Evolving Canadian Federalism

A. R. M. Lower, F. R. Scott, *et al.*

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FOREWORD

THE APPEARANCE in the era of two World Wars of the Commonwealth of Nations as the heir to what was once the British Empire has not been given in the United States the attention it merits as a field for study. It was in response to this need that a Commonwealth Studies Center was created at Duke University in 1955 with financial assistance from the Carnegie Corporation.

The Center is devoted to the encouragement of research in Commonwealth affairs by members of the Duke University faculty and graduate students, and to the encouragement of similar research in economics, history, and political science by scholars and graduate students from various Commonwealth countries.

The purposes of the Center are implemented in a number of ways. Among these is the annual program known as the Commonwealth Summer Research Group, which in each of the summers of 1956 and 1957 brought to the University for a period of two months groups of scholars already known for their interest and competence in one or another aspect of Commonwealth affairs. During the summer these scholars in residence pursued their

own research in their chosen fields. They came together daily around the coffee table for purely informal discussion of their research projects or of more general Commonwealth topics. In addition, the group met formally at intervals as a seminar for critical analysis of papers prepared by distinguished visiting Canadian lecturers.

In the summer of 1957 the visiting lecturers considered specific aspects in the broad theme of Emergent Canadian Federalism. In these more formal sessions, as well as in the daily informal meetings, the visiting scholars were joined by interested members of the Duke University faculty.

The Summer Research Group program has thus sought to further a number of useful purposes. It has provided a means whereby a limited number of scholars who are university teachers with Commonweath interests may pursue their research throughout a summer unimpeded by the demands of classroom instruction. It has given them an opportunity for informal association with others of similar interests for the free exchange and stimulation of ideas. Finally, in centering attention on a particular theme, such as the subject of this volume, it has brought to the Seminar and to the wider audience to which these pages are addressed some of the mature thought and interpretation of scholars whose understanding of Canadian federalism is both deep and comprehensive.

Since the Commonwealth Studies Center is concerned exclusively with the encouragement of research, any interpretations of Commonwealth developments appearing in its publications do not represent expressions of the views of the Center or of the Carnegie Corporation; the

authors of the several publications are responsible for the conclusions expressed in them.

PAUL H. CLYDE, *Chairman*
The Summer Research Group

INTRODUCTORY STATEMENT

SOME YEARS ago an engineer defined an airplane as a "machine that almost doesn't fly." What he meant was that at that stage in the development of airplane engines and the theory of aerodynamics, it was difficult to design an airplane with much leeway or margin of safety to keep it aloft under all conditions. Sometimes it was impossible to tell, theoretically, whether or not a given machine would fly. In the same way, a strict constitutional theorist might be tempted to define a federal government as one "which almost doesn't govern," since at times it is impossible to say, theoretically, whether a given division of powers is such as to permit it to function successfully. The maintenance of a workable equilibrium of powers and functions is an added burden or hazard which a federal state must assume in maintaining a viable government. For that reason, among others, some observers regard the federal form as only a temporary or transitional stage in the evolution of a unitary state.

In any event, for many students of political, economic, and legal developments the characteristics and problems of a federal state hold a special interest—even a fascination. For such people the ninety years of Canadian history since Federation is a storehouse of intriguing and challenging materials. It is the record of an enormous laboratory in which great political experiments have been conducted. It is the story of the failures and the successes of a people who have worked diligently, earnestly, and thoughtfully to devise a form of government suitable to their peculiar conditions. It is a story which we can read with more interest and pleasure because we know that it has a "happy ending"; it has been a success thus far. The experiment has been a success in that it has produced in Canada a strong, effective, and responsible government in the democratic tradition and has made Canada one of the best-governed countries in the world.

For analytical purposes Canada's experiences with federalism may be divided broadly into two categories, although the division is not precise and at places the two categories overlap. The first category is made up of those experiences which, in some measure, are common to all federal states in this period of history. It includes first the story of the organization of the federation—why it was organized, the forces at work, the different attempts at organization, the various proposals that were made, the inevitable failures, and the ultimate success. As he contemplates this stage, the student will at various times be tempted

to conclude that "it almost didn't happen." This category also includes an account of the basic division of powers between the central government and the constituent states or provinces, as well as the financial arrangements between them. These things differ in detail with every federal state, but all have had to wrestle with the same general problems.

The first category also includes an account of how the federation has withstood, or failed to withstand, the effects of the many centralizing forces in the world in recent years—forces which tend to upset the original distribution of powers and to transfer powers and functions from the constituent states to the central government. Perhaps the most important of these have been the military considerations which have dictated large outlays for national defense, as exemplified by two world wars and a cold war. At times the military effort must be the maximum that the nation can make. It can be directed only by the central government, which may be forced ruthlessly to override the requirements of the states.

But there are other centralizing forces. There have been great improvements in transportation and communications as represented by the radio, television, the automobile, and the airplane. Directly these have thrust additional functions upon the central government; indirectly they have called for more central control and direction because they have made national problems out of problems which formerly were purely local in character. In addition, there have been the growth of large interstate business units,

demands for policies of economic stabilization through fiscal policy, and the rise of the welfare state. Demands for more progressive taxation have forced greater reliance upon steeply progressive income taxes, which only the central government can administer successfully. All of these and others have exerted a great pressure in the direction of centralization and, inevitably, the central government has gained in relative power. Whether federalism in any meaningful sense can continue to function in the face of such pressures is a question to which we do not yet have the answer.

The second category of Canada's federal experiences is made up of those which are, at least in part, peculiar to Canada. Perhaps the most important of these, and the one to which all the contributors to this symposium allude at one time or another, is the application of federalism to a biracial society. There is in Canada a large minority of people, concentrated mostly in the Province of Quebec, who are strikingly different from the people of the other provinces in language, religion, and culture. The French-Canadians are jealous of their right to maintain undiluted these characteristics of their society. Generally, their right to do this is written into the Constitution, but they are fearful that it might be lost through the amending process if their province is counted merely as one province among ten. This situation, as the following papers show, creates fundamental and difficult problems in the operation of a federal state.

These problems are accentuated by another fea-

ture which is unique to Canada—the lack of any prescribed procedure for amending the Constitution. The British North America Act, which is the organic act or Constitution of Canada, was passed as an ordinary statute by the Parliament of Great Britain. As such, quite naturally, it contained no provision for amendment, since the Parliament which passed it could always amend it through the regular process of legislation. But with the passage of time and the political development of Canada, there came a time when the British Parliament ceased to legislate for the people of Canada except in the most technical sense. This raised the awkward and embarrassing question of how and to whom the power to amend the Constitution should be transferred. In 1949 the Canadian Parliament was given limited power to change constitutional provisions which affect only the federal government. The provinces, too, have very narrow powers to alter provisions dealing with purely provincial matters. But on most basic constitutional questions the British Parliament still must take the final action. True, for many years that action has been automatic and mechanical; the Parliament at Westminster has been ready and willing to act whenever it is duly requested to do so. The big question is: How and by whom is the request properly made? The Canadian people can answer that question in any way they wish, but as yet they have not been able to agree upon a formula.

As several people have pointed out, it is impossible to know precisely how many times the B.N.A. Act has been amended. There have been ten formal

amendments and several other acts which have changed constitutional provisions without being labeled as amendments. In the United States the state legislatures or conventions act upon proposed constitutional amendments; in Australia the people vote upon them in popular referenda. In Canada the procedure is not so specific nor so simple. In the end, the Canadian Parliament requests the British Parliament to enact the amendment, but before that happens the provinces will have been consulted to some extent and in some fashion. The method of that consultation, and particularly the extent of provincial agreement which should precede the request, constitute the heart of the present disagreement.

A problem peculiar to Canada and Australia has been the application of the principles of federalism to a country evolving from the status of a British colony to that of an independent nation. It is easy to see that the powers of a central government which were adequate at a time when it had no control over its foreign policy and little responsibility for its defense would not be appropriate when it was fully responsible for both of these functions. One of the following papers gives a succinct and cogent discussion of the ways in which the federal relationships have been adjusted in this area. In this connection, another feature of federalism common to Canada and Australia is the fact that for many years the court of last resort for the interpretation of their constitutions was the Judicial Committee of the British Privy Council.

Also unique to Canada has been the influence of a large and powerful neighbor who had preceded her in the federal experiment by some eighty years. She has had the benefit of a large federal laboratory just across the border and has been influenced by a common language and culture and many common institutions. One of the papers in this symposium points out various ways in which, in the formative period, Canada drew upon American ideas and profited from American mistakes. Undoubtedly that influence has continued in some measure, although it is not discussed specifically in these papers.

From this great range of problems, each of the contributors to this symposium, all distinguished Canadian scholars, has selected one or a few in which he has special interest and competence. He has discussed that area in detail, illuminating it with the accumulated knowledge and experience gained from years of study and research. While these papers do not cover the whole of Canadian federalism, they do treat the major problem areas in depth. Taken together, they give a broad understanding of how federalism works in Canada, how and why the major problems have developed, what attempts have been made to solve them, and what measure of success has attended those efforts.

Generally the authors place most emphasis on those problems which are peculiar to Canada. This is fortunate, for it gives the outsider a better understanding of the forces which have shaped Canadian developments. There is some measure of duplication

between the different papers, especially with respect to the problem posed by Quebec. No attempt has been made to eliminate this duplication. The different opinions do not clash and yet they are not mere repetition; each writer looks at the problem from a slightly different angle and thereby adds something to a fuller understanding of it.

The contributors to the pages that follow require no introduction to their colleagues in Canada and the United States. For the wider, non-academic audience to which these pages are also addressed, it is appropriate to add here a word of identification. Professor A. R. M. Lower is Douglas Professor of Canadian History in Queen's University, Kingston, Ontario. Professor Frank R. Scott is Macdonald Professor of Law in McGill University, Montreal. Professor J. A. Corry of the Department of Political Science is also Vice-Principal of Queen's University. Professor F. H. Soward is Chairman of the Department of History, Director of International Studies, and Associate Dean of Graduate Studies in the University of British Columbia, Vancouver.

B. U. RATCHFORD

Duke University

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Evolving Canadian Federalism

Theories of Canadian Federalism—Yesterday and Today

A. R. M. Lower

FEDERALISM: ITS GENERAL NATURE

THE POLITICAL ORGANIZATION of North America, like its geography, is simple in outline and complex in detail. Most of the continent consists of two very large states, both of which have found their way to approximately the same form of government—a federal union. One of these states pioneered the form, the other, adopting it, constituted its second conspicuous example.[1] Later on, other political entities of the same general nature came into existence. All of them, except Germany, were semicontinental in size, and because of that none of them could well have conducted their affairs without the federal device. Federalism has proved the saving element in situations in which sheer size, involving the separation and divergence of communities, has been the dominating feature. The vast modern states of the English-speaking world could not exist without it, for its very es-

[1] The Swiss Federation preceded that of Canada by about seventeen years.

sence is its elasticity and its provision of local freedom within the general organization.

The federal device must be reckoned one of the most happy, as it is one of the most original, of political inventions: sufficient honor can never be paid to those who transferred it from a mere theory into the Constitution of the United States. Its happiness consists precisely in the element just mentioned—its flexibility. The political institutions of a federal state are never at rest: they reflect its internal play and balance of forces. Sometimes localism is strong, sometimes centralization. At such times the local governments gain power, the central loses it, or vice versa. The regulating mechanism, as we all know, is a court, an arbiter, a device that has sprung up in all our federal states, not from theory but from necessity. And since the state is a collection of living beings, behind these courts stand the interests and emotions of people, which, consciously or unconsciously, the courts reflect. No court is an abstraction, any more than a judge is an abstraction, and legal logic, from one point of view, consists in the skill with which opinions that suited yesterday are, without apparent inconsistency, turned into the very different opinions that suit today.

A federation in some respects is a microcosm of the international world: it has its own internal balance of power, its alliances and its axes, none the less real for being informal, its diplomacy and its diplomats. It is fortunate that this should be so, for if all these devices of internal compromise break down,

there may be only one alternative. Luckily, in only one instance have they broken down, but the invocation of the alternative in that case was so dreadful that it stands as a warning for all the future.

THEORIES OF CANADIAN FEDERALISM: THE EMPIRIC NATURE OF CANADIAN FEDERALISM

The American Union rests on the natural-rights philosophy of the eighteenth century; embodied in a great document hallowed by emotion, potent in its language, that philosophy has vastly influenced both specific constitutional form (as in the Bill of Rights) and subsequent interpretation. Its neighbor is quite without a comparable ideological foundation in writing. The first point to establish, therefore, in this paper on "Theories of Canadian Federalism" is that there are no theories: at least none neatly put down in syllogisms and mounting up to the dignity of a political philosophy. The Fathers of the Canadian Confederation[2] took the form of the state for granted; they considered only the historic monarchy. From this angle Canadian federalism was empiric, a continuation of what had always existed, and it has developed empirically. Through this doorway to the past, the whole of English constitutional tradition entered just as it had entered the American colonies before the Revolution. The difference between Canada and the United States in this respect was that by the Revolution the United States had shut this doorway to the past, though in an incomplete way. It had

[2] In Canada, little distinction has been made between the words "confederation" and "federation."

locked the stable door after the steed—that is, the traditional English institutions—had been securely tied inside. No one needs to be reminded that today, after nearly two centuries of separation, the institutions of the entire English-speaking world have tremendous areas in common.

The Canadian federal union began in empiricism and has evolved in it. The closest we get to theory is the theory which comes out of the courts: extremely acute judicial reasoning, logic fine spun enough to delight any scholastic philosopher, and semimetaphysical distinctions of enormous subtlety. But, taken together, they do not constitute a considered political philosophy. The whole genius of English politics, from the Norman conquest on, has been specific and empiric—rights, not right, liberties, not liberty—and it is this genius, turned loose on the federating instrument, the British North America Act, which has given us the body of compromises, make-shifts, references, rulings, decisions, in which we must seek the general nature of Canadian federalism.

From the first, rules of interpretation for the constituting Act grew up, and these might, after a fashion, be considered "theories." For example, it was decided that the Crown is as much present in a provincial legislature as it is in the Parliament of Canada; that the provinces, within their prescribed areas, had as much of the sovereignty as Canada itself; that it was "the pith and substance" of an enactment which had to be determined; and so on. Perhaps the chief point of theorizing in the whole sweep of institutions

retaining organic connection with Great Britain has been with respect to the term "The Crown." As any student of English constitutional history knows, the Crown has been and remains the fixed point from which nearly everything emanates and about which all revolves. (It is hardly necessary, it may be assumed, to stress the vast gulf which yawns between the impersonal "Crown" and the flesh-and-blood king.) To fit this historic conception into the institutions of a scattered, sprawling Confederation required carpenter work of no mean nature, and it was this which the framers of the original Act and the judges after them had to supply. The job was done after the manner of carpenters, nevertheless, and not after that of philosophers: ship-carpenters, if you like, men of cunning eye and hand, who, taking a glance at the hull before them, plane off a bit here and give an extra inch to the swell of a rib there. Their efforts, as the decades go by, are seen to be harmonious, but they arise from no deep mathematical theories on the curves of hulls.

It is only in our own day that some modification of that position may be necessary. Today we have a problem that, for the generation of Confederation, did not exist; the danger to liberty from within, from the very law itself. Since Canada has assumed complete responsibility for its own fate, that is, since the Statute of Westminster, 1931, she has had to consider the basic nature of her own existence.[3] She has the

[3] Most people would content themselves with saying that Canada is a monarchy and that the monarch's ancient attributes

English tradition, it is true, and that goes far, but circumstances are so different from what they used to be and life so much more complex that she can no longer go easily along on the assumptions of the 1860's. When one provincial legislature attempts to cut into the freedom of the press and when another legislates to lock people out of their own houses without cause shown, then immediately the whole genius and nature of the state comes up for consideration. So far we have not got very far along this road, but it is possible that within another half-century or so we may travel it far enough to find for ourselves some body of doctrine, set forth, probably, in dry judicial language, which will elucidate the nature of the state and thus come to be worthy of the name of a political philosophy. Meanwhile, as something to go on with, everyone is agreed, for what it is worth, that Canada is a state based on freedom.

CONFEDERATION

The Canadian ship of state, I have suggested, has been built largely by the cunning of experienced hands, rather than from the elaborate blueprints of the political theorist. That does not mean, however, that the builders had no idea of the kind of structure they hoped to complete. Some of them had quite definite ideas, and one of them at least, John A. Macdonald, may even have had (locked within his own mind) something like a blueprint.

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give us theory enough: "the King is the fount of justice"; "the King can do no wrong"; etc. But what if the Cabinet became King, with both King and Constitution in its hands?

When in 1864 the "Fathers of Confederation" met in conference at Charlottetown and Quebec, most of them were surprised to find how large was the area of agreement between them. At Quebec, which was the gathering expressly for the purpose of working out a constitution, they took only a little over two October weeks to hammer out the Resolutions on which the future British North America Act was based: this was possible because they did not need to debate certain major fundamentals of the proposed constitution.

Although the topic offered every opportunity for distrust and antagonism, no one, whatever his previous attitude had been, was disposed at Quebec to be intolerant or illiberal with respect to the great basic areas of language and religion. Everyone was agreed that the British connection must be maintained and the form of government be that of the traditional monarchy. Everyone was agreed that cabinet government (as a convention of the constitution) must go on. Though the mode of doing it provided one of the biggest bones of contention and was to provide virtually the whole corpus of Canadian constitutional history and law, yet similarly there was agreement that the powers of government must be divided between the new central government and the provinces. The new creation must be tied together with railroads. It must get as large a territorial future as possible. And the American wolf must be kept as far from the British North American door as possible: in fact, but for the loud howling of the American wolf

in 1864 and the following years, it is probable that the different provinces would not have come together. This fear of the great, heaving neighbor was reflected in a hundred ways, not least by the disproportionate share of attention given to the subject of defense: British North American union was to be union for defense against the United States.

EXPERIENCE, MODELS, PRECEDENTS

The "Fathers" of the Canadian Confederation were not in the starkly naked position of the "Fathers" of the American: the latter were alone in a hostile world, with nothing to guide them but some vague precedents from ancient Greece and the scarcely more useful current models such as Switzerland. The British North Americans already had a wealth of experience, both in what to adopt and what to avoid, and their efforts at Quebec were devoted to incorporating that accumulated experience into the document upon which they labored. This experience might be placed under four categories, the least weighty first:

1. For nearly a century, or from 1776, they had lived in a rather nebulous entity termed "British North America" and had come to derive from the experience a not inconsiderable feeling of unity based on their common status as British subjects.

2. For a generation they had been growing accustomed to the idea—especially the Canadians among them—that they were living in what actually was already a federation. "Responsible Government" had

virtually meant "self-government within the Empire." Durham[4] had laid down the dictum that the Imperial government need only reserve four central subjects to itself and that, subject to its overriding authority, colonial legislatures could look after all the rest. Since everyone in the colonies had always accepted British supremacy, once local autonomy was given, there was, apart from secondary matters (such as Galt's successful claim for complete jurisdiction over the tariff-making power) no further clash. The sphere of colonial self-government was rapidly widened and the yoke, if yoke it can be called, of the Imperial government became lighter and lighter. Although they had no representation in Great Britain and technically were "governed" by it, the colonies accepted the Imperial power much as the American colonies had accepted it before harmony was destroyed, but with the difference that there was less intervention by Great Britain from 1846 on than there had been before 1776. Nevertheless it was all one polity, with the same public symbols (such as the flag), the same monarch, the same forms of government, with legal appeals going one way across the ocean and governors coming back the other. If this kind of polity was not a crude type of federalism, what was it?

3. The two Canadian provinces had themselves evolved into still another approximation to federalism

[4] In his famous *Report*, 1839. For a recent reprint of this, see: John George Lambton, 1st Earl of Durham, *The Report of the Earl of Durham, Her Majesty's High Commissioner and Governor-General of British North America* (London, 1930).

by 1867. The Act of Union, 1840, was supposed to have put them together and have made of them one political community. As it was, their differences were too great for that, and by 1848 it was beginning to be seen that in many of the details of government, each would have to be considered by itself. A "double-barreled" cabinet appeared, half of whose members came from each province. Later on, the doctrine of "the double majority" made its appearance, by which it was suggested that important measures must find separate majorities in the representations from each province (this, however, was never pushed to its logical extreme). The Province of Canada, as the combination was termed, 1840-1867, became in fact neither a unitary polity nor a federation, but something half-way between, yet with the federal element there prominently enough to focus men's attention upon it as a device of government.

4. The last piece of experience, and the most weighty, in my opinion, was the existence of the United States. Here was an ever-present model and example, to be imitated or improved upon. The British North American of any standing who did not understand, if not in intimate detail, at least in general plan and spirit, the way in which the American Constitution worked could hardly have existed. The colonials had watched its creation, followed its development, and in the 1860's were contemplating the awful spectacle of its disruption. Then as now, American territory was almost as familiar to them as their own, American public men constantly under appraisal, and

every American measure of importance debated. It is only necessary to open the *Confederation Debates* to find how fully the minds of "the Fathers" were occupied with what had been going on, and especially with what *was* going on, next door. The Quebec Conference had been held in October, 1864, the debates took place in February and March of 1865. No dates could be more significant for the nature of Canadian Confederation.

The effects of the coincidence in time, if all pervading, would in themselves be hard to pin down if it were not that we have some important documentary evidence. John A. Macdonald was an assiduous reader of Hamilton's doctrines in *The Federalist*. He possessed a copy of this work which he annotated freely in the margins. The present writer was told of this many years ago by Professor W. B. Munro, of Queen's and Harvard, into whose possession this personal copy had come: Munro used this and referred to it in his *American Influences on Canadian Government*. The effect of the combination of Macdonald's own cast of mind with Hamiltonian views is written all over the B.N.A. Act. Several of the distinctive features of Hamilton's rejected constitutional scheme[5] were taken over by the Quebec Convention, almost certainly under Macdonald's influence, and later embodied in the B.N.A. Act. Perhaps the very term "Senate" comes from this source, and the life tenure of the Senators, while mainly de-

[5] James Madison, *Journal of the Federal Convention* (Chicago, 1893), p. 185.

riving from other considerations, may have been influenced by it. Hamilton's "Supreme Executive Authority" serving during good behavior, was, of course, ready-made in the monarch, and his judges, also serving during good behavior, already a part of the colonial system. But the arrangement (section X of Hamilton's scheme) for keeping the states—or provinces—in line was a novelty, and associated only with a federal system. Hamilton would have had the "Governor or President of each state . . . appointed by the General Government." Under the B.N.A. Act, the lieutenant-governors of the provinces were (and remain) appointees of the "general government"; that is, the government of Canada. He would further have given the governor of the state "a negative upon the laws about to be passed" in his state. Canadian lieutenant-governors still have this negative, which is the old veto power of the Crown, and it is still used, though infrequently. Further than this, the B.N.A. Act provides that all provincial legislation shall be subject to disallowance by the Governor-General-in-Council within one year from its passing. This control, which has never been used freely, is yet by no means a dead letter: it was last used some twenty years ago.[6]

Canada's constituting act, therefore, took over from Hamilton the most formidable weapons of centralization which his scheme contained, and it seems probable that the adoption was direct and conscious, through the channel of the man who proclaimed in

[6] Certain laws passed by the first Social Credit Administration of Alberta were disallowed in the late 1930's.

set terms his desire for as much centralized power as possible, John A. Macdonald. And if there were any theorizing about the making of the Canadian Constitution, it lay in this precise point: How tight an instrument should it be? Where would the main power lie? Would it fashion a loose league of provinces or bind them into as close an approximation to a unified nation as circumstances permitted? This was the great subject of debate, presumably, at Quebec (where no records were kept) and definitely in the Confederation debates (which were recorded word for word).

THE CONFEDERATION DEBATES: OPINIONS, CONVICTIONS, PREJUDICES: CENTRALIZATION OR DECENTRALIZATION

Since the discussions at Quebec were not recorded, we cannot watch the day-by-day play of debate as it can be watched in the framing of the American Constitution. There was good reason for this—simply that if proceedings got out into the press, no agreement would ever be reached: the Quebec Resolutions were framed by "secret diplomacy." No one seemed to object, except the "rump" party of opposition in Canada East, whose members had not been included in the Quebec Conference.[7] This party, nicknamed *les rouges,* was the Liberal left wing, containing some decided French anticlericals, some men whose Catholicism was open to grave suspicion, and extreme localists of both races. It was the only group in the province of Canada which opposed the new

[7] Nomenclature: Province of Quebec, 1763-1791; Lower Canada, 1791-1840; Canada East, 1840-1867; Province of Quebec, 1867-.

scheme and it did so mainly on the basis of local autonomy. The major group of French-speaking Canadians, through Georges Etienne Cartier, leader of the French Conservatives, or *les bleus*, accepted the scheme, and without their acceptance there could have been no Confederation. They accepted it because Cartier was able to assure them that the guarantees found in the resolutions for their language and religion were adequate. This was a difficult corner to turn, for no more prickly questions than these could have been imagined. We could build up, if not an important theory, at least a major foundation stone of Canadian Confederation right at this point, for by joining in the larger union, under certain mutual guarantees, the two races surely tacitly agreed to bury the hatchet and to try to live amicably together. In retrospect, Confederation consisted in an undoing of the Conquest, an admission on the part of the English that henceforth there were to be neither conquered or conqueror, simply subjects of Her Majesty in Her new Dominion. French-speaking Canadians were not slow to adopt this point of view, and it has often received eloquent expression, but English-Canadians, many of them, could not easily forget the past, and their arrogance persisted. The result has been friction and animosities which at crucial times have endangered the Canadian nation.

A marked contrast between Canada and the United States appears once this matter of religion and language is mentioned. Roman Catholicism had received certain guarantees in the Treaty of Paris,

1763: these were made more precise by the Quebec Act and became strengthened by practice. For French-speaking Canadians, "the Queen's Roman Catholic subjects" to most intents and purposes meant themselves: "Roman Catholic" and "French" thus came to have a close, if not a complete, identity. Hence the guarantees found in the B.N.A. Act for the school rights of the minority, whether Roman Catholic in English Canada, or Protestant in Quebec. These guarantees were accompanied by, though unrelated to, certain guarantees concerning the use of the French language. The two together in the minds of French-speaking Canadians constitute the heart of Confederation. If the B.N.A. Act could be said to have anything about it of a Bill of Rights, this would consist in the language and religious guarantees.

But no lawyer would admit that the Act does contain a Bill of Rights. The writer will make bold to contend that in this the lawyers are wrong. Not only are there the racial and religious clauses, but there are the financial and railroad rights guaranteed to the Maritime provinces. And there is the division of powers. In fact, the federal form of government in itself is a kind of large bill of rights, for under it, if one door to liberty is closed, others remain open.[8]

Nevertheless, no formal bill of rights was attached to the Act, and now ninety years later, the omission is proving of importance, and perhaps, regrettable.

[8] Rigid legal minds do not seem to be able to penetrate past the actual examples of Bills of Rights to the realities which underlie the phrase.

Why did it occur? The major reason is that in the 1860's everyone took freedom for granted: there was hardly a cloud in the sky. The result was that in the *Debates*, the word was mentioned only to be accepted as a matter of course. As George Brown said, "Our scheme is to establish a government that will endeavor to maintain liberty and justice and Christianity throughout the land. . . ."[9] That was the furthermost reference to a subject which seemed to have been so completely settled in the storms of the seventeenth century and subsequent developments that it could be taken for granted. Had they not "the British Constitution" and the whole sweep of liberties embodied in the ancient documents? No one even suggested formal reiteration of specific liberties. As Joseph Cauchon, one of the French-speaking supporters of the scheme, put it, in words that were highly characteristic of the attitudes of the day: "I feel myself free as a bird of the air in the midst of space, under the mighty aegis of the British Empire—a thousand times more free than I should be, with the name of citizen, in the grasp of the American Eagle" ("hear, hear, and cheers").[10]

Moreover, a formal bill of rights, it would have been argued then, as it is argued now, would have been against the genius of the Constitution, for it would have cut into the sovereign power of the legislature. Canada has adopted to the full the doctrine

[9] *Confederation Debates*, p. 86. (See Bibliography for complete citation.)

[10] *Ibid.*, pp. 573 ff.

of parliamentary omnicompetence, which has been confirmed by the courts, so that to the legal mind there is no room left for formal limitations. It would seem to the writer, however, that since no legislature in a federal system can go beyond the powers assigned to it, to talk of omnicompetence does not make much sense. If, for example, a provincial legislature may not legislate on coinage, why should it be able to pass a law to padlock a man's house without cause (as that of Quebec actually did)? Whether freedom is safer without a bill of rights than with one may be a subject for discussion, but personally I prefer to have one even if it only enunciates great principles. A bill of rights at least gives us a mark to shoot at. One recognizes, of course, that no document will preserve liberty if the people are indifferent to it. Still, crutches do help a lame man to walk. It may be that the question of a bill of rights (which has been brought forward since the war by various disinterested groups but has not become the subject of general discussion) will one day come in for thorough investigation. But not, I would think, unless it has been precipitated by some crisis of liberty. The opportunity for theoretical enunciation of general statements of principle would seem to have passed, and the most that I would expect would be detailed safeguards introduced in *ad hoc* fashion. I do not see why we could not have these latter.

Once discussion got out into the open territory of the legislature, everyone had a chance, and judging by the thousand pages of the *Confederation Debates*,

everyone took it. Speeches were made that were eloquent, learned, and long. Some were all three, some simply long. Their range was wide and in most cases their temper was good. The knowledge and scholarship displayed by many of the more prominent debaters was deep. As in the case of the American Constitutional Convention, the hour brought forth a remarkable group of men.

Among them, one stood out—"The Attorney-General West," as it was the fashion to dub him—John A. Macdonald. Macdonald had taken little interest in Confederation as long as it remained "up in the air," but once it became practical politics, no one pursued the goal more intensively and more effectively than he. He emerged from the three years of debate, 1864-1867, *facile princeps*, in every area—the management of men, the manipulation of words and phrases in forming the new law, and the width of his vision. Very properly he was to be called upon to form the first ministry of the new Dominion. Macdonald was an avowed centralizer. In his great introductory speech, he stated frankly that he would have preferred a legislative union to a federal, but since that was not attainable, he had bent his energies to making as strong a federation as possible and decreasing the importance of the provinces to a maximum degree. Hence the various controls placed in the hands of the central government—nomination of the judges, appointment of the lieutenant-governors, right to disallow provincial legislation, and especially, of course, the whole scheme of the division of

powers[11] with its careful reservation of the residuum to the central government. Again and again, Macdonald insisted that the new union must avoid the errors of the American, and, he contended, these were patent: to them he put down the current Civil War. Of them all, the major one, he said, had lain in leaving to the states the residuum of power. The American Civil War ensured that the Dominion of Canada and not its provinces should have this power.

Despite this insistence on a strong central power, with the residuum in its possession, Macdonald constantly talked about the agreement reached at Quebec as "a treaty." His language, plus historic circumstances, has projected into Canadian life in forcible fashion the very issue he wished to avoid. Is Confederation a treaty? If so, who are the parties to it and is it unchangeable except by their consent? Obviously the Dominion of Canada was not a party to it. It is hard to see how provinces created by the Dominion since 1867 could be parties to something arranged before they existed, especially since they owe their existence to that something. Were the original three provinces, Canada, Nova Scotia, and New Brunswick, the parties? If so, they immediately disappeared, to be replaced by the four new provinces of Ontario, Quebec, Nova Scotia, and New Brunswick. And was the whole arrangement no more than an ordinary statute of the British Parliament? As such it has always been treated.

It seems probable that Macdonald and others who

[11] Sections 91 and 92 of the Act.

flung about this word "treaty" did so purposely for political reasons. It was plain that if any local legislature were allowed to make alterations in the Quebec Resolutions, the whole negotiation would have to be conducted over again and agreement would never be reached a second time. So, as Macdonald said, the goal had to be arrived at *per saltum*. Perhaps the best way to avoid opening up the details for amendment was to emphasize their nature as an agreement, compact, or treaty.

But the aftermath in our own days has been difficult, for the essence of the contention urged by that province which, more than any other, constantly tries to enlarge the sphere of what it calls its "autonomy," is that Confederation was a treaty, not to be altered without the consent of the parties thereto, and that every extension of Dominion power, whatever the legal niceties on which it is based, is an invasion of the original compact and a violation of right. The original notion of "treaty" thus becomes one of the main supports for provincial rights.

On the point of residual power, in 1865 a fairly clear line could be drawn between French and English in the province of Canada. Nearly all the English, except the local-autonomy men from Lower Canada, said they would have preferred a legislative union, but this being impossible, they were prepared to take the next best thing. Most of the French evidently would have nothing of a legislative union; yet, although they felt that they had gone as far towards it as they could, they did not manifest hostility to the

scheme as drawn. In general, French members seemed far less interested in constitutionalism than English, confining themselves for the most part to the resolutions relating to the protection not of a mere provincial autonomy, but of race and faith. Yet it was only *les rouges*, as I have said, who were unremittingly hostile. Afterwards, when Federation was achieved, Lower Canadian *rouges* were joined in their opposition to centralization by most Nova Scotians, and eventually by groups from all the other provinces: in this rallying of the forces of localism was to be found the genesis of the present national Liberal party. The two large parties thus came to stand roughly for centralization (Conservatives) and local autonomy (Liberals): their resemblance to Republicans and Democrats is evident. Of late years both have come loose from their moorings.

MONARCHY, ARISTOCRACY, DEMOCRACY

It is in association with such terms as monarchy, aristocracy, and democracy that we usually assume the center of gravity for political philosophy is to be found. It cannot be said that there was overmuch discussion of them in the formation of the Canadian Confederation, most people taking their meaning and their bearing on each other for granted. Since no one was interested in drawing fine distinctions or enunciating mere theory, everyone was willing to confine himself to practical points. "Monarchy" meant good Queen Victoria, fast becoming the mother of her people, lately widowed and beloved from afar by all.

"Aristocracy" meant what they had in England in the House of Lords and everyone said they were glad that there was nothing to match it in Canada. "Democracy" meant what they had in the United States and everybody thanked God in a loud, sanctimonious voice that we had nothing of that sort in British North America. What did we have then? Well, "the blessings of the British Constitution," by which was meant the historic mixture, minus one or two major objectionable features, such as House of Lords and Established Church. Many a public man turned without sense of contradiction from invocation of the throne to some statement to the effect that in British North America power was in the hands of the people. The explanation is simple: there had been no sharp break with the past, the historic institutions continued but they were married to environment, that pioneer environment which everywhere has ground down classes and produced a crude equalitarianism.

So far did the practical legal spirit go that the proposed Act got little debate from the point of view of underlying theory, either as a whole or in detail. The proposal to make Senators appointive and for life and to require property qualifications of them was far from democratic, but while there was much opposition to the form of the Senate, it was mainly on grounds of party and section. The appointment of judges during good conduct was taken for granted: it was part of the tradition. The division of powers was the point of contention, not the theory of society. No one invoked the mystique of THE PEOPLE. American democ-

racy, "a universal democracy" (as D'Arcy McGhee called it), by which was meant, apparently, the general and frequent use of elections, was to be carefully avoided, and the most serious charge against the leading French opponent of the scheme, A. A. Dorion, was that he was at heart "an American democrat." Such attitudes being dominant, it is not surprising that suggestions that the scheme should be submitted to the voters through the process of a dissolution and an election made no impression. "This mode of appealing to the people is not British but American, as under the British system, the representatives of the people in Parliament are presumed to be competent to decide all public questions submitted to them."[12]

The emotional preference for everything British did not range everyone behind the British aristocratic system. Those on the left wing were too democratic to approve it. Everyone on the right wing prominent enough to be elected a representative admired it, of course, because it was based on "gentlemen," dignity, and decorum; most of them would have accepted peerages from their gracious sovereign without much urging. But it was easy to see that in a colony "it was not practical" or that the time was not come when colonial society could support a landed gentry. Today that time seems more remote than ever!

The big, unexpressed "theory of Confederation," if it could be called such, was the one that lay behind all the arguments for the new union: build a

[12] *Constitutional Debates*, p. 77. Speaker—Honorable Mr. Ross.

new state, and BUILD! Build the state, shove out its boundaries as far as possible, build railways, build industries and cities! Here again one can see not only the parallels between Conservatives and Republicans, Liberals and Democrats, but also the echoes of Hamiltonianism and Jeffersonianism. It was Conservatives who became the high tariff people, who brought in the Northwest and British Columbia, who built the Canadian Pacific Railway.

It could be made narrower than that: it could almost be said that it was Macdonald who did these things. He called the platform of protection which he adopted in 1878 the "National Policy," but his whole program from the accomplishment of Confederation to the completion of the Canadian Pacific (including, in another sphere, the maintenance of unity between the races) can properly be called a national policy: he was the nation builder *par excellence*, and it was his vision which made something more of British North America than a few colonies tied together by a form of constitutional words. Gradually his vision transferred itself to other men, and then the making of modern Canada was under way. One can call it the building of a new state and the creation of a new nation, a theory, a dream, a vision: he can use whatever word he chooses. Whatever it was, the chief actor was John A. Macdonald.

Opposition always arises to large and, what seem to some, overly ambitious schemes. In the debates of 1865 it was *les rouges*, both in their English and French wings, which supplied it. As free thinkers,

French-speaking *rouges* urged the threat which the new union constituted for the faith, and as admirers of republican institutions and possibly annexationists, the English *rouges* deplored the likelihood of the new union weakening the British connection! Christopher Dunkin, the ablest and most intellectual of the opponents, laid bare weaknesses of the scheme which were to manifest themselves in later years, such as the necessity, which immediately became apparent, for federalism in the composition of the cabinet, and the wedge which the new union would drive between mother country and province. He professed to regard the provinces as already federated with the mother country, which provided the general government. The new union, he said, created "a federal government between the Imperial and Provincial... which, having nothing of its own to do, must find work by encroaching on the functions of the Imperial and Provincial governments in turn, with no place among the nations, no relations with other countries, no foreign policy."[13] It would, in short, be just a fifth wheel. But the concept of a new nationality, appealing to French and English alike, overbore the Dunkins and the Dorions and all those who favored smallness and sameness, and carried the Resolutions with flying colors. After their passage, despite setbacks and discouragement, the end seemed relatively sure; and on July 1, 1867, the culmination was reached in the proclamation of the new Dominion of Canada.

[13] *Ibid.*, pp. 525 ff.

THE HISTORIC DEVELOPMENT OF CANADIAN FEDERALISM: THE DECISIONS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

"Federalism" is a device that may be explored in many areas. Among these are public sentiment, the bargains between representatives of the center and the circumference, party politics, and the dry-as-dust decisions of the courts. Since it is manifestly impossible to put into a short paper a history of Canadian politics, with the tensions between provinces and Dominion as expressed in public events, I propose to draw, for the most part, on the legal side: this, after all, brings us closer to theories of federalism than the less exact expressions of public opinion. It also offers the steadiest line of development, and for long periods the most important. To this there are only a few outstanding exceptions, such as the attempt of certain provincial premiers in the 1880's to mobilize opinion in favor of reducing the central government's powers, the personal clashes, such as those between Hepburn and King in the 1930's, and the attempt, which commenced with the great depression of that decade and is still proceeding, to introduce some coordinated system of financing. On all these a few words will be said later.

Macdonald's fears of "states' rights" and their consequences were justified, for, shortly after the new Dominion had been formed, some of the provincial governments began to assert their rights and powers. Macdonald's ablest and most persistent foe was Oliver Mowat of Ontario, who had been one of his own law

students in Kingston. Mowat came out on top in several legal contests, all of which added something by interpretation to provincial powers. It is interesting to note that the former Attorney-General of the American Confederacy, Judah P. Benjamin, had moved to London and there became a highly successful practitioner before the Privy Council. He took a number of Canadian cases and in all but one argued the provincial side, although only in two of them did he win his point. It is probable that through him there can be traced the stream of "states' rights" argument flowing through the London bar and Privy Council into the interpretation of the Canadian Constitution, for he was a most influential advocate, and no doubt had his disciples: at any rate, later judges such as Watson and Haldane took the provincial side vigorously.

Most legal writers state that the first interpretations were pointed in the direction of "broad construction." The cases, with one exception, fail to show much evidence of this, though the attack on Dominion power is not sharp. It is from the 1890's that decisions in London cut decidedly into the central government's authority, and this trend went on until as late as 1930. After 1930, especially after 1931 with the Statute of Westminster, the trend was reversed, and an era of broad construction set in, to last until the abolition of appeals in 1949. It is still too soon to gauge the trend of the decisions of the Supreme Court of Canada as the ultimate appeal body. In none of these periods did the course of decision have

logical consistency. Thus from 1930 on, one justice invariably construed the act broadly and another one narrowly: their decisions might not have been unrelated to their politics. Objection to Privy Council appeals did not become considerable until about 1930, but it rapidly increased during the Depression when certain decisions visibly hampered the country's ability to cope with the situation. Then with the rise of relatively intensive national feeling during the war, the maintenance of this tag end of colonialism began to seem not much more than a bit of antiquarianism.

Section 91 of the B.N.A. Act begins: "It shall be lawful for the Queen by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." This is the familiar "Peace, Order and good Government clause"; over it most of the controversy concerning "the true nature" of Canadian federalism has raged. At this point a short review of the leading cases will clarify the whole question. These are listed in the footnote.[14] From them, the most important may be

[14] (1) *Russell v. The Queen*, 7 App. Cas. 829 (1882). This decided that the Dominion had the right, under peace, order, and good government, to pass a law providing for local option in the regulation of the liquor traffic. This was Benjamin's last case and he lost it.

(2) *Hodge v. The Queen*, 9 App. Cas. 117 (1883). This decided that the provinces, within the powers granted to them, have sovereign authority.

(3) *Maritime Bank v. Receiver-General of New Brunswick*,

singled out for further discussion. These are:

1. *Russell v. The Queen* (1882).
2. *Hodge v. The Queen* (1883).
3. *Ontario v. Canada* (1895).
4. Board of Commerce case (1919).
5. The "Persons" case (1930).

[1892] A. C. 437. This reaffirmed and put increased emphasis on provincial sovereignty. One of Lord Watson's decisions adding to provincial power.

(4) *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A. C. 348. Ontario won the right to provincial regulation of the liquor traffic. This was Watson's classic decision. In it he greatly cut down the scope of "Peace, Order and good Government."

(5) *In re The Board of Commerce 1919 and Combines and Fair Prices 1919*, [1922] 1 A. C. 191. Haldane's equally classic decision, defining peace, order, and good government as virtually not much more that emergency powers, to be used only in a great national crisis, such as a war.

(6) *Fort Frances Pulp and Power Company v. Manitoba Free Press*, [1923] A. C. 695. Another of Haldane's decisions in which he lays it down that emergency powers can in their nature hardly be more than temporary, and introduces the American doctrine of "implied powers."

(7) *Toronto Electric Commissioners v. Snider*, [1925] A. C. 396. The high-water mark of Haldane decisions cutting down peace, order, and good government.

(8) *Edwards v. Attorney-General for Canada*, [1930] A. C. 124. "Women are persons." The turn of the tide. Lord Sankey made his famous comparison of the B.N.A. Act to a "living tree."

(9) *In re The Regulation and Control of Aeronautics*, [1932] A. C. 54. The air and its regulation is a Dominion power.

(10) *In re Regulation and Control of Radio Communication in Canada*, [1932] A. C. 304. Radio comes under "telegraphs," an enumerated Dominion power and is therefore controlled from Ottawa.

(11) *British Coal Corporation v. The King*, [1935] A. C. 500. Re-emphasizes the national element in the Act.

(12) *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A. C. 326. (The Labor Conventions Case.)

6. The Supreme Court decisions on civil liberties (1938, 1953, 1957).

Under *Russell v. The Queen*, Judah P. Benjamin attempted to show that regulation of the liquor traffic was of local concern only and therefore must be

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Provincial powers may not be cut into under guise of ratifying an international agreement not an "Empire" agreement (B.N.A. Act, 132). An eddy in the nationalistic stream.

(13) *Attorney-General for Ontario v. Canadian Temperance Federation*, [1946] A. C. 193. A back eddy, as it cut down peace, order, and good government to an "emergency power" once more.

(14) *Attorney-General for Ontario v. Attorney-General for Canada*, [1947] A. C. 127. The Privy Council decided that Canada possessed the right to abolish appeals. This represented the bestowal upon the Dominion Government of "the widest amplitude of power."

To these should be added at least three cases from the Supreme Court of Canada:

(1) *Reference re Alberta Statutes* (The Bank Taxation Act; The Credit of Alberta Regulation Act; and The Accurate News and Information Act) [1938] Can. Sup. Ct., 100; 2 D. L. R. 81 (1938). The Supreme Court of Canada decided that the Province did not have the right to pass a law requiring newspapers to publish information supplied to them by the government. Chief Justice Duff added that since Canada was given a Constitution similar in principle to that of the United Kingdom, this must include untrammeled freedom of discussion.

(2) *Saumur v. City of Quebec and Attorney-General of Quebec*, [1953] Can. Sup. Ct., 299; 4 D. L. R. 641 (1953). (The Jehovah's Witnesses Case.) This dealt with the establishment of freedom to distribute the materials of discussion from door to door.

(3) *Switzman v. Elbling and Attorney-General of Quebec*, [1957] Can. Sup. Ct., 285; 7 D. L. R. (2d) 337 (1957). (The Quebec Padlock Law Case.) Here the law was found *ultra vires* on much the same grounds as in the Alberta Press Bill Case.

There is another Jehovah's Witnesses case pending. These last represent the initial step in the judicial elaboration of Canadian "rights of the subject" in the field of civil liberties.

left to the provinces. He was overruled. Under peace, order, and good government, the court held that the general government had power to legislate for what it believed to be the well-being of the country, just as it could deal with the drug traffic, traffic in arms, or other threats to the public peace. *Russell v. The Queen* remained for decades to plague English law lords whose imagination did not comprehend colonial emotions against the demon rum, and whose proclivities were all against prohibitive legislation bearing hard on private right. Succeeding generations of judges did their best to whittle away *Russell v. The Queen*, and their exercises in dialectic are useful reading for those who still believe in what has been aptly termed "the slot-machine conception of the judge."

The reversal of attitude began immediately after the decision had been taken, for in *Hodge v. The Queen* there appeared the famous dictum that powers conferred upon the provincial parliaments in 1867 were not in any sense to be exercised by delegation or as agents of the Imperial Parliament; rather, they were in authority as plenary and as ample, within the limits prescribed by section 92, as any powers which the Imperial Parliament possessed and could bestow.[15] That is, the provincial parliaments were sovereign bodies within their powers.

In the 1890's, we come upon decisions by Lord Watson, whose cast of mind, it would appear, placed

[15] E. R. Cameron, *The Canadian Constitution as Interpreted by the Judicial Committee of the Privy Council* (2 vols.; Winnipeg, 1915, and Toronto, 1930), I, 346.

him on the provincial side. His decisions contained much involved and obscure language, but their tendency was plain enough. Thus in *The Maritime Bank v. the Receiver-General of New Brunswick* (1892) he said:

> The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy.[16]

A plainer misstatement of what everyone in 1867 had said was the object of the Act could hardly be made. Why was it made? Could it be that the strenuous shouts of provincial premiers in opposition to the later Macdonald administration had been heard across the ocean? The new Dominion had been in low water in the 1880's, torn by racial and sectional strife, and in 1887 a conference of some provincial premiers at Quebec had passed resolutions calling for drastic reductions in the powers of the central government. These evidences of the strength of local feeling, accompanied as they were by fervent declarations of loyalty to the Crown, would, it may be believed, lead the distant Privy Council to imagine that decisions strengthening provincial powers were in line with the drift of Canadian public opinion.

Lord Watson's next decision, the apex of his de-

[16] [1892] A. C. 442.

cisions, was the *Ontario v. Canada* case of 1895,[17] again on the subject of liquor traffic regulation. His judgment contained much dicta and, among other things, he said, in language which the present writer cannot understand, that:

> There may, therefore, be matters not included in the enumeration [of Dominion powers] upon which the Parliament of Canada has power to legislate, because they concern the peace, order and good government of the Dominion. But to those matters which are not specified among the enumerated subjects of legislation, the exception from s. 92 which is enacted by the concluding words of s. 91, has no application . . . .[18]

Note the words "there may be"; evidently he was skeptical that the Dominion could have any power at all except those specifically enumerated in 91. He went on:

> And, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects [exclusively assigned to the provinces by s. 92] . . . . the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, [e.g., the exercise of the residual power] ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s.92. [To do otherwise] would practically destroy the autonomy of the provinces.[19]

[17] [1896] A. C. 348.
[18] *Ibid.*, p. 360.
[19] *Ibid.*, pp. 360-361.

The skilful dialectic of Lord Watson carried the B.N.A. Act far away from what seems to be its original meaning;[20] that of Lord Haldane, who had appeared in many a case before the older man, was to carry it farther still. In the Board of Commerce case (1919), where the issue was whether the Dominion's undoubted right to act for the peace, order, and good government of the country during the war extended on into the period of peace, Haldane, in deciding the case against the Dominion, said, among other things:

> It may well be that the subject of undue combination and hoarding [in respect to which the same came up] are matters in which the Dominion has a great practical interest. In special circumstances, such as those of a great war, such an interest might conceivably become of such paramount and overriding importance as to amount to what lies outside the heads in s. 92, and is not covered by them. The decision in *Russell v. The Queen* appears to recognize this as constitutionally possible, even in times of peace; but it is quite another matter to say that under normal circumstances general Canadian policy can justify interference, on such a scale as the statutes in controversy involve, with the property and civil rights of the inhabitants of the Provinces. It is to the Legislatures of the Provinces that the regulation and restriction of their civil rights have in general been exclusively confided, and as to these the Provincial legislatures possess quasi-sovereign au-

[20] On this see: *Report to the Speaker of the Senate by the Parliamentary Counsel* [William F. O'Connor] *Relating to the Enactment of the British North America Act, 1867, any lack of consonance between its terms and judicial construction of them and cognate matters* (Ottawa, 1939), usually referred to as "The O'Connor Report."

thority. It can, therefore, be only under necessity in highly exceptionable circumstances, such as cannot be assumed to exist in the present case, that the liberty of the inhabitants of the Provinces may be restricted by the Parliament of Canada, and that the Dominion can intervene in the interests of Canada as a whole. . . .[21]

Further on he added that when a subject becomes of paramount importance, it may be withdrawn from s. 92, but "This is a Principle which . . . has always been applied with reluctance, and its recognition as relevant can be justified only after scrutiny sufficient to render it clear that the circumstances are abnormal."[22]

Canadian commentators invariably use the most respectful language when discussing these Watson-Haldane decisions, but it is not hard to sense that behind their words lies disagreement. They point out that the decisions of the Privy Council, owing to frequent changes of personnel, lacked consistency, and in the cases of judges like Haldane, some seem to glance not only at his constitutional wisdom but at his *expertise*. For example, *in Fort Frances Pulp and Power Company v. Manitoba Free Press*, he introduced into the settlement, *de novo* and without warning, the American doctrine of "implied powers," which nowhere else has been suggested in connection with the Canadian Constitution. I would imagine that Haldane as a Liberal politician would be temperamentally against the increase of the central government's powers. And it is possible that he and his master, Watson, like Christopher Dunkin before them,

[21] [1922] 1 A. C. 197-198. [22] *Ibid.*, p. 200.

viewed the very idea of a "colonial" central government and its increase in powers, as disruptive of imperial unity, an unnecessary fifth wheel on the coach of genuine imperial federalism.

In the "Persons" case (1930), the issue was momentous: are women persons? If so, it followed they were entitled to all the privileges of "persons," including, in this case, appointment to the Senate. The Privy Council, speaking through Lord Sankey, Labour Lord Chancellor, decided that women are "persons."[23] His grounds were involved but the point for us here is a metaphor he used: "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the act was to grant a constitution to Canada."[24] This object had never been admitted before. The judgment was the beginning of a series of broad-construction decisions which ran on until appeals were abolished. These decisions were interrupted from 1937 to 1946 by a few backward-looking ones (especially items 12 and 13 in footnote 14), which returned to the attack on peace, order, and good government; in the Canadian Temperance Federation case that grant of authority was cut down to an "emergency" power once more. Broad construction was resumed again in 1947 when the Privy Council decided that the abolition of appeals to itself was within the powers of the Dominion Parlia-

[23] C. P. Plaxton, ed., *Canadian Constitutional Decisions of the Judicial Committee of the Privy Council, 1930 to 1939* (Ottawa, 1939), p. 14.

[24] *Ibid.*, p. 25.

ment. A broad construction was followed by a Labour Lord Chancellor (Lord Sankey); a narrow one by a Conservative (Lord Atkin). In decisions involving the control of the air and of radio, Sankey reiterated his "living tree" doctrines, while in destroying the Bennett Government's attempt at a labor code (1934), Atkin in his "Labour Conventions" case (1937), declared that "While the ship of State now sails on larger ventures and into foreign waters she still retains the water-tight compartments which are an essential part of her original structure."[25] While young Canadians walked the roads or "rode the rods" during the Depression, gentlemen in distant London hurled metaphors at each other—and at urgent Canadian necessities. From this disturbed period of the 1930's, when government seemed ineffective and a hampering court made it even more so, force began to gather behind proposals for terminating appeals. The war postponed the issue, but in 1947, quietly and without much fuss, it was concluded.

W. P. M. Kennedy, late dean of the University of Toronto Faculty of Law, used to say that the Act unfolded precisely as it should have done and that he himself had been able to anticipate practically every decision made under it simply by understanding its inner nature and genius. Not everyone can aspire to the same insight as Kennedy: others seem to think that frequently decisions were personal, and perhaps even political. It seems impossible to doubt that the decision reflected what the Judicial Committee

[25] [1937] A. C. 354.

thought was the state of Canadian public opinion. And nothing is more evident than that the judges could always "make the punishment fit the crime," that is, by processes of ingenious reasoning, come out exactly to the point at which they had probably arrived before they started.

In all these years, from 1874 (the first decision) to 1947 (the abolition of appeals),[26] the Privy Council, as Canada's court of last resort, expounded its constitution, which is, for practical purposes, the B.N.A. Act. The just-short-of-unitary state that Macdonald thought he had achieved was cut down to something just short of a confederacy. The power to make laws for the peace, order, and good government of Canada became a power not to make laws for peace, order, and good government of Canada, unless every other expedient had been exhausted and dire emergency threatened. The regulation of trade and commerce was eroded to a shell. Then after provincialism had reached its limit and nationalism had begun to make headway, or from 1930, the court began to strengthen the central power, and by 1947 it had restored something like life to many of the original vital clauses. As a result of the Second World War, the government of Canada found itself immensely stronger than before; this strength was necessary to meet the new spirit of the times in its socializing tendencies and it was unthinkable that there could be a return to the former provincialism. The Court put the

[26] Since cases begun before abolition were entitled to go to the Privy Council, a few of them have lingered down to the present.

necessary powers into the government's hands and it seems unlikely today that the former degree of erosion could take place again.

THE SUPREME COURT OF CANADA AS COURT OF LAST RESORT

It is too soon yet to decide what will be brought forth by the new situation wherein a Canadian court is the final arbiter, but already there have been a few decisions which the present writer believes will prove of immense future importance. These are listed in footnote 14. The point is that Canada, although a country governed under a division of powers, has no formal guarantees in its Constitution beyond those contained in those powers and in the language and religion clauses, and in particular, it has no formal guarantees of the liberties of the subject except those to be found in the historic English institutions and documents, such as the Bill of Rights of 1688. Yet a modern state, if a free society is to be maintained within it, must have some guarantee of civil liberties. The three cases mentioned seem to be feeling their way to a constitutional interpretation which will put civil liberties on some safe, legal basis. As evidence of this there may be cited the opinion of Mr. Justice Rand in the recent (1957) decision which upset the infamous "Padlock Law" of Quebec. This was an act passed by the first administration of Mr. Duplessis which gave to the authorities power to close up any premises occupied by anyone using them "to propagate

communism or bolshevism by any means whatever."[27] "Communism" was not defined in the Act. In substance it gave the authorities power to close up any house they liked. It was not until 1956 that it was found possible to get a suitable case before the courts: the costs of the case were met by a widespread public subscription. The analogy depended upon by the defendants was brothel-keeping: if a brothel could be closed up, why not a house of communism? This apparently assumed that one species of conduct was as easily recognized as the other. The "Property and Civil Rights" clause was also invoked by the province.

After employing the usual formulae for allocating power as between Dominion and provinces, which caused him to decide that it was impossible to put this case under property and civil rights, Justice Rand continued in part:

> The ban is directed against the freedom or civil liberty of the actor; no civil right of anyone is affected. . . . The aim of the statute is, by means of penalties, to prevent what is considered a poisoning of men's minds, to shield the individual from exposure to dangerous ideas, to protect him, in short, from his own thinking propensities. There is nothing of civil rights in this; it is to curtail or proscribe those freedoms which the majority so far consider to be the condition of social cohesion and its ultimate stabilizing force.

Indicated by the opening words of the preamble in the Act of 1867, reciting the desire of the four Provinces to be united in a federal union with a Constitution "similar in principle to that of the United Kingdom," the polit-

[27] 1 Geo. VI, c. 21 (Quebec).

ical theory which the Act embodies is that of parliamentary Government, with all its social implications. . . . Whatever the deficiencies in its workings, Canadian government is in substance the will of the majority expressed directly or indirectly through popular assemblies. This means ultimately government by the free public opinion of an open society, the effectiveness of which, as events have not infrequently demonstrated, is undoubted.

But public opinion, in order to meet such a responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas. Parliamentary Government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles. Under that Government, the freedom of discussion in Canada, as a subject-matter of legislation, has a unity of interest and significance extending equality to every part of the Dominion. . . .

Liberty in this is little less vital to man's mind and spirit than breathing is to his physical existence. As such an inherence in the individual, it is embodied in his status of citizenship.[28]

These are noble words. But they made little impression on some of Justice Rand's fellow-judges. The case, in fact, brought up the hardest and least manageable factor in Canadian life—the presence of two races differing fundamentally in language, religion, ideas, and historic tradition. Now that English Canada is more and more realizing itself as a national entity, the attitude of its people on the great funda-

[28] 7 D. L. R. (2d) 357-358 (1957).

mentals of freedom, while often fumbling, can be assumed: it will always be that of the English-speaking peoples the world over. It finds much response in French Canada, and I think it will find more. But as yet it would be merely wishful thinking to believe that there is among Canadians of French speech a great deal of genuine concern for, much less understanding of, civil liberties.

The liberties French Canada understands, for which it has always fought and always will fight, consist in the safeguards of its existence as a social group: freedom to follow the Roman Catholic faith, freedom to use, speak, be educated in the French language, freedom to maintain the ancestral code of laws. The unconscious pressure of an English continent gives to the individual in this group a relatively secondary place: he must be a good soldier in the ranks.

It is for this reason that it will take more than the throwing out of one padlock law to ensure English civil liberty in the province of Quebec. And the implications are startling. "Freedom to maintain the ancestral code of laws"—on that simple phrase, explanation and discussion could go on indefinitely. Until the present generation, its exposition went on in the leisurely processes of the courts. Nowadays, however, we have a provincial administration in Quebec which has discovered the possibilities of the word "autonomy" and is driving it to its limits. Quebec apparently is not merely a province like other provinces, but a special entity, guardian of a minority group, verging towards a state within a state. The most ex-

treme exponents of "autonomy" would perhaps privately be willing to point to another event of that great year 1867—the *Ausgleich*, or compromise, between Austria and Hungary, which made the Hapsburg Empire into the Dual Monarchy. These extremists are few and as a general rule all except a tiny group come down on the side of Canadian unity. But not organic unity: a state of two races, one of them fortified behind the "autonomy" of a province.

At present the number of informed people in Quebec who think in terms of a state within a state is probably small, though the number of uninformed who feel that way may be large. What the future will bring, who can tell? No one wants to subordinate French Canada or to cut into its rights, but too much extremism can easily arouse again the old racial arrogance of the English. Despite "autonomy," the relations between the two peoples are good. It is in these good relations and in the increase of mutual understanding that the solution will be found for this, the greatest of all problems of Canadian life.

FEDERALISM AND PUBLIC FINANCE

There are many clauses in the B.N.A. Act dealing with the financial arrangements between the uniting provinces. These arrangements are complex, but in essence they consist in the bestowal on the central government of unlimited powers of taxation, the confinement of the provincial governments to direct taxes, and compensatory payments by the central government to the provinces. These arrangements were ar-

rived at because in 1867 the privilege of direct taxation was a rather empty one; the people had had no experience with direct taxes and provincial treasuries dependent on them would have remained empty. The size of the Dominion grants to the provinces was revised from time to time, but it was not until the depression of the 1930's that this mode of financing became entirely inadequate for the weaker provinces. In that decade more than one province faced bankruptcy, and the economy of the whole country was strained so that some wholesale revision of financing had to be attempted. The first step was the appointment of the Rowell-Sirois Commission, one of those grand inquests into the state of the nation which within the last generation have become so common and so useful.[29] As a result of its studies, joined to the pressures of the war, a series of agreements was made between the Dominion and provinces (all except Quebec) which, while theoretically retaining the original constitutional position, has scrambled in bewildering fashion the whole field of taxation. Out of the series one fact clearly emerges: weak provinces cannot be left alone in their weakness but, as members of the Canadian family, they must be given enough public money to keep their living standards within reasonable proximity to the average. The justification for redistribution of this type is that metropolitan areas,

[29] Examples are the Aird Commission on Radio, the Massey Commission on Canadian culture generally, the Fowler Commission on Broadcasting. Apart from their specific recommendations, all of these have provided wide opportunities for national discussion on important topics affecting the federal structure, and this no doubt has been one of their major objectives.

all in the richer provinces, extract much wealth from every section of the country and this wealth should in some way be returned whence it came. Every new agreement is arrived at only after protracted bargaining and loud accusations of injustice, favoritism, and roguery. These agreements are reached by means of a peculiar device, a conference between the Dominion and the provinces. At first informal, these conferences are becoming formal, and there is already in existence a secretariat which looks after the formalities. In some respects they resemble international gatherings, and if there were not much pressure on the whole Canadian Confederation, they could easily drift off into a species of Canadian League of Nations, with all the weaknesses of a League. That is not likely to happen, however, but what conceivably could emerge from too much formalization, say over a century, could be a new governmental form, a government of governments.

The financial arrangement which has evolved out of these developments can be strong enough to meet the demands made upon it—in particular, all those demands arising from the needs of the modern socialized community—only if the total resources of the country are mobilized and co-ordinated. Out of this financial arrangement is slowly emerging an all-Canadian pattern of financing, one not sharply differentiated into provincial and federal, but one in which all authorities are interwoven. This interweaving may be one more stage towards the unitary state: that, at any rate, is what Quebec fears and that is why

it struggles so desperately for its "autonomy." But then, does not every tendency of the time—outside pressures and interior communications—drive us closer towards this unitary state? That is the major problem of federalism: how to maintain the desirable features of local autonomy while at the same time adjusting the conduct of our affairs to the rapid shrinkage of space.

CANADIAN FEDERALISM: A SEAMLESS GARMENT

The financial situation in Canada simply exemplifies one aspect of Canadian federalism that has been present and has been accepted from the first; namely, that the instrument of government does not set up separate and distinct spheres of administration but provides only for diversity in unity. In one sense Canada has only one government, divided into separate jurisdictions. Old-fashioned people would say that it is "the Queen's Government," wherever it is found, and they would be right in that all government in Canada is conducted in the name of the Crown and it is the same Crown, whether it acts through Ottawa, through a province, through a local police magistrate. This is the underlying concept and it explains why province and Dominion cannot be quite as disjunct units as they are in the United States: the same central power house, as it were, circulates its current through all of them. The constitutional provisions to secure this are numerous, and most of them have been mentioned—the Dominion appointment of lieutenant-governors and judges, the power to disal-

low provincial legislation, and, now, the undoubted pattern of unity which is creeping into the financial system.

"The people" in Canadian constitutionalism is quite a different concept from "the people" in American constitutional theory. It is a much weaker concept and is only one of the sources of power. No theoretical constitutional position can be based on it, nor could "the people of Nova Scotia," say, be contrasted with "the people of Canada." They are all the Queen's subjects. But they are also Canadian citizens and while the concept of "the people" is neither traditional nor legal, yet everyone freely admits that democracy is the dominating concept in Canadian constitutionalism today.[30]

We thus end where we began, by emphasizing the empirical nature of Canadian constitutionalism. The Canadian people have built upon the historic institutions under which they grew up, have kept many of them unchanged (such as the writ of *habeas corpus*), have discarded others (such as the granting of titles),[31] and have modified still others. They have adapted what they considered the best from the institutions of their elder brother, and have slowly worked out their own additions. All this they have done

[30] See above, Justice Rand's opinion in the "Padlock Law" case.

[31] The granting of titles perhaps illustrates as clearly as may be the distinction between the American and Canadian systems. The practice is forbidden by the American Constitution (Art. I, Sec. 9, cl. 8), but in Canada, after long debate, the Prime Minister simply informed the House of Commons that in future the Crown would be advised not to grant titles to Canadians.

while expressing the utmost respect, at times an almost unbecoming degree of respect, for monarchy with all its implications and paying the utmost attention to the principles and practices implied by the phrase "the will of the people." If this be theory, make the most of it!

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French-Canada and Canadian Federalism

F. R. Scott

New France was a firmly established colony on the banks of the St. Lawrence, with a history of unbroken settlement stretching back a century and a half before the country came under British rule by the Treaty of Paris in 1763. Quebec was founded in 1608, Three Rivers in 1634, and Montreal in 1641. The development of agriculture and trade and the establishment of religious, judicial, and political institutions provided an expanding base for communities that enjoyed a distinctively French and Catholic way of life. Exploration into the interior of the continent had opened up vast areas for further settlement and had excited grandiose hopes for future domination in North America. The exclusion of all Protestants, whether French Huguenots or others, kept the society tightly knit and sharpened the notion of a missionary group dedicated to the propagation of the Catholic faith in the New World. Authoritarian practices embedded in religious and civil government habituated the people to feudal social relationships

which, because of the cession to Britain, were not fractured by the French Revolution and continued well into the nineteenth century, surviving in some forms to the present day. Most of the settlers in New France came from the northeast section of Old France, which was the last to succumb to the revolutionary forces, and a *Te Deum* was sung in Notre Dame Cathedral in Montreal to celebrate Nelson's victory over Napoleon's fleet at Trafalgar. French Canada was thus deprived by the accidents of history of a revolutionary tradition other than that of the struggle to survive under English domination.

Great Britain guaranteed to this compact French community the continuance of its religion and laws by the Quebec Act of 1774. That important statute, enacted to immunize the new colony against the growing spirit of independence and revolt in the American colonies, made a duality of culture the essential basis of Canadian resistance to American absorption, and wrote into Canadian constitutional law a recognition of cultural rights which has since been so distinctive a characteristic of Canadian federalism. Much of the later political history of Canada resolves itself into a struggle on the part of Quebec to expand those rights, and on the part of English-speaking Canadians either to resist the expansion or else to integrate it harmoniously—and here French as well as English statesmen have given leadership—into the concept of a larger Canadian nationhood. The thread runs unbroken through the early nineteenth century constitutional conflicts, the rebellions of 1837-1838, the lan-

guage and school questions, the conscription issues in the two World Wars, down to the recent disagreements over fiscal autonomy. There can be little doubt that cultural diversity will continue to provide much of the excitement and color in Canadian politics.

Cultural dualism, however, did not mean, in the early days, any large degree of political autonomy for French Canada. Though French Canadians—or "new subjects" as they were called—for many decades greatly outnumbered their English fellow-citizens—the "old subjects"—the latter held a dominant position in the governments that succeeded the cession. British rule was, at the outset, a rule imposed by force, and, however natural in the light of contemporary thinking, was none the less galling to the vanquished. It was the British, however, who supplied the parliamentary processes, unknown in Old or New France, through which the French determination to survive could find effective political expression; and historians have remarked upon the speed with which the novices to parliamentary government acquired its techniques and skills and directed them to their own ends. Their majority control of the Legislative Assembly of Lower Canada under the constitution of 1792, nevertheless, was frustrated by the final authority vested in the Governor—appointed from London —and his Executive Council. The will of the English minority prevailed, though forced constantly to accommodate itself to the insistent demands of the majority. When at last the principle of Responsible Government was achieved, in 1849, and Cabinet de-

pendence upon the majority in the Lower House recognized, the victory still left final control in English hands since the Act of Union of 1840, by which Lower and Upper Canada (Quebec and Ontario) were joined in one legislature, secured a majority of seats for representatives of English constituencies. Not till the constitution of 1867 introduced a truly federal system was any portion of political sovereignty transferred to the exclusive control of the French majority in Quebec.

Thus the initial survival of French culture in Canada did not depend upon "provincial autonomy," a belief in which is such an inseparable and insistent part of present opinion in Quebec. In the critical early days after the cession, and to a lesser extent down to 1867, the French were subjected to alien rule. The social institutions, the religion, and the language of the people were a sufficiently cohesive force, under the tolerant policy of Britain, to ensure the continuance of the group even though ultimate political power lay elsewhere. The British in Canada, while hoping for French assimilation in the early days, never went to any of the extremes to which modern history has accustomed us in their desire to secure it; they never began even to match the severity of the laws against Catholics in England down to the Emancipation Acts or the laws against Huguenots in France from the Revocation of the Edict of Nantes down to the Revolution. Durham talked largely about assimilation, and the Act of Union of 1840 was in part designed to achieve it, but the proscription of the

French language in that constitution lasted but eight years and was confined to its use in legislation. The ban was more insulting than socially menacing, and served to excite rather than diminish the nationalist feeling. Before 1867 had arrived, and while French Canada was still subject to an English majority, the official use of the two languages had been restored, separate schools for Catholics had been granted in Ontario as well as in Quebec, the remnants of English law had been removed from the Eastern Townships, the Quebec Civil Code had been drafted and promulgated, and a practical political federalism—the "double majority rule"—had emerged under the Union government which led naturally into the system formalized in the British North America Act. Thus it was that Canada, under the pressure of her dual cultures and infused by enlarging concepts of democratic government drawn both from England and North America, as well as from her own experience, led the way in the evolution of political relationships between differing ethnic groups which began the slow change of Old Empire into modern Commonwealth.

THE 1867 SETTLEMENT

For Quebec, the coming of Confederation meant a great step forward in self-government. For the first time her people had virtually complete control of a government possessed of exclusive legislative power over considerable areas of jurisdiction. For the first time, too, they enjoyed the experience of having to

care for the rights of minorities within their predominant group, for although the Protestants had been guaranteed separate schools in Quebec as well as the use of English as an official language, Jews and other religious and racial communities were entirely dependent on the French majority for all such rights within provincial jurisdiction. But since Confederation occurred in the heyday of *laissez faire*, and since it was the federal government which originally was thought to be the chief developmental authority in Canada, the possession of provincial autonomy was a relatively minor factor in the growth of French culture and influence during the first half century after 1867. The Church, rather than the state, was the guardian of the French way of life. There was as yet no theory of the positive state to suggest the use of legislation as cultural "social engineering"; any such notion would have smacked too much of socialism to have been acceptable to the Catholic mind. The legislature became a forum for airing grievances rather than a source of social directives.

Despite the increased freedom it allowed her, Quebec cannot be said to have accepted Confederation with any great enthusiasm. When the vote was taken on the Quebec Resolutions in the Legislative Assembly of the Union Parliament in 1865, there were 27 French members for the measure and 21 against. In the Upper House, elective at this time, the division was 14-6. What would have happened on a referendum of the people will never be known. The principal reason for opposition to Confederation in Quebec

was that the amount of jurisdiction allotted to the provincial legislatures seemed too limited, and the predominant powers appeared to be vested in the federal government and Parliament in which the English element would necessarily have a majority. The fear of this majority was present then in Quebec thinking as it is today; yet, short of total independence for Quebec, no form of federal constitution could have been devised which could have avoided it. The English were, after all, a majority. What could be done, and what was done, was to write certain cultural guarantees into the fundamental law. These existed in the 1867 Act in regard to the use of the French and English languages, and in regard to the right to separate schools, while the principle of representation by population was secured for the federal House of Commons.

A constitution might have been drafted with more power allotted to the provinces and hence to Quebec, but there were strong reasons, acceptable to the majority of French Canadian representatives led by Cartier, as well as to English Canada, why this should not be. A weak federal state could hardly be expected to survive against the centrifugal pressures of geography and cultural dualism. The American Civil War seemed to prove that exaggerated states' rights lead to dissension and disaster. Provincial separateness in British North America prior to Confederation had greatly aggravated the problems inherent in the economic development and military defense of the vast region; a firm hand, it appeared, would be needed

at the center of the new nation to counterbalance the divisive forces which were even then powerful enough to make the acceptance of Confederation highly doubtful in the Maritime Provinces and not easy in Quebec. Yet too much centralization would have made the scheme totally unacceptable and would have defeated the very purposes which its promoters sought to achieve. Whatever else Canadian federalism might mean, it was clear that it had to be free from any reasonable suspicion of being a device to bring about the assimilation of French Canada which had been Durham's hope for the Act of Union of 1840, and which French determination, and the happy co-operation between Upper and Lower Canadian reformers in winning responsible government, had prevented. Confederation had to be as strong as possible for reasons of good government, while being as safe as possible for French culture and local loyalties in the Maritimes.

Macdonald and Cartier were the prime architects of the compromise that emerged. Macdonald was the principal one to stress the unitary principles in the new constitution though he was not alone in this attitude; Cartier emphasized for Quebec the security of her language and institutions. In this respect, as Mason Wade has said,[1] Macdonald was the Hamiltonian and Cartier the Jeffersonian among the Fathers —though the analogy must not be forced, since Cartier

[1] Mason Wade, *The French-Canadians* (New York, 1955), p. 320.

was a strong monarchist and interested in minority rather than individual rights. At this stage in Canada's constitutional evolution, the battles were over group rights, not individual rights; it was not to be until after World War I that questions of civil liberties began to be actively discussed in Canada, and not till the 1940's that proposals for the addition of a Bill of Rights to the Canadian Constitution were put forward. Without Cartier's skillful support, backed by the Church, Confederation would not have been accepted in Quebec; the Church, of course, did not have the fear of centralization that the French nationalists had, and felt persuaded of the wisdom of the scheme. Thus led, the people—or enough of them —followed, and in the end Canada received a form of federalism which leaned strongly toward the unitary state.

Evidences of the unitary principle run all through the B.N.A. Act. In the first place, the residue of powers—those not specifically allotted either to Ottawa or the provinces—rests with the central government; the American Constitution was here expressly repudiated. Then the central power appoints and pays the Senators from each province, the Lieutenant-Governors of provinces, and the judges of all superior provincial courts. The judicial system of the federation is unified, not dual as in the United States; the Supreme Court of Canada, appointed by the federal Executive, may hear appeals on all matters arising in the provinces, whether under federal or provincial laws. All matters "of common interest to the

whole country," to use the words of the Quebec Resolutions, were to be placed in the hands of the "General Government," while the "Local Governments" were to be "charged with the control of local matters in their respective sections." So unimportant was the work of the local governments expected to be that they were deprived of any power to impose indirect taxes, the central government making up, by way of annual subsidies, the extra amount it was anticipated they would need to balance their budgets. And a special provision was introduced by which the Parliament of Canada could "declare" any local work to be "for the general advantage of Canada," and thus could bring it under exclusive federal control. To cap the structure of federal dominance, Ottawa was given the power to disallow any new provincial statute within one year of its adoption.

These various provisions give Canada a special form of federalism, unlike any theory of the federal state in existence then or now. Indeed, Professor Wheare has raised the question whether Canada can be said to have a federal constitution at all; he prefers to say that she has a quasi-federal constitution, since, judged by the strict law, it is difficult to know whether it should be called a federal constitution with considerable unitary modifications, or a unitary constitution with considerable federal modifications.[2] Looked at in the light of present Canadian politics, where respect for "provincial autonomy" has been

[2] K. C. Wheare, *Federal Government* (3rd ed.; London, 1956), p. 20.

elevated by Privy Council decisions and increasing French-Canadian influence to be a supreme purpose of the B.N.A. Act, the acceptance of the unitary provisions in 1867 appears remarkable, especially in Quebec, but it must not be forgotten that however anti-provincial the Constitution might seem, it was much less centralized than the Act of Union which preceded it. As explained above, French Canada had never enjoyed any "sovereignty" under British rule—though its people participated in government far more under that rule than they had done under the previous French rule—so that, small though it may then have appeared, the area of provincial jurisdiction they would control under the B.N.A. Act was greater than they had ever before known. The French could thus feel they were stepping out into a wider freedom whereas the English were entering a closer union. This explains why it was easier to win the support of Quebec than of the Maritime provinces. In addition, there were the guarantees for minority rights written into the law governing all provinces and placed beyond the will of the English majority. Particular to Quebec were two important provisions; judges in the Quebec courts must be drawn from the Quebec bar in order to protect the Civil Law of the province, and Section 94 of the Constitution, by which the common-law provinces may, if they wish, delegate to Ottawa some or all of their jurisdiction over "property and civil rights," was not to apply to Quebec. The survival of French law was thus a clear purpose of the Constitution.

In accepting the Confederation scheme Quebec, as subsequent history has proved, was certainly not committing "the political suicide of the French race in Canada," as J. F. Perrault predicted,[3] nor was its effect "to snatch from them what little influence they still enjoy," to use the words of A. A. Dorion.[4] Nevertheless, in two respects the Constitution failed to provide French Canada with the rights which its constantly expanding population in other provinces and its growing national spirit led it to formulate very clearly at a later date. The minority rights which were guaranteed did not in practice apply equally throughout the whole federation, since Quebec was the only province in which the two languages were official, and separate schools were in 1867 restricted to central Canada. Also, the province of Quebec as such was not treated so differently from other provinces as to suggest that it was a special state within the state—something set markedly apart in law as it was set apart in race, language, religion, and aspirations. The racial settlement was worked out in the area where the two races were then in close juxtaposition; other English provinces that were brought into the Union—British Columbia, Prince Edward Island, and, recently, Newfoundland—would never have committed themselves to the writing of their provincial laws in the French language, which they knew little or nothing of, or to the separate schools, which (except in Newfoundland) they had had no domestic

[3] Cited in Mason Wade, *op. cit.*, p. 325.
[4] *Ibid.*, p. 327.

reason to adopt. Hence it was only in those provinces which the Parliament of Canada itself created out of the Northwest territories—Manitoba, Saskatchewan, and Alberta—that minority rights came to be established at all, and while Ottawa kept faith with Quebec in writing language and school clauses into the Manitoba constitution in 1870, that province in 1890 abolished both, while in Saskatchewan and Alberta the school clauses, and those in a somewhat restricted form, were alone introduced. Ontario has kept the separate school system with which it began, but in 1913 launched a direct attack upon the use of the French language as a medium of instruction in separate schools. Thus it is that the history of French-English relations since 1867 has been filled with struggles over language and school rights in all parts of Canada outside Quebec (with some stirrings inside); thus also the French Canadian's claim that he cannot feel as much "at home" in other parts of Canada as he does in Quebec finds its justification.

Since the battles over minority rights concerned only French and English, Catholics and Protestants, at the founding of modern Canada, and since English public law knew nothing of formal declarations of civil liberties, nothing was said in the B.N.A. Act about human rights or religious liberty in general. Other races and religions were left without special protection; they depended upon the democratic sentiment and traditions of the majority, and in Quebec and Ontario upon the pre-Confederation Freedom of Worship Act of 1851, for any recognition of their

rights. Thus Canada possesses two favored languages and religions, but no more. As new settlers arrived, particularly in the Western provinces, a mixed population developed which became increasingly unsympathetic to the idea of separate schools limited to Catholics and Protestants, and preferred the nonsectarian school with no favors to any group. The same influences worked against the extension or, in Manitoba, the retention of French as an official language. In some parts of the Canadian West other language groups outnumber the French. The Quebec view is that new immigrants take the Constitution as they find it, and that French Canadians as the original white settlers of the country have by historic right a preferred position, but this argument often has little weight with the men and women from many parts of the world who opened up the western country and knew nothing of the early history of race relations in central Canada.

POST-CONFEDERATION DEVELOPMENTS

The first years of Confederation were filled with the task of nation-building of which the Union of the four original provinces was only the beginning. Other provinces and territories had to be brought in, the Supreme Court of Canada established, and the first transcontinental railway built. The figure of John A. Macdonald dominated the political scene, and the federal authority he had done so much to create remained virtually unchallenged. When the tide of federal energy waned during the economic depres-

sion of the seventies and eighties, and nationalist sentiment in Quebec was aroused by Louis Riel's career and execution in 1885, provincial rights began to be asserted with increasing vigor. The first Interprovincial Conference was summoned by Quebec's nationalist premier, Honoré Mercier, in 1887, and was presided over by Macdonald's great political opponent Oliver Mowat, premier of Ontario. Representatives from Nova Scotia, New Brunswick, and Manitoba also attended. The avowed intention of the Conference was to seek amendments in the B.N.A. Act since, as the preamble to the adopted resolutions states, "the preservation of provincial autonomy is essential to the future well-being of Canada," and "if such autonomy is to be maintained, it has become apparent that the constitutional act must be revised and amended."[5] There was no talk here of holding Ottawa to an observance of the terms of Union, or to the Act as a compact or treaty that should not be touched without unanimous consent, since the Dominion and two provinces did not attend; yet the resolutions asking for amendments were duly forwarded to Ottawa and through to the Colonial Secretary in London, where they died. It was only too obvious to the provincial premiers that it was the Act itself, and not merely an invasion of their rights by Ottawa, that restricted the autonomy they desired. Among the suggested amendments were included the abolition of the federal veto over provincial laws,

[5] See *Dominion-Provincial and Interprovincial Conferences from 1887 to 1926* (Ottawa, 1951), p. 20.

provision for provincial appointment of Senators, and a restriction on the federal declaratory power over local works. In this instance Quebec nationalists desiring more freedom for their government sought and found support among other provinces for an attempted reduction of federal powers.

While no formal amendment to the Constitution resulted from this 1887 conference, a considerable number of matters on which an amendment was sought were later resolved in favor of the provinces without amendment, chiefly by judicial decisions of the Privy Council, namely:

i. the establishment of machinery for referring constitutional questions to the courts, upheld in *A. G. Ontario v. A. G. Canada*, [1912] A. C. 571,

ii. the granting of full prerogative powers to Lieutenant-Governors of provinces, affirmed by the Liquidator's case, [1892] A. C. 437,

iii. the right of provincial legislatures to define their own privileges, declared in *Fielding v. Thomas*, [1896] A. C. 600,

iv. the right of provincial legislatures to abolish their Legislative Councils, effected partly by provincial legislation, and for Nova Scotia with the help of the Legislative Council reference, [1928] A. C. 107,

v. the provincial claim to full ownership of Crown lands, declared in a series of cases beginning with *A. G. Ontario v. Mercer* 8. A. C. 767,

vi. the right of provincial legislatures to enact bankruptcy laws in the absence of federal legislation, upheld effectively in the Voluntary Assignments case, [1894] A. C. 187,

vii. the right of the Lieutenant-Governor to exercise the prerogative of mercy with respect to offences against provincial laws, upheld by the Supreme Court following the Liquidator's case: see 23 S.C.R. (1893) 458,

viii. the fixing of boundaries of Ontario and Manitoba by Imperial statute,

ix. the upward revision of provincial subsidies, a process that has continued intermittently since 1869 and included the amendment to the B.N.A. Act of 1907.

Even more important than these additions to provincial autonomy were some of the decisions of the Privy Council with respect to the distribution of legislative powers between Ottawa and the provinces. Beginning at the time when federal leadership was declining in the 1880's and continuing with some fluctuation through to the group of reference cases arising out of Mr. Bennett's "New Deal" legislation of the 1930's, these judicial interpretations so restricted certain heads of federal jurisdiction and so enlarged provincial fields that it was a prevalent opinion among constitutional authorities in Canada that the whole balance of the original Constitution had been upset.[6]

[6]. The authorities are collected in my article, "Centralization and Decentralization in Canadian Federalism," *Canadian Bar Review*, XXIX (1951), p. 1108, n. 44.

More specifically, Dominion authority with respect to the regulation of trade and commerce, of fisheries, of agriculture, and of international treaties was held to a minimum, and the residuary clause reduced to a war-time emergency power, while provincial control over "property and civil rights" grew to include substantial areas of internal trade, labor relations, development of natural resources, social insurance, and welfare legislation generally. The concept of the "common interest" as distinct from matters of "local interest," which was so evident in the Quebec and London Resolutions and in the *Debates on Confederation*, was lost in a series of "canons of construction" enunciated by the courts and derived from the peculiar logic of statutory interpretation. All this expanded the autonomy of Quebec as well as of other provinces, and thus assisted greatly in widening the field within which the government of Quebec could, if it wished, exercise legislative power on behalf of its nationalist aims. Well might R. B. Haldane, who later as Lord Haldane himself carried on this decentralizing work, write of Lord Watson, its originator:

> He completely altered the tendency of the decisions of the [Canadian] Supreme Court, and established in the first place the sovereignty (subject to the power to interfere of the Imperial Parliament alone) of the legislatures of Ontario, Quebec and other Provinces. He then worked out as a principle the direct relation, in point of exercise of the prerogative, of the Lieutenant-Governors to the Crown. In a series of masterly judgments he expounded and established the real constitution of Canada. . . . No-

where is his memory likely to be more gratefully preserved than in those distant Canadian provinces whose rights of self-government he placed on a basis that was both intelligible and firm.[7]

This frank admission of the political role of a constitutional court could hardly go further, and to it may be added what Lord Haldane said in the argument of the Snider case in 1925: "The real contest was between Sir John Macdonald and Lord Watson."[8] In this contest the British spokesman had the last word. *Divide et impera.*

French-Canadian students of the Constitution have not unnaturally welcomed the general trend of Privy Council decisions. One of the recognized authorities in Quebec has written:

A great volume of criticism has been heaped upon the Privy Council and the Supreme Court on the ground that their decisions rest on a narrow and technical construction of the B.N.A. Act. This contention is ill-founded. The decisions on the whole proceed from a much higher view. . . .the recognize the implicit fluidity of any constitution by allowing for emergencies and by raising distinctions on questions of degree. At the same time they firmly uphold the fundamental principle of provincial autonomy: they staunchly refuse to let our federal constitution be changed gradually, by one device or another,

[7] R. B. Haldane, "Lord Watson," *Judicial Review*, XI (1899), 280-281; see also: *Canadian Bar Review*, VIII (1930), 438.

[8] *Judicial Proceedings Respecting Constitutional Validity of the Industrial Disputes Investigation Act, 1907* (Ottawa, 1925), 190.

to a legislative union. In doing so they are preserving the essential condition of the Canadian Confederation.[9]

This comment is not quite fair: none of the criticism thus criticized blamed the Privy Council for not permitting the change to a legislative union. Rather was it directed to the failure in the Court to maintain the kind of strong federal state originally planned.

Despite its belief in provincial autonomy, French Canada has on several occasions openly urged its restriction in favor of minority rights. When the Conservative party sought to impose separate schools upon Manitoba through federal legislation after that province had abolished them in 1890, the Quebec section of the party and the Quebec clergy strongly supported the proposal; though in the ensuing election the voters in Quebec, wanting a French Canadian Prime Minister and trusting his ability to protect their coreligionists in Manitoba, elected Wilfrid Laurier despite his opposition to federal coercion. When Ontario in 1913 attempted to regulate the use of French as a language of school instruction, the French separate school trustees in Ottawa asked the courts to declare that the province did not possess this kind of autonomy. When the Canadian Broadcasting Corporation established its trans-Canada radio network, there was strong and successful pressure from Quebec to build French-language stations for the Prairie Provinces regardless of the wishes of local populations. Provincial autonomy, which is the right

[9] L. P. Pigeon, "The Meaning of Provincial Autonomy," *Canadian Bar Review*, XXIX (1951), 1135.

of the legislature of a province to make what laws it pleases, not infrequently becomes the enemy of minority rights. The two concepts are quite different. One promotes majority rule, the other limits it in favor of a more fundamental right. To say that French Canada wishes the maximum degree of provincial autonomy in Quebec and the maximum degree of minority rights in other provinces where the majority are English speaking, is merely to state the obvious wish of this group of Canadians to protect their way of life to the utmost. English Canadians can be said to desire the maximum degree of minority rights for the Protestant minority in Quebec, but since they are a majority in Ottawa, they have less fear of federal authority in general.

ECONOMIC DEPRESSION AND THE REVIVAL OF FEDERAL POWER

The world economic depression of the 1930's revealed profound weaknesses in the Canadian Constitution as interpreted by the courts. The provinces had grown in stature and social responsibility far beyond the "local and private matters" imagined at Confederation, but lacked the financial means to protect the people against widespread unemployment and poverty. The federal government had the financial means, but insufficient legislative authority. The magnitude of the calamity surpassed provincial jurisdiction as it surpassed their boundaries. Either constitutional reinterpretation or constitutional amendment had to occur, and a shift in power could mean only

one thing—greater centralization. When the Privy Council found the fields of aeronautics and radio broadcasting to be within federal powers[10] it seemed as though a reinterpretation of the Constitution might take place, but when Mr. Bennett's "New Deal" legislation, covering such matters as unemployment insurance, agricultural marketing, and regulation of wages and hours of labor, was referred to the courts in 1936, the judges reverted to the older concepts of provincial autonomy much as did the American Supreme Court in the first New Deal cases.[11] The judicial road being blocked, the pressure for formal constitutional amendment mounted. Even in Quebec, traditional home of provincial rights, opinion was moving in this direction; not only had the Quebec legislature accepted federal control over industrial disputes after this subject had been unexpectedly assigned to the provinces by the Privy Council decision in the Snider case in 1925,[12] but the Quebec Social Insurance Commission set up in 1930 reported in favor of federal unemployment insurance legislation and, though somewhat reluctantly, in favor also of the acceptance by Quebec of federal old age pensions.[13] The time was propitious for a new look at

[10] *In re the Regulation and Control of Aeronautics in Canada*, [1932] A. C. 54; *In re Regulation and Control of Radio Communications in Canada*, [1932] A. C. 304.

[11] These references are all in 1937 A. C. Comments on them will be found in the *Canadian Bar Review* of that year.

[12] See 22 Geo. V, c. 46 (Quebec); *Toronto Electric Commissioners v. Snider*, 1925 A. C. 396.

[13] See *Report of the Quebec Social Insurance Commission, 1932* (Quebec, 1932), pp. 150, 203.

the Canadian Constitution, and this was provided in the *Report* of the Rowell-Sirois Royal Commission on Dominion-Provincial Relations in 1940.

The proposals of this *Report*, its bold plan for securing to all Canadians a minimum level of social welfare, and its suggestions for avoiding in the future the chaos resulting from unco-ordinated provincial financing, are now part of the history of Canadian federalism but not of her law. For by the time the *Report* was published, World War II had intervened, and this fact, coupled with determined opposition by the governments of Ontario, British Columbia, and Alberta, meant the indefinite postponement of the plan. Fortunately, the manifold problems posed by the war effort could be effectively handled by Ottawa, since the outbreak of hostilities called into being the emergency federal powers which, with the defense power, temporarily solved the constitutional difficulties. Mr. Mackenzie King, then Prime Minister, made but one important constitutional change; taking advantage of the fact that his Liberal party controlled all the provincial governments except Alberta, he put through an amendment to the B.N.A. Act in 1940 providing Ottawa with jurisdiction over unemployment insurance. This was the first time since 1867 that a formal transfer of legislative power had been made. Other constitutional arrangements during the war years, such as the Taxation Agreements with provinces, were contractual agreements which did not change the fundamental law and, as postwar events showed, lasted only so long as the provinces were will-

ing to continue them. Quebec accepted the first of these Agreements, but withdrew and vigorously opposed their extension under the leadership of Mr. Duplessis and his Union Nationale party after 1945. Only one amendment touching provincial powers was made in the postwar period; in 1951 old age pensions were allotted to Ottawa, and this merely regularized the fact that the federal Parliament was already legislating in this field.

The growth of federal power in Canada since 1940, necessitated first by the war and subsequently by problems of fiscal policy and defense, has thus changed the political balance of power between federal and provincial governments more than it has altered the text of the Constitution. Ottawa's jurisdiction over defense matters has become a potent source of authority in a world that remains in a state of cold war. The federal taxing power was stated broadly enough in the original Constitution to validate income taxes, and these with the banking power and central bank operations in control of credit give a legal base to fiscal planning. The courts have gone so far as to hold that federal taxes can be given priority over provincial taxes, thus enabling Ottawa to exert, as Professor Wheare has pointed out,[14] an enormous influence on the future of federal government in Canada. Coupled with the taxing power is another power of comparable importance, namely the "spending" power. What Ottawa collects as taxes, it can distribute as gifts or subsidies. It can select the recipient

[14] *Op. cit.*, p. 112.

at its choice, be he an individual or body politic. Like the Prince of old, the Queen of Canada can scatter her largesse. She may go further, and attach conditions to the gift. All conditional grants are made on this basis. Making a gift not being the same as legislating in the field which is the object of the gift, since there is no change in the law and no compulsion to accept, a policy of offering to subsidize what it cannot directly compel by legislation opens to the federal government a wide road into positive social planning based on an induced provincial consent. Hence such federal forms of assistance as family allowances and grants to universities exist in Canada, and the recently created Canada Council, with a purse of $100,000,000 to spend, has embarked upon an imaginative program of encouragement of the arts, humanities and social sciences as recommended in the Massey Report of 1951.[15]

While federal authority in Canada is at a high point, the provinces have by no means sunk back into insignificance. Their control of their natural resources gives them a key position in the economic development that is taking place. It is chiefly to the provinces that the private entrepreneur must go for the oil and mineral rights he seeks, unless he invests in the Northwest Territories. The provincial governments are thus involved in economic planning as owners of the raw materials being exploited on terms they lay

[15] *Report of the Royal Commission on National Development in the Arts, Letters and Sciences* (Ottawa, 1951). Quebec universities at first accepted federal grants, then under pressure from Premier Duplessis refused them on the ground they threatened provincial control over education.

down. But the over-all responsibility for full employment and fiscal policy remains in federal hands.

QUEBEC'S OPPOSITION TO CENTRALIZATION

It is but natural that the recent resuscitation of federal authority should cause grave concern among certain Quebec spokesmen of nationalist leanings. It so happens that the beginning of the federal revival coincided with the advent to power in Quebec of Maurice Duplessis and his Union Nationale party, pledged to the protection of French Canadian rights and the strengthening of provincial autonomy. Mr. Duplessis had previously been the leader of the provincial Conservative party, before he gave his followers a new name and adopted a more nationalist program; hence it is not surprising that with his appeals to race and religion he combines a firm belief in free enterprise and a strong opposition to trades-unionism, socialism, and the welfare state. Therein lies much of his support from the business groups, of whatever nationality, in Quebec, who forgive him his nationalism in return for his economic conservatism. By skillfully playing on both these drums simultaneously he charms both types of autonomist—those who resist Ottawa because it represents the English majority and those who resist its growing authority because it represents the "creeping socialism" of social insurance and its concomitant taxation. He has been Prime Minister of the province from 1936-1939, and continuously from 1943. Under his leadership the formulation of Quebec's views on Canadian federalism has be-

come more positive and more precise, especially since the publication of the *Report* in 1956 of his own Royal Commission of Inquiry on Constitutional Problems, commonly called the Tremblay *Report.* This *Report*, covering much the same ground as the Sirois *Report* of 1940 and the Massey *Report* of 1951, has come up with radically different solutions. Whatever opinion may be held of the views it expresses, it must be admitted that they present a vigorous argument for the nationalist position, and stand upon political and philosophic concepts which lie deep in the traditions of the French and Catholic population of Quebec. Current discussions of federalism in Canada have centered largely around certain issues which Mr. Duplessis has raised during his terms in office, and which the Tremblay *Report* has underpinned with its broad theoretical analysis.

QUEBEC'S THEORIES OF PROVINCIAL AUTONOMY

One of the most firmly held convictions in Quebec is that the Canadian Constitution rests upon a solemn compact or treaty between the provinces. The government at Ottawa, it is even said, is the creature of the provinces who brought about Confederation. It follows that no changes should be made in the basic law without the unanimous consent of all the partners, or at least—if the notion of little Prince Edward Island holding a veto be too absurd—without the consent of the four original provinces that created the Union. This view is of course not the invention of Mr. Duplessis, and has solid backing among some Cana-

dians of both races from far back; he has, however, raised it to the position of a dogma by constant repetition and by writing it into statute form on more than one occasion.[16] The implication of this doctrine is obvious; it enables Quebec to claim a right of veto over proposals from other provinces for further amendments to the Constitution. It would be a courageous government at Ottawa that would dare to override Quebec's opposition to any amendment that sought to transfer legislative powers from provinces to the central Parliament. Mr. St. Laurent disregarded strong protests from Quebec in 1949, when a limited power of amendment was introduced, as did Mr. King in 1943 and 1946 when the constitutional provisions for representation in the federal House of Commons were changed, but the amendments in question did not touch provincial autonomy. The Constitutional Conference of 1950, which sought to overcome Canada's inability to change her Constitution without going back to the United Kingdom Parliament, could reach no agreement because of Mr. Duplessis's refusal to countenance any plan that deprived Quebec of her asserted right of veto. So the question of constitutional amendment remains unsettled today, with Canada continuing, despite her growth in international status, to return to the Parliament at Westminster for certain constitutional changes, as she was obliged to do when she was a mere colony. There is an established convention that whatever is demanded by the Parliament at Ottawa will be automatically granted in Lon-

[16] E. g.., 2-3 Elizabeth II, c. 17 (Quebec).

don, so that it is theoretically possible to secure amendment regardless of Quebec's or any other province's opposition, but the symbol of colonial dependence remains.

The compact theory is negative and static; it seeks to preserve the existing Constitution from change imposed by mere majority vote. It does not provide a criterion for determining whether the present Constitution is adequate for future needs. It does not supply an argument for the enlargement of provincial autonomy beyond that envisaged in 1867. Since this is the aim of Mr. Duplessis, who objects strongly to the growth of federal authority since the last war, new theories must be advanced. These are forthcoming in the treaty-between-races theory, and in the similar notion that the chief purpose of federalism in Canada is to permit the two cultures to develop side by side in equality and harmony. If the B.N.A. Act is looked upon primarily as a treaty between races, and if the further supposition is made that the government of Quebec is alone authorized to speak for the French race, then some radical conclusions can be rapidly reached. The races being equal, the governments that speak for them should be equal. Hence Quebec ceases to be a mere province, in which position she is forced to share a place with nine other provinces under a national government centered at Ottawa, and becomes in a way a smaller but co-equal partner in a dual state. Moreover Quebec then assumes a special Catholic and French character, just as Ottawa is made to take on a Protestant and English

character, not just *de facto* but also *de jure*. The line is sharply drawn, and the two champions face one another in an opposition that has many of the characteristics of a cold war. "Deux Etats, deux conceptions, deux peuples," writes Mr. Philippe Ferland, Q.C.,[17] and he has suggested amendments to the Constitution which would make this sharp division more evident by abolishing Ottawa's right of veto of provincial laws, as well as the jurisdiction of the Supreme Court of Canada over such laws, and by placing the residue of legislative powers in provincial hands with the right to appoint all provincial judges.[18]

If there are only two states, and not eleven as at present (one federal and ten provincial), then the original theory of Confederation is drastically altered. The B.N.A. Act does not conceive of governments as representing races or religions. "Dans notre pays, il n'existe pas de religion d'Etat," said Mr. Justice Taschereau in *Chaput v. Romain*.[19] All government is carried on in the name of the Crown, and all religions are voluntary associations equally free to practice their faith as they see fit within the law. The fact that at a given moment the majority of persons in one province belongs to one faith and speaks one language does not impart a religious or racial personality to the machinery of the state, which must serve all citizens impartially and without fear or favor.

[17] Cited in F. R. Scott, "Areas of Conflict in the Field of Public Law and Policy," *McGill Law Journal*, III (1957), 34.

[18] In "Il Faut Refaire la Conféderation," *L'Action Nationale*, Sept. 1954, p. 15.

[19] [1955] Sup. Ct. Can., 840.

The Quebec government is as much the government of the English minority in that province as of the French majority; similarly, the Parliament of Canada governs all Canadians of all races within its sphere. Even the fact that the Queen must, under English law, be a communicant in the Church of England does not make that religion an established church in Canada; if it were, it would be so in Quebec also. This is part of the original compact, with which the treaty-between-races theory at this point is in sharp variance.

The approach to Canadian federalism elaborated in the Tremblay *Report* rests on more solid philosophical ground when it starts from the proposition that Canada is a country of two cultures and that it was a purpose of the Constitution to recognize that fact and to provide the conditions under which both cultures might flourish. But by making that purpose in effect the sole purpose of Canadian federalism, and then postulating certain elements as essential to the preservation of a culture and selecting the government of Quebec as the sole representative of that culture, it arrives at very radical conclusions. The main premises of the *Report* are summarized thus:

1. The primary purpose of Canadian federalism is to allow the two great cultural communities which make up our population (a) to live and develop themselves according to their respective particularisms and (b) to co-operate in the building and progress of a common fatherland;
2. With regard to French-Canadian culture, the Province of Quebec assumes alone the responsibil-

ities which the other provinces jointly assume with regard to Anglo-Canadian culture;

3. The Canadian reality, both economic and sociological, has undergone a profound transformation since 1867, but its cultural elements have not changed, so that the basic problem still remains the same.[20]

Thus posed, the postulates, formulated without any consultation with representatives from outside Quebec, lead on to a critical analysis of present trends toward centralization and call for a "re-adaptation of the public administration according to the spirit of federalism."[21] In more precise terms, the *Report* recommends that all social services, including such measures as unemployment insurance and old age pensions, should be exclusively provincial. The federal Parliament should abandon the fields it has already occupied. All cultural activities of the federal government should cease, as being an invasion of the provincial field. "It is the right and duty of French-Canadians to defend their own culture against invasion by an alien culture" said the St. Jean-Baptiste Society in a brief which the Commission expressly approved; "The Provincial Government and French-Canadian society have the means of financing on their own their schools, colleges, universities, artists, research students and authors."[22] Hence Ottawa should

[20] *Report of the Royal Commission of Inquiry on Constitutional Problems* (Summary, 4 vols. and annexes; Quebec, 1956), Summary, pp. 18-19, hereinafter called Tremblay *Report*.

[21] *Ibid.*, p. 21.

[22] Tremblay *Report*, III, Book I, p. 231.

stop its grants to universities, its bursaries to artists and writers, its educational programs over the Canadian Broadcasting Corporation networks, its research activities in the National Research Council, its courses on liberal arts in the Royal Military College, its conditional grants for technical education, its assistance to hospitals, its family allowances. These are contrary to "the spirit of federalism."

The conclusions of the Commission on fiscal matters are conceived in the same spirit. The federal government, the *Report* complains,

> concludes that it alone can exercise all the initiatives needed to control the economy, to maintain employment, and to equalize fiscal resources between the provinces. As a consequence, it seems to think that pursuit of economic and social goals has, in some way, priority over cultural objectives, and also that the federal government itself has similar priority over the provinces.[23]

Whereas, it is contended, this purely economic view is erroneous; cultural and social policy are only extensions of each other, and "must be entrusted to the government which, being itself a participant in the culture, can best grasp its spirit and express it through laws."[24] Taxes should be distributed between the orders of government according to the functions with which each is vested. Since income taxes have a direct incidence on persons and institutions, they should belong to the government on which cultural and social responsibility is incumbent, which of course means the

[23] Tremblay *Report* Summary, p. 19.
[24] *Ibid.*, p. 20.

province. Hence Ottawa is to lose the income tax, though retaining business taxes and sales taxes. Instead of leaving anticyclical policies in federal hands, the provinces must be made a part of the machinery of planning; they should discuss among themselves, "without the federal government's participation," the problems which are properly within their resort.[25] To this end there should be a permanent Council of the Provinces, on the model of the Council of State Governments in the United States. Federal-Provincial Conferences, however, should continue, with a permanent secretariat. To help provinces finance their economic planning they should be able to obtain the credits they need from the Bank of Canada and should be represented on its central Board of Directors. To secure the new concepts of federalism from misinterpretation by a Supreme Court composed, as at present, of judges nominated by Ottawa alone, there should be created a Court of Constitutional Affairs on which will sit provincial as well as federal nominees, since the present court "does not enjoy the complete confidence of the people."[26]

It is not the purpose of this chapter to attempt a critique of the ideas in this *Report*. It could be pointed out that the evidence and special studies on which it is based came almost exclusively from one of the two cultural groups whose future is thus being determined. Not one supplementary study for the Royal Commission was written by an English Canadian,

[25] *Ibid.*, p. 30.
[26] Tremblay *Report*, III, Book I, p. 296.

even one from Quebec. The rule *audi alteram partem* seems to have been forgotten. The Commission never took evidence outside Quebec, though French minorities in other provinces—not to mention English majorities—might have added much that would have been valuable. Ottawa was not invited to present its views. Moreover, the terms of reference of the Commission implied the conclusions of the *Report*, since they instructed the Commissioners to study "encroachments" by the central power in the legislative and administrative regime of the province and especially in the taxing field. If, as the federal government has always maintained, there never have been any "encroachments," since its actions were within the law of the Constitution, there was nothing for the Commission to study in this regard. One could point to many implications in the *Report* that the growth of federal powers since World War II was due to an "ulterior motive" in the minds of the federal administrators to secure the progressive assimilation of French Canada which so far she has resisted; the evidence for this gratuitous assumption is, however, totally lacking. But all such comments are beside the point, for fundamentally, as the *Report* itself says, "for the Province of Quebec the only possible choice lies between a state-controlled socialist system of social security and one of Christian inspiration," and this *Report* is based on "the traditional Catholic concept of the population of the Province."[27] As such it makes an important contribution to the accumulating thought about Cana-

[27] *Ibid.*, p. 131.

dian federalism. It is, however, a one-sided argument, and not, like the Sirois *Report* which preceded it, an attempt to find a synthesis acceptable to two contrasting theses.

CONSTITUTIONAL THEORIES AND ECONOMIC REALITIES

The Tremblay *Report* has had singularly little discussion in Quebec since its publication. It seems to have melted into the stream of events almost as though it was not taken seriously even by its promoters. Perhaps the charm of provincialism is difficult to recapture in an age of man-made satellites and inter-continental missiles. The military and economic pressures which in the 1860's drove the scattered British North America provinces into Confederation continue to push them into closer union just as they push the Canadian nation into ever more intimate contact with the United States and her NATO allies. The scale of economic and military operations is constantly enlarging, and with it the scale of governmental operations must expand correspondingly. This does not invalidate that part of the Tremblay *Report* which sets human and cultural values above materialistic objectives as guides in social policy; such concepts belong in the realm of religion and philosophy, and can operate on a provincial, national, or international level. It does, however, cast grave doubts, if nothing more, upon the wisdom of selecting a provincial government as the sole protector of those values. A government belongs in the sphere of human institutions, and an institution will fail even the no-

blest purposes if the task assigned to it is beyond its capacity. Even assuming the rest of Canada would accept the virtual destruction of the present Canadian state in order to satisfy Quebec's demands for greater autonomy as formulated in this *Report*—and this appears utterly beyond the bounds of practical politics —it still remains a fact that the integration of Quebec with the general economy of Canada and North America presents her with fiscal, industrial, and social problems that cannot be resolved by one part of a federal state separately from the other parts.

In the words of an eminent French-Canadian economist:

> Le séparatisme peut être l'aspiration normale d'un nationalisme frustré et désirant se consolider en se créant une vie et des cadres politiques à lui. It revient sans cesse hanter certains esprits comme une nostalgie. Mais il enfermerait la culture canadienne-française dans une vase clos où elle finirait par étouffer. Le rêve, en se réalisant, signifierait peut-être le suicide. C'est sans doute pourquoi la grande majorité des Canadiens française sont opposés au séparatisme.[28]

For him the only solution for Quebec is "a lucid integration into the new Canadian federalism."[29] This solution, as has been shown, is repudiated expressly and at length in the Tremblay *Report*. But the Commissioners themselves admit that the far-reaching decentralization they advocate cannot be brought about

[28] Maurice Lamontagne, *Le Fédéralisme Canadien; Evolution et Problèmes* (Quebec, 1954), p. 294.

[29] Tremblay *Report*, II, 188.

immediately, because "*de facto* situations and habits of thought have been created which must be corrected," and they therefore offer a "Temporary Solution" which confines itself to a mere reallocation of taxes within the present constitutional scheme. That some such financial adjustments will be made in the future is probable; no part of the Canadian Constitution has been more flexible, more responsive to changing political and economic pressures, than the subsidies provisions and tax arrangements. But the profound reshaping of the Constitution itself, called for in the main recommendations of this *Report*, is another matter. It cannot be as divorced, as it is here, from the hard facts of Canada's increasing industrial growth in an increasingly dangerous world. The preservation of human and cultural values in this day and age, which this *Report* professes to seek, is an aim all Canadians would support; what would be questioned, in Quebec as outside, is the possibility of reverting to smaller governmental units, however distinct they may be in race or religion, for the almost exclusive protection of those values. The present distribution of powers in Canada has not satisfied everyone, but it has unquestionably permitted a wide freedom for the steady development of the two cultural groups along their own distinctive lines.

Constitutional Trends and Federalism

J. A. Corry

As a minimum courtesy, those who have the fortitude to listen to a discussion of constitutional trends and federalism should be told what is to be discussed under the heading. I shall interpret the first limb of my topic broadly and refuse to be limited to constitutional matters in the strict sense. In addition to trends in formal amendment, in judicial interpretation, and in developing constitutional usages and conventions, I shall consider social, political, and economic trends that make a significant impact on the working of federal constitutions, trends that affect the balance of the constitution.

To allay somewhat the fears aroused by a determination to plunge you into this morass, I shall interpret the second limb of the topic narrowly and restrict discussion to the three Anglo-American federations, the United States, Australia, and Canada. They are the only ones with enough in common for ordinary folk to generalize about or to find readily comparable. What I can say of all three will be very

general indeed. What I can say in particular with any assurance will be limited to Canada.

One very good reason for limiting discussion to these three is that they were all constructed, and have been operated, by the same kind of people with the same kind of basic ideas about the role of government in a broadly similar social and physical environment. The men who framed these federations and set the main lines of their working were the heirs of the English liberalism of the seventeenth and eighteenth centuries. Regardless of how far the Americans of 1789 and Canadians of 1867 were democrats in the sense in which we now use the word, they were liberals with a profound belief in individual freedom. In particular, they had an abiding faith in economic freedom and saw this faith amply justified by the way in which free men had been able to carve out goodly heritages in the new continental domains that lay before their eyes. Believing that individual men could shape their own destinies by their thought and effort, they did not want much of governments except that they should be both responsive and responsible.

They wanted governments to be responsive at every level in maintaining a regime of public order congenial to individual freedom and enterprise and in judiciously helping energetic people to help themselves. They wanted governments to be responsible in the sense of being accountable under law for encroachments on individual freedom of action. To this

end, governments as well as individuals should be subject to law enforced by independent courts.

When the circumstances of the several times and places counseled political unity of the separate colonies, it did not seem inappropriate to liberal minds that the price of union should be continuance of the states, or provinces, in self-governing dignity. Indeed, they should be autonomous, responding to the enfranchised within their boundaries, rather than mere field agencies of a distant national government. As Woodrow Wilson, that latter-day heir of the liberal tradition, made clear to us, self-determination of individuals is easily translated into self-determination of small nations.

If the self-determination of individuals and small states is to be preserved, there must be order based on law. Accordingly, the framers of the constitutions attempted to state with some precision the limits of legislative authority at both levels of government. While they did not, in any instance, provide expressly that the courts should police the distribution of legislative power, what other result could they have contemplated? Both the Canadian and Australian Constitutions were Acts of the British Parliament which, of course, the courts would interpret when litigants contested their meaning. And even if *Marbury v. Madison*[1] was not directly within the vision of the framers of the Constitution of the United States, one could have predicted it as consequence of

[1] Cr. 137 (1803).

the circle of ideas in which they and their generation moved.

What I have been taking too long to say is that the design of these three federations was shaped under the influence of liberal ideas. They began, and continued for some time, under the impulse of individualism, legalism, and *laissez faire*. From an examination of these three constitutions comes the definition of federalism we have found meaningful: general and regional governments of co-ordinate authority, each independent of the other in its appropriate sphere, ruling over the same persons and the same territory under the benign surveillance of a court. This is classical federalism in the Anglo-American mode.

Classical federalism saw the national and state governments in the system as independent entities, each going its own way in the enjoyment of its own powers under the check of a watchful electorate with a minimum of either association or collision. Because the electorates would limit narrowly the actual use made by governments of their extensive legislative powers under the constitution, the governments would not run afoul of one another so long as each minded its own business. If some governments forgot themselves and encroached on the domains of others, the courts would remind them of their proper place. Indeed, the genius of place would have its way, in Virginia and Massachusetts, in Quebec and Nova Scotia. Both unity and genuine diversity would flourish.

With due allowances for the imperfect realiza-

tion of ideals in action, for the general untidiness of political processes, and for one major breakdown in the War between the States, the classical federalism worked with considerable success until World War I. Thereafter it was subjected to increasing trials and was finally transformed into something quite different in the depression of the thirties, something which is called co-operative federalism, or the new federalism. Although the change has been effected without striking amendments in the formal constitutions of any of the three countries, the alteration in the working governmental structures of the United States, Canada, and Australia has been profound. Whether the essential reality of these structures can now be called federal at all depends, of course, on one's definition of federalism. At any rate, the reality has moved far away from what I have called classical federalism.

There has been a persistent and rapid acceleration in the centralizing of the prime initiative in government, if not so much in the formal exercise of governmental power. The umpiring of each of these federal systems seems to be slipping out of the hands of the judges into the hands of the politicians, where decisions are taken on a view of policy rather than as a matter of law. The co-ordinate governments no longer work in splendid isolation from one another but are increasingly engaged in co-operative ventures in which each relies heavily on the other. Before considering the outlines of these developments, we

should remind ourselves of some of the forces thrusting in this direction.

Great improvements in transportation and communication within the free trade area that each federation provides have knit the economic life of each federation into an interdependent whole. The separate chambers of the states are insulated no longer. Instead, conduit pipes and high voltage wires link them together, transmitting economic pressures and economic shocks throughout the country. The exercise by one government of its undoubted powers often has serious repercussions on some or all of the others by the transmission of political pressures and political shocks.

Economic individualism has been displaced by a mixed economy of a strongly collectivist cast. In part, it is a private collectivism of giant corporations, national trade associations, and national trade unions, which we are always being driven to try to match by extending the authority of national governments. In part, it is a public collectivism in which *laissez faire* has given way to a dispensation in which governments are many things to all men.

Governments intervene in the social and economic spheres in at least three different and important ways. First, they respond to complaints of social and economic maladjustment with regulatory action in one sector of affairs in ways which impinge on other sectors and other governments. Second, to meet their housekeeping needs and to finance the services they provide, the several governments in the federation

taken together impose a weight of taxation which seriously affects economic decisions, the level and distribution of economic activity. The dominant economic theories of the time gravely warn governments to give serious thought to finding the least burdensome and disruptive, or perhaps I should say the most beneficial, way to raise a given total of public revenues. Because it is so hard for seven or eleven, much less fifty, governments to take thought effectively together, the tendency is for the national governments to take strong leadership in taxation policy. Third, because economic concentration and the tinkering of governments have diminished greatly the self-adjusting capacity of the economy, the national governments have gone a considerable way towards assuming responsibility for over-all guidance of the economy.

The experience of national action gained in two World Wars, improvements in communications, additional bundles of social and economic data, improved in reliability by statistical techniques, to say nothing of electronics, have made it easier for the national governments to take the initiative on a wide front. The fact that in the last ten years of uneasy peace these federations have had to remain girded for war has strengthened the case for the dominance of national governments in the field of taxation. But the material factors, to which for the most part consideration has been restricted so far, will not alone account for the decisive leadership the national governments are taking. In countries where governments are as

responsive to popular moods as they are in Australia, Canada, and the United States, there must be widespread acquiescence, if not active support, for the enlarged role of the national government. If the people of the several states and provinces remained stubbornly determined to find their principal collective expression as Tarheels or Bluenoses, we should not have arrived where we are. So it seems necessary to put as a major factor in the superseding of the classical federalism some nationalizing of sentiment.

The cautious phrasing of this statement may seem to some quite unnecessary. Of course, we have become Americans, Canadians, and Australians. What began as sheer expediency has come to have an independent and inspiring value of its own. We have become nations in Renan's sense that our people are conscious of having done great things together in the past and want to stick together to do great things in the future. We now see many things we did not always see in the past that we want to accomplish in unity together, and are willing to use our national governments as means to these ends even if pursuit of them entails sacrifices of interests, both individual and parochial. Certainly this is true as far as it goes, but it does not go the length of saying how many things, of what kinds, and at what sacrifices.

Some say the nationalizing of sentiment has gone so far that the vitality of federalism which depends on some balance of provincial and national feeling has been destroyed. There are some awkward facts in the way of such a conclusion. There has not been

any strong swelling of sentiment in favor of drastic centralizing amendments or of reducing the states and provinces to administrative instruments of national governments. If we leave aside the income tax amendment of 1913 as perhaps equivocal, Americans have not put forward, let alone approved, any formal amendment to enlarge national power at the expense of state power. Perhaps an obliging Supreme Court has made any such action unnecessary, a point to be considered later. Since 1867, Canadians have put forward and pushed through two amendments, and two only, which enlarge the powers of Parliament at the expense of the provinces—the unemployment insurance and old age pensions amendments.

Two other important facts about Canada are to be noted. First, repeated efforts to get agreement on a method of amending the portions of the B.N.A. Act which define provincial powers and privileges have failed completely. Second, all attempts to get general agreement on a comprehensive and enduring settlement of federal-provincial public finances have also failed. We have, it is true, negotiated, since World War II, three successive sets of federal-provincial tax agreements, but only because the federal government, in the end, relied on its constitutional advantages in the field of taxation and negotiated separate agreements with each province that was prepared to deal.

It is clear that national unity is not strong enough to bring Canadians to agreement on these matters. While Quebec has been in the forefront of the re-

sistance, she has not been there alone by any means. On the other hand, it must be said that all the discussions just referred to have been directed at getting the agreement of provincial premiers and cabinets who have a vested interest in provincial status and power which the several provincial electorates perhaps do not share fully. Having no provision for plebiscites on such issues, we do not know what the electorates would say. Yet there is no evidence that the provincial electorates have been dismayed, or even disturbed, by the reluctance of their governments to make concessions for the sake of agreement.[2]

In Australia formal amendment requires approval by majorities of the electorates of four of the six states, as well as by a nationwide majority. The Australian Parliament has proposed some twenty centralizing amendments, and only two of these have secured the needed popular majorities. Most of the Australian writers I have read still insist, in the face of these verdicts, that "the States are no longer vital political entities in any basic sense,"[3] and that these impressive refusals of enlarged authority to the Commonwealth Parliament do not spring from any loyalty to federalism as such. The electoral votes are explained rather as votes against paternalism in general or against the particular proposals in question on the ground that they should not be enacted by any legis-

[2] Equally, of course, one has to say that on June 9, 1957, there was little evidence of the restiveness of the Canadian electorate over twenty-two years of Liberal rule.

[3] S. J. Butlin, "The Problem of Federal Finance," *Economic Record*, XXX (1954), 11.

lature, state or national. This explanation does not carry full conviction to me, partly because until I know more, I would be disposed to regard a vote for *laissez faire*, hopeless and misguided though it may be, as an unequivocal vote for the classical federalism.

In Canada we have no plebiscites of this kind to explain one way or the other, unless the rejection of the Liberal party in the 1957 and 1958 national elections can be interpreted as a rejection of the centralizing policies of the Liberal Government. Of course, we do not need plebiscites at all to know that the Quebec electorate is generally opposed to centralization, whether it be by formal amendment or through the informal drift of prime initiative to Ottawa. In a negative way, as noted above, the other provincial electorates have shown that they see no urgency for nationwide agreement on at least some broad and vital issues. But we do not know what positive views, if any, these other electorates have on the question of the piecemeal centralizing of initiative in the national government.

We do know something of the attitudes of the provincial premiers and cabinets to this question. The positions they adopt and the courses they pursue over a period of time probably reflect the balance of opinion in their respective provinces. Therefore it seems highly significant that in the recurring tax negotiations and agreements of recent years, all provincial governments except Ontario and Quebec have given up, for three successive five-year periods, the right to

levy personal and corporate income taxes and succession duties in return for guaranteed annual grants from the federal treasury. In fact, Ontario did give up personal and corporate income taxes for one five-year period, and for a second period has given up the right to levy the personal income tax. So it, too, has been a participant, if not so fully committed as the other eight English-speaking provinces, in transactions with a strongly centralizing effect, increasing the leverage of the national government on the policies of provincial governments as well as on the economy of the country.

In these negotiations and deals, Quebec alone has had a completely consistent position. Since 1945 Premier Duplessis has refused to enter into a tax agreement with the national government. Since 1951 this has entailed a considerable sacrifice in the revenues he otherwise could have had for provincial purposes. He does not want grants from Ottawa. He does not want Ottawa to assume burdens for purposes that lie within the scope of provincial legislative power, such as grants to the universities. All he wants of the national government is that it should get out of his way, allow him effective freedom to tax heavily personal and corporate incomes and successions, and allow his government to carry the full cost of whatever services it decides Quebec is to have. He wants to go it alone, and so far has been prepared to take the risks and pay the price for provincial autonomy.

Generally speaking, the other provincial premiers do not appear to be willing to pay the price of being

genuinely masters in their own houses. They either press for, or readily acquiesce in, federal assumption of burdens relating to costly services which traditionally, to say the least, have been regarded as provincial responsibilities: education, highways, welfare, electric-power development, and so on. We are now to have provincial health insurance schemes, in aid of which the federal government somewhat reluctantly promised large federal grants. As far as one can judge, the strongest pressure for the Dominion to take up this costly venture came from Premier Frost of Ontario.

All federal commitments for objects that are either constitutionally or traditionally the responsibilities of the provinces increase the dependence of the Dominion on personal and corporate income taxes and reduce the room for effective provincial exploitation of these tax sources. The provincial premiers do not stop at the point of encouraging new direct federal expenditures. Each goes on to urge, in addition, that the Dominion proposals for compensating the provinces for giving up these tax sources are quite inadequate, that Dominion grants to the provinces should be greatly increased. At each round of negotiations, these grants are sharply increased. In effect, the provincial governments, Quebec excepted, are doing all they can to ensure that the Dominion will continue its dominant role in public finance and fiscal manipulation, and that genuine provincial initiative will be correspondingly curtailed. The provincial electorates, Quebec again excepted, do not seem to mind.

Of course, a just appreciation of the lines pursued by provincial premiers in tax negotiations must take account of their dilemmas. The requirements of national defense have always to be taken into account. Given the level of provincial services and expenditures established in response to electoral demand, if not social need, most provincial governments could not make ends meet at all by scorning tax agreements and the large federal grants they produce, and levying their own personal and corporate income taxes. Partly because of the concentration of control of the economy, a very large proportion of the high personal and corporate incomes are concentrated in two or three provinces. The other seven or eight provinces must either acquiesce in a much lower level of government services or conspire with the Dominion in a scheme for taxing and redistributing this concentrated income. I think it is correct to say that the reflective members of the Canadian community in all provinces, except perhaps Quebec, have decided that the first alternative is unfair and unjust, and therefore approve the second.

Ontario is the province which would best be able to go it alone. Indeed, Ontario would profit immensely from complete dismantling of the tax agreements. She did, in fact, oppose the first postwar tax agreements, adhering to the bucolic wisdom of former Premier Mitchell Hepburn, who had said many years earlier that Ontario wouldn't be made a milch-cow for the rest of the Dominion. By 1951 Ontario had changed her mind, had acquiesced in the policy of

centralized taxation, and had entered into a tax agreement. The change of mind was, in part at least, due to a recognition of some justice in the claims of the poorer provinces that much of the wealth pooled in the richer provinces is produced by the skill and effort of people in other provinces, and that some of it should be redistributed for their benefit. That is to say, Ontario has loyalties that go beyond her boundaries and distract her from any crusade for a self-centered provincial autonomy.

Indeed, a self-centered states' rights or provincial autonomy is no longer practicable. It is not practical at all for states and provinces in these three federations to think of themselves as did the American states before, and even after, the War between the States or as the older Canadian provinces tended to think of themselves until after World War I. They cannot think of themselves as independent principalities, bowing only to federal dictates on foreign policy and foreign trade and a few other matters. They threw all this away when they allowed themselves to be drawn into an interdependent economy which undermined whatever secure economic base they may previously have had within their own boundaries. Even the rich and powerful states in the federation compromised their positions when they brought within their walls the Trojan horse of big enterprise with nationwide interests and outlook, which, by its very nature, cannot be loyal to any self-centered provincialism. In so committing themselves, states and provinces gave up the power to develop or maintain

widely differing economic relationships and sharply divergent social and cultural patterns. In fact, before interdependence had gone very far, the American states found they could not live together half slave and half free, if I may use a term which points to the fateful differences but does not express them fully. In this discovery they pointed up a lesson for all federal systems to learn in their maturity, if not before.

Alberta soon found it was not free to follow the genius of Social Credit in building the New Jerusalem in the foothills. If Saskatchewan under the C.C.F. had attempted full-scale socialism it would have run into much more trouble than the mere timidity of free enterprise about exploring for oil. Actually, the C.C.F. in Saskatchewan has chosen to work within the postulates of the mixed economy, which is the dominant economic pattern for the country as a whole. It has found there room for considerable experiment and variety in adapting the mixed economy to the distinctive genius of Saskatchewan for public and co-operative enterprise.

If it is said that Quebec has managed so far to maintain a culture markedly different from that of the other provinces, it must be recalled that for most of its people and over most of its area, Quebec culture has rested, until very recently, on a base of relatively self-sufficient agriculture. The very rapid industrialization in Quebec in the last fifteen or so years has caused much internal stress and strain. Much of the stress is due to the unremitting pressure exerted,

for example, through trade unions and corporate enterprise to establish there the urban industrial pattern accepted by the rest of Canada. Quebec is being caught up in the logic of the interdependent economy and of large-scale industrial enterprise.

A province cannot now hope to run successfully against the tide of national development unless, of course, it associates with enough other provinces to turn the tide, in which event we have national, not provincial, action. The most it can hope to hold is freedom for minor adventure, for embroidering its own particular patterns in harmony with the national design, for playing variant melodies within the general theme.

It can hope to be free to decide to have rather more public ownership and rather less private enterprise, more or less social security and provincial regulation of economic life. It can hope to adjust policy on education and conservation of natural resources to distinctive provincial needs and aims, and so on. But it is everywhere limited in the distance it can go by having become part of a larger, although not necessarily a better, scheme of things. Its main role now is to lighten the curse of bigness.

In support of this conclusion I have so far produced only big nationwide enterprise, the interdependent economy, and some admittedly equivocal evidence on the nationalizing of sentiment. This testimony alone is not enough. Economic interdependence does not always draw communities together; big cartels do not always foster integration effectively

—witness the World Wars of the twentieth century. There must be, in addition, a will to work together in solving the problems posed by interdependence. If that will emerges, it will find its main instrument in the initiatives of the national government and legislature. But it is not clear to me that there are firm popular majorities in the several states with this united will. It is little more than twenty years since an almost spontaneous mass revolt took place in Alberta and more such may well be possible, even if somewhat unlikely. The truth is that the bulk of the people are not really aware of what is at stake in federal-state issues. They probably want the best of both worlds, state governments that respond fully to regional aspirations and a national government with power to spawn an increasing range of services, deploring only the outrageously high taxation.

Whatever may be the truth about popular loyalties, it seems clear that sentiment is rapidly being nationalized among the élites, meaning by this term no more than the leaders of minority groups, the persons whose occupations or interests lead them either into close relationships with government or into sustained reflection about it.

The active persons in many occupations and interests have been drawn into national associations. Whether or not these organizations become pressure groups in the strict sense, association in them has marked effects on those who take part. Their horizons are widened and they breathe the large air of broader understanding and sympathies. The relations

of French-speaking and English-speaking Canadians have improved immensely in recent years. Much of both the decline in recriminations and the rise in generosity comes from the meeting each year in national associations of one kind and another of relatively small numbers of persons of the two language groups who reach not only understanding but friendship. They recognize themselves and one another as Canadians.

Associations of this kind break down barriers and clear ground for common action. When the members of such associations find they have common problems, they are led easily to think of attacking them on the broadest possible front, which is the national front. The welfare élite increasingly pins its hopes on the national government, for initiative and the setting of standards at least. The agricultural élite still wants governmental action at both state and national levels but wants the essential frame of policy determined at the latter level. The trade union élite wants national standards in labor matters. In Canada the education élite, if that is a permissible description of the National Conference of Canadian Universities, has been pressing strongly for federal subventions to university education.

Most striking of all are the changing attitudes of the business élites. In the long retreat of *laissez faire* in the first third of the century, substantial business interests fought many determined rearguard actions from the bastions of state power and judicial review in an effort to stem the advance of federal legislative

action. Over the last twenty years they have almost given up the struggle, not so much because *laissez faire* is a lost cause but rather because events have made them change their minds. Industrial concentration has proceeded at a rapid pace. One industry after another has come to be dominated by a few great corporations. These mammoths and a number of more nebulous but nevertheless very real industrial combinations have deployed themselves in a nationwide arena.

The men who control them are compelled to think in nationwide, if not national, terms. They do not want *laissez faire*, or the free fluctuating market, or the unco-ordinated tinkering of many state or provincial governments. Instead, they want stability in prices, in labor relations, in monetary, fiscal, and other governmental policies, so that they can engage in long-range planning for their industry. They want the economy to be manageable, and, within the limits, to be managed with a foresight which takes their nationwide concerns into account. Because foresight on the scale that they want implicates the national government and its powers at many points, they want to be able to bring a persuasive influence to bear upon the national government. Instead of being closeted with their attorneys to find ways of frustrating national governments, they are now in conference on friendly terms with presidents, cabinet ministers, and senior officials at the national capitals. A wise precept says, "If you can't lick 'em, join 'em," and one may guess that the great managers would now consider a part-

nership with the national government if suitable terms could be arranged.

This is not quite the managerial revolution, but it is a profound change. Adolf Berle calls it "administered capitalism" in a brilliant paper[4] in which he sketches the anatomy of the change and discusses its significance for federalism. He speaks only about the United States, but it is possible to discern the outlines of a similar change taking place in Canada on a smaller scale and at a somewhat slower pace. In the last twenty years Canadian business interests have not challenged seriously the constitutional validity of federal legislation in the courts. Significantly, the one case in this period which reproduced some of the atmosphere of battles long ago was brought by grain traders (who still believe in the free market) seeking to have declared unconstitutional a wartime regulation of the federal government which, in effect, denied them windfall profits arising from decontrol of the price of barley.

From 1912 to 1932 interests engaged in the insurance business urged the courts again and again to hold that the Parliament of Canada had no constitutional power to regulate the business of insurance. By 1941 Canadian financial interests, including the insurance companies, had become the strongest supporters of the main recommendations of the Royal Commission on Dominion-Provincial Relations, rec-

[4] "Evolving Capitalism and Political Federalism," in *Federalism, Mature and Emergent*, ed. A. W. Macmahon (New York, 1953), pp. 68-82.

ommendations which proposed to stabilize public finance and restore confidence and credit mainly through greatly enlarged action by the federal government. Shaken by widespread defaults in the depression and terrified by the revolt against financial orthodoxy in Alberta, they were driven to take a nationwide view of their affairs and to pin their hopes on the national government.

The tax agreements, which were first undertaken as a wartime measure and which have continued to the present, give the sole power of levying personal and corporate income taxes and succession duties to the national Parliament. These far-reaching fiscal powers joined to federal monetary powers have been used courageously and with considerable effectiveness to stabilize the economy during the war and postwar periods. The fiscal initiative of the national government has not only kept the attention of business leaders focused on Ottawa but has also earned a grudging appreciation from the clear-headed ones. Despite incantations about free enterprise and imprecations about the scandalous tax burden, few of them want to return to a situation in which each of eleven governments dips into personal and corporate incomes as it sees fit. National government planning in fiscal matters is the least of the horrible evils that must be endured in a polity where high taxation seems inevitable.

To say that business leaders in Canada are coming to look more favorably on the federal government does not mean that they have all succumbed to this

temptation or that those who have really favor all that the federal government does. Those whose interests are concentrated on the development and exploitation of the natural resources of a single province naturally want the federal government to leave them alone while they cultivate the good will of the provincial government. Big business with nationwide interests sees more readily how helpful the national government could be. At the same time, it finds the federal government's scrutiny of combines and monopolies somewhat hampering and can be expected to urge on the courts a narrow interpretation of the power of the federal government in this field. All that is asserted is that nationwide interests establish some kind of bond with the national government.

There is considerable ground for thinking that the business and other élites are coming to accept the preeminence of the national governments and to concentrate their efforts on ways and means of getting effective influence in the national arenas. In the main they are the active leaders of opinion, and they are likely, in the long run, to carry electoral opinion in most states and provinces. If this is so, the federal balance is being tipped decisively in favor of the national power, and it is hard to see how state governments and national governments can continue to be genuinely co-ordinate authorities. In constitutional law the states may long continue to be co-ordinate, but politically they are likely to sink to a subordinate position.

Much the greater part of this paper so far has been taken up with speculation about the focus of opinion and sentiment in electorates and influential groups. It has had to be speculation because, as far as I know, this aspect of federal trends has not been studied with detailed care. Nevertheless, in these democratic aggregates with which we are concerned, sentiment and opinion, molded and canalized no doubt by material factors, will decide where power lies. Because power alone can balance power, the provinces and states have to keep strong and vigorous bodies of opinion on their side if they are to stop the aggrandizement of national governments.

For a long time we believed, admittedly without being fully correct, that the boundaries of power were pretty clearly marked out by the Constitution. In practice, uncertainties about these boundaries were expounded, if not always completely clarified, by the courts. In the classical federalism, the courts were the arbiters of the system. Even if it would not be quite correct to say that they held the balance between state governments and national governments (since, allowing for some exceptions in the case of the Judicial Committee of the Privy Council, the courts did follow the election returns), they nevertheless tipped the balance one way or the other from time to time. Here we come on a constitutional trend of the greatest importance. The courts are retiring, or being retired, from their posts as the supervisors of the balance.

If the consistent course of decision in the last twenty years is a reliable index, the Supreme Court of the United States has retired. By very wide interpretations of the interstate commerce clause and of the general welfare clause as it relates to the federal spending power, the Court has come very close to holding that Congress can direct the economic life of the country—and influence its social and political structure through the spending power—as it sees fit. It has not excluded the states from intervention in the areas of economic life formerly thought to be their exclusive preserves but rather has enabled Congress to oust them by overriding legislation. At the same time, by restrictive reinterpretation of the due process clauses, it has freed both state legislatures and Congress from the restraints formerly imposed by these clauses on legislative regulation of economic affairs. Judicial review by the Court continues to be important in two main matters—in restraining the states from encroachment on fields that are either clearly exclusive federal domain under the Constitution or that have been occupied by federal law, and in the safeguarding of fundamental civil liberties against encroachments by governments. In so far as the federal balance is concerned, "recent judicial doctrine encourages the determination of both power and action by legislation, so that for most purposes, the national policy-makers are the arbiters of the federal system."[5]

Of course, this does not necessarily mean that

[5] Harvey C. Mansfield, "The States in the American System," in *The Forty-Eight States* (New York: The American Assembly, 1955), p. 30.

Congress is rapidly denuding the states of all effective power. The states do not lack defenders in Congress, and so far state interests have been treated with circumspection, if not generosity. It does mean that contests about state power have to take place largely in the national political arena and that a flexible method of experimental shifting of powers back or forth between the nation and the states has been achieved. It also means that, in federal relations as in many other aspects of our affairs, leadership in social adjustment to rapid and complex change has shifted from courts to legislatures, and law has been replaced in part by policy.

It would be quite wrong, however, to say that the Supreme Court of Canada is retiring from its post as supervisor of the federal balance in Canada. Indeed, the Supreme Court has recently proclaimed its strict adherence to the classical federalism by holding that neither the federal Parliament nor a provincial legislature can constitutionally delegate any portion of the exercise of its legislative powers to the other.[6] Ironically enough, it seems clear that Parliament can delegate its legislative powers to a provincial cabinet or other provincial executive agency or even to a tramp in the street, and that provincial legislatures can equally delegate their powers to the Governor-General in Council or to some agency of the federal executive.[7] The reason that the Parliament and the

[6] *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] Sup. Ct. Can., 31.

[7] *Prince Edward Island Marketing Board v. H. B. Mills*,

legislatures cannot delegate to one another is that their capacity for lawmaking is limited by the B.N.A. Act to the classes of subject exclusively conferred on them therein. The Supreme Court sticks to the notion of exclusive and rigidly separated spheres of power. There is here no encouragement for experimental trading back and forth of legislative power between the nation and the provinces.

There is, however, some ground for thinking that the Supreme Court is being retired from this post, or perhaps rather being relieved of many of its duties at this post, by forces outside itself. It is well known that, on the whole, the Judicial Committee of the Privy Council gave a narrow, restrictive interpretation of the powers of Parliament under the B.N.A. Act and a correspondingly wide interpretation to the powers of the provincial legislatures. Faced with this condition and seeing no hope of drastic constitutional amendment, those who have been concerned over the past twenty years with finding means of national action which would meet what they thought were, or would be, national needs have tried to turn the flank of the constitutional obstacles.

One of the reasons for persuading provinces voluntarily to give up personal and corporate income taxes and succession duties to the Dominion was to give the Dominion massive fiscal powers. On the assumption that the power of the Dominion over its "public property" conferred by s.91.1 gave by impli-

Inc. and Attorney General of Canada, [1952] 2. Sup. Ct. Can., 392.

cation a wide federal spending power, big spending programs were undertaken. Vigorous use of its constitutional powers over monetary and foreign trade policy, of its constitutional- and contractual-fiscal powers, and of its assumed spending power for objects within the exclusive legislative authority of the provinces, has given the federal government enormous leverage on the provinces as well as on the national economy. This has been achieved without undertaking much legislative action of dubious constitutionality on which the Judicial Committee of the Privy Council or the Supreme Court would have had a chance to rule.

At first glance it seems extraordinary that no one has challenged the constitutionality of the assumed spending power before the Supreme Court. It accounts for a very large portion of the heavy taxation about which everybody groans. Yet a little reflection will show that proof of the unconstitutionality of federal spending for objects outside federal legislative power would prove far too much for almost anybody's comfort. A great many of the substantial interests of the country now derive advantages from it, and the rest of them have not given up hope of doing so. The provincial governments which, as pointed out earlier, are always urging new projects on the federal government, do not want to challenge it. Federal spending now supports so much of the established political, social, and economic structure of the country that prudent men hesitate to take steps that might wipe it out.

More generally, it can be said that neither the provincial governments nor big business interests are testing federal legislative action in the courts as vigorously as they used to. No spectacular cases challenging federal legislative power have recently come to the Supreme Court. An arbiter who is rarely appealed to is still an arbiter, but his importance diminishes *pro tanto*. Perhaps this is happening to the Supreme Court of Canada. I say perhaps, because conclusions should not be based on trends of twenty years or less, which may turn out to have been merely temporary aberrations.

The negative side of the development is that the Court is not being asked to rule against Parliament so often. On the positive side, Dominion-Provincial conferences, notably those held to negotiate about tax agreements every five years, have become clearing houses for many disputed issues between the Dominion and the provinces. One can almost say that the various stresses and strains of the system are negotiated down to tolerable compromises in the course of hammering out the next tax agreements. In Australia, where fiscal power and policy have also been centralized and the states are dependent for a large part of their revenues on the central government, as in Canada, annual premiers' conferences perform somewhat more systematically functions similar to those of the Dominion-Provincial conferences. The Australian premiers' conference mediates between the states and the nation in much the same way as does the United States Senate. Because of the discipline

imposed by cabinet government in Australia and Canada regional interests cannot express themselves as freely in the national parliaments as they do in the United States Senate. They do express themselves through the state and provincial premiers in negotiations with the national governments. The Australian and Canadian mechanisms differ from that used in the United States, but they also give the appearance of a political process replacing, or at any rate supplementing more extensively than in earlier years, the judicial process.

The political processes have a flexibility and an easy adaptability to the dominant moods of the country that constitutional amendment and judicial interpretation both lack. There will continue to be regional aspirations which, even if they cannot have free play in a mature federalism, still have to be recognized and reckoned with. There will still be regional resistance by the people in the poorer areas against the tribute levied on them by the metropolitan areas. All these stresses and conflicts need to be negotiated and compromised in *ad hoc* arrangements, particularly where the electorates do not seem disposed to say clearly whether they are federal or unitary in spirit.

At any rate, we are likely to have to live for a long time with the equivocal structure called co-operative federalism. It has arisen because several separate governments share a divided responsibility for regulating a single economic and social structure. It is most unlikely that any constitution could be devised which would enable each to perform its specific

functions adequately without impinging seriously on the others. So their activities are inevitably mingled and co-operative arrangements must be worked out. In the result, formal powers are not co-terminous with operating responsibilities; the two levels of government as well as the several state and provincial governments interpenetrate one another in many places and ways. Under the heat and pressure generated by social and economic change in the twentieth century, the distinct strata of the older federalism have begun to melt and flow into one another.

Little can be said about co-operative federalism in the compass of a paper, and it is a subject on which saying a little is not very useful. An outsider can surely be excused for saying that he finds the ramifications of co-operative federalism in the United States bewildering, particularly if he adds that neither Canada nor Australia has been able to make nearly so many promising applications of it. The most effective instrument of its vertical, or federal-state, manifestations in the United States has been the federal grant-in-aid, which has been used with great flexibility, ingenuity, and imagination, if not always with fully satisfying results.

Its achievements are very largely due to two features of the American governmental structure, the strict separation of powers at both state and national levels and the loose structure of command within the state executives. The separation of powers shields the formulation and operation of co-operative schemes from the more niggling reservations of politicians.

Because state administration is not fully integrated under the command of the governors, many governors cannot control effectively the arrangements that state officials make with officials of the federal government. In some measure, perhaps, the exigencies of government in Washington deny the President and his staff effective control of officials at their end.

The result is that federal and state officials, many of whom have a professional devotion to their tasks, are relatively free to develop administratively satisfactory arrangements for the federal aid programs. Nothing like these conditions prevail in Australia or Canada because of responsible, cabinet government. Federal and state cabinets will not—indeed cannot—keep political considerations out of co-operative federalism. More than that, there is an integrated command of administration under premiers, prime ministers, and cabinets. Officials know they have to be sure of the support of their ministers before taking significant positions in matters as political as Dominion-provincial relations.

These differences explain in large measure why the federal grant-in-aid is less used and less flexible in Canada and Australia. To help with the imbalance of state and provincial revenues and responsibilities as well as to meet effectively the special cases of the poorer states, efforts have gone into securing a federal monopoly of levying the progressive taxes in return for which large unconditional grants are made to the states and provinces. Having possessed themselves of these revenues without federal conditions or con-

trols on their use, the states and provinces develop their own services and programs as they see fit. Federal-state co-operative arrangements are not undertaken except where there are special and compelling reasons, as for example in the administration of proposed health insurance schemes in Canada. The tendency is for the provinces to become dignified and haughty pensioners rather than partners of the national government.

Given the political conditions in which it would have to be worked, it is not clear whether Canada and Australia could really secure the important advantages that the technique of the federal grant-in-aid offers. On the other hand, it must be said that the broad fiscal powers that the Australian and Canadian national governments have secured are important, if not indispensable, instruments for maintaining stability and coherence in the public finance system and in the economy at large. The maxim that the power to tax is the power to destroy has a special poignancy for present-day polities with the prevailing high levels of taxation. Perhaps we exaggerate the practical usefulness of cyclical budgeting which broad fiscal powers make so attractive in theory. It would be difficult to exaggerate the menace to economic stability and rationality of a number of unco-ordinated taxing authorities each trying to dip deeply into the flow of income. Perhaps the American economy is sufficiently productive to stand it without serious distortion and disruption. The Australian and Canadian economies almost certainly are not.

Whatever the different configurations of co-operative federalism are and however well they may be working, the ingenuity and resource that have gone into the adaptation of the classical federalism to the complexities of the twentieth century in the last two decades is remarkable. In the mid-thirties the prospects that polities with significant federal elements in their constitutions could survive the tribulations from which they then suffered seemed dim. The prospects now appear to have improved greatly. We can at least hope to operate big government with a moderate amount of centralization and at the same time preserve many of the values of wide participation and decentralized decision. Those who want to get back the substance of the classical federalism will have to reduce greatly big business, big government, and economic interdependence.

External Affairs and Canadian Federalism

F. H. Soward

NINETY YEARS have elapsed since the British Parliament enacted the British North America Act whereby a new Dominion "under the name of Canada" came into being as a federal state. Scholars are still arguing as to the nature of Canadian federalism, Professor Wheare preferring to say that Canada has "a quasi-federal constitution,"[1] an observation with which one of my predecessors in this series of discussions, Professor F. R. Scott, is in agreement.[2] But there is no question that the Fathers of Confederation, for various reasons, were desirous that the provinces constituting the new country should be, as the preamble to the B.N.A. Act says, "federally united." They were also resolved that the new Dominion should have a constitution "similar in principle to that of the United Kingdom," as the preamble also

[1] K. C. Wheare, *Federal Government* (3rd ed.; London, 1956), p. 20.

[2] Cf. F. R. Scott, "The Special Nature of Canadian Federalism," *The Canadian Journal of Economics and Political Science*, XIII (1947), 13-25.

records. By this marriage of the conventions of a unitary state with the constitution of a federal one, the Founding Fathers imported by a simple line, as Edward Blake long ago pointed out, "that mighty, and complex and somewhat indefinite aggregate called the British Constitution." In a sense they did not "import" it in 1867, but rather assured the continuance of what Canadians call "Responsible" government and Englishmen, "Cabinet" government. That is why it was not necessary to make any reference to the Prime Minister or the Cabinet in the B.N.A. Act.

Much has happened since then. The four provinces of 1867 have become ten; a population of slightly more than 3,400,000 now approaches 17,000,000; a country essentially rural in character ranks today among the leading industrial powers; a colony with no control over its external policy has become a secondary power capable, when urgent necessity requires it (as in November, 1956) of playing a significant part in world affairs. It is the purpose of this paper to attempt a description of the limitations which a federal structure has placed upon the administration of external policy and of the influence or lack of it which the provinces have had upon that policy.

A fairly concise answer can be given to the question "How was external policy administered in the formative years of the new country?" It might read "Largely in London, but partly in Ottawa." It must be remembered that the prerogative of the Crown under British constitutional practice for the negotia-

tion, signature, and ratification of treaties has remained undiminished. As a constitutional monarch the ruler acts on the advice of his ministers. Under Section 9 of the B.N.A. Act, the Executive Government and authority in and over Canada was vested in the Sovereign, then Queen Victoria. Her representative in Ottawa was the Governor-General, appointed for a generation solely upon the advice of the British cabinet, and continuing to represent the British government as well as the Sovereign until 1927. In keeping with his role as the Sovereign's representative, the Governor-General was the official channel of communication between Ottawa and London and between Ottawa and British embassies. At the outset the Foreign Office saw to it that diplomatic questions remained in its exclusive purview and that colonial agents should not enter upon direct negotiations with foreign governments. Such persons must not endanger the diplomatic unity of the British Empire. Thus the Governor-General was warned in 1879 that "The Dominion cannot negotiate independently with foreign powers and at the same time reap the benefit which she desires in negotiations from being a part of the Empire."[3] It is not surprising, therefore, that a Department of External Affairs did not appear until 1909 and that it was designed primarily to deal more systematically with dispatches transmitted by the Governor-General to the Privy Council and with re-

[3] Quoted in F. H. Soward, *The Department of External Affairs and Canadian Autonomy, 1899-1939*, The Canadian Historical Association Historical Booklets, No. 7 (Ottawa, 1956), p. 3.

plies prepared to them. In setting up the new department, which was placed first under the Secretary of State, later under the Prime Minister, and since 1946 under a full-time Secretary of State for External Affairs, Ottawa assured London that the legislation for that purpose should not be regarded as "an improper attempt to shelve the Governor-General."[4] Sir Wilfrid Laurier spoke only of "special machinery," but did say it was necessary, since "the foreign affairs with which Canada has to deal" were becoming of "such absorbing moment."[5] Although the Canadian Prime Minister and his other overseas colleagues were informed at the Imperial Conference of 1911 of contemporary disturbing events in foreign policy, it was made clear to them that the authority of the Imperial Government in that field could not be shared. So it was that, after fifty years of federalism, Canada had no treaty-making power, no diplomatic representation abroad, and no effective influence upon a foreign policy which was made in London. As Mr. Glazebrook has summarized it: "To the outside world, it was a colony, the channel to which was by way of the imperial government."[6]

In the next ten years (1917-1927), there was a tremendous increase in the Dominion's control of ex-

[4] *Ibid.*, p. 8. In the new Progressive Conservative Government of June, 1957, the Prime Minister assumed temporarily the post of Secretary of State for External Affairs, but relinquished it on September 13.

[5] Quoted in O. D. Skelton, *Life and Letters of Sir Wilfrid Laurier* (2 vols.; Toronto, 1921), II, 347.

[6] G. P. DeT. Glazebrook, *A History of Canadian External Relations* (Toronto, 1950), p. 30.

ternal policy. Because of the costly sacrifices of Canadian lives on the battlefields of France and Flanders, Sir Robert Borden felt justified in claiming for the Dominions, at the Imperial War Conference of 1917, an "adequate voice in foreign policy in future." His resolution to that effect was seconded by Smuts of South Africa and readily adopted. Following this the Dominions were granted separate representation at the Peace Conference, although their spokesman retained their membership in the British Empire Delegation; Dominion representatives signed the various peace treaties separately, but under the heading of the British Empire; and each Dominion (except Newfoundland) had separate membership in the League of Nations. For the first time the Dominions were acquiring something approaching an international personality. In the early twenties Canada successfully challenged the views of the United Kingdom, Australia, and New Zealand on the wisdom of renewing the alliance with Japan. She negotiated with the United States and, for the first time, signed solely in her own right a treaty for the regulation of halibut fishing on the Pacific Coast. When Prime Minister Mackenzie King was confronted with an urgent appeal from London for help in the Chanak crisis of 1922, he enunciated the doctrine that the Canadian Parliament must decide what action should be taken. His delaying action heralded the breakdown of the concept of a single foreign policy for the British Empire conducted by Whitehall, a fact subsequently un-

derlined by the Treaty of Locarno containing a clause expressly excepting from its application the British Dominions unless they adhered to it.

In 1927 a Canadian minister made his first appearance in Washington and soon afterwards a minister from the United States and a High Commissioner from the United Kingdom arrived in Ottawa. In what has been described as "a disorderly collection of abstract nouns" the world was informed by means of the Balfour Declaration of 1926 that Great Britain and the Dominions could be "readily [!] defined" as "autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations."[7] These skillful, almost metaphysical generalities were reinforced five years later by the Statute of Westminster, which was designed to give the Dominions "as much legal equality as the Imperial Parliament could bestow."[8] All of this, it should be stressed, had been achieved so far as Canada is concerned without a single alteration in the B.N.A. Act.

But the acquisition of the *right* to a separate foreign policy and the treaty-making power involved also the *capacity* to perform the obligations arising out

[7] *The Report of the Inter-Imperial Relations Committee, Imperial Conference, 1926.* Quoted in A. B. Keith, *Speeches and Documents of the British Dominions, 1918-1931* (Oxford, 1948), p. 161.

[8] Robert MacGregor Dawson, *The Development of Dominion Status, 1900-1936* (London, 1937), p. 119.

of treaties. It is here that serious trouble has arisen and has yet to be dispelled. The root of the difficulty is the B.N.A. Act and, even more, its judicial interpretation. Bearing in mind the nature of the royal prerogative in foreign policy and the absence of any desire by Britain to grant, and of Canada to claim, control of her own external policy in 1867, it is not surprising that there is only a single reference to one of its attributes. It is to be found in Section 132, which reads as follows:

> The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

This somewhat awkwardly worded clause refers to a type of treaty between the Empire and foreign countries which, strictly speaking, did not exist at that time. Those who have studied the clause have understood it to mean that the Canadian Parliament was being called upon to replace the British Parliament as the appropriate agency to enact legislation to implement obligations incumbent upon Canada as a result of treaties negotiated by the Imperial Government. Presumably what was meant in 1867 by an Empire Treaty was one "recommended to the King by his Imperial Cabinet and signed by his representatives from Great Britain."[9]

[9] Sidney Smith, "Treaty-Making Powers," in *The Canadian*

The supremacy of federal over provincial legislation on such questions, despite the division of powers between the two areas of government in Sections 91 and 92 of the B.N.A. Act, was clear and palpable. When, for example, after the Canadian Parliament had passed the Japanese Treaty Act of 1913 to implement the treaty of 1911 between the United Kingdom and Japan, the Legislature of British Columbia enacted legislation restricting the rights of Japanese in that province which conflicted with the Canadian legislation and the treaty, it was ruled invalid by the Judicial Committee of the Privy Council. Similarly, a federal statute applied certain restrictions to the Maritime Provinces only as a consequence of a Migratory Birds Convention of 1916.[10]

So far so good. But what would happen when Canada negotiated a treaty or convention applicable only to Canada and signed on behalf of the Canadian government? Could such a treaty entitle the federal government to override provincial rights upon matters within the jurisdiction of the provinces? Such a problem was first posed when Canada became a member of the International Labor Organization and was called upon to state its policy upon ratification of conventions recommended for adoption by that organization. In 1920 the Minister of Justice advised the cabinet that in his opinion five of the six draft con-

Constitution, Canadian Broadcasting Corporation Publications No. 4 (Toronto, 1938), p. 105.

[10] Cf. James McLeod Hendry, *Treaties and Federal Constitutions* (Washington, 1955), pp. 124-125; Scott, *op. cit.*, p. 20.

ventions adopted at the first session of the International Labor Conference should be referred to the provinces for legislative action, since they did not fall within the legislative competence of the federal government. Unless the provinces took appropriate action the Government should not ratify the Convention. By proceeding in this manner the Minister of Justice prudently sidestepped a clash of authority between province and Dominion and developed a procedure which the Supreme Court of Canada upheld in a unanimous advisory opinion delivered in 1925.[11]

For the time being all was well, but at the cost of a pretty dismal record of ratification of labor conventions, despite the fact that Canada's social legislation would compare favorably with that of many countries more successful in taking action upon these conventions. Between 1920 and 1935, Canada ratified only four conventions, all dealing with maritime questions.[12]

At the beginning of the thirties, the prospects for strengthening the Canadian government's capacity to perform its treaty obligation seemed to be markedly improved by the attitude of the Judicial Committee of the Privy Council towards interpreting the division of powers between province and Dominion. In a judgment handed down in 1930, Lord Sankey, then

[11] Cf. R. B. Stewart, *Canadian Labor Laws and the Treaty* (New York, 1926), p. 39.

[12] To date Canada has ratified only 18 of over 100 conventions of the I.L.O. The United States, which shares the same problem of divided authority, ratified 7 in the 20 years after it joined the Organization in 1934.

Lord Chancellor, declared that "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits." He and his colleagues did not, therefore, propose "to cut down the provisions of the Act by a narrow and technical construction but rather to give it a large and liberal interpretation."[13] In that spirit they decided in favor of the federal government in two cases involving the federal control of aeronautics and radio.[14] In the Aeronautics case the issue was fairly simple, since it arose from federal legislation made necessary by the adoption of the Convention Relating to the Regulation of Aerial Navigation of 1919, which Canada had signed as a member of the British Empire. The Privy Council had no difficulty in ruling that this was a clear case of carrying out the terms of Section 132 of the B.N.A. Act. The second case was much more significant. In 1927 Canada had negotiated with a host of other countries an International Radio Telegraph Convention. This convention had been ratified by the Canadian government. There was, of course, no mention of the British Empire in the convention and there could obviously be no reference to control of radio in the division of powers between the Dominion and the provinces which appears in Sections 91 and 92 of the B.N.A. Act. The Judicial Committee ruled that the convention did not fall within the purview of Section 132, but that the legis-

[13] Edward's Case [1930], A. C. 124 at p. 126.

[14] *In re the Regulation and Control of Aeronautics in Canada* [1932], A. C. 54; *In re Regulation and Control of Radio Communications in Canada* [1932], A. C. 304.

lation adopted as a result of the convention could be supported by the initial words of Section 91 authorizing the Canadian Parliament to make laws "for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes and Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

With this encouragement, the Bennett Government of 1935 decided to enact legislation for social reform which could be justified as being in accordance with the provisions of three I.L.O. labor conventions which it ratified. It fell to the King Government, which succeeded to office shortly afterwards, to test the validity of the measures which, as the opposition, it had questioned during the debates on the adoption of various measures. After the Supreme Court of Canada had divided evenly on the question, the case was carried to the Privy Council, and there in January, 1937, the legislation was declared *ultra vires*.[15] The Judicial Committee had changed completely in personnel since 1932 and seemed to have been inspired by a desire to protect the rights of the provinces. The swing of the pendulum "from literalism to liberalism and back to literalism"[16] operated at the cost of the treaty-performing power of the federal government. Their Lordships said that they could not share the views of those who had relied upon the judgments of 1932 to support their contention that

[15] *Attorney-General for Canada v. Attorney-General for Ontario and Others* [1937], A. C. 326.

[16] Hendry, *op.cit.*, p. 179.

legislation pursuant to a treaty rests exclusively with the Dominion.

The labor conventions were not Empire treaties and therefore federal legislation based upon them could not override the rights of the provinces. Nor did the learned judges consider that they could be justified by "the Peace, Order and good Government" clause which had been used in the Radio case. It would have been "remarkable," they declared, that a government ". . .not responsible to the Provinces nor controlled by the Provincial Parliaments need only to agree with a foreign country to enact such legislation and its Parliament would forthwith be clothed with authority to affect provincial rights to the full extent of such agreement."[17] One can imagine Senator Bricker of Ohio reading these sentiments with an approving nod! The resulting position of Canada was stated as follows:

> In totality of legislative powers, Dominion and provincial together, she [Canada] is full equipped. But the legislative powers remain distributed, and if in the exercise of her new functions derived from her new international status Canada incurs obligations, they must, so far as legislation be concerned, when they deal with provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces.[18]

Such a sharp curb to the powers of the federal

[17] Quoted in Scott, *op. cit.*, p. 21.

[18] [1937] A. C. 354. This judgement and those in the Aeronautics and Radio cases are reproduced in Jennings and Young, *Constitutional Laws of the Commonwealth* (Oxford, 1952).

government was a shock both to those interested in social reform and those anxious to clarify the international status of Canada. It is not surprising that the Privy Council's decision was greeted with disappointment and annoyance. The Dean of the Dalhousie Law School, now a member of the bench of Nova Scotia, wrote at the time that "To carry into the field of external contractual relations the divisions of power set out in Sections 91 and 92 as to domestic power seems to be of doubtful validity in point of law, suicidal in point of governmental efficiency, and to involve the frustration of Canada's achievements in political autonomy and international status."[19] His predecessor, now Secretary of State for External Affairs, remarked in a broadcast discussion on Canada's treaty-making power that the Privy Council "shifted its ground a little too nimbly to be convincing." With reference to the deterring effect of the judgment upon constitutional progress through an interpretation based upon the letter and not the spirit of 1867, he said pithily that " A constitution should be a road and not a gate."[20] The Canadian correspondents of the *Round Table* were equally concerned and one of their number wrote pessimistically:

> . . .the Privy Council now informs Canadians that their achievement of Dominion status has destroyed their national unity in world affairs; in regard to an "Empire" treaty the federal parliament is fully competent to legis-

[19] V. C. MacDonald, "The Canadian Constitution Seventy Years After," *Canadian Bar Review*, XV (1937), 419.

[20] Sidney Smith, *op. cit.*, pp. 110-111.

late even for provinces, but in regard to a Canadian treaty the federal parliament is incompetent over a whole range of important matters. Dominion status, it appears, raised the international position of the provinces and lowered that of the Dominion.[21]

With these criticisms recent writers are in entire agreement. Thus, Professor Hendry speaks of "inaccurate and inconsistent interpretations" of Section 132 and Professor Scott complains that "The present judge-made law makes no sense at all in the light of the compact of 1867."[22]

As a result of this decision Canada was left in the embarrassing position of having ratified three I.L.O. conventions which it was subsequently unable to implement by federal legislation. Henceforth its diplomats and legislators would be required to find their way through what Dean MacDonald called a "judicial labyrinth," aware that "Empire" treaties were obsolete unless Canada should reverse her advance towards complete autonomy but confronted, again to quote the Nova Scotian jurist, "by the inescapable necessity of determining whether the topics covered, or to be covered, by the document are in pith and substance in relation to the 'classes of subjects' assigned to the Dominion or to the provinces."[23]

Since the method of judicial interpretation has left Canada in a difficult and anomalous position so far as her capacity for treaty performance is con-

[21] Anonymous, "Canada and the Privy Council," *Round Table*, XXVII (1937), 761.

[22] Cf. Hendry, *op. cit.*, p. 131; Scott, *op. cit.*, p. 20.

[23] Quoted in the *Round Table*, *op. cit.*, p. 761.

cerned, constitutional lawyers are agreed that it would be advisable for her to secure the required improvements by an amendment to the B.N.A. Act. In Article 132, for example, if the phrases "thereof as part of the British Empire" and "between the Empire and foreign countries" were struck out, the shortened article would read "The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof arising under Treaties." Such an alteration, if accompanied by adequate assurances that there would be no interference with the exclusive powers of the provincial legislatures as defined in Section 92 of the B.N.A. Act, might cover the exigency. Dean H. F. Angus would prefer the expedient, however, of adding to the section the phrase "or under multilateral international conventions," an addition which would further strengthen the position of the federal government in dealing with I.L.O. conventions and other "international legislation in Embryo."[24] He thought that such a classification

[24] H. F. Angus, "The Canadian Constitution and the United Nations Charter," *Canadian Journal of Economics and Political Science*, XII (1946), 133. In a brief on "The Treaty-Making Power in Canada," submitted to the Royal Commission on Dominion-Provincial Relations by the League of Nations Society in Canada in January, 1938, Dr. N. A. M. MacKenzie, then Professor of International Law at the University of Toronto, made several interesting proposals. In the *Report* of this Royal Commission (Ottawa, 1939) it was recommended that "the Dominion and the provinces together should decide how International Labour Conventions should be implemented," and it was suggested that the best method would be for the provinces "to give to the Parliament of Canada power to implement such international labour conventions as the Government of Canada has

"might do something to allay the suspicion of provincial governments." But once again the restraining powers of the provinces have complicated the position with the result that to date no action has been taken.

The B.N.A. Act is, of course, a British statute. Prior to the Statute of Westminster any amendment to it desired by Canada was enacted in London upon request of Ottawa. This was done seven times between 1867 and 1930. Under Section 2 of the first draft of the Statute of Westminster it would have been possible for the federal government of Canada to acquire complete control of the power of amendment. As soon as this was realized (after the draft had been circulated), the Premier of Ontario, G. Howard Ferguson, took the lead in declaring that his province would not accept any restatement of the procedure for amendment "that does not fully and frankly acknowledge the right of all the provinces to be consulted and to become parties to the decision arrived at."[25] The Conservative government which had just (1930) assumed office in Ottawa naturally was particularly responsive to the appeal of a Conservative Prime Minister from the province which was the basis of the party's electoral strength. After

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ratified or may ratify in future." The Commission did not feel that "there is legitimate cause for fear that this method will be used for the purpose of invading provincial rights." They did not make any recommendations with respect to treaties in general. *Book II, Recommendations*, pp. 48-49.

[25] Quoted in K. C. Wheare, *The Statute of Westminster and Dominion Status* (5th ed.; Oxford, 1953), p. 194.

convening a conference of the provinces with the Dominion at which the Liberal Premier of Quebec strongly supported the Premier of Ontario, Prime Minister Bennett accepted certain suggestions which ultimately appeared in the Statute of Westminster. The most important for our purpose, Subsection 1 of Section 7, designed to offset the implications of Section 2, reads as follows.

> Nothing in this Act shall be deemed to apply to the repeal, amendment, or alteration of the British North America Acts 1867 to 1930, or any order, rule or regulation made thereunder.

Thus, although Canada had become a fully sovereign state by her own volition, she chose to leave the United Kingdom and Parliament as the instrument of amendment. Since 1931 the federal and provincial governments have been unable to find an agreed method of amendment in Canada by Canadians for Canada which covers all necessities. There is one advance, however; by the British North America Act of 1949 the federal government may amend the Constitution in purely federal matters, but not on such important questions as the legislative authority of the provinces, the rights and privileges of provincial legislatures or governments, schools, the use of the English or French language, and the duration of the House of Commons. If the federal government should wish to curtail the powers of the provinces with respect to legislation for treaty implementation, it must still have recourse to the United Kingdom

Parliament. In other words, if Canada proposed to amend Section 132 in the manner that has been described, it would have to do so by British legislation enacted at the request of the Federal Parliament. In practice, it is most improbable that such a request would be made without prior assurance that the provinces were in accord. In the present uncompromising mood of insistence upon provincial rights, which is particularly conspicuous in the Province of Quebec, but which is far from being a negligible quantity in other provinces, no such acquiescence may be expected. When Mr. St. Laurent, a native of Quebec, was Prime Minister, it was scarcely to be expected that he would run counter to the sentiments of so many of his fellow-countrymen, except on a matter of the utmost urgency. We may infer that Prime Minister St. Laurent did not regard the amendment of Section 132 in that light.

Professor Hendry of Dalhousie University, who appreciates the necessity "for cautiousness in constitutional change," has recently come up with a suggestion which might meet the objections of Quebec. It is to the effect that the suggested amending section should "unequivocally state that the central government has all the necessary implementing powers, subject again to judicial control, and that should it be deemed that the legislation in fact amends the Constitution, the legislation is invalid."[26] In making this suggestion he takes into account the fact that appeals to the Privy Council in civil cases from Canada have

[26] Hendry, *op. cit.*, p. 180.

been abolished since 1949. It would be the Supreme Court of Canada, a body steeped in the lore of federalism in Canada as British jurists cannot be expected to be, and regarding the Constitution as Canadians as well as jurists, which would be the final court for interpretation. It remains to be seen whether some such suggestion as this will be considered at another federal-provincial conference. A Constitutional Conference of the federal and provincial governments met on January 10, 1950, to examine this very problem, but in spite of a promising beginning no action of a positive character followed its deliberations.

Meanwhile it is important to remember that the disability under which the Canadian government suffers in the performance of treaty obligations, while more restrictive than is to be found in such federal states as Australia, the United States, and Switzerland, is harassing but not fatal. The enabling legislation arising from the great majority of treaties which Canada negotiates and ratifies falls readily within the sphere of competence of the Canadian government and no difficulty arises. Ratification of such significant international documents as the Charter of the United Nations or the North Atlantic Treaty was accomplished without delay. With I.L.O. conventions, the difficulty will continue to arise as in other federal states, but neither the I.L.O. nor Canada seems seriously disturbed by the dilemma.

Periodically in the United Nations, however, it is necessary for Canadians to explain why their country cannot go all the way in support of a worthy pro-

posal. Thus, in 1947 in a committee of the General Assembly, Canada abstained upon a Norwegian resolution recommending to member governments that they encourage the teaching of the purposes, principles, structure, and activities of the United Nations in their schools. The Canadian spokesman said that because of the "scrupulous respect" which the Canadian government entertained towards provincial rights and because of the fact that education was within the exclusive jurisdiction of the provinces, all that the government could do was "gladly transmit" the recommendation to the various provincial authorities and in turn "gladly communicate" to the Secretary-General the replies received.[27] A year later when the General Assembly adopted the Universal Declaration of Human Rights, Canada voted in favor, but Mr. Pearson, then Secretary of State for External Affairs, was careful to point out that in this field his government had no intention of trespassing upon the rights of the provinces. "We shall continue to develop and maintain these rights and freedoms, but we shall do so within the framework of our constitution which assigns jurisdiction to the legislatures of our provinces."[28]

A similar caution has had to be exercised by Canadian delegations to the General Assembly during the protracted discussion upon Covenants for Human Rights which has continued since the adoption of the

[27] *Canada and the United Nations, 1947* (Ottawa, 1948), p. 236.

[28] *Canada and the United Nations, 1948* (Ottawa, 1949), p. 249.

Declaration on Human Rights. It was agreed in 1951 that two Covenants on Human Rights should be drafted dealing respectively with civil and political rights, and economic, social, and cultural rights. The Commission on Human Rights has been struggling with these instruments ever since 1948. Its deliberations annually come under review in the Third Committee of the General Assembly. Like other federal states, Canada has urged the inclusion of a clause in these Covenants specifically making allowances for their constitutional difficulties, but has been met by the objection voiced by some delegations that such a clause was "a device to evade full implementation of the Covenants."[29] To these critics the reply has been made that "short of a drastic overhaul of its present constitutional arrangements" (which as we have seen is unlikely) Canada would be unable to ratify the Covenants. This warning was reiterated in a statement sent to the Secretary-General and published on March 10, 1954. In that statement the Canadian government declared that "in the absence of a satisfactory Federal State clause, Canada could not become a party to the Covenants, due to the nature of its constitution which divides legislative powers concerning Human Rights between the national parliament and provincial legislatures."[30] However, by the margin of a single vote the Commission on Human Rights, on which Canada is not represented, refused to accept an Australian proposal for an effec-

[29] *Canada and the United Nations, 1953-54* (Ottawa, 1954), p. 47.

[30] *Ibid.*, p. 48.

tive Federal State clause. On the contrary, it adopted a Soviet draft article which would make the provisions of the Covenants applicable to federal states "without any limitation or exceptions." This sweeping provision, which would have the absurd result of imposing upon federal states obligations which they are unable constitutionally to undertake, was partially offset by another proposal leaving it to the General Assembly to decide upon the advisability of including in the Covenants a clause permitting states to adhere to the Covenants with reservations. From present indications it will be at least two years before the Third Committee and the General Assembly complete the texts of these Covenants and open them for signature. The latest statement of the Canadian position was made by Mrs. Ann Shipley M. P. on January 30, 1957, during a debate in the Third Committee on Article 13 of the Covenant on Economic, Social, and Cultural Rights.[31] After pointing out that the same difficulty faced the Canadian delegation in the clause under discussion as was generally true in the consideration of all the other articles, namely the constitutional problems faced by federal states, she reminded her colleagues that:

. . .the participation of the Canadian delegation in the discussion of the Covenant. . .has been, and will continue to be, based on the assumption that the Covenants as they finally emerge, will contain provisions which will

[31] Canadian Delegation to the United Nations General Assembly (Eleventh Session), *Press Release* No. 47, p. 2. See also *Canada and the United Nations, 1956-57* (Ottawa, 1957), pp. 67-68.

adequately take care of the jurisdictional problems which are peculiar to federal states such as Canada. Indeed without such provisions it will be impossible for the Canadian government to adhere to these Covenants, even if they are to be acceptable in other respects.

A similar dilemma exists with regard to the Convention on the Political Rights of Women, which was adopted by the General Assembly at its Seventh Session and opened for signature in March, 1953. Although Canada voted for the convention, which guarantees women the same rights as men in voting, holding public office, exercising public functions, and being eligible for election to public office, she was obliged to reserve her position on signature and ratification. This was necessary because many of these rights are in the jurisdiction of the provinces as well as the national government and there was no clause in the convention covering the position of federal states.[32]

Such developments induced a Canadian political scientist to suggest as early as 1950 that " the delegates of other nations must be beginning to wonder whether the 'inviolable constitution' is nothing but a convenient device which the Canadian government can and does use to avoid sacrificing its sovereignty to the international body or its affiliated agencies."[33] In similar vein Professor Hendry has written: "It

[32] *Canada and the United Nations, 1952-53* (Ottawa, 1953), p. 45. On the other hand, it was possible for Canada to sign the Convention on the Nationality of Married Women when it was opened for signature on February 20, 1957.

[33] James Eayrs, "Canadian Federalism and the United Nations," *Canadian Journal of Economics and Political Science*, XVI (1950), 182.

may be contended that 'Canada lacks a firm and active authority in international affairs.'" He then declared that foreign policy "is bound to be weak and vacillating if the central executive has doubts as to its authority to contract binding international engagements."[34]

While acknowledging the force of these criticisms voiced by Messrs. Eayrs and Hendry, I am unable to concur with them in their entirety. So far as I am aware, other delegations to the United Nations have not been as skeptical of the intent of Canadian policy as was feared. It is perfectly true that the Soviet government can use the constitutional difficulties of federal states to cast doubt upon their good faith, but its motives for so doing are suspect to many and the sincerity of its own belief in human rights is open to considerable question in view of what is known about its record of performance. The recent enlargement in membership of the United Nations has brought within its ranks a number of states far more jealous of their newly acquired sovereignty than a country like Canada with a longer experience of nationhood and of international co-operation. If Canada had consistently followed in the United Nations what used to be called her "back seat" policy in League of Nations days, doubts of the wholeheartedness of Canadian support of the ideals of the U.N. would have been more prevalent. But, as Al Smith would say, let us consider the record. As a country which ranked third among the U.N. states which sent forces to fight in

[34] Hendry, *op. cit.*, p. 62.

Korea and which ranked first in its contribution of trained personnel to the United Nations Emergency Force, of which it was the original proponent, Canada has not been found wanting when men as well as noble sentiments were required to ensure the success of the United Nations. As one of the largest contributors to Technical Assistance funds and a steady supporter of relief agencies in the Middle East and Korea, Canada has never been accused of holding back when financial support for voluntary agencies, as distinct from other assessments for normal U.N. purposes, was requested. In a recent issue of the *Economist* a forceful article on "What Hope for UNO?" concluded that the present task of the United Nations was not so much "to take the tremendous jump to world government in order to survive" but "rather to evolve more effective pressures and incentives to get member Nations to abide by the undertakings they have freely made." What was needed, the writer reasoned, was a "ginger group" within the U.N. with the following qualifications:

> . . .of more than negligible weight, with enough detachment to win widespread confidence, enough concern for the general good to break out of the parochial pattern of geographical and racial blocks, enough imagination to put forward new techniques, and enough generosity to set an example by contributing physically to the development of those techniques.

The article admitted that the potential membership of such a group was "sadly limited." It then

went on to describe Canada and the Scandinavian countries as providing at present a "hard core," since they were "not only contributors to the U.N. force but also . . . independent-minded advocates of constructive sanity."[35] Such a commentary by one of the most respected journals of independent opinion in the world, which takes into account the necessity of abiding by undertakings, should be impressive testimony to offset the portrait of a Canada hypocritically parading a "cloistered virtue," protected by limiting elements of the B.N.A. Act. Judging from my own experience at the Eleventh Session of the General Assembly, it is fair to say that Canada commands a decent respect from her fellow-members.

The second criticism voiced by Mr. Hendry is only partially true. No Canadian Minister of External Affairs is going to pursue a vigorous foreign policy which does not take into account the complicating factors which have been described. Every Canadian cabinet minister is necessarily schooled in the arts of compromise and accustomed to concern himself with the possible rather than the ideal.[36] But having said that, it must be added that there is a very wide area of policy in which these limitations are not applicable. They did not prevent, for example, the entry of Canada into the United Nations and the North Atlantic Treaty Organization, which have been the locales for the most significant policies that Can-

[35] Anonymous, "What Hope for UNO?," *Economist*, CLXXXII (March 16, 1957), 888.

[36] Cf. Kenneth McNaught, "Ottawa and Washington Look at the U. N.," *Foreign Affairs*, XXXIII (1955), 663-678.

ada has pursued in the postwar period. Indeed, far from being hampered by her Constitution, Canada was the first state to deposit her ratification of the North Atlantic Treaty in Washington. They have not prevented Canada from participating in the Colombo Plan, one of the most successful experiments in co-operation with South-East Asia on the part of states of Western origin. To that Plan Canada has been the largest cash contributor among the Commonwealth countries. Nor has the B.N.A Act prevented Canada from being in the forefront in transforming the British Empire into the present Commonwealth of Nations, and in helping to devise methods whereby republics like India and Pakistan could remain in the Commonwealth while ceasing to be united with their fellow-members by a common allegiance to the Crown. Surely actions such as these are not typical of a country with a weak and vacillating foreign policy.

In the conduct of foreign policy it is fair to say that Canada is less inhibited by her federal structure than is the United States. In 1787, when the Founding Fathers in Philadelphia, in an effort to avoid placing too much power in the hands of any one branch of the federal government, decided that treaties negotiated by the executive must be approved by a two-thirds majority of the members of the Senate present and voting when the treaty came up for ratification, they gave to the American Senate a unique restraint upon foreign policy. The combination of this limitation with the provision that each state,

no matter what its size, shall have only two Senators, and with the working of the seniority rule in senatorial committees, creates a situation for which there is no parallel in Canada. The voice of Idaho, Michigan, or Georgia resounds throughout the land when a Borah, a Vandenberg, or a George dominates the Senate Committee on Foreign Relations on major issues of foreign policy.

No Canadian province can ever produce such a masterful personality as its spokesman in the Canadian Senate no matter how able or long-lived he may be. This is true not only because of the absence of any two-thirds clause on treaty ratification in the B.N.A. Act but because of the very nature of the Canadian Senate. Its members are appointed for life or good behavior by the Governor-General on the advice of the Prime Minister of Canada and not on that of a provincial premier. Alberta, for example, has had a Social Credit government for over twenty years, but not a single Social Credit Senator. Representation in the Senate is equalized between regions rather than provinces. The dominant legislative body is the House of Commons. Under these conditions the Canadian Senate is one of the weakest second chambers in the world. The ordinary citizen would be hard put to name even two Senators from his province, even if there are only six, as is true in most of the Canadian provinces. A Prime Minister may allow vacancies through death to accumulate to as many as 15 or 20 out of 102 and no one seems to mind, except the party stalwart anxious

for a life appointment. Then, too, the fact that Parliament approves (not ratifies) treaties by a simple majority precludes a province from attempting to prevent approval of a treaty through its M.P.'s voting as a bloc, assuming that they are all of the same party persuasion. On the whole we may conclude, therefore, that the provinces, as such, speak in the Federal Parliament with muted tones rather than with a rebel yell or a barbaric yawp such as befits the "sons of the wild jackass" that years ago so irritated a Senator from the eastern United States.

If the Senate is not the stronghold of the Canadian provinces, where is the place in which they attempt to exercise their most effective political pressure? Many observers would say in the Cabinet, where the real measure of the importance of the province is indicated. When, for example, British Columbia increased in wealth and population during the forties it gained an additional member of the Cabinet. The political influence and power of these cabinet ministers are active and significant. The Ministers of External Affairs, Finance, Transport, Health and Welfare, and the Secretary of State, all from Ontario; of Trade and Commerce from Manitoba; of Agriculture from Alberta; of National Defense, Justice, and Public Works from British Columbia—these are servants of Canada first, but they are also the cabinet ministers to whom M.P.'s and premiers from those provinces will normally turn for support of a measure regarded as vital to that province. Similarly, the federal administration not only relies upon their as-

sessment of the attitude of their province on controversial matters, but will on occasion, especially at election time, leave it to a cabinet minister from a particular province to make in his own area an important pronouncement on federal policy as affecting that province. It was a B.C. minister, Mr. Sinclair, then Minister of Fisheries, for instance, who during the election campaign of 1957 first announced in that province the willingness of the federal government to make a contribution to the construction of a dam on the Columbia River. Incidentally, that particular question of developing electric power urgently needed in the Pacific Northwest offers a good demonstration of the relative strength of the provinces and the Dominion in this field. When, two years ago, it seemed probable that the provincial government of British Columbia was prepared to permit American interests to build a dam on the Columbia River in Canadian territory in order to provide power for United States industry on terms which the federal government thought overgenerous, the Parliament of Canada passed a bill which prevented the export of power from Canada without a federal license. In the negotiations which are currently under way between the American and Canadian governments on the use of waterpower resources from rivers crossing the international boundary, the Minister of Lands of British Columbia may be present at some of the talks, but purely in an advisory capacity.[37]

[37] See Bruce Hutchinson, "The Coming Battle for the Columbia," *Maclean's Magazine*, Sept. 29, 1956, pp. 11-13, 28-35.

There is another recent development in dominion-provincial relations which should be noted although it has had little effect upon foreign policy. The fact that continuously for twenty-two years, and for the greater part of thirty years, the Liberal party was in office in Ottawa produced a situation in which for a time the provinces seemed likely to become the real center of Her Majesty's Loyal Opposition. As Professor Frank Underhill told an audience in a public lecture at Queen's University in 1955, "By some instinctive subconscious mental process the Canadian people have apparently decided that, since freedom depends upon a balance of power, they will balance the monopolistic power of the Liberal Government at Ottawa by setting up the effective countervailing power not in Ottawa but in the provincial capitals."[38] Before the federal election of 1957 the Liberal party held 170 seats in the House of Commons and the remaining 95 were divided among three other parties, two of which might be described as "splinter" parties that did not have a national constituency. In contrast to this overwhelming strength in the federal field, the Liberal party held office in only three provinces—Newfoundland, Prince Edward Island, and Manitoba—while the Progressive Conservatives governed three; the Social Credit party, two; the CCF, one; and a purely provincial party, "L'Union Nationale," of Quebec, one. Among the considerations which, it is generally agreed, affected the views of the voters

[38] F. H. Underhill, "Canadian Liberal Democracy in 1955," MS, pp. 6-7.

in the 1957 election was the conviction that the disproportionate strength of the Liberal party was not in the best interest of the country and that it had produced arrogance and complacency in Ottawa. As a consequence, the elections created a remarkable reversal of fortune. In the new House of Commons there were 113 Progressive Conservatives, of whom 61 came from Ontario. The Liberals were reduced to 106 M.P.'s, of whom 63 were from Quebec. The CCF party won 25 seats, but was confined to the Provinces of Ontario, Manitoba, Saskatchewan, and British Columbia. The Social Credit party elected 19 members, all of whom came from Alberta and British Columbia.

In Ottawa during the last fifteen years of Liberal government the three opposition parties never voted as a unit in opposing the government's foreign policy. Thus, the Social Credit party in 1944 strongly criticized Canadian membership in the International Bank and the International Monetary Fund, but the other two did not; the CCF criticized the government for not securing adequate implementation of Article 2 of the NATO treaty, but the others did not; the Progressive Conservative party secured no support from the other parties when it moved a resolution of censure upon the government for its handling of the Suez Crisis. Naturally, any Canadian government is desirous, as Prime Minister King said before going to San Francisco in 1945, that Canada should speak on international affairs with a clear, strong, and united voice. On the whole that objective has been achieved.

Party politics have caused few differences on foreign policy in the past twenty years, except recently upon the Suez problem.[39] But when there was a weak and divided opposition in Ottawa, the federal government was inclined to keep a watchful eye on the provincial governments and their views, if any, on foreign policy.

Normally the provinces avoid controversy in this field with the federal government, except upon immediate economic interests such as wheat, fish, or power.[40] However, the attitude of one province on broader issues must always be kept in mind. That province is, of course, Quebec. The cautious attitude displayed towards Quebec exists not only because it sends seventy-five members to Ottawa, the overwhelming proportion being almost invariably Liberals, but because Quebec is the home of French-speaking Canada. Its people, long separated from France, deeply rooted in the soil and devoted to their language and church, cannot be expected to respond in an international crisis as English-speaking Canadians have often done to what a French-Canadian Cabinet

[39] See Anonymous, "The Ottawa Stampede," *Economist*, CLXXXIII (June 15, 1957), 953-954. After describing Canada's position as "not merely a power with a mind of its own but also as an unusually constructive contributor to the world's councils," the editorial comments: "There is no reason whatsoever for supposing that Mr. Diefenbaker, the Progressive Conservatives' new and dynamic leader, would wish to reverse this trend." This forecast has been justified by the strengthening degree of agreement shown in the debate on External Affairs in the House of Commons on Nov. 26, 1957.

[40] But in the federal election campaign of 1957 the Premier of British Columbia accused the Government of "not having a friend in the world" because of its handling of the Suez problem.

Minister once described as "the call of the blood." As a people, until recently largely rural and immersed in the affairs of the parish, they are naturally inclined to isolationism and wary of being drawn into what one of their greatest leaders, Sir Wilfrid Laurier, described fifty years ago as "the vortex of militarism, the curse and blight of Europe." When another French-Canadian Prime Minister, Mr. St. Laurent, angrily inveighed against "the super-men" of Europe in the debate on the Middle East last winter, he unconsciously demonstrated a vestigiary survival of that attitude. If an American can think of the Democratic South (perhaps I should add of pre-Eisenhower days) often voicing the sentiments of the more isolationist parts of the Middle West, but in French rather than English, he will find a parallel to the special role of the province of Quebec in Canadian policy. It is Quebec more than any other province that necessitates the raising of the Canadian armed forces by voluntary methods, a method not followed by any other NATO country with a military establishment. But it cannot be stressed too much that this attitude would be the same whether Canada were a federal or a unitary state. The fact is that Canada is and will remain a bicultural state, the product of history and environment, and increasingly her people have become accustomed to that phenomenon.[41]

It is Canada's good fortune that her national unity

[41] See George W. Brown, "Canadian Nationalism: An Historical Approach," *International Affairs*, XXX (1954), 166-174.

was never stronger than at present. The threat of an atheistic Communistic imperialism, as a French-speaking Canadian might describe it, to the liberties of the free peoples, the adroit leadership of Canada during and since World War II, the possession of a well-filled purse and an expanding economy have all contributed to this fortunate position. So long as these conditions remain, and most of the present omens are favorable, federalism must be rated as a complicating but not as a disabling factor in Canadian external relations.

Federations: The Canadian and British West Indies*

Alexander Brady

THE ESTABLISHMENT early in 1958 of the West Indies Federation is momentous for the ten dependencies involved, and significant for Britain, Canada, and the Commonwealth. It comes in the manner characteristic of political evolution in the British tradition—by successive and tentative measures over many years.

* The preceding papers have given us, from different points of view, several illuminating insights into the development of federalism in Canada. They have described the problems which Canada encountered at the different stages of geographical, economic, and political development and have shown how, in most cases at least, those problems were met and solved. They have demonstrated that, despite many difficulties, Canada has maintained an effective and dynamic federalism.

Since World War II several new federal states have come into being. The most recent of these and of special interest both to Canada and the United States is the Federation of the West Indies, established in January, 1958. The following paper by Professor Alexander Brady of the University of Toronto discusses some West Indian problems and prospects and compares them with Canadian federal issues. Professor Brady was unable to accept an invitation to participate in the Seminar on Canadian Federalism at Duke University, but has kindly permitted us to publish this paper, which was read at the Mount Allison University Summer Institute on Canada and the West Indies in August, 1957.—B.U.R.

The idea of federal union in these colonies is old. Yet its antiquity does not lessen the magnitude and gravity of the step to be taken, a step that many West Indians naturally approach with trepidation and wistful glances backward. Although they see it as something in the logic of their situation and their history, they also realize that it will introduce a host of new and complex problems.

Hairs have been split in defining a federation, and it is needless here to split more. The federal essence consists in creating a large political community out of many smaller ones without destroying them. It merges the many into one in such a way as to guarantee that the many continue to play a distinct and useful role within the wider confines of the federal society. It enables the people of a region hitherto disunited to employ with more effect their political intelligence on common problems, to achieve greater co-operation, and to foster a more fruitful sense of interdependence, coupled with the acceptance of local autonomy. But federal systems conform to no single model; they are, as the Canadian and West Indian cases illustrate, *sui generis*. Each is a special compromise determined by time, conditions, and exigencies in the respective country. Yet whatever the original compromise, every federation, if it is to achieve its purpose and gain vitality, or indeed endure, must inspire the people of the separate units with a more profound feeling than they had before that they belong to one another. It must feed and nourish ideals of nationhood.

At its inception, however, a federation is not merely or mainly the offspring of an idealistic nationality. Much of its impetus comes from men and interests who see it simply as the best practical contrivance for coping with the economic, social, and political necessities of a region. This was the fact in Canada and is the fact in the West Indies, and it provokes comment upon some concrete features of the Canadian experience compared with the West Indian situation.

The material advantages of federation sought by the British North American colonies in 1867 broadly resemble those of the British West Indies today. In Canada then, as in the Caribbean now, a larger political unit was devised in order to weld the different communities into a more spacious trading area, increase their economic interdependence upon one another, lessen their excessive reliance upon outside markets, give greater scope for joint efforts in coping with common economic problems, ensure a more rational use of men and resources within the region, and, with more effective administration, attract a quickened inflow of foreign investment. These are the more obvious and invaluable consequences of a larger political unit, and they resulted from the federation of Canada in the last century.

The precise economic effects of federal union, however, depend upon the special circumstances of the region and the quantity and quality of its resources in relation to markets. In the sixties and seventies of the last century, British North America inherited in the West a vast empire of unsettled lands,

and fully benefited from a federal government that marshaled more effectively than could the separate colonies the capital needed for railways to develop and consolidate these extensive territories. The government built or sponsored lines which linked the Maritimes with Ontario and Quebec, bound the eastern provinces with the plains of the Northwest and the valleys of British Columbia, and thus contributed to the multiplication of people, farms, villages, and towns. In all this a powerful political motive, under outside pressure, was joined to economic expansion. The feverish zeal of Canadians in projecting transcontinental railways was not only to secure the profits of a future trade but to secure unoccupied lands from annexation by the expanding drive of the United States. From its inception a primary aim of Canadian federation was to protect British North America and its potential resources from absorption into the neighboring republic. This continued to be the main aim during the last decades of the nineteenth century. The heavy investment of capital in railways was derived from a political as much as an economic plan, and could ultimately be justified only by the inflow of people to settle vacant lands, develop untapped resources, and make a nation. In Canada federation and railways were the two indispensable agents of nation-building.

This situation may seem singularly irrelevant to the federal union of the British West Indies today. The islands of the Caribbean possess no rich heritage of vacant land to secure and settle. It is a harsh but

inescapable fact that they have already too many people, subsisting on too few acres, and exploiting too few resources. Population relentlesssly presses upon nature's scanty endowments. Its density in the islands is about 370 per square mile, and because of mountainous and steep hillsides half the area of these lands is unfit for tillage. This fact tends to accentuate the real density on cultivated land, which is still the primary source of West Indian income. Moreover, the population problem does not become less difficult for, owing to health and welfare measures, death rates strikingly decline while birth rates remain high, a situation that in the last half of the nineteenth century characterized Western Europe and that partly explained the immense outflow of Europeans overseas. The fecundity of the West Indians, however, has no such easy outlets in emigration. The world of the present century is more disposed than that of the nineteenth to shut and bar doors against the movement of peoples. It values less mere manual labor; it is more absorbed with plans of economic nationalism and applies various discriminating criteria to those who would cross national boundaries. Today labor is more strongly organized on a national basis, more determined to safeguard by political action its standards of living, and hence, despite its protestations of human fraternity, usually seeks to restrict by law the inflow of competitive laborers.

These and related facts present the West Indian federation with critical problems somewhat different from the Canadian. Although the islands have no

unoccupied acres and perhaps no untapped resources (at least clearly recognizable), the federal government will have the exacting and difficult task of promoting more effective use of what exists, increasing the accumulation of capital, assessing where fresh investment is most needed, providing for better inter-island transport, improving popular skills, furthering a diversified industry, and extending in every way feasible the efficiency and integration of the regional economy. This catalogue of responsibilities is difficult and heavy, indeed probably more difficult, in so far as one can compare such things, than that of the Canadian government after 1867. In the strategy of policy it implies, not a few major strokes as in Canada, but many small ones, the results of which will often be uncertain and conjectural. The very abundance of Canadian resources in the last century made less serious the mistakes which were made in political judgment and administrative practices. The West Indian federation can less afford to blunder. More urgently it needs administrative skills and political insights, and astute leaders to provide them.

A federation is an experiment wherein political success is basic for economic success and vice versa. It means a larger area for everything involved in the complicated process of composing differences between diverse social interests and reaching agreements on the contentious matters implicit in a bigger society. Federal union, like political liberty in general, does not bring an easy and painless life. It opens for a people not merely a wider but a more troubled arena

of politics, wherein they are certain to face formidable problems that in their local communities they had happily escaped or readily dodged. They must revise and rearrange loyalties; they must pass severe tests in political ingenuity, enterprise, and stamina. The new benefits which they envisage will be accompanied by heavier responsibilities and fresh burdens.

Canada and the West Indies have one notable bond in that they have shared alike for generations the British political tradition; that is, the tradition of thinking and attitude, expressed in parliamentary institutions, shaped by the history and environment of Britain, taken over by varied communities in the Empire, and now cherished by peoples, not necessarily British in origin, but British in political thought. It lives by the basic and empiric assumption that, in the name of the Crown, political power can be arranged to suit different circumstances, that those who exercise it are ultimately accountable to the people, and that convention no less than law governs its exercise.

The parliamentary system has features which, as the Canadian case shows, fit with ease into the federal structure and facilitate its success. The executive and legislative work together in intimate union. Political parties accommodate themselves to this union, and fight for an electoral victory that secures for one of them a mastery over both legislative and executive. They operate best when they assume a disciplined two-party form, are socially composite, and straddle as many regions and groupings within the country as possible. The politician and the public official, both

servants of the Crown, participate in a cordial partnership in administering the state and in formulating its policies. Finally, the system presupposes some qualities which make its operation possible and effective, such as a vigilant respect for the rules of the game, a spirit of moderation that subdues and restrains the fanatic, a tolerant acceptance of differences, and a related readiness to heal discords by compromise. The demagogic arts of dodging unpleasant facts and pretending that social problems have easy solutions are common under parliamentarism, although they do not add to its vitality.

Since 1867 the main elements of the British political tradition have been fused into Canada's federal system and unquestionably have contributed to its success. The Canadian parliamentary executive is a federalized cabinet, made to represent regions and provinces. But its British feature of uniting executive and legislative authority enables the leaders to exert a weighty influence over followers and to introduce a valuable element of discipline into the party politics of the federation and its provinces. The need of discipline in so fissile a continental state is obvious. The British tradition brings, not merely an institutional, but an invaluable psychological equipment, especially a pragmatic temper, which encourages a patient attack on federal difficulties. This same tradition will be the political underpinning in the federation of the West Indies, although at the outset there is an obvious contrast between the Canadian development and the West Indian. When the original

colonies of British North America federated, they had for many years operated a system of responsible government whereby they acquired political skills invaluable in their new venture and shared a common political experience. But this system has only recently come to the West Indies, and not fully to all. Nor is it fully provided for in the new federal constitution; it is to evolve as federalism evolves. Here is a situation with special and difficult problems of its own.

Fortunately many conspicuous and related components of the British parliamentary inheritance are not merely present in the islands now but are just as deeply rooted as in the Canada of 1867—such as legislative bodies debating in accordance with the rules of procedure at Westminster, civil servants faithfully applying the professional code of Whitehall, and courts adjudicating in harmony with the venerable traditions of the common law. Moreover the idea of evolutionary change is a marked characteristic of West Indian political thought. It is amply illustrated in the federal scheme, especially in the long list of concurrent powers agreed to at the London Conference of 1953, which permits the island legislatures and the federal legislature to share an extensive range of subjects, but in cases of inconsistency ensures that the federal enactment is to prevail. Thus steps towards greater unity can be taken gradually as need dictates.

Political parties, disciplined by the necessities of parliamentary and responsible government, play a major role in a federal as in a unitary democracy, al-

though in the former their difficulties may be greater. National parties are essential for national policies. They finally rule. They garner and apply the political experiences of the state. Their leaders determine the quality of federal agreements and express the spirit of federal compromise. Their character in turn is shaped by the peculiar social forces of the community and the extent to which these forces provide for an informed, mature, and vigorous public opinion. If powerful groups in the electorate really want the federation to fulfil its purpose, they will bring their opinion to bear upon the parties. If unfriendly, they will assert their hostility. But parliamentary parties, when imaginatively led, have themselves an independent power to influence opinion and sentiment. They normally contribute to the federalizing process because their more astute and skilful leaders appreciate the fact that parliamentary success ultimately depends upon winning votes and support in the main regions of the federation and among its diverse elements. Consequently they endeavor by political arts to liquidate resistance to the measures that make a nationwide appeal and promote the unity of the whole; they strive to procure agreement for national policies by striking an astute balance between the vehement claims of rival regional interests. In all this they employ within the counsels of the party the spirit of compromise without which a democratic federation cannot operate or survive.

In Canada the national parties have exerted this federalizing influence, although their effectiveness

has periodically fluctuated with the quality of their leadership and the acuteness of the difficulties with which they have had to contend. The partnership of French and English in the two national parties from their inception has helped to maintain a valuable bridge between the two peoples and contributed to federal cohesion.

The results of this partnership are abundantly illustrated in the country's political history. In the first quarter century of federal union it enabled the ministries of Sir John Macdonald to pursue policies designed to create through railways, settlement, and tariffs a continental economy, and thus add to the strength of the federation. It was not inevitable that the French should support such policies, for their self-protective and self-regarding outlook as a minority cultural group predisposed them to avoid involvement in the westward expansion. But the political maneuvers and skills of Macdonald and his associates kept French and English working together in support of the national policy. The ministry of Laurier in the first decade of the present century and the ministries of Mackenzie King in the third and fourth decades pursued policies and employed tactics of a like kind although under different conditions. This partnership in party activity of the two main cultural divisions of the society has been fundamental to the survival of the federation.

In the British West Indies no task will be more important and in the next decade perhaps none more difficult than the building and training of parties re-

sponsive to the demands of federal rule and the obligations of federal thinking. The task is made more difficult by the speed of recent constitutional and social change. Politicians in the islands have to learn quickly the arts of coping with the pressures and ministering to the needs of the larger and more diverse community. They will perform their task best under a two-party alignment, since a multiparty system tends to diffuse responsibility, gives undue scope to local politicians who extravagantly exploit local sentiments, and projects needless confusion into public discussions. But the traditions of a two-party system with reliable strength are not as yet established in the West Indies. Labor parties linked with the trade unions have appeared in the principal islands, and in September, 1956, a West Indian Federal Labour party was formally launched. A political labor movement, drawing mainly upon British Fabian ideas and practices, thus makes some progress, but much less evident is a counter movement of middle-class composition and liberal or conservative conceptions. The unions constitute a useful and effective base for a labor party, but no comparable associations knit together by kindred ideas provide the base for a cohesive Opposition. There are, however, some colorful personalities who now gather round them groups to oppose Labor, and upon whom reliance must be placed for building an Opposition.

The main issue here is not peculiarly a federal issue. Imperative in any democratic state, whether federal or unitary, is not merely a strong government

to serve the community, but a strong Opposition to help make the government responsible and to secure at need an alternative group of rulers. A parliamentary democracy is no stronger than its party system, and the federal politician is merely the democratic politician writ large. This evident fact assumes a special importance in an emergent federation like the West Indian where the party structure for the new state, with some of its attendant mental traits, has to be improvised from the ground floor. But the federation in itself is likely to inspire fresh political initiative and bring forth fresh political talent. It provides a larger and more attractive stage for statesmen.

Parties are shaped by public opinion and public attitudes; indeed they are shaped by the mores of the community, including the quality of its social ethics. Coherence in a party system must reflect coherence in the sentiments and culture of the public and the assumptions underlying its thought. In their common traditions and common aspirations the islands of the British West Indies have some measure of such coherence and continue to acquire more. Unlike many African colonies they have no tribal structure or tribal sentiment to hamper the process of political integration. As already mentioned, they are attached to British legal and parliamentary traditions and are conscious that the mature evolution of this inheritance along the road of self-government must come through federal union. In federation they also hope to achieve an economic viability, essential for political liberty and for higher standards of life. They are also aware,

and indeed proud, of being communities with mixed race and varied color which have gone far to eliminate the stigma of discrimination on the basis of race and color.

On these matters there is a community of thought and feeling hardly less strong than that of the British American colonies before 1867. It might indeed be argued that it is stronger, since the West Indies have nothing exactly comparable to the large and distinct cultural enclave of French Quebec. Admittedly there are many heterogeneous elements of culture, including French and Latin in some islands, and notably the Hindu culture and the Hindi language of the East Indians in Trinidad. But English as the medium of communication throughout the region faces no serious challenge. Such are the facts on the credit side. It would be unwise, however, to assume more unity than actually exists in popular opinion and outlook. These colonies are islands. Public discussion for generations has been dominated mainly by an insular and parochial outlook, naturally so since the main political interest of the people, fed by a local press and fostered by physical isolation, has been the affairs of individual islands. Parochialism is still dominant amongst the masses and evident in the labor movement. Before the airplane, from the days of Anthony Trollope, all visitors were astonished by the limited degree of communication between the colonies. With little trade, there was little shipping, and the movement of laborers was restricted. But what the railway was for Canadian federation, the commercial

airplane has been for the West Indian. It has made possible frequent interisland meetings and conferences, and quickened that sense of West Indian unity which the parties must both utilize and further promote. Much will depend upon the skill and wisdom with which the future party leaders carry this responsibility, for they must foster the spirit of unity in the working of the federal regime.

Strong and democratic parties are essential for another and allied role. They guide federal change and preserve federal balance. A constitution has to bend and adjust to technical and social innovations in domestic development. At the outset it is inevitably drafted with an eye to current needs and popular attitudes. But in modern times, needs rapidly change and attitudes alter. It is a familiar fact that the Fathers of the Canadian Confederation sought a system which would ensure impressive strength at the center. They desired to minimize the frictions and ills of a dual sovereignty, which in the neighboring republic had exploded into the violence of civil war. The B.N.A. Act illustrates their desire, especially in providing that the national government should have the power to disallow the acts of provincial legislatures. But in time this centralist bias was corrected, not simply by judicial interpretation, although that in itself tended to strengthen the position of the provinces, but by new attitudes which accompanied the growth in power and self-confidence of Quebec and Ontario. Immersed in the affairs of its French culture within a Canada mainly English-speaking, Quebec particularly re-

sented dictation from Ottawa. In the twentieth century the federal government has faced increasing difficulty in disallowing acts of Ontario and Quebec, however freely it might disallow those of the frontier provinces in the West, and since 1911 has not disallowed any.[1] Where clashes of jurisdiction occurred the courts were left to settle them, and the ill political consequences of the disallowance powers were avoided. Thus the balance in the federal constitution shifted, mainly because the two most powerful provinces, possessing together more than half the population of the country and more than half its wealth, wanted it to shift. More recently other economic and social forces have been tending to shift some of this power back. The necessities of war and the preparation for war have contributed to this result, along with the voracious appetite of the democracy for welfare services.

Jamaica and Trinidad, although separated by a thousand miles of ocean, are the West Indian counterparts of Ontario and Quebec; they contain some 77 per cent of the projected federation's population, 83 per cent of its area, and a large portion of its wealth. Jamaica alone has 55 per cent of the population of the whole. Whether they pull together or pull apart, the two big islands are likely to determine the course of federal development. The more autonomy the federation acquires and the more rapid the progress of industrialism, the more certain is this to happen.

[1] See the table of disallowed acts in G. V. LaForest, *Disallowance and Reservation of Provincial Legislation* (Ottawa, 1955), Appendix A.

When ultimately the smaller islands in the West Indies no longer derive aid from Whitehall, they must increasingly look to the federal treasury, which will be replenished by drawing upon the income of all the islands, but especially the large islands. As the financial power grows important, it relentlessly draws to it other power, whatever the intentions of the federal pact. New federal tensions are thus created and political leadership confronts new tasks.

It is a basic feature of modern federations that the local units are born in inequality, however much the constitution may dedicate them to the proposition of equal status and equal treatment. Some have abundant resources and some have few; some are wealthy and some impoverished; some benefit much from the advance of industrialism and some benefit little; and the securing of fair, if not equal, standards in public services demands a measure of central direction and finance. Federation implies a common pool to which rich and poor contribute, but from which the poor derive more than they contribute. This has been the Canadian and Australian experience, and is likely to be the West Indian, for in this region, too, the same inexorable forces will operate. The craving for equality of treatment of citizens in the state, which de Tocqueville put at the heart of the democratic impulse, is paralleled in the craving of the units in a democratic federation for a like equality. To these federal facts political parties will need to respond. They must assume a more national character as they are compelled to grapple with such critical problems

of federal rule, and as they become more national they will further the ultimate ends of the federation.

It is evident in the facts cited that the federal problems of Canada and the West Indies are in some respects divergent and in others alike. The divergences are derived from the obvious differences in territorial area, geographic environment, character of resources, economic structure, and colonial history. The likenesses are in those urgent political needs implicit in a parliamentary government of the British type coupled with the divided powers and local diversities of a federal regime. The most crucial need is that of building and preserving under able leadership a dual party system of the kind which makes the vehicle of parliamentary rule effective and at the same time federal in spirit and technique. This system implies in the leaders a sympathetic appreciation of good administration as well as shrewd politics. Such a system took years to establish in Canada, and the nation's political leadership is continuously taxed to maintain it in a state of vitality. The West Indian leaders have still the hazardous task of creating it. In this venture their success or failure may in no small degree determine the relative success or failure of the federation, for federal economic and social goals can scarcely be fully achieved without it.

Modern federations are unfortunately not left to cope in a leisurely fashion with their economic and social problems, simply because these problems rapidly change in character and dimension. All federations are now more or less shaped in development by the

pervasive and disturbing compulsions of industrialism, broadly interpreting that term to mean not merely the increase in manufactures but the application of mechanical technique to all forms of production whether on the farm or in the factory. As its economy develops the West Indian federation will increasingly experience these transforming forces. Indeed their active presence will be a condition and expression of economic growth; they will signify the achievement of a more productive and less precarious economy, although at the same time they will impose new and heavy demands upon political leadership.

Canadian experience illustrates that on the whole industrialism tends to achieve the integration of the federal community by improving the means of communication between its isolated parts, by breaking down localisms in different areas of life, and by creating in its regions a stronger sense of mutual interdependence. But industrialism, like most agents of change, has effects in the short run as well as in the the long run; it brings gains to many but losses to some; in creating new conditions it destroys old harmonies and poses harsh problems of readjustment. Among the short-run effects is the unpleasant sense of tension and frustration generated in some regions of the federation owing to the tendency of industrialism to concentrate production, and hence people, in favored and strategic areas to the material disadvantage of others. The most obvious illustration in Canada is the Maritime Provinces versus the central provinces of Quebec and Ontario. The former have not shared

to the same degree as the latter in the rapid industrial expansion and its benefits. They have indeed witnessed some of their original industries dwindle and disappear in face of competition from the stronger industries of central Canada. Their public services may often seem to limp and lag compared with those in the more favored and highly industrialized provinces, and sometimes they have to seek lavish aid from the federal treasury. Conscious of such disparities, they easily acquire the feeling of being a neglected economic fringe in the national life, and their smouldering sense of being viewed as subordinates detracts from the federal achievement. The future experience of the West Indies need not be exactly that of Canada, for many circumstances are different, but here the islands have a warning that while federation will be a major step in their material and cultural progress, an essential step towards anything like nationhood, it cannot be an ideal ordering of their affairs. It will never cease to generate complex and difficult problems.

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