with services and service laws. It is going to be the commercial centre of this region. To make a long story short, they have set up a form of self-government that has six members on the council, two from Gwitchen, two from the Inuvialuit, two from Inuviek.

When there is a question of the development including the resource development of Inuvialuit or Gwitchen lands, each of those six has an equal vote. It works and as we get more practical examples of how this works, I think that the apprehension about these systems will diminish but it is a

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new factor accepted by and large in theory, rejected in a referendum I have to say, but it is accepted in theory by most governments and most commenters on the Canadian Constitution.

CHAIRPERSON:

Thank you. Peter and then Melanie.

MR SMITH:

I have listened now with interest to your description. In some cases we think that you are moving to more confederalism in a sense. But I want to ask, is, asymmetry 10 seems to be a solution for your problem but seems to be failing if not maybe you must tell us. If it fails is it because of cultural reasons or cultural differences or maybe incompetence in your self-governing or incompetency of finances. What is the asymmetry thing in Canada?

MR CLARK:

I am a practical politician. I think if something will not work there is no point proceeding with it. We had a proposal for an asymmetric approach to the question of culture that would let Quebec have jurisdiction over culture 20 but no other province. It made sense to me. No other province wanted jurisdiction over culture, they wanted the

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federal government to have it.

I went around to every Premiere, I went around to the leaders of the opposition in every province and I did not find a single person who thought that he or she could go out to his or her electorate and sell asymmetrical federalism with respect to culture, because I called it asymmetrical federalism, they called it special status and special status implies that in this country of people who are equal as citizens, some are more equal than others and the idea of special status has become majority. 10

Now that troubles me because through all our history we have had a kind of asymmetry. I have mentioned some of the cases that exist where people are not, where provinces are not treated in exactly the same way. For example, we have a rule that says representation in our parliament is (inaudible) ... representation by population except that if you are a tiny province like Prince Edward Island and you have six appointed members in your senate, which is the way we still do things with our senate, I am sorry, four appointed members in the inter senate, you cannot have fewer elected 20

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members than you have appointed members. That is asymmetry. That is in the Constitution.

I hope that at some time in the Canadian context we will be able to have asymmetry recognised as a practical and established Canadian practice that so far it is seen as special status and so long as it is seen as special status it is unacceptable.

CHAIRPERSON:

Melanie?

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MS MELANIE:

I want to ask you a question on local governments and municipalities and I heard you just sort of said it in passing something about it, I might have been late and I apologise for that but, and I want to link it to the ethnicity question which you have, not previously but the one before, which you actually answered part of it by saying, and I apologise if this is a sweeping statement, that it seems that federalism in itself is not a guarantee for dealing with different ethnicities and different cultures. It seems that Australia with the Aborigines, especially where it is small minorities, you know, it is not working.

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Now in a way the, what I heard what you said the solution in that specific town has been for people in what you call self-government and it seems to be a form of local government almost. Now I want to ask you how does your local government look and whether it is a form of strong local government and whether you can see a strong form of local government and it is in whatever you can call that and whether that is in a way then a kind of solution for the ethnicity problem and whether that could work in the case of Quebec as well, that you do not deal with it on a federal 10 or on a state level but on a local government level almost.

MR CLARK:

I think before you arrived I made the point that under our Constitution, municipalities have no formal status, they are creatures of the province. I want to again correct my rules of this discussion. I am talking about what happens in Canada and I am very careful about being perspective. I do not think any ism works. I do not think there is any magic to federalism or unitary states or other of these kinds of things. I think you have to devise a system that applies to 20 your circumstances. I go back again to the point that of the genius, the man who was a genius who created our first, our

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country, wanted a much more unitary state than evolved and events took care of his ideology, if you will.

Minorities, a very difficult question of minorities. There is a sense in which our treatment of our Aboriginal people have nothing to do with federalist. It had to do with other things. We would have treated them as well or as badly under a unitary state or under something else because in effect they were left out. The only way we can think to bring them back in to a sense of being full members of the society enjoying respect is by establishing them as a third order of government. You are correct that that self-government would express itself principally locally, in local arrangements because they are in fact highly local. There are a number of tribes and communities that are spread across the country and their interest primarily, is in functioning locally. 10

However, once we establish a third order of government of Aboriginal people, I have no doubt that leaders of that third order of government will take part with the provinces and with the federal government in inter-governmental 20

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conferences. What form that will take I cannot predict now but that means that their functions will not be exclusively local.

The communities will be defined in accordance with local circumstances but there will also be the right of participation in the larger inter-governmental discussions involving representatives of what would then be the three orders of government.

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What is the power of our municipalities now? They have a substantial exhaustive power. They are big, they are energetic, they are the sources of innovation in the country. They are more likely to get their way on a particular issue than some smaller place and, obviously more organised and more efficient municipalities are more likely to do that. This is a distinction between informal power and formal power. They have substantial informal power, they have very little formal power. Are ethnic or other minorities better treated in municipalities? Are local governments more sensitive to local realities? In some cities yes, in some cities no, would be my answer.

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CHAIRPERSON:

Thank you. I want to ask some questions to do with finance and then I have got Peter Smith again and Praveen. Sorry, a lady there, all right.

Mr Clark I would like to ask two things relating to the financial arrangements within your country. You said there is financial equalisation according to a formula. Could you elaborate a bit more as to how the formula is or was derived, whether the formula changes, who decides what the formula is and in terms of in the end what is the decision process of that amount from that province ends up in federal and that amount out of the federal ends up in that province in terms of this equalisation process. 10

Secondly, specifically could you give us a little more detail as to which taxes provinces have the authority to apply or exert and which the National Federal level has, and is that a Constitutional or a legal or a conventional division?

UNKNOWN:

Is that the battle, is the equalisation by some other mechanism or is it only by... 20

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CHAIRPERSON: Oh okay well yes by financial equalisation.

UNKNOWN: Separate now.

CHAIRPERSON: Ja.

MR CLARK: If I have wrong detail like a law (inaudible) ... High Commission will get in touch with you to correct any false impression that I have left. I do not believe I am going to be wrong on these details but I may be and so I will try to follow this up. It does change, the equalisation formula does change. A change is theoretically a result of negotiation between the Federal Government of the provinces but it is usually as the result of a federal initiative and it is usually to bring, in recent times, to bring it down because we are in hard fiscal circumstances. 10

Habitually the Federal Government would propose to have it, would come in with an unusually low proposal and the provinces would bid it up, that would happen, it does change, usually at the initiative of the Federal Government. It is based upon an assessment of per capita GTP in each 20

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province and so what changes is the percentage of per capita GTP that would be sent by a wealthy province to Ottawa and then sent on in equalisation.

The role of Ottawa in this case is a flow through role. Ottawa cannot keep this, not supposed to keep this, the equalisation payment, it flows through its sources to other provinces.

One of our difficulties is that with the changes in industrial 10
development in Canada, the province that is traditionally
then the richest our province of Ontario is now having some
difficulties in a lot of its traditional industries and it is for a
variety of reasons the net recipient of and receives more
immigration than other provinces and it tends to receive
more of what we call family class immigration which tends
to be mothers and ultra dependent relatives, people who are
already there, people who are not able to play a productive
role in the workforce and who in fact are a charge upon the
economy. So Ontario's relative wealth and capacity to 20
contribute to equalisation is declining and it is declining
faster than the relative wealth is increasing in some of the

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recipient provinces so we have a, that is one of the factors that we have to deal with.

Taxes. Jurisdiction over natural resources rests with provinces, at least jurisdiction over natural resources as they move within the province. There is consequently a capacity for provinces to impose taxes upon natural resource of royalties, generally royalty regimes.

In our situation the ownership of resources rests with the state, that is, I think a fairly general practice but it is certainly the Canadian practice so there is a royalty charge that is a substantial source of income in a province like mine and I would believe that just the same sort of thing would apply when the resource is hydro so it would be of use to a province like Quebec. 10

A sales tax, value added taxes can be applied by provinces. All provinces in fact except mine which is a wealthy place, have a provincial value added tax. There is also a federal value added tax so that is a shared area of jurisdiction. 20
There is an agreement worked out on income tax and

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generally in every case except Quebec the federal government collects the income tax, they fill out one form and it goes to Ottawa and then the provincial share goes back to the provincial capital.

The federal share is kept in Ottawa and there is a reversal of that in Quebec in that Quebec is allowed to collect the tax and each level of government determines which part, how much income it will tax but obviously they do that with a sense of overall tax rates.

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Michael is there anything else that I should add on tax? Municipal governments do have the delegated power to levy a property tax, that is their major source of revenue plus transfers, revenue transfers from other levels of government. Thank you. Customs and excise and federal tax.

CHAIRPERSON: And company taxes?

MR CLARK: I believe exclusively federal, excuse me, corporate taxes.

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CHAIRPERSON: Thanks very much.

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UNKNOWN: Equalise, by a levy or only through the tax system...

CHAIRPERSON: Is it through the tax system or is it a levy for the...

MR CLARK: It is a levy. It is a levy.

CHAIRPERSON: Okay thank you very much. Peter Smith and then Praveen.

MR SMITH: Thank you. After the quick standing question, I do not know where to start. I wonder...

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CHAIRPERSON: I think start with one.

MR SMITH: Ja, no, okay you mentioned a small third order of government. Is there any potential of conflict between the Bill of Rights and perhaps practices that take place within those communities. Each government's relations, are they institutionalised within the Constitution or is it purely a voluntary practice?

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You mentioned too that the problem of the executive federalism and where decisions are then taken to the

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legislatures afterwards. To what extent do the legislatures not give the Premiers for example, or the Ministers mandates to reach agreements as opposed to the other way around? I think I will stop there.

MR CLARK:

Yes there are conflicts with respect to Aboriginal rights and indeed some other rights and our charter of rights. Our charter of rights contains a notwithstanding clause and so there can be exemptions from the application to the charter of rights. They were resorted to very rarely but there is a, 10 and there is a provision in the charter of rights, there is a reference in the charter of rights, I do not have the language here, taking into account of Aboriginal rights let me refer here to an issue that I should not deal with so briefly but I will, I must.

We, as a practical matter recognise and live with concepts of individual rights and community rights and certainly Aboriginal rights are a species of community right and there is, there can be a conflict with the charter of rights and 20 freedoms and indeed with international obligations. We have been taken to, we have been found into fault with

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international human rights standards on one occasion about 15 years ago.

A practice in our Indian Act, Aboriginal Indian Act, said that an Indian woman who married a non-Indian lost her Indian status. An Indian man who married a non-Indian kept his Indian status and the descendants of the Indian woman who lost her status, also lost their status. That was found to be discriminatory against women.

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We changed the law so in that case the individual right prevailed over in effect the community right, but there is a notwithstanding clause in our Constitution. There is no reference in our Constitution to federal provincial relations or ratings. There is no reference to a Prime Minister, there is no reference to a cabinet. Those are inventional parts of the Constitution.

I think the issue of mandates what leaders can do and what they cannot do is very hard to define. I think it is hard to define with respect to a leader who goes from a parliamentary caucus to make decisions and comes back, I think it is extremely difficult to know what mandates

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someone who wins an election actually carries. When people voted for me, I in many cases had no idea really why they voted, no idea what they were approving and what they were disapproving except the only thing I knew was that they had voted for me and not the other guy.

CHAIRPERSON:

Thank you. We are fast running out of time so I think we will have to close off after the three who I have on the list at present who are Praveen, Zoe and Ruth. Praveen?

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MR PRAVEEN:

Thank you. The issue here is one of provincial representation at a national level. What form does it take in Canada?

MR CLARK:

Theoretically through the senate. The senate is supposed to be the representative of the National Government of the provinces. The senate however, is appointed by the central government. It does not except in rare circumstances fill that role. There is a strong movement in Canada to either abolish the senate or to have it directly elected in the provinces at a time different from the national election so that there will be a more, a greater likelihood that it will

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reflect provincial settlement.

In some of the matters we were looking at in the last round of negotiations there were particular powers that would apply to a senate elected in that way, that do not apply now with respect to some areas where there is an unusual provincial jurisdiction or interest.

CHAIRPERSON: Thank you. Zoe?

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MS ZOE: Yes, my question is in regard to the standard of education. You said that is the prerogative of the provinces. Okay but you further said that there are schemes that you have identified that are quite critical in terms of international standards. Could you say perhaps briefly what those bills are. Secondly, in terms of the provinces that are rich and the poor provinces, (inaudible) ... in regard to their education affects the upward mobility of the Canadians to social, economic and political spheres, definitely those who are coming from the other provinces who have much more access to upward mobility.

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MR CLARK:

In my own view, jurisdiction over education is of great importance to the National Government and if we could do it, I would have jurisdiction over education in my country at the national level. It is not that simple.

Education is a provincial jurisdiction because it is so closely related to culture and the language and part of the special nature of Quebec recognised in our Constitution has been that Quebec would not have formed, joined a confederation where the majority controlled the schools in its province and we are living with that legacy now. We are trying to find, we are making significant progress in coordinating skills training and this sort of thing but it is a significant problem. 10

Now we do have, again we have used our spending power to have substantial impact upon skills training as we get into a fiscal crunch or capacity to use the (inaudible) ... spending power diminishes and there is no doubt that this is one area in which the need to take account of local realities has impeded the capacity of the National Government to do what it needs to do. In my judgment a national government obviously has to have control of fiscal policy, have real 20

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control of fiscal policy, I mean it is not just that it nominally sets the fiscal policy, I think that it has to have some influence over the spending and the taxing and the fiscal related activities of other levels of government or else its fiscal policy is for nought. It cannot enforce it.

In my judgment there has to be a need to conclude treaties to act internationally, there are a range of functions that I think are essential in the Canadian context. To some degree we have been able to overcome this problem of inequality, 10 of unequal opportunity by the social net that we have put in place, the medical care programmes, the equalisation programmes, some affirmative action programmes which are federally driven.

CHAIRPERSON: Thank you. Ruth?

RUTH: Mr Clark, one of our speakers suggested that you had alluded to the failure of asymmetry. Now is that not perhaps because you have not genuinely recognised the 20 asymmetry of Quebec and I want to make, want to ask your opinion about the contrast between that and the situation in

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Spain, where regions like the Basque and Catalonian regions did negotiate their own special treaties with the central government, whereas the other provinces accepted a regionalist type of dispensation. So it is very asymmetric but it has remained stable ever since about 1970 I think, when it was negotiated.

MR CLARK:

My own view in Canada (I want to be very careful about that) is that there is no logical reason not to practice some degree of asymmetry, no logical reason. Unfortunately 10
public life, politics is not always logical and at the moment in Canada there is not a political support for asymmetry because it is seen as special status, as treating people, giving people special advantages that are not available elsewhere.

I hope that we can overcome that in Canada but as one of the most prominent spokespersons in Canada for a less centralised federation, and that has been my view for some time, my Canadian view, I see important limits upon 20
asymmetry. I think, I am not unconscious of to whom I am speaking here in this debate but I want to be very careful

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about my view as to how this phenomena develops in Canada.

I think that where there is a real difference that should be recognised. We should find a way to recognise that but I think that asymmetry should be the exception rather than the rule, in my view, in my country. I think that is as much as I can, there are other places, I am not an expert on Spain or other places.

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There are undoubtedly other places where other arrangements have worked and I think that as you are going through your process, you should take a, everyone should take a hard look at what works and whether or not what makes it work. Has it a prevalence in South Africa or not. Those are the kinds of judgments you make.

My last observation to you would be, this is carrying coals to Newcastle, I do not need to say this to you but your Constitution is your Constitution. You have a very complex community here. You have to find a way to make that community continue to work together. It may be that there

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will be some guidance from our successes and from our failures and for the successes and failures of other places.

I would not have come before you if I thought anyone would go away from here saying this is the way the Canadians do it so we should too. That would be a significant mistake. We would not do that in our country. No self-respecting country I think would do that. We are trying to share our experiences.

10

I am acutely aware of having spent part of my career as a Foreign Minister telling South Africans what I thought you should do with one element of your policy. I was never very comfortable with that but I was engaged in that debate as the Chairman of the Commonwealth Committee of Foreign Ministers.

I think that what is a far more normal and constructive approach is for people who are in this business of trying to make societies and communities work, to sit down together and to share our experiences including being acutely conscious of where our experiences are different.

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I have tended to focus on some or other things that we have done. You have asked questions about things that we do that may apply in your circumstances. Those are judgments for you to make. I should also say I think that for my part, and I am sure I speak for other Canadians who are excited by what you are doing here, if there are other ways in which we can be of help to you as you move forward, we would like to be. Thank you.

CHAIRPERSON:

Well thank you Mr Clark. I am sure I speak on behalf of 10
everybody here as you will see that if I did not close off the
question list we could have spent many more hours, but the
short time that we have been able to spend with you, I am
sure has been invaluable, to hear you speak, to be able to
ask you questions, to draw on your experience, your
knowledge, your skills in your own country so that at least,
not that we plan to simply replicate as you have said, to
what some other country is doing, but at least when one is
looking at the range of options and what has been tried
elsewhere in the world, it just adds to the range of our own 20
experience and knowledge and we have got some mighty
difficult things to sort out here.

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We greatly appreciate the interest that you have shown in being here today. The interest in fact you have shown in our country over very many years, and so on behalf of everybody, thank you very much indeed and I hope that the rest of the time you spend in South Africa will be very enjoyable indeed. Thank you very much.

MR CLARK: Thank you very much.

CHAIRPERSON: There is a meeting at 11 o'clock on, is that right (inaudible) 10
... Is it 11:30 on Monday. 11:30 in the Core Group at
090:30. Thank you.

[END]

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