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CONSTITUTIONAL ASSEMBLY

ADDRESS BY

THE RT HON JOE CLARK

**PRIME MINISTER OF CANADA
1979 - 1980**

24 FEBRUARY 1995

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10h10 Room V227

Mr Clark was Prime Minister of Canada (1979 - 1980); Secretary of State for External Affairs (1984 - 1991); and Minister for Constitutional Affairs (1991 - 1992). For several years, he chaired the Commonwealth Committee for Foreign Ministers on Southern Africa.

First elected to the House of Commons in 1973, Mr Clark became national leader of the Progressive Conservative Party in 1976 at the age of 36, and served as Leader of the Opposition from 1976 - 1979. He became the youngest Prime Minister in Canadian history in 1979 - 1980. From 1980 - 1983, he again served as Leader of the Opposition.

During his term a Minister for Constitutional Affairs (1991 - 1992), Canada engaged in an intensive round of constitutional renewal involving public consultations and federal-provincial negotiations. This process culminated in the 1992 national referendum.

Mr Clark retired from the House of Commons in 1993. He serves at present as the UN Secretary General's Special Representative on the Cyprus conflict.

The Rt Hon Joe 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 come in when I was the Foreign Minister of Canada and the Chair of the Commonwealth Committee on Southern Africa. This is my first visit to South Africa of any length of 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 in recent years and by the appearance that there is a broad determination to try to keep this going. I am very conscious that there are some parallels and certainly a lot of historic similarities between Canada and South Africa. We are very different countries. What may work in Canada may not work here and I want to make it clear that what I am seeking to do today is to describe 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 in further examination to be very different and I simply want to make that disclaimer at the beginning.

I was perhaps unusual as a Constitutional Minister in Canada in that I am not a lawyer. I felt that this was one of the reasons I was successful. I don't 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 a negotiation that would bring major changes to our constitution, was that too often

people who have been too long in the constitutional wars or in the legal wars, had a fixed definition after the limited definition, as to what might work. I approached this as a practical politician, a pragmatist faced with problems trying to solve those problems, and my sense was that if I could find a consensus among other political leaders our lawyers would sufficiently adapt 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'm 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).

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 of 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 the formal sense), derive from the powers of the Provincial Government of Ontario.

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 doubt, put those powers in the hands of the federal government. That originally in our Constitution, which was first devised in 1867, was accomplished through what is called a "*Peace, Order and Good Government*" clause. When that was drafted there was a sense that the federal government could take any action that was justified by considerations by 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. From time to time, even recently, there have been people suggesting the federal government should do things which would in fact be in the jurisdiction assigned to the provinces using the justification of the "*Peace, Order and Good Government*" clause. My judgment is that we will not see that happen except in the most extraordinary circumstances, circumstances I frankly could not contemplate. But it is important to know in terms of the evolution of the Constitution that when this was put in place there was 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, and you know that better than most people, about words and phrases and what they mean. No word can be more difficult than, whether it is Canada or Cyprus or South Africa, the word "*Federation*" and "*Federalism*". Let me use the Canadian example: we are a Federation, 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 systems and my view of the nature of Federalism is that it is an eminently flexible process that can be applied in different ways, with different implications, in different societies. I think one thing that one can not do, (this was a firm conviction of mine through our

own constitutional discussions), is take something that works in country A and apply it to country B because country A is not country B. Some of the theories may apply but you can't holis-bolis transform a system.

We have some fields of concurrent jurisdiction spelt out in our Constitution. Agriculture is one of them. They tend to be areas that were of most importance at the time the country was formed naturally enough, that being now 130 some years ago. So 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. And because we are such a large country, and this is an important factor in the Canadian Confederation, is the size of our geography. We are the second largest nation in territory in the world after Russia. 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. But also as the world has changed, as there have been developments of radio, of other modern developments that were not contemplated by the Constitution, as new issues like the environment have arisen 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 to tax. In other words not an equal power. The far stronger power to tax is with the National Government, but there is the power to levy taxes on the part of the provinces. And indeed, part of that power has been delegated to municipalities with respect to property taxes and some of their 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 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 the factors that has driven us towards national programmes, (an we have some very successful national programmes), has been the power of the federal government to raise money, to spend money, and by being able to mount programmes that would say to a particular province "We think there should be programme X. It's in your jurisdiction. You can say no, but if you say yes we'll pay for it." That creates a powerful incentive to have that kind of programme carried forward in the jurisdiction of the province.

A classic example is "Medicare". We have a medical care system in Canada that extends 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 to Canada. That is how we have been able secure a range of other important programmes.

There are some very practical areas of overlap where there have been some very

practical resolutions. As Foreign Minister I chaired many of our discussions with respect to international trade treaties (the Free Trade Agreement), and was involved in the NAFTA Agreement we subsequently signed with the Mexico and the United States. Technically the responsibility for international trade and treaties rests exclusively with the National Government, however the responsibility for trade within a province lies with the provincial. 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's one thing to negotiate a trade treaty, it's another thing to give it effect. 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 had negotiated.

Let me be specific. If we were dealing with rules regarding trucking between Canada and the United States, the Province of Ontario would say "Fine, that's your jurisdiction. You can deal with the trucks that cross between Canada and 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 a 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's 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 we did not have a problem rising from jurisdictions in terms of giving effect to the trading arrangements that we put in place.

We have developed a very elaborate series of regular, federal 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. It is important to note, and it is a problem, that those are among governments. They are not necessarily among parliaments and legislatures, and there is to some degree a question of responsibility to a parliament because what happens often, is that a Federal Minister of the Environment would go and would sit down with 10 Provincial Ministers of the Environment; they would come to an agreement among themselves that had 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 of Alberta for example, that minister would say "I'm sorry we didn't debate this here, but we do have this agreement, if you don't support it the whole thing comes apart."

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

But these regular Federal Provincial conferences are eminently valuable in the

practical day to day co-ordination of policy. If you have a national environmental policy and 10 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.

There is also regularly a discussion of funding since the National Government has most of the money in these processes. I should say parenthetically, that one of the things that I think there is widespread belief that we need in Canada, is to have Ministers of Finance of the National Governments and 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. 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 governments, that there needs to be much more practical cooperation on those kinds of questions.

I think those Federal Provincial Conferences are most effective where both levels of government have some powers. 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 of 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 that the 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 there is a capacity for the National Government to establish national policy in those fields. That's a problem from time to time with us.

It has also become the case since power breeds competition, that our Federal Provincial Conferences have become increasingly adversarial over the last several years. But having said that, they none the less can work. It is important to note with respect to the Constitution itself, that our formal Constitution, which covers a lot of what we do, (part of it is informal in the British sense), but a lot of our Constitution is formal, and that Constitution can only be amended by 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 can be very difficult. We've had trouble getting agreement on a lot of our most recent discussions, but it is also possible. You made reference to the negotiation that I had to chair. We called it the Charlottetown Accord Negotiation. We did negotiate a very complex detailed constitutional change. The most comprehensive in the history of the country. We got unanimous agreement, not only from the federal government, and the 10 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 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 unable to get accepted in the country for a variety of reasons.

A couple of things just quickly to add about Canada that may or may not be relevant.

One, I mentioned that our municipalities have no special powers. That leads to very real anomalies. The Municipality of Toronto, the Municipal district of Toronto, has millions of people. The Province of Prince Edward Island has a tiny population of perhaps a 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 two or three or four years, what would be called a "*Third Order of Government*". I don't 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 are in the far north, plus a large group called the Métis people who are the products of unions between Europeans who came and aboriginal people who were there. That is a complex issue in Canada. Our record with the 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 to say, something that does not have an international enervation or expression of sovereignty. That is to come. It will be a complicating factor. You should know about that simply because it's part of the

The last thing I will say (I have spoken longer than I intended), is about a device that has served us very well in Canada. It is the device about equalisation. We have rich provinces. We have poor provinces. For the last 50 years we have had a law that says that 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 provinces. 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 New Finland that happens to be poor now. It is interesting that when the equalisation notion was brought in, my province which is oil based, had not discovered oil, so that when equalisation was brought in my province received help from the federal government. A few years later we struck oil and we are giving help to other people. But what that shows, is that the wealth and 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 that you think I need to know, but obviously, if there are questions that either these remarks have excited or that you might want otherwise to put, I would be pleased to try to deal with them.

K Andrew Thank you very much. I'm sure there will be many questions, and because we have limited time, I will ask people to try and ask questions and not make speeches. They could send speeches to Mr Clark in writing if they wish to do so.

Q
D Du Toit The thing now which interests us perhaps most about Canada, is the financial / fiscal system which is a divided system there and not a joint system. Perhaps you can just tell us what were the problems with the borrowing of the provinces in Canada? and whether that went up at a higher rate than the federal did? and whether that is structurally related to the Federation which you have? and what type of controls were lacking in the system in that situation?

A
J Clark I would 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. When we were relatively rich we started a lot of programmes and put them in place, and when we ran into a recession we had to keep paying for the programmes but without having the money. Since it was the federal government that was putting the money up we were borrowing more.

Provinces are free to borrow and they are free to borrow on their own hook on what they can negotiate as part of the Federation of Canada. If they happen to be a poor province but part of Canada, obviously their belonging to Canada helps them with their credit ratings. But a number of our provinces are now having difficulty with their credit ratings. That is more related to the fact 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 of an inner borrower in a richer province.

Q
P Smith I wonder Mr Clark, whether you could give us a brief word on the constitutional position of Quebec?

A
J Clark 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's an issue we still have full account of in our

Constitution, but in terms of European settlement, the French and the English were both there very early, and both have 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 lead 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.

Now that was the case, but up until the 1950's, the Quebec population acted like a minority and was not assertive and was prepared to accept secondary positions. It is interesting. Their slogan of their province is "Je me souviens" (I remember). Past looking. Backward looking. In 1960, a Provincial government was elected in Quebec led by the late Premier Lasage 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 their own Catholic church. They took control of the industries of Quebec back from English speaking Canadians and English speaking non-Canadians who controlled it, and set up a series of parastatals within their own domain and in effect created Quebecorp and started a quite dramatic change in the capacity of Quebec to function as a society that was not just a culture but an active, growing society.

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 where their numbers warrant, have the right deal with their National Government in French, just as English speaking Canadians where our numbers warrant, have the right to deal with our National Government in English. There are other programmes designed to protect the culture and 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 and in other provinces. It is a constant theme of constant tension in 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.

Now without getting into this, it is very important for me to emphasize to you, that is very much a unique product of a unique Canadian experience. It may or it may not have its implications elsewhere, but it flows from our distinct history as a country. You should also know, let me be the devils advocate for a view I don't hold but 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 want to elaborate that argument. I don't share that fear but it is a legitimate fear in the debate in Canada.

Q

R Rabinowitz

Mr Clark, in your brief introduction, you talked about the federal government's powers and I won't say you actually passed judgement, but you talk about it as if it was useful. The federal government could exert pressures on the provinces by suggesting programmes and providing funds for those programmes. But in the question you responded by saying the federal government has become heavily in debt and it actually doesn't have the money that it might require to fund those programmes. You were mentioning something that the Republicans have complained about in America, the unfunded mandates from the central government. You spoke of it as an advantage and yet you seem to suggest there is a disadvantage. In addition to that question, I would like to add on the fact, what is the fear of giving 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.

A

Mr Clark

We Canadians have ambiguous views about central questions and I can't give you a straight answer to your first question about the powers, the relation between using the spending power to establish national standards and the debt. There is undoubtedly some relation. And one of the issues we are facing now is how we can cut back on some of our social programmes to help us deal with our indebtedness. But is also critically important to say that an overwhelming number of Canadians would believe the whole population has drawn high value from our social programmes. If we compare ourselves for example with the United States, no-one in Canada, (this is a remarkable observation), no-one in Canada has to fear getting sick one Tuesday afternoon will ruin all of their lives financially. If they get

sick and it is a fatal disease, obviously the disease will kill them, but the costs won't. And in the comparable country to ourselves if you get sick on a Tuesday afternoon, and the disease is not fatal but takes a long time, you might survive the disease but you won't survive the cost. Most Canadians would argue that our social programmes are part of what makes us a distinctive country. We take some pride in the UN judgement which each year at the United Nations, judges countries of 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.

Now, 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. And some high spending ensued in the early 1980's that has made our debt much less manageable. There is no doubt that whoever's fault it was, there is going to have to be some very significant cutting back on that kind of expenditure. 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 that most Canadians would say we regret the debt, but we treasure the Medicare. That's 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 have had to do it. We have not set out to do it. We haven't gone around looking for areas where we would treat Province A differently to Province B, but what we have done is said that where Province A is 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 and control over issues that are of fundamental importance to us. 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 in views, but I hope that's a fair description of the two views on that question.

Q
Y Carrim

You referred to this third order of government for the aboriginal

and other indigenous people. I just wonder if you could elaborate on that. And to what extent is the attitude towards Quebec 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 concern?

A
Mr Clark

The relation is not between the aboriginal people and Quebec. There is a controversy there, but the relation is not there. I think that, certainly my view, and I think that it is generally accepted, 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 stateness? Quebec has been distinct society since a 100 years before the country was formed, part of our history.

With respect to the aboriginals the question is, does the fact that it was their land first and the fact that they have suffered abuse and discrimination subsequently, entitle them to a treatment different from people who came after the modern country was formed? I think that 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 aboriginals 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 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 applying rights to self-government across the country? But secondly, there was a very real concern that I used to hold 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 are in our country? We resolved that in the Charlottetown Accord by an agreement, including the aboriginals, that it would be an inherent right to self-government within Canada.

Now what does that mean? First of all it's important to bear in mind that our aboriginal traditions vary sharply. I mentioned at the beginning there are three categories broadly speaking of aboriginal people. There are the Inuit (the Eskimoes), there are the Indians who have status under the Constitution; there are the

Métis, who do not have status under the Constitution. Let's deal with the Indians who have status. Their traditions vary widely. There are the 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 for a long time.

There are the Northern Cree who are highly migratory, who have always moved, who hunt and who fish. There are a variety of others. Thousands of other Indian bands. Self-government for the Haida people, stationary, fishing people, would take different forms of self-government than for the Cree people who are more migratory, hunting people.

What's 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. When I had to take this to a referendum, I was talking theory and I lost. Partly because people has 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 didn't have an adequate answer to that question.

Now, and this is only two years, we have 15 or 20 concrete examples of circumstances. In one case it has to do with the Inuit Guitchen Indians and the non-aboriginal town of Inuvik in our North-West territories. Those three different groups have put together a form of self-government. The Guitchen and the Inuit own a lot of land around the city. Rich land. Oil is under the land. Land worth holding. The city of Inuvik, small city, has services. A question arose as to whether or not the Inuit Corporation was going to set up a new suburb by itself, bring in sewerage services etc etc. Leaders of the three communities sat down and said, "This is silly. We have got a centre with services and service lots. 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 the Guitchen, two from the Inuit, two from Inuvik. When there is a question of the development, including the resource development of Inuit or Guitchen lands, each of those six has an equal vote. It works. And as we get more practical examples of how this works, I think the apprehension about these systems will diminish. But it is a new factor, accepted by and large in theory, rejected at a referendum I have to say, but accepted in theory by most governments and most commentators on the Canadian

Constitution.

Q

P Saaiman

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

A

Mr Clark

I am a practical politician. I think if something won't work, there is no point proceeding with it. We had a proposal for an asymmetric approach to the question of culture. That is to let Quebec have jurisdiction over culture, but no other powers. It made sense to me. No other province wanted jurisdiction over culture. They wanted the federal government to have it. I went around to every Premier. I went around the leaders of opposition of 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 call 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 pejorative (unclear). That troubles me, because throughout our history we have had a kind of asymmetry. I have mentioned some of the cases that exist where provinces are not treated in exactly the same way.

For example, we have a rule that says representation of parliament is by population. Except if you are a tiny province like Prince Edward Island, and you have four appointed members in your Senate, (which is the way we still do things with our Senate), you can not have fewer elected members than you have appointed members. That's asymmetry. That's 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. But so far it is seen as special status and so long as it is seen as special status, it is unacceptable.

Q

M Verwoerd

(Note, this speaker's voice is barely discernable on the tape). I want to ask you a question on local government and municipalities. I want to link it to the ethnicity question which was answered in part to not the previous speaker but the one before. I apologise if this is a sweeping statement - it seems that federalism in itself is not a guarantee for dealing with different ethnicities and different cultures. And it seems that Australia with the aborigines, especially where its small minorities, isn't

working. What I heard what you said this morning that a specific town is being for people in what you call (unclear) it seems to me a form of local government almost. What I want to ask you, how does your local government look? Whether it is a form of strong local government and whether you can see a strong form of local government or municipalities, or whatever you could call that, and whether that is in a way a kind of solution for the ethnicity problem and whether that could work in the case of Quebec as well? That you don't deal with it on a federal or state level, but on a local government levels?

A

J 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 go back to my rules of this discussion, I am talking about what happens in Canada and I am very careful about being proscriptive.

I don't think any "ism" works. I don't 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 your circumstances. And I go back to the point that the man who was the genius who created our country, wanted a much more unitary state than evolved. Events took care of his ideology. It is a very difficult question with minorities. There is a sense in which our treatment of our aboriginal people had nothing to do with federalism. 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 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 function locally. 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 conferences.

What form that will take, I can't 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 in what would then be the three orders of government.

What is the power of our municipalities now? They have a substantial suasive 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.

Q

K Andrew

Mr Clark, I would like to ask two things related to the financial arrangements related to your country. You said there is financial equalisation according to a formula. Could you elaborate a bit more as to this 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? And 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 legal or conventional division?

?

And if I could just add to that. Is the equalisation by some other mechanism or is it only by (unclear)?

A

J Clark

If I am wrong on a detail, Michael Walma who is here from the Canadian High Commission, will get in touch with you to correct any false impression I have left. I don't believe I am going to be wrong on these details but I may be.

It does change. The equalisation formula does change. The change is theoretically the result of negotiation between the federal government and the provinces, but it is usually as a result of a federal initiative and it is usually to bring in these times, to bring down, because we are in hard fiscal circumstances. Habitually, the federal government would propose to have it, would come in with an unusually low proposal and the provinces would bid it up. It does change, usually at the initiative of the federal government. It's based upon an assessment of per capita GDP in each province. So what changes is the percentage of GDP 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 conduit role. Ottawa can't keep this equalisation payment. It flows through its sources to other provinces.

One of our difficulties is that with the changes in industrial development in Canada, the province that has traditionally been 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 immigrants, it 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 often dependant relatives of 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 contribute to equalisation is declining and is declining faster than the relative wealth is increasing. It's on the recipient provinces. That is one of the factors 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 resources. 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. I would believe the same sort of thing would apply for the resources hydro.

Sales tax. Value added tax 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. There is an agreement worked out on income tax and generally in every case except Quebec, the federal government collects the income tax. Fill out one form and it goes to Ottawa and then the provincial share goes back to the provincial government and the federal share is kept in Ottawa. There is a reversal of that in Quebec in that Quebec is allowed to collect the tax and each level of government determines how much income it will tax. But obviously they do that with a sense of overall tax rates.

Municipal governments do the have the delegated power to levy a property tax. That is their major source of revenue, plus revenue transfers from other levels of government.

Q

Customs and excise?

A

Federal tax.

Q

Company taxes?

A

I believe exclusively corporate taxes.

Q

P Smith

You mentioned this whole third order of government. Is there any potential for conflict between the (unclear) Bill of Rights and perhaps practices that take place within those communities? Inter-governmental relations - are they institutionalised within the Constitution or is it purely a voluntary practice? You mentioned

to that the problem of the executive federalism, where decisions are then taken to the legislatures afterwards; to what extent do legislatures not give the Premiers for example, or the Ministers, mandates to reach agreements as apposed to the other way around?

A

J 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 of the Charter of Rights. They would be resorted to very rarely. There is a provision in the Charter of Rights, there is a reference in the Charter of Rights, (I don't have the language here), taking account of aboriginal rights. Let me refer here to an issue that I shouldn't 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. There can be a conflict with the Charter of Rights and freedoms and indeed with international obligations. We have been found in default of international human rights standards on one occasion about 15 years ago. A practice in our Indian Act, a provision of our 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. The descendants of the Indian woman who lost her status, also lost status. That was found to be discriminatory against women. 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 meetings. There is no reference to a Prime Minister. There is no reference to a Cabinet. Those are conventional parts of the Constitution.

I think the issue of mandates, what leaders can do, and what they can't 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 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 disapproving, except the only thing I knew was that they had voted for me and not the other guy.

Q

P Gordhan

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

A

J 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, 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 to the national election so that a greater likelihood that it will reflect provincial sentiment. And 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 what did in that way that do not apply now, with respect to some areas where there is an unusual provincial jurisdiction or interest.

Q

Z Kota

My question is in regard to the field of education. You said it was the prerogative of provinces. In fact you said that affairs that you have identified that are quite critical in terms of international agreements. Could you say perhaps briefly, what those fields are? Secondly, in terms of the provinces, the rich and the poor provinces, (unclear) education effects the upward mobility of the Canadians to social, economic and political spheres. Definitely those who are coming from the other provinces would have much more access to upward

A

J 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 at the national level. It's not that simple. Education is a provincial jurisdiction because it is so closely related to culture and the language. Part of the special nature of Quebec recognised in our Constitution has been that Quebec would not have joined the Confederation where the majority controlled the schools in its province. And we are living with that legacy now. We are making significant progress in co-ordinating skills training and this sort of thing, but it is a significant problem.

If we used our spending power to have substantial impact upon skills training, as we get into a fiscal crunch, our capacity to use the instrument of spending power diminishes. There is not doubt this is one area which we need to take account of all the realities, has impeded the National Government to do what it needs to do. In my judgement, the National Government obviously has to have control of fiscal policy. And real control over fiscal policy. It's not just that it nominally sets the fiscal policy, I think it has to have some influence over the spending and the taxing and the fiscal related activities of the levels of government or else its fiscal policy is for nought. It can't enforce it. In my judgement, 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, of unequal opportunity, by the social net we have put in place. The medical care programmes, legalisation programmes, some affirmative action programmes which are federally driven.

Q

Dr Rabinowitz

One of our speakers suggested that you had alluded to the failure of asymmetry. Now, is that not perhaps because you haven't recognised the asymmetry of Quebec? And I want to ask your opinion about the contrast between that and the situation in Spain where the Basque and Catalonia regions did negotiate their own special treaties with the central government, whereas the other provinces accepted the regionalist type of dispensation. It's very asymmetric but it remained stable ever since about 1970 I think, when it was negotiated.

A

J Clark

My own view in Canada, and 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 public life, politics, is not always logical. At the moment in Canada, there is not a political support for asymmetry because it is seen as special status, as giving people special advantages that are not available elsewhere. I hope we can overcome that in Canada. But as one of the most prominent spokespersons' in Canada for a less centralised federation, that has been my view for some time, my Canadian view.

I see important limits upon asymmetry. I am not unconscious of to whom I'm speaking here in this debate and I want to be very careful about my view as to how this phenomena develops in Canada. I think therefore there is a real difference that should be recognised. We should find a way to recognise it. But I think that asymmetry should be the exception rather than the rule in my country. I am not an expert on Spain or other places. There are undoubtably other places where arrangements have worked and I think as you are going through your process, everyone should take a hard look at what works and whether or not what makes it work, has an equivalence in South Africa or not. Those are the kinds of judgements you make.

My last observation to you would be (this is carrying coals to Newcastle, I don't need to say this to you), 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 will be some guidance from our success and from our failures. And from the success and failures of other places. I would not have come before you if I thought anyone would go away saying "This is the way the Canadians do it, so we should to." That would be a significant mistake. We wouldn't do that in our country. No self-respecting country would do that. We're trying to share experiences.

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 at 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.

I have tended to focus on some of the things we have done. You have asked questions about things that we do that may apply in your circumstances. Those are judgements for you to make. I should also say I think, that for my part, and I'm 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 move forward, we would like to. Thank you.

K Andrew

Thank you Mr Clark. I'm sure I speak on behalf of everybody here, as you'll see if I didn't close off the question list we could have spent many more hours. But the short time we have been able to spend with you I'm 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, 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 experience and knowledge. And we have got some mighty difficult things to sort out here and we greatly appreciate the interest that you have shown in being here today. The interest you have in fact shown in our country over very many years. 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.