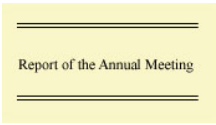
Report of the Annual Meeting
Rapports annuels de la Société historique du Canada



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Volume 7, numéro 1, 1928

URI : https://id.erudit.org/iderudit/300059ar
DOI : https://doi.org/10.7202/300059ar

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Éditeur(s)

The Canadian Historical Association/La Société historique du Canada

ISSN

0317-0594 (imprimé)
1712-9095 (numérique)

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Citer cet article

Martin, C. (1928). Sir Edmund Head's First Project of Federation, 1851. *Report of the Annual Meeting / Rapports annuels de la Société historique du Canada*, *7*(1), 14–26. https://doi.org/10.7202/300059ar

HISTORICAL PAPERS

SIR EDMUND HEAD'S FIRST PROJECT OF FEDERATION, 1851

By CHESTER MARTIN

The secret memorandum here published was drafted privately for Earl Grey, then Colonial Secretary, in 1851, it would seem, about seven years before Galt's first resolutions on Federal Union in the Canadian Assembly. While some form of union for the British provinces must have been a familiar theme since the appearance of Roebuck's project in the British House of Commons and the publication of Durham's Report, a special interest attaches to this first project of the man who as Governor General was afterwards responsible for launching Galt's larger scheme into the sphere of practical politics at the Colonial Office.

Head had been a colleague of Elgin's at Merton. He came to New Brunswick at a critical stage of provincial politics when the fishing and lumbering interests, as Elgin wrote to Grey, were inclined to play some strange pranks with Grey's pontificial doctrine of free trade and *laissez-faire*. There was much, however, in the practical, not to say mercenary, temper of New Brunswick to appeal to Sir Edmund Head's shrewd hard empiricism. He had the true Peelite's impatience of abstractions and the Peelite's discernment, too, for hard facts. Some of his opinions, had they been known, must have filled the conventional colonial tory of that day with astonishment.

"With regard to the future," writes Head, "it is useless to shut our eyes." The haunting fear of the annexation of the British provinces to the United States dominated British policy two decades before Confederation, and it is here seen without disguise. In 1783 William Knox, Under Secretary for the American Department during the American Revolution, had advised the division of the remaining provinces with an eye to "the *permanency* of their connection with this country." Head now saw that they must be united if they were not to disintegrate piecemeal into the United States. "The duty and the interest of England in this matter seem to coincide." It was a matter of duty "so to govern these Colonies as to fit them gradually for an independent existence," and it was a matter of interest to weld them into a federal system capable of forming a "powerful and independent State." The theme was a familiar one but unlike the "men of little faith" Head combined this cold calculation with a robust conviction that it was "by no means . . . . impossible that the connection should be maintained for an indefinite period." That faith was a rarer phenomenon in the middle of the nineteenth century than this generation in Canada is apt to think.

It would be easy to criticize this memorandum in detail, but a score of Head's ideas will command attention. He assigns the Post Office, currency, railways and commerce to the federal government and public lands to the provinces. The Lieutenant-Governor of each province, he assumes, would be "elected by the Colony" or "appointed by themselves" in some other way. Residuary power he assigns to the provinces—a tendency of course

which the Fathers of Confederation deliberately set themselves to reverse. He disapproves of the Judicial Committee of the Privy Council as a "living interpreter" of the constitution because "it sits in England." The Colonial Secretary, too, no matter what the merits of the case, would be charged with "caprice and arbitrary dictation." Head advocates a "High Court" of the most august character to sit in Canada and command the highest legal talent in British America.

Second chambers would be unnecessary for the provinces since many of their functions were to be transferred to the federal government. The service of the new federation would open to British America a "wide field for ambition and distinction." In a rough draft on the "Union of Colonies" —obviously of later date—Head proves with cold and deliberate calculation the "impossibility of getting rid of them prematurely even if desired." To permit designedly "such dissatisfaction as would induce their populations to seek or demand a separation" would be "weak & wicked. It w[d]. imply bad faith"; and he adds his own personal conviction that Britain would be recreant alike to honour and to her own interest if she did not foster in these young and growing colonies "the feeling that a national destiny of their own is before them. The tie of allegiance to the British Crown may, it sems to me, last for an indefinite time . . . . It is one in which they feel a pride: it suggests no humiliation and it inspires no bitterness." "We are yet smarting (he adds) from the results of a course of action which created such sentiments in the last century."

With an eye to "practical politics" Head was quick to see the advantage of British institutions both in effecting and in maintaining the proposed federation. The baffling problem of state sovereignty which already overshadowed the American Union and was soon to precipitate a devasting civil war could be avoided by utilizing the happier conventions of British constitutional development. The Gordian Knot could be cut by the simple expedient of a British Act of Parliament. Thus for Confederation, as for responsible government, the British experiment could escape the fatal disabilities of the American by retaining vital contact with the flexible empiricism of the British constitution.

The "tolerant moderation" which Head invokes for a British American federation carries him far beyond the limited vision of his own day. While he contemplates as yet a federation of but five provinces—Upper and Lower Canada, New Brunswick, Nova Scotia and Prince Edward Island—he is prepared to endow them with national attributes of remarkable scope and significance. All those expedients which "foster a sentiment of union should be studiously attended to." Their currency "should be one & the same in all the Provinces & they should have a mint of their own." "Their flag should be a modification of that of England—the Union Jack with a difference of some sort." Might not a federation acting thus in union "gradually develop & cherish a feeling of united interest & feel a joint pride in the name of 'British North America' as their common Country?" Only thus would "the end be accomplished of raising up on this side of the Atlantic a balance to the United States—a power so united as never to be absorbed piecemeal & so important in itself as to take an independent position." "The wish on the part of England to restrain their Colonies by force has long ceased to exist and the great object seems to be to offer in time such terms as will place on a more solid footing their connection with Great Britain & relieve themselves & the Empire from the constant agitation in favour of organic changes."

A word must be added with regard to the text. Head's handwriting is perhaps the most execrable to be found among the official papers of that day—worse even than Buller's. The final memorandum must be in existence somewhere among the Grey papers at Howick; the text here published is taken from the original draft in Head's worst handwriting. The quickness of his mind may be inferred from the forthright speed at which the thirty odd pages of the manuscript were obviously written. Splashes of ink and corrections teem upon the pages with all the exuberance of Head's own ideas. Many of the readings are somewhat problematical, but where serious doubts exist I have indicated them in the footnotes, together with a view of the original readings where subsequent corrections have proved illuminating.

The immediate occasion of this memorandum must remain for the present a matter of conjecture. In many respects Head has been underrated. His contribution to Canadian history has been obscured perhaps by his somewhat prosaic but signally successful administration in New Brunswick and by the fact that in Canada he followed the more spectacular and epochal career of Lord Elgin. Many of the "conventions" of responsible government however received their final recognition at his hands. At a time when even John A. Macdonald was "squeamish" with regard to political methods in Canada[1] Head kept his confidence in the outcome more or less unruffled. In the fragmentary notes, already referred to as belonging to a later date, there is still more resolute program of "national destiny" for a "Union of Colonies." The only hope (he still believes) seems to depend on the existence in British North America of such self importance & self reliance as could give these colonies the power of standing alone & could make their pride shrink from becoming an appendage to any other sovereign power. Our aim should be to teach them the value of Parliamentary Govt. on principles similar to those adopted in Gt. Britain & to let the forms & the substance of our Constitution come to maturity in this part of America under the shelter of the Crown . . . . They should stand in conscious strength and in the full equipment of self Govt. as a free people bound by the ties of gratitude and affection."

[Transcript]

Endorsed: "This is the Draft of a Mem^{m} on the Gov^{t} of the N.A.C. sent privately to Lord Grey. 185r. E.H."[2]

It is impossible for any man of common intelligence and education to be familiar with the details of gov^{t} in the British provinces of North America without feeling that the present state of things is more or less provisional. This condition of affairs is mischievous in every way: it is mischievous to the colonies both in a material & a moral point of view & it is mischievous to the Mother Country.

The mischief to the colonies consists in a constant feeling of impending change & in a sence of uncertainty which sets men speculating on

[1] Campbell (Macdonald's partner) to Macdonald, March 8, 1855: 'You were never so despondng . . . . as before and during the last campaign . . . . the disgusting electioneering arts you felt compelled to resort to.—*Macdonald Papers*, Public Archives.

[2] *Head Papers*, Public Archives of Canada. The '1' in the date is superimposed upon the beginning of another figure in such a way as to resemble a '4' in any other script than Head's. The watermark however is 1849, and Grey left the Colonial Office in 1852. I have had the great advantage of Professor W. M. Whitelaw's opinion in favour of the earlier date.

all sorts of organic and constitutional changes whilst they neglect the obvious interests of a material character open to them on every side. The old colonial system has fostered the notion that the government is to do everything. The colonists have become convinced that the Gov^{t} in England are neither inclined nor able to thwart them, but they always hope to extort something more by importunity and they have not yet learnt that their own ultimate prosperity must depend on their own exertions. A succession of popular agitators can always persuade them that if they are not prosperous it is the fault of the gov^{t}. It is far easier to encourage and adopt this belief than to suggest or make the first efforts towards the real sources of prosperity and wealth. A cry agst the Colonial Office is the stock in trade of such men. There is a feeling too analogous to that which was expressed in Ireland by the phrase ' England's weakness is Ireland's opportunity.' If trouble breaks out in Canada the lower Provinces will, I fear, now be always ready to swell the cry & profit by it if they can.[3] It may be assumed therefore that it is inexpedient, if not impossible, to allow the N.A. Colonies to continue permanently on their present footing.

With regard to the future, whether that future be arrived at gradually or suddenly, several suppositions present themselves to which it is useless to shut our eyes.

These Colonies may ultimately continue in allegiance to the British Crown or they may not.[4] If they remain British dependencies they may hold that character as separate states or as one state of which the several parts should be more or less closely united by something in the nature of a federal tie. I confess I doubt how far their separate existence as single Colonies dependent on Gt. Britain can be secured if the present condition of things continues very long. If they cease to bear allegiance to England then they must be merged in the American Union or they must become independent. That they should maintain their independence singly is hardly conceivable; that they should do so if formed into one compact and United body does not seem absurd especially when the natural and internal sources of division between the north and south of the U.S. are taken into account.

The duty and the interest of England in this matter seem to coincide. It is her duty so to govern these Colonies as to fit them gradually for an independent existence if the tie with the Mother country be severed; and it [is] her interest in that case that such an independent existence should be given them as will not allow them to swell the strength and influence of the United States.

It would injure the moral dignity of England most severely to allow the great Provinces of B.N.A. to drift away from her as a mere consequence of discontent engendered by squabbles and disputes relating to the mode of their Government. It would injure her still more deeply to allow the force of these Colonies and the advantages of their military position their trade and their shipping to be transferred by any process to the Government of Washington.

It is a great misfortune that in Parliament and elsewhere Englishmen talked of this contingency as a result which was predestined. I for one

[3] An opinion based no doubt upon Head's observation of the 'fishing bounties' controversy and the preliminaries of reciprocity in the 'loyalist' province of New Brunswick.

[4] Crossed out from the original draft is the statement more than once subsequently repeated by Head in other forms: 'I for one am far from thinking this a desperate hope.'

by no means consider it impossible that the connection should be maintained for an indefinite period.

Is it then possible to devise any system which could employ the common allegiance borne by the Colonies to Great Britain in such a way as to bind them together one to the other until as time advanced and their powers of self gov^{t} were matured they might if they did separate be ready to assume as a whole, the bearing of a powerful and independent State?

Any such result would at once secure the interests of England and the ultimate prosperity of the Colonies themselves.

Would it be practicable, then I repeat, to unite the B.N.A. Colonies by anything in the nature of a 'federal' tie; by a system which whilst it yet acknowledged the supremacy of the British Crown should assign to a general gov^{t} and to the Local Gov^{ts} respectively all powers of self control consistent with such supremacy?

Any such bond or tie would not be strictly speaking of a 'federal' nature inasmuch as it would not consist of a league of independent states. Indeed the doubt whether the constitution of the United States is or is not strictly speaking in the nature of 'Federal' league or compact is yet a grave practical question and one at this moment especially pregnant with important consequences. It has been argued that if the Union be in its essence a league of independent States, Alabama or S. Carolina may or will withdraw from the compact and release the other parties. Accordingly Story[4a] lays great stress on the enacting words of the Constitution 'We the people of the United States do ordain and establish this Constitution' (not 'We the people of each state concurring in a league or treaty') as if the Union was 'de facto' existing before the Constitution and the power of the people as exerted in its establishment was exercised in this collective capacity. Now it is remarkable that the relative position of the Governments of these Colonies and of the British Crown would lend itself readily to a plan which would at least avoid these theoretical difficulties.

The Sovereignty of the Queen of England is acknowledged: a written Constitution uniting for certain purposes these Colonies would be in the nature of a Charter and might be established by act of the Imperial Parliament. Any Court duly authorized could decide what questions belonged to the competency of the Imperial Gov^{t}, the 'Federal' Gov^{t} or the Gov^{t} of the several States or Colonies. In this respect therefore we have in our hand an 'à priori' mode of solving theoretical difficulties which yet exist in the Constitution of the United States of America.

I do not mean by this that the assent of the several Colonies to any such Constitution would be unnecessary, but within a given time I believe they would receive with satisfaction any plan which left them a proper share of local self government and defined that share by a written Constitution interpreted by the decisions of an impartial court. Physical obstacles no doubt exist which perhaps would only be removed by the construction of such a work as the Halifax and Quebec railway, though I doubt if these difficulties w^{d} be even now insurmountable. The chief difficulty would be the nature of the tribunal which should be the living interpreter of the Constitutional Law as between England and the Colonies and between the several Local Gov^{ts} of these Colonies.

[4a] Joseph Story, 1799-1845, judge of the Supreme Court of the United States; wrote *"On the Constitution of the United States"* and many other legal works.

The requisites for the successful working of any such scheme would seem to be—

1. That the relation to England should be subject to as little strain and be as little galling as possible and should therefore be limited and strictly defined.

2. That the functions of the 'Federal' Gov^{t} should be strictly defined in its relation to the Separate Gov^{ts}.

3. That the residue of all powers neither reserved by the Mother Country nor handed over to the Federal Gov^{t} should be expressly left to the Gov^{t} of each separate Colony.

In the first place with reference to England it is obvious that unless some reservation of powers be made and unless their power could be habitually exercised, the link between Great Britain and the Colonies would be practically null. Rather than concede this indirectly it would be better openly to cast off the responsibility of fighting and negotiating on behalf of the Colonies and thus in fact to leave them to merge as they could in the United States or become nominally and prematurely independent. If the Mother Country is to exercise any control at all, the Sovereign control of war and peace and consequently the exclusive power of making and interpreting Treaties, which was in the 'ultima ratio' for enforcing must rest with her. As a further consequence from this the British Crown must, I conceive, claim the control over the general principles of Commercial Legislation, so far at least as relates to Foreign Powers and to other Colonies.[5]

The Crown too as the guardian of Justice should perhaps not allow the salaries of Judges of the Supreme Courts, to be touched during the incumbency of the present holders of seats on the Bench.[6] Now supposing that such limitations of the respective powers of the Colonial Gov^{ts} and the British Gov^{t} were embodied in an act of Parliament framed on a draft approved by the Colonies still the practical difficulty would necessarily arise whenever power were exercised in a specific case by one party which appeared to trench on the rights reserved to the others. Without a living interpreter, whose decisions were such as to command respect and acquiescence, like those of the Supreme Court of the United States, the difficulty would be essentially the same as it now is. One of the great evils of the present state of things is that the decision of the Secretary of State whether a reasonable case for interference does or does not exist, is always a decision in an individual case and looks like a decision in his own favour when he brings H.M. prerogative to bear upon it.

The Colonists consider the point as decided against them 'ex post facto' and though a principle may be involved in the decision they always assume that the principle is put forward to justify this particular exertion of power. Such a mode of exercising the control wants in their eyes the à priori generality which is one of the main characteristics of Law. The propriety or impropriety of the conclusion arrived at is secondary and there is always a disposition to talk of 'caprice and arbitrary dictation'.

[5] It proved one of the most remarkable features of the *B.N.A. Act* of 1867 that the relations between the Dominion and the British Government were left to adjust themselves by the unwritten conventions of the constitution as the occasion should arise. It was under Head's own governorship in 1859, that the Newcastle-Galt controversy terminated the 'control over the general principles of Commercial Legislation' by the Colonial Office.

[6] Original draft: 'The Crown too shd. reserve to itself the appointments of the Judges of the Supreme Court & should not allow their salaries to be reduced without its consent or during . . . .'

Another characteristic of Judicial power besides its generality is that it does not interfere voluntarily but the case is brought before the Court: the tribunal must be called into action by some party interested in the cause.

There appears to me to exist in the English and American mind one tendency the result no doubt of long submission to Law which is eminently useful in fitting men for Constitutional Government and this is the constant disposition to turn every thing into a point of law. There is among men of our race an aptitude for allowing political strife and agitation to evaporate in a judicial form, when other nations would be thinking of barricades and actual violence. We are ready to assume that the law is equal if it be not made for the occasion but laid down in general terms beforehand: the only question would be whether any particular case does or does not come within the terms of the Law.

Would it then be impossible for Great Britain in her relation to these Colonies to turn this most valuable tendency to account and instead of the sort of irritating notion that they are constantly liable to be interfered with to subsitute in the Colonies a recourse to a judicial decision as to the extent and meaning of the words of a written Constitution?[7] I confess I cannot see why the difficulty may not be met.

A preliminary objection may however be made. If the Queen's authority is to be recognized as paramount whence is the compentency of any such Court to be derived? Must not the British Crown[8] in exercising the supreme power judge in the last resort what cases are properly within its own jurisdiction and control?

To this I will only answer that a similar difficulty exists in the Law of England itself and has been readily evaded as we see every day. When the Crown grants a municipal Charter it does in effect grant a written Constitution of a limited and particular kind. It ties its own hands prospectively. When a case arises for instance between the Queen and the Corporation of London as to the——[9] it is argued in Westminster Hall—theoretically no doubt in the Queen's Own Courts and therefore before one of the parties, but practically before the Judges. All parties acquiesce in the decision. The question at issue is simply whether the Crown has by charter parted with a certain portion of the Prerogative. What difference is there in principle between such a case & a question which may arise as to the limit of the Queen's power to interfere with a Colonial Act? A subordinate gov^{t} and a municipality differ perhaps mainly in the point that the former must be supposed to possess all powers not expressly taken away whilst the latter would be deemed to hold no power which had not been expressly granted or which must be presumed from lapse of time to have been so granted. The burthen of proof is in favour of the subordinate gov^{t} and against the Municipal Body.

I can therefore see nothing derogatory to the dignity of the Crown in allowing questions as to the relative extent of Constitutional powers given or reserved to be determined by a Court.

The next question is a much more difficult one—can any Court be so constituted as to secure respect for its decisions and convey to the inhabitants of the Colonies a conviction of its impartiality?

[7] Original draft: 'It is true that all written limits of Constitutional power are necessarily vague & therefore without a competent court often useless.'

[8] Original draft: 'and the British Parl^{t}.'

[9] Illegible.

It has been I know suggested that the Judicial Committee of the Privy Council would be a fit and proper tribunal for determining constitutional questions of this kind. I think there is one strong objection to it and that is that it sits in England. Of the competence and impartiality of such a Court there could be no doubt but a vague feeling that the decision which ousted them of their rights (as the Colonists would say) came from the Mother Country would at once destroy half its weight. The decisions of such a court might embarrass the Gov^{t} without satisfying the public.

What obstacles would there be to [a] 'High Court' consisting (say) of three or five persons with the rank of Privy Councillors to the Queen, holding office as Judges during good behaviour & sitting at Quebec? It is perhaps questionable whether all should be lawyers but however this were left, by associating to themselves the Chief Justices of the several Colonies they might in addition to their Constitutional functions constitute what is very much wanted in B.N.A.—an effective Court of Appeal & thus incidentally be of great use to the Colonies themselves.

Such a tribunal might be made to command respect from the rank, ability & independence of its members & it appears to me that if they sat in the Colonies their decision on the constitutional question whether such or such a bill were within the competence of the Imperial, the Federal, or a Local Legislature would be free from all appearance of arbitrary or capricious interference of an external character.

Such a Court would derive its authority from a source confessedly paramount to all the Colonial Governments both Federal & Local. The only theoretical anomaly would be that it might be said to derive its power from one of the parties who might come before it but this is an anomaly I have already said with which the Law of England is familiar.[10]

Very much would depend on the character & position of the men composing the 'High Court'. They should as a matter of course be paid from England & not by the colonies & should hold office like the English Judges during good behaviour. I see no reason why their decisions should not then have as much weight as those of the Judges at home. If they acted indeed as a Court of Appeal Colonies might reasonably contribute a part of the salaries & would I believe willingly do so.

The next point to be considered is the mode in which such tribunal would work with reference to constitutional matters.

The Legislation of the United Colonies would divide itself into three classes of acts.

1. Acts *federal or local* which according to the Constitution professedly required the Special Consent of the Queen in Council.
2. *Federal Acts* not professing to require such assent.
3. *Local Acts*—not professing to require such assent.

The first class of Acts should not be sent home by the Gov^{r} Gen^{l} until the High Court had endorsed upon them their opinion that such assent was constitutionally requisite. The second class of Acts would be assented to by the Gov^{r} Gen^{l}. The third Class would be assented to by the L^{t} Gov^{r} of each Colony; but they should be submitted to the Gov^{r} General & if he or the Federal Legislature thought fit they sh^{d} be laid

[10] In original draft: 'The Supreme Court of the United States discharges functions of this same character and in theory derives its authority from a source superior both to the Local & Federal Gov^{ts}.'

before the High Court for the judgment of the tribunal as to their Constitutional character. With a 'Federal Act' the Gov. Gen[l] might, perhaps, in a case of doubt take this course before giving or refusing his assent which he wd. do according to the advice of an Executive Council responsible to the 'Federal' Legislature. If 'the High Court' determine that the act or bill did not constitutionally require H.M. special sanction then it should be or might become law.

If they disallowed the Act or bill as unconstitutional, it would be null—but if it went home to be submitted to the Queen it wd. only be when H.M. rights to assent or dissent had been established by a Judicial decision.

It would be open to any person or to the Legislature of any Colony being a member of the 'Federation' to question the Constitutionality of an act of a Local Gov[t] & for any Local Gov[t] to question the constitutional character of a Federal Act, but no act once certified as Constitutional would be again called in question.

The position of the Governor General is the next subject which claims attention. He as H.M. Representative w[d] be the head of the Federal Legislature & the Federal Executive. There should be a Lt. Gov[r] of each separate Colony who should preside over the administration of that Colony so far as such administration were constitutionally left to the Local Gov[ts]. If such Lt. Gov[r] were elected by the Colony he ought to be paid by the Colony at a fixed rate which could not be altered during the term of his holding office. The Gov[r] Gen[l] on the other hand (and the Lt. Gov[r] if appointed by the Crown) ought to be paid by England only.

The Federal Legislature might possibly not be required to meet every year: once in two years might be sufficient. The Customs duties, Commerce so far as was not reserved to the Imperial Gov.[t], the P.O., the Currency & perhaps the great leading lines of Railroad & Canal should be subject to the Federal Legislature & the Federal Executive alone.

The Local Government would transact the business of each separate Province so far as the powers of the Imperial & Federal Gov[ts] did not expressly exempt the subject matter from their control. They would regulate all the details of Schools, Byeroads, & the ordinary administration of Justice. All that was not given to the Imperial Gov[t] or the Federal Gov[t] would belong as a matter of course to the Local Legislature. The Courts of Justice should be separate in each Province, subject to——[11] an appeal as I have described above. The process civil or criminal of the lawful authorities of one Colony in an individual case should be required by the Constitution to be endorsed by the authorities of another and should then run in that other. The 'High Court' would as a matter of course discharge no functions except those of a Constitutional or Appellate character. When in any court of original jurisdiction a question of the Constitutional character of a Prov. or Federal Act arose, a case might be granted & the points of Law argued in the 'High Court' wh. shd. be alone competent to decide it.

I conceive that such a Gov.[t] as I have described would not be a cheap Gov[t]. The Produce of the Customs, the P.O. and some other sources of general revenue would it is presumed go to the Federal Treasury but it might possibly be expedient to leave to each Province a proportion of the Customs duties levied in it. At any rate the Federal Gov.[t] & Federal Legislature would hardly require the whole produce of this revenue as

[11] 'Such.'

they would have no Army or Navy to pay. The barracks——[12] and Ordnance buildings as well as expense of organizing the Militia would it is presumed be paid by the Federal Gov^{t} & the Executive control over these matters would be in the hands of the Federal Gov.^{t} & the Gov^{r}. General only. The debt of each Colony at the time of forming the Union wd. be a matter to be adjusted by special arrangement. One thing must be recollected. All schemes which profess to leave a large share in their own Gov.^{t} to the Colonies themselves assume tolerant moderation on the part of the People of England. If the Colonies manage their own affairs they will often do things which public opinion in England would not justify in support—but what then? Two communities at the distance of England & N.A. cannot always agree in their views of a given question & the English people in making up their minds to concede free action, concede the power of differing. Let the sphere of action of each be defined as well as it can be. The great point is that the Colonies should not profess to feel that their discretion such as it is, is liable to be encroached on after a measure has been adopted and under circumstances which offered a pretext for an outcry about capricious and arbitrary interference. It is possible that if the functions of the Local Govt^{s} were thus controlled one House might be sufficient for the Legislature of each separate Colony. In this case however the Constitution itself should prescribe certain forms & interpose certain delays in the passage of measures through this one House. Standing orders of their own making are always liable to be dispensed with when the popular cry demands a thing to be done. Forms prescribed by the Constitution should only be dispensed with with the consent of the Gov^{r} General even if this power were necessary or expedient which may be doubted.

The "Federal" Gov.^{t} should certainly consist of two Chambers & I think the principle of the United States Senate should be observed in the Constitution of the second of these two—so far at least that its members sh^{d} be delegated not by the people of each Colony but by the Legislature.

The members of both 'Federal' Chambers sh^{d} be paid from the Federal treasury. One great objection to a 'Federal' Legislature of this kind with limited functions is that such a body might not have any very great quantity of business to transact & being thus circumstanced might employ its spare time in mischievous agitation. I admit this objection but I think it might be partially guarded against by making it necessary for them to sit only once in two years or by limiting in the Constitution the duration of the sitting. The Gov^{r} General too sh^{d} have the power of dissolving either the 'Federal' Legislature or any one of the Local Legislatures, if he deemed it necessary.

If the Lt. Govr. of the separate Colonies were appointed by themselves, all correspondence with the Secretary of State sh^{d} be carried on through the Govr. General which w^{d} I imagine simplify the business in the Col. Office.

The 'Federal' Legislature should alone possess the power of regulating the currency pledging the Provincial faith by the issue of debentures or bills of any kind. At any rate their assent wl^{d} be indispensable to any such charges on the resources of a single Colony.

I repeat that I do not think this Gov^{t} would be on the whole a cheap one. Each Colony would have the expenses of its own internal Govt. to defray & the cost of the 'Federal' Govt. would be apparently so much

[12] Illegible.

extra. But on the other hand the temptation to jobbing & ——[13] would be infinitely less than it now is out of the surplus revenue of many of these Provinces & local demands would have to be met by local taxation.

One great source of discontent at any rate would be done away with. A wide field for ambition & distinction in the 'Federal' Legislature would be open to the inhabitants of all the associated colonies & the 'High Court' would probably gather round it an able & efficient bar drawn from the several Provinces amenable to its jurisdiction. It may be said "If the 'High Court' consisted of members selected by England & paid by the Crown would their decisions be respected as impartial in the Colonies?" I think they would bear this character if the members were properly chosen & being domiciled in the Colonies were known to hold office during good behaviour. Much no doubt w[d] depend on the character which their decisions acquired.

Let us take a supposed case to illustrate the working of such a system. One of the Local Legislatures might pass an act indirectly impeding the foreign commerce of the Country. When the acts of the session came from the Lt. Govr. to the Govr. General, the latter would submit this act to his legal advisers & acting on their advice he would lay it before the 'High Court.' This tribunal would decide on the issue whether the act did or did not trench on 'Federal' or Imperial rights. As a precaution a provision might be inserted in the Constitution that no Local acts shd. come into force until six weeks or two months after they were laid before the Gov. General. The Gov. General shd. have no direct power of assent or dissent and if he did not test the constitutional character of the Act within a given time it should be liable to be impeached only on the suit of a party interested whether that party were the Legislature of another State or the 'Federal' Legislature or a private individual aggrieved by such Legislation.[14] I have not enumerated among the powers of the 'Federal' Govt. the control over the sale of public lands & I think upon the whole that this would be best left to each separate Colony. All attempts to enforce a high price for waste lands or carry out strict conditions as to their settlement must be null in B.N.A. so long as the nature of the Country & the state of public opinion continue to favour "squatting."

The 'Squatters' or unauthorized occupants of public land in a country containing large tracts of uninhabited forest will always be a difficult race to deal with; if a man so squatting knows that he can practically in the end get his land for nothing he will not pay a high price for a legal title at the outset. Upon the whole therefore I think the better plan would be to leave each separate Province to deal with its own waste lands as its own estate & make the most they can from them—except perhaps where lines of railroad or canal are to be carried through them.

Any such scheme as I have roughly sketched would probably make the 'Federation' consist of Upper Canada, Lower Canada, New Brunswick, Nova Scotia & Prince Edward's Island. The most convenient seat for the Federal Gov[t] would in this case be Quebec and the burthen of the attendance of the paid Representatives of these Colonies for a limited time once in two years or even once a year would not be very great.

One incidental advantage of such a 'Federation' would be that the distinct Laws of Upper and Lower Canada as affecting the Clergy, the tenure of land, and other matters, would be regulated by their separate

[13] Illegible.

[14] In the original draft: "On the other hand the Gov. Gen[l]. if he doubted the Constitutional character of such an Act might refer it for the opinion of the 'High Court.'"

Legislatures whilst, in all that concerned the relation with Great Britain, the French interest would be in a minority in the 'Federal' Government.

With regard to the pecuniary burthen on England it would not amount to much—£8000 or 10000 would probably pay the members of the 'High Court' and this with the Govr. Genl's salary & that of his staff would be the only expense necessarily falling on the Imperial Treasury. On the other hand the expense of barracks & military stations (with the exception of fortresses like Quebec & arsenals such as Halifax) should fall on the Colonies collectively.

But after all if the risk of disturbance & rebellion with the chance of embarrassment arising in time of war from doubtful allegiance on the part of the Colonists be got rid of this would more than compensate to England for any such trifling burthen.

Might it not be hoped that a body of Provinces acting thus in union would gradually develop & cherish a feeling of united interest & feel a joint pride in the name of 'British North America' as their common Country? And if this were the result would not the end be accomplished of raising up on this side of the Atlantic a balance to the United States—a power so united as never to be absorbed piecemeal & so important in itself as to take an independent position if at any time hereafter the remaining ties with Great Britain should be severed? With a view to create such a feeling all those subordinate matters which foster a sentiment of union should be studiously attended to—their flag should be a modification of that of England—the Union Jack with a difference of some kind. Their money should bear the Queen's head but it should be one & the same in all the Provinces & they should have a mint of their own. They should be spoken of always officially as 'British North America.'

All these things are small in themselves but their aggregate weight is considerable in guiding men's thoughts & creating prejudices one way or the other.

It may be said—"But if this —[15] of Union were created might they not become too powerful for the Mother Country to deal with? The answer seems to me to be—The whole question is one presenting a choice of evils. They are formidable now to England though detached from each other because each Colony is on the watch to extort what it can from the Imperial Govt. & by no means scrupulous in availing itself of the opportunity afforded by the discontent or disturbance of its neighbours. They possess already in troubled times many of the elements of power for evil but in ordinary circumstances they are powerless for good. The wish on the part of England to restrain their Colonies by force has long ceased to exist and the great object seems to be to offer in time such terms as will place on a more solid footing their connection with Great Britain & relieve themselves & the Empire from the constant agitation in favour of organic changes.

One most important question remains. How would such a measure be laid before the Colonial Govts with any chance of their concurrence?

Probably the most feasible scheme would be to submit to the Local Legislatures as now constituted some four or five propositions enunciating the principal features of such a scheme—asking them to consider these principles & if they assented to their general tenor to appoint two delegates from each branch of their Legislatures who should confer with one

[15] Illegible.

another & with a Royal Commission empowered to frame with their assistance the draft of an act of Parlt. to be considered by the Imperial Legislature.

The principles wh. it would be essential to lay down wd. be—

1. That the army & navy & diplomacy shd. be in H.M. hands and shd. be paid by England.
2. That the general principles of Commercial Legislation as affecting foreign powers shd. be subject to Imperial control.[16]
3. That certain matters of common interest to all the Colonies shd. be regulated by a 'Federal' Govt.
4. That all powers not reserved as above shd. remain in the Local Legislatures of each separate Colony, the form of which shd. be definitively settled by the Constitution and subject to amendment only on an address from the Colony & the Federal Legislature.
5. That a Court shd. be created competent to decide on the constitutional or unconstitutional character of all acts whether federal or local.
6. That the Federal Constitution when so framed & sanctioned by the British Parl[t] shd. not be altered or amended (say) for 10 years & then only on address from a majority of the Colonies & by a delegation & commission as before.[17]

The views set forth in this memorandum are professedly crude & undigested. They may appear to more experienced statesmen to be utterly impracticable & visionary. I have put them on paper with the utmost mistrust of my own competency to discuss such a question & with no pretention to do more than suggest them for the consideration of others.

[16] In both these respects Elgin's judgment was more discerning. He rejected Durham's 'line of demarcation' between imperial and provincial interests and could 'see nothing for it but that the Governors should be responsible for the share which the Imperial Government may have . . . . with the liability to be recalled and disavowed.' Walrond, *Letters and Journals of Lord Elgin*, pp. 111, 114.

[17] Here also Head's suggestion proved abortive, for the amendment of the *British North America Act* of 1867 was left in abeyance. It is noteworthy however that the sanction of the British Parliament in Head's project is purely perfunctory.