CORRESPONDENCE

A Time for Change?

TO THE EDITOR:

The members of our Association are indebted to Mr. A. M. Laidlaw for his timely paper in the February issue, "The Canadian Bar Association: A Time for Change?". Few men have so intimate a knowledge of the Association's affairs as Mr. Laidlaw, and he is to be complimented upon his analysis and recommendations.

With all due appreciation to those who have served the Association in the past, it is quite apparent that there is a limit to voluntary effort. If we expect the Canadian Bar Association to reflect the views of the Canadian lawyer and to do it effectively from one year to the next, we cannot continue to place the full responsibility on the shoulders of men whose main duties are in the representation of private clients and who can only devote, often at great personal sacrifice, such time as may be left to the affairs of the organization.

Unlike Mr. Laidlaw, I do not regret the attitude of the many Canadian lawyers who say, "What has the Canadian Bar Association done for me or what will it do for me?" (page 172). Rather, I think the fact that the question is asked is a healthy sign. In my view, the only excuse for the existence of the Association is that it reflects the views of the 11,500 lawyers in Canada and is prepared to speak on their behalf with courage and efficiency. There are so many things the practitioner cannot say or do on his own behalf and that can only be said or done by the organized bar. In many respects the national association is best suited for this function, although it can be discharged partially by provincial and local associations.

Three subjects will serve to illustrate the fields in which only the organized bar can act. The first is public relations. Lagging woefully behind our sister organization, the Canadian Medical Association, we have done no more than scratch the surface. Thirty-five years ago the medical profession began its efforts to arouse an interest in preventive medicine; today there is a wide public consciousness of the need. Preventive law is still in its in-

fancy; in some areas it has not even been born. Much has to be done if the public are to understand the lawyer's story, to be made aware of their legal problems and how the lawyer can serve them. Public attitudes are facts. It is no use deploring our poor public relations and excusing them on the ground that they are due to misunderstanding. We know that public opinion can be changed, but first we in the legal profession must change. Here the Canadian Bar Association can give the necessary leadership. It can undertake on our behalf a programme of public information that no individual lawyer could, or would be permitted to.

Secondly, there is the field of continuing education. The programmes of the last few years in Ontario and elsewhere demonstrate that the practitioner is keenly interested in keeping his techniques up to date and in learning new ones. Continuing education should not be restricted to bar meetings. It must and can be carried on continuously throughout the year. In Canada we can duplicate the wonderful work of the American Law Institute, the Practising Law Institute and the American Bar Association, and make available to the practitioner a wide variety of programmes. The Canadian Bar Association is eminently suited for this work.

Thirdly, a permanent committee on law reform is needed in most provinces. More than anyone else in the community lawyers see where the law is defective. We call ourselves the custodians of the rights of the people and in our organizations pass resolutions asking for legislative action. The executive currently in office presents them to the government then in power. Sometimes relief is obtained; more often it is postponed. If the organized bar is to serve the public by improving the law, it will require the machinery to follow up proposed reforms energetically. It is surprising how many resolutions calling for reform are passed and forgotten, only to be brought up at some subsequent meeting and argued about all over again. The Association must not be merely a resolution-passing organization. We cannot let our resolutions be pigeon-holed.

The foregoing are only illustrations of what must be done by the Canadian Bar Association if it is going to satisfy its members that something is being done for them. The field of service is unlimited. The essential work cannot be done on a part-time basis by busy lawyers. Their rôle is to assist those who will be devoting their full time to the Association's objectives. In my opinion the opportunities for service to the public and the practising lawyer can never be grasped until, as Mr. Laidlaw suggests, the Association has a full-time director with an adequate staff. Those who believe it cannot be done should study the workings of the Canad-

ian Medical Association. Our sister profession has shown us the way.

EDSON L. HAINES*

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The Torrens System in Alberta: A Correction

TO THE EDITOR:

I wish to draw to your attention an error that by inadvertence crept into my article on the Torrens System in Alberta, which appeared in the January issue of the Review. At the top of page 32 I indicated that it is doubtful whether a petroleum and natural gas lease is registrable. I should have stated that the doubt was removed on March 29th, 1956, when an act of the legislature of the province of Alberta received the royal assent.

The full title of the act is "An Act to Remove Doubt as to the Meaning of the Term 'Lease' Under The Land Titles Act" and the short title, "The Land Titles Act Clarification Act" (5 Eliz. II, c. 26). It deals with documents which are called petroleum and natural gas leases but which, because of their nature, do not truly fit into the category of what are usually called leases.

The body of the act reads as follows:

> 2. It is hereby declared that the term 'lease' as used in *The Land Titles Act* and any Act for which *The Land Titles Act* was substituted includes, and shall be deemed to have included, an agreement whereby an owner of any estate or interest in any minerals within, upon or under any land for which a certificate of title has been granted under *The Land Titles Act* or any Act for which *The Land Titles Act* was substituted, demises or grants or purports to demise or grant to another person a right to take or remove any such minerals for a term certain or for a term certain coupled with a right thereafter to remove any such minerals so long as the same are being produced from the land within, upon or under which such minerals are situate.

I regret that this error should have occurred.

IVAN L. HEAD†

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Prerogative Powers of the Head of the State

TO THE EDITOR:

Professor Mallory's remarks in your February issue on Professor McWhinney's "comment" on the procedure to be followed if a

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Prime Minister dies, or resigns because of ill-health, leave little to be said. But even if Professor Mallory were wholly wrong, I venture to suggest that Professor McWhinney's proposal is by no means so simple and sufficient as it looks.

Professor McWhinney would have the Governor General call on "the senior ranking Cabinet Minister" or, "perhaps, some elder statesman, not himself a candidate for succession to the party leadership", to head a "caretaker Cabinet" until the party in power could choose a new leader. This might be all very well in Britain or Australia, where choosing a new leader is a matter of days. In Canada, where parties now insist on choosing their leaders by national conventions, it would take months. So the "caretaker", here, would hold office for a considerable time, during which he might wreak havoc. Our one experience of making the "senior ranking Cabinet Minister" Prime Minister was not a happy one: Sir Mackenzie Bowell wrecked his party. A second Bowell, even if in office only a few months, might, in these troublous times, do as much or worse.

One apparent advantage of Professor McWhinney's plan, that it would reduce the area of the Governor General's discretion, is more apparent than real. The Governor would first have to choose between the "senior ranking Cabinet Minister" and an "elder statesman". If he decided on the latter, he might have some trouble finding him, except perhaps in the Senate. Then he would have to choose among the several possibilities there. When he had chosen, he might well find that neither the party nor the country would tolerate a senator as Prime Minister, even for a few months. The Canadian Senate is a very different matter from the Australian, and our last experience of a Prime Minister in the Senate (Sir Mackenzie Bowell again) was not a happy one.

EUGENE FORSEY*

TO THE EDITOR:

Professor Mallory's letter in your February issue represents a clear and thoughtful statement of what may be described (without any derogatory implication) as the "traditionalist" view of the present-day scope of the powers of the Head of State (the Queen or Governor General, as the case may be) in the commonwealth countries.

In outlining my views on the general question of prerogative powers in your January issue, I was not of course reacting *ad*

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hoc to the circumstances of the recent succession as Prime Minister to Sir Anthony Eden; for (as I indicated by a footnote reference) I had formulated my general propositions on the constitutional trend in the commonwealth countries towards limitation or elimination of prerogative powers in a discussion several years ago for Asian students, who were then somewhat concerned at the exercise by the Head of State in Pakistan of claimed prerogative powers as to dissolution, if need be against the wishes of the Prime Minister of the day, and as to selection of members of the Cabinet and allocation of major portfolios within the Cabinet. Understandably enough, many Asian students felt that these actions by the Governor General, in spite of his conceded personal integrity, were quite anachronistic, being more in keeping with the intellectual attitudes and practices of the former viceroys than with the present era of independence and responsible government.

The differences here between Professor Mallory and Dr. Forsey (whose letter in this issue I have seen before publication), on the one hand, and myself stem, I think, from rather different basic premises. Professor Mallory writes in the tradition of the great constitutional lawyer, Berriedale Keith, whose first-hand experience, after all, was in the normally calmer traditions of the United Kingdom. My own views more closely parallel those expressed a generation ago by an equally distinguished jurist, the then Mr. Justice Evatt, who was directing his ideas especially to the self-governing member-countries of the Commonwealth other than the United Kingdom. These countries have occasionally had unfortunate experience, especially at the state or provincial level, with over-assertive or even incompetent Heads of State and are less likely on that account to be impressed by arguments such as those advanced by Professor Mallory, which conceive present-day remnants of the old prerogative powers as a sort of "fourth arm" of the constitution to "save" the country from its elected representatives; they are apt, in fact, to conclude that, if constitutional protections of minority interests are needed, it accords more with present-day democratic attitudes and expectations to provide them by use of machinery arrangements like the federal form and bills of rights. In the special case of the United Kingdom, I suggest, the better sanctions for the preservation of respect for minority interests (if sanctions be needed) are the self-restraint of legislative majorities and the corrective of public opinion as expressed through the ballot.

In respect of some of the old prerogative powers, for example the old power as to dissolution, a clear principle, which is attuned to present-day democratic expectations and needs, seems to have emerged, namely, that the Head of State shall yield to the wishes of the Prime Minister of the day.

In respect of some other of the old prerogative powers, however, the search for a contemporary re-interpretation of the conventions of the constitution may present at times some machinery problems. As already noted, in the case of the death in office or sudden resignation of a Prime Minister without there being any clearly designated successor, the Australian practice is to install the senior-ranking cabinet minister as caretaker Prime Minister for the few days necessary to enable the government party's rank-and-file members to meet in caucus and choose a permanent successor. This practice operates quickly and harmoniously in Australia, and could be as easily applied in most of the other commonwealth countries, including the United Kingdom. It would, I concede Dr. Forsey's point, present greater problems in the case of Canada, where the leadership of both main political parties is normally determined by a party nominating convention. A partial solution in Canada might be to designate an "heir apparent" in advance, as the Liberal Party did in convention before Mr. King's retirement, as Mr. Churchill did more informally but none the less decisively with respect to Mr. Eden, and as the political parties do in some of the commonwealth countries by establishing the office of deputy-leader of the party. When this solution is not available, would it be too objectionable, in Canada, to allow the party caucus to ballot to elect the new leader?

In canvassing these machinery-type questions, I am, of course, assuming agreement on fundamentals—that the conventions of the constitution are not to be regarded (any more than Dicey himself regarded them) as a frozen cake of doctrine, but rather as capable of continuing adjustment in accordance with the changing needs of society. In the situation that substantially exists in the commonwealth countries today (other than the United Kingdom), where the Head of State is effectively selected by the Prime Minister of the country concerned, will normally be a citizen of that country and possibly have prior political experience (*vide*, for example, South Africa and Australia), the wisdom seems especially clear of allowing the old prerogative powers to lapse; for the Head of State is otherwise increasingly likely to become embroiled in partisan strife of the nature that, a generation or so ago, brought Lord Byng's term as Governor General of Canada to a rather unfortunate conclusion.

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