

THE SEARCH FOR A VIABLE FEDERALISM¹

I. *Introduction*

Mr. Chairman, my Lords, etc.

Need I say I am honoured and delighted to have been asked to give the Manitoba Law School Foundation Lecture for 1968? I am not sure why I was invited to follow in the illustrious path of Lord Denning, Judge Schaeffer and Sir Leslie Scarman, unless it was to give eternal footnotes of scholarship to the tentative precedents of Judges. I congratulate the Law Faculty and the Law Society on this fine and fruitful joint enterprise.

This is for me no visit to an alien land. I come here as no remote stranger to address the 'locals' in search of wisdom. I am instead, a home town boy, who has never lost the threads that wind him to his place of birth, to the city, the teachers and the friends that gave to spirit and mind the early shaping that provided forms on which to build whatever was to come. The streets, the halls of the Courts, the grounds of the university, are filled not so much with ghosts as the shimmering memories of growth—achievements and frustrations, hopes vaguely realized or re-directed; in short, a past for things remembered, for things never to unrecalled.

At the very centre of this 'seamless web' of origins lies the amalgam that is central: of law and the university. And so it has been ever since for me with one or two interruptions enforced by war or the drift of indecision. But the main path really was set almost forty years ago and it is not nostalgia but indebtedness that prompts me now to see this moment as an occasion to pay respect to all who made it possible for me to begin the long discipline toward profession, to service and to some sense of fulfilment.

Of course, it has not been all wine and roses. The depression of the 'thirties' was the dominant social fact of our lives and it remains among the deeply pervasive influences of my generation. Summer employment from selling magazines to university advertising; paying tuition fees on instalments; borrowing from reluctant bankers suspicious of law students with no collateral—as Mr. Justice Freedman will well remember when I tried once to get a loan for both of us and was told by my banker, in a brutal reply, "let him go to his own bank!"; law firms that could pay little or nothing at all; and a kind of discouraged social and political environment where the hopes of men were not only

1. The Manitoba Law School Foundation Annual Lecture. This paper has been amended since it was delivered in October 1968, to take account of developments in the Constitutional review programme and including the Conference of First Ministers in February 1969.

frustrated by unemployment and minimal incomes but by the looming darkness of Nazi Europe that was soon to bring on the Second World War.

No, it was not all fun, but there was more than enough to lighten this pre-Keynsian prairie load. How magnificent were our student victories, how deep our wisdom. I 'chaired' a debate, an emergency debate, in 1933 the subject of which was splendidly entitled "That this House will not fight for King and Country." I can remember in 1932 defending some German rearmament against the image of French power with its standing army allegedly four million strong. I can recall the paradoxes of an internationally-minded Winnipeg that could not decide whether isolation from so-called British imperialism or the defence of world values against the new Fascism was the more desirable Canadian policy.

How distant much of it now seems. But over the issues of the day were great figures who loomed large in law school, in the courts, in the country. I cannot forget Mr. Justice Robson who was the original bridge between faculty and profession. Two strong Chief Justices such as Mathers and Prendergast; leaders of the Bar such as Isaac Pitblado, Travers Sweatman, Sir James Aikens, Mr. E. B. Loftus, Joe Thorson, E. H. Coleman, A. J. Andrews, R. A. Bonner, Hart Green, Marcus Hyman—all these were men of ability and of high professional distinction. In the City and the university there were other stars in the mixed Winnipeg firmament—John Dafoe, Edgar Tarr, Dr. John Mackay, Guthrie Perry, Lowrer the historian, Lodge the philosopher, Robertson the stylist, Hugh Ross the choirmaster, Brandson the surgeon, Hollenberg the physician. Not for nothing did Bruce Hutchison give Winnipeg a special place in his explorations of the "Unknown Country." Though it suffered heavily from a too entrenched elite, its new Canadians, who are now quite old Canadians, gave to prairie isolation an almost international dimension. These were some of my local heroes in the law and elsewhere and I regard this evening as a chance to pay homage to that past, deference to that inheritance.

II. *The Search for a Viable Federalism*

I have chosen as my subject for this evening's presentation, "The Search for a Viable Federalism." Most community life has its periodic crisis and the only difference for Canada possibly is that ours seems perpetual. If we were born in deadlock as a federation, providence seems to be imposing chronic crises as the means of achieving maturity.

1. *How important is the issue?*

When I was asked to suggest a topic what seemed self-evident to me was not an opinion shared by everyone. For the present

Premier of Saskatchewan, the Honourable Ross Thatcher is reported to have said that in any list of one hundred Saskatchewan problems, the constitutional question would be the one hundred and first. Yet on any reading of the cards this would be a frivolous view. For undoubtedly the question as to whether we can survive as a federal system embracing French language Quebec and the other Provinces, and developing in the process a self-image at home that is acceptable politically and psychologically, and an identity abroad that it is identifiably unique, this is surely *the* Canadian question. Not to recognize it is to risk events overtaking a barren imagination.

And yet there is something to be said for those who wonder about this preoccupation with the anxieties of Canadian survival. On all sides, the world about us seems so much more unstable than ourselves. Indeed, the very contrast between Canadian concerns and global dilemmas puts to shame our sharp focus on things domestic. Everywhere the old order changeth—social systems, population-growth, international student unrest and the ongoing arms race, wearing the black crown of nuclear annihilation, fill our media and our dreams with a Kafkaesque nightmare from which there seems no exit. At a moment when men are conquering space, the new ethology tells him that his capacity for aggression and self-destruction is possibly unique among the species; and that perhaps man should give prime attention to his inner world of the spirit rather than to launching his Odyssey to the stars. The challenge to ethics, to moral sensibility has perhaps never been more pervasive or in more urgent need of social reply. White versus non-white, stand across the gulf of oppression and accidental history, one armed with affluence, the other with poverty. And this union of colour and guilt, of skin and well-being has yet to express itself in the profoundly violent terms which may one day face men and races if that gulf is not bridged.

The classical cement of family and community, the leadership of established elites, the taming role of religious feeling and the liberal tradition—all are under attack. Islands of stability are no doubt to be found everywhere, but they are islands only. The two most powerful nations in the world, the United States and the U.S.S.R., happen at this moment in time to be Canada's very immediate neighbours, and they symbolize by their own power the external threats to states and to mankind as well as the internal vulnerabilities of even the most powerful of peoples.

In the face of this time of trouble what importance may a reasonable man assign to the Canadian conflict. In the scale of global priorities, Mr. Thatcher's comment perhaps has a relevance

wiser than he thought. Yet in Canada, on our own doorstep, we are prisoners of the external frontier when it comes to assigning priorities. For it is a fact that, certainly in Quebec, and to varying degrees elsewhere (substantially in Ontario and New Brunswick and with declining force eastward and westward from those provinces), the primary short-run issue for Canadians is whether we can re-interpret our federal experience so as to make it meaningful for all those who must willingly participate in it if the Canada we knew is to remain the Canada we know and wish it to be. In short, history and other lands may downgrade the Canadian debate in this wider world setting. Existentially, we may not be able to do so because it is here as a fact and demands from us both serious attention and workable answers.

2. *Why did Canadian federalism reach the present critical position?*

While I shall not recount our national story, it is important to at least remember that we were fated almost from the beginnings to be the child of dispute. English and French-speaking peoples did not end their rivalry on the Plains of Abraham but only began it in another form. A triumphant Anglophonic majority made North America theirs by the 1770's, leaving the French minority in Quebec to treat itself as if it were in a state of permanent cultural siege. Its institutions and its values thereafter were designed for defense, for survival. Land, law, religion, church, family and language were the pillars of a 'closed' system, cut off from essential cultural interplay with English-speaking neighbours and fed sparingly by its former imperial parent France, that was without very deep devotion when Quebec was hers and now almost indifferent when Quebec was lost.

This is no place to argue the means and the merits of these early years. Yet the fact remains that English self-interest, combined with some generosity, did establish in Quebec freedom for language and religion with large degrees of self-government so that Lower Canada by the beginning of the 19th century was already a viable and recognizable political and cultural unit one day soon to be heavily reinforced through its French-speaking citizens achieving a large majority position in the province. Once the American colonies had gone their way, British North America was to become a land of two cultures and although the early pre-confederation self-image was quite unclear about that dualism, the foundations in fact were laid for the unique bilingual society we might one day become.

Confederation and one hundred years of Federalism have demonstrated that it has been possible to evolve a framework of govern-

ment within which Quebec, and French-speaking Canadians in Quebec, not only preserved their numbers and their values but were encouraged to grow to ever greater strength so that some could one day consider the option of going it alone. Thus the first irony in the present crisis is that the claim for re-examined federalism in aid of French-Canadian survival comes at a moment when, in Quebec at least, French-speaking culture has never been more vital, its intellectual and artistic life never more creative, its institutions never more self-confident.

Hence the question arises, why then in the face of growing self-confidence as a society of rising economic development, and of ever-increasing influence in the Canadian order as a whole, why do we have this crisis of unity? A close look at the reasons will suggest that not all has been well within the French-speaking society; that there were unsolved problems, historic and hurtful to them in other provinces; and that certain issues were arising in the very nature of our federal system, independently of the French-English question, which now have combined to create the critical, explosive mass we have known these past several years.

In French-Canada itself the present *crise de conscience* has had to do with converting or advancing survival into the satisfaction of fulfillment. French-Canadians were discovering that outside of Quebec they were not only strangers in their own land, in monolingual, English-speaking Canada; they were discovering also that their living standards generally were lower than their English-speaking neighbours and that somehow, if they were to move out into the world, it was a North American, English-speaking world wherein they would have to compete, and whose media and values could inundate their own society. In short, their desire to be fulfilled in economic, social and political terms, raised questions for French-Canadians that had been concealed more or less when the primary values theretofore had been survival, with their exposure to the total Anglophonic world about them defensive and minimal. Hence, there has grown a new fear (and restiveness) in Franco-phonetic Quebec—how to be both French-speaking and fully Canadian; how to be themselves yet North American, how to be economically and socially mobile and yet retain their language and essential values without serious threats to it or unacceptable competitive disadvantages.

As subordinate clauses to this new Quebec francophonic dilemma were not merely the memories of older collisions over values and policy, between it and the English-speaking Canadian majority—conscription in 1917, compulsory service in 1944, so-called intrusions

on provincial jurisdiction from family allowances to pensions and medicare. But equally there was the memory of the essential rejection of French-Canadian claims leading toward a bi-cultural society in other provinces dramatized by the Manitoba school question in the 1890's, by Rule 17 in the Ontario educational policy, and by the earlier cautious attitude in New Brunswick toward its substantial French-speaking minority.

There were other evidences too of this implied, national, mono-lingual policy. The Federal Government itself was essentially English-speaking except for certain limited operations of the two languages in documents and in some federal courts. There was the abolition of French language rights and practices when the Northwest Territories became the Provinces of Alberta and Saskatchewan. And symbolically, if perhaps perversely, there was the conversion of Louis Riel into a folk hero, the very image of rights rejected, of Anglophonic supremacy overcoming earlier settlers and natives who spoke French and were in the process of creating a French language society.

Another element in crisis-making transcended the English-French question but interpenetrated with it in Quebec and elsewhere—and that was the changing role of government and administration in the federal structure itself. The Canadian system was an odd hybrid of imperial, quasi-unitary and federal systems and ideas. Indeed, it is arguable that all parties at Confederation somehow saw the Provinces in relation to the Federal Government as 'subordinate' just as the self-governing colonies had been to the imperial mother, with that maternal role now moving from London to Bytown. The counter balance here was the entrenched protection of French language and civil law in Quebec and, equally, of the Catholic and Protestant School systems of that Province (and possibly elsewhere?) To put it in blunt terms the Provinces were local governments, no more no less in 1867, but each of the four founding members had certain special conditions under which they entered Confederation and in the case of Francophonic Quebec, those conditions went to the very heart of her ethnic, religious and linguistic 'survival' and the means to assure it.

By contrast, to the central government was given the power of disallowance, of reservation of bills, of the appointment of Lieutenant Governors and of members of the county and superior courts (as well as of the Supreme Court of Canada) and of the Senate. It had, too, the right to declare certain works to be for the general advantage of Canada. And, finally, a whole series of specific economic powers touching tariff, trade, banking, commercial paper, com-

panies and other matters were set out in such a way to clearly suggest a union where the federal parliament and an administration were pre-eminent, a system potentially very centralist, perhaps even quasi-unitary, as some have described it.

The general rationale for this kind of Confederation in 1867 is now widely understood. Evidence of federal weakness in the United States' system of the day, the economic fragility of the Atlantic provinces, the need to avoid the deadlocks and stalemates of the temporary union of Upper and Lower Canada after 1841 and, finally, the serious intent to have a strong, guiding hand in Ottawa, not unlike the role that London once played for the colonies and still played in their defence, foreign policy and certain other areas—all these were considerations in the grand design. There were genuflections to bilingualism in Section 133 protecting the English language in Quebec for courts and governmental purposes and the French language within federal institutions. And there was the parallel protection of school rights in Section 93 but in denominational terms which had its indirect (but not direct) consequences for language rights in Quebec because most Catholics spoke French, and Protestants English.

But essentially and fundamentally, the Fathers were dealing with a federation that had to be strong if it was going to manage the northern half of a sparsely settled continent whose western lands were being hungrily viewed by a powerful neighbour emerging now with even greater strength from the trials of its civil war. What was not foreseen was that courts and events would redirect the intentions of men who lived and drafted the constitution in another time. By the end of the 19th century it was quite clear that the Privy Council saw federalism differently and that this interesting, if distant court, was soon to reshape the Canadian scheme and create "strong" provinces, juridically, whatever their social and economic resources in fact may have been.

Thus the real dilemmas of federalism became evident not so much in such interventions as the conscription challenges of 1917. Here, after all, was war and in wartime the rules are changed in favour of the center. The difficulties became evident as the great depression tore the mask of self reliance from "sovereign" provinces unable to bear, without federal support, the burdens of their jurisdictional claims. Unemployment, welfare, mortgage foreclosures, the deprivations in cities, villages and on the land simply could not be resolved by the slender resources of most of these governments. The Rowell-Sirois Commission began its work as an exercise in reshaping the rationale of federalism to meet the evident requirements

of mass unemployment. Legal and administrative tools had somehow to be newly designed to justify, without subterfuge, direct federal intervention in the larger, and smaller, needs of the economy, national and local. Indeed, one of the ironies of Canadian social history is that the Rowell-Sirois Report turned out to be an immensely important exercise in education but its specifics were lost in the effective solutions to the legal and social problems of the day, now given by war.

For it was war which changed the Canadian economy from underemployed to overemployed, which removed mass poverty as an experience and suspended the argument over jurisdiction until it was, for the time, forgotten. By war's end an almost wholly "managed" capitalist economy had evolved administrative and legal instruments covering wages and prices, supplies and profits, and labour relations. Ottawa collected the total income tax revenues through a single Federal funnel under agreements with the Provinces that shared the revenue on some equalizing basis resulting in a kind of rough equity for all, but with the "pie" administered by the national government. By 1945 Keynes had defeated Haldane in a forum where neither had expected to meet.

This image of powerful economic management from the center remained even after the war buttressed not only by the tax sharing agreements but also by the initiation, at the federal level, of many "social" programmes that otherwise might have seemed to have been within provincial jurisdiction. For the "spending power" of a highly centralized tax collector became an instrument for direct or implied jurisdictional claims and was becoming perhaps as important in the delineation of powers as the legal niceties of Privy Council decisions or the becoming obsolescence of disallowance and reservation. And behind it all was an immensely confident political (Liberal) party, in office since 1935, that had built up an elitist civil service possibly even more self-confident than the politicians themselves. In short, by the middle 1950's, the Canadian federal system despite seventy-five years of judicial decisions almost chronically shaped in favour of provincial power had in fact become, through these countervailing measures of tax-sharing and spending, and programme-making making a strongly centralized system at least in the areas of basic economic social policy. And all this emerged despite the fact that, technically speaking, prices, wages and resources, welfare and education, were within provincial jurisdiction.

Now one must ask, what happened to bring this edifice of sublime managerial efficiency and confident political control into radical

challenge by the provinces and to some extent by the public which only a few years before had welcomed federal power, if not war itself, as the rescuer of a desperate and weakened economy? The Liberal defeat of 1957, following the pipeline debate now appears to have had deeper roots. Indeed, the rejection of the party in power by increasingly prosperous public and provinces suggested that there were new problems for which the old insights were not enough. The rising demands of the late 'fifties and early 'sixties were those making claims reaching toward equality of opportunity and a fair share of both resources and of protection against the hazards of life and society. All of this meant new programmes from education to pensions, from medicare to farm supports. Suddenly it became evident that the neat solutions of the tax-sharing agreements and federal social initiatives might not be adequate to the day when the demands on provincial and municipal treasuries were rising far more quickly than statistical prophesy could anticipate. New generations of provincial civil servants, competent and aggressive, were appearing to buttress provincial leaders in their negotiations with Ottawa. Political parties of the same name no longer had the same necessary perspective when they were dealing with provincial as against federal interests. Indeed, in the case of Alberta and Saskatchewan, the two major traditional parties no longer even had a provincial following for a generation. In short, some new balance was necessarily to emerge that would somehow have to reflect the growing functions of the Provinces side by side with the continuing and overriding role of the Federal Government in matters of national economic and fiscal policy. And, curiously, at that very moment, when that new balance would have to be discovered, both in institutions and perhaps in law, the need was re-inforced by its interpenetration with the particular Quebec problem on the one side and the related English-French question throughout Canada on the other.

Thus "the Quiet Revolution" in Quebec which Jean Lesage ushered in with his administration in 1960—but which really predated him by many years of artistic, intellectual and social ferment—gave a degree of social dynamism to the federal-provincial debate over powers, programmes and monies that inevitably escalated the issue to the level of crisis. For while Mr. Duplessis had fought his battles for jurisdiction, his image was essentially negative and defensive—less a competition for funds and programmes than for an isolated "autonomy" almost for its own sake. Now to many Quebec leaders, self-preservation required some recognition of language rights at every level, federally and in all Provinces, while 'fulfill-

ment' for French-Canadians needed a new sense of opportunity in government, in management, not only in Quebec but outside. And all of these would require institutions, funds, and programmes which heretofore may have been in the possession of, or were carried on partly or wholly by, the Federal Government. Hence the French-Canadian debate in Quebec was married in this special way to the Federal-Provincial debate over new powers, new resources and new activities. Moreover, it was rediscovered that the law was heavily on the side of the provinces, as constitutional interpretation had evolved, when it came to such matters as education and welfare, wages and prices, resource development, hospitals—indeed, a whole range of matters touching the individual intimately.

Hence the Canadian crisis since 1960/61 has had inner, self-escalating elements, mutually reacting on each other that transcended in complexity and potential danger any of the previous threats to the viability of confederation.

What English-speaking Canadians even in Quebec were slow to realize was the extent to which intellectual and political leaders in French-speaking Quebec had evolved a new self-image, had re-evaluated their place in the sun and found it wanting, had examined the status of fellow French-speaking Canadians elsewhere and found it too, wanting, in the matter of language and school rights, and in economic status. For the first time, serious and otherwise moderate Quebecers of the Francophonic family began to ask whether there was not a separate option open to them if their new vision of Quebec and its place in Canada somehow could not be fulfilled within the present system.

The movement toward cooperative federalism and the use of the "opting out" procedure between 1963 and 1965 was a creative federal response to this new situation. But to have succeeded, cooperative federalism would have had to almost bind the federal government to consult at every stage, wherever a possible provincial jurisdictional interest was involved in any programme, before it was implemented; and conversely, each province would have been equally obliged to consult. And, while in fact, more consultation took place after 1963, and has taken place since, than at any time in Federal-Provincial history, few if any of the eleven governments apparently were prepared to permanently institutionalize the consultative obligation—as yet. Similarly, the opting out programme was, as Mr. Trudeau began to point out as early as 1966, a means for indirectly creating a "special status" for the one province making use of it, namely, Quebec; for it was not a mechanism

that seemed sufficiently attractive to other provinces to be worth the administrative trouble.

The decline of cooperative federalism after 1965 was reinforced by the failure of the Fulton-Favreau Formula to be accepted as a means of constitutional repatriation and amendment. And when to this was added, the serious debates over medicare and pensions, it was clear by 1966/67 that somehow new constitutional responses to the everchanging balances between federal and provincial functions were not going to be easy to discover. Indeed, the irony was that, on paper, by the beginning of 1967 Canadian federalism already was one of the more decentralized federal systems of the western world. Yet a high degree of authority still remained in the federal center, resting upon its power to spend and to initiate joined or shared programmes and of course, resting also on its overall responsibility for the economy expressed through the tax-sharing agreements, fiscal and monetary policy, and through the management of foreign exchange policies and other more or less important direct and indirect economic mechanisms.

The severe debates between Mr. Lesage and the federal government were by no means reduced in substance even if they were somewhat modified in tone by the late Daniel Johnson when he came to office in 1966. A whole series of unsettled and unsettling questions remained to be gingerly handled: University financing; vocational training; Quebec and international relations; Indians and Eskimos; offshore mineral rights; medicare (the pension problem having been resolved); and the demand for constitutional reform, generally, both for symbolic and substantive reasons.

Nor were matters helped by the intervention of General de Gaulle on his visit to Canada at the height of expo and the evidence that under him French policy was mischievously playing with pro-separatists and their slogans, relying on a Quebec Gaullist temper to respond. Meanwhile the growing pressure on an initially reluctant Federal Government to undertake some leadership in the area of constitutional review and reform was partly finessed by the initiatives of Mr. Robarts and the late Mr. Daniel Johnson, particularly the former, in designing the Confederation of Tomorrow Conference of December, 1967. It should not be forgotten that at this Conference General de Gaulle again intervened by remarks bound to influence it; that the Estates General met in Montreal just days before and passed strongly nationalist, anti-federalist resolutions; that Mr. Johnson gave a moderately-toned but toughly articulated statement of Quebec's demands and, finally, that the entire exercise was climaxed by the emergence within a few days after-

wards of Volume I of the Report of the Royal Commission on Bilingualism and Biculturalism.

The truth is that most of the Premiers attending the Robarts Conference were not prepared for the "hardness" of Mr. Johnson's position and the cold experience of listening to him was a rapid education in the Canadian crisis, eased only by the diplomacy of the Ontario Prime Minister in his management of the Conference. But if they were not persuaded in Toronto the Premiers had their education furthered by the B. and B. Report which set out in concrete terms the absolute necessity for programmes of "bilingualization" in all Provinces if Confederation was to survive.

Mr. Pearson, already having announced earlier in the autumn of 1967 that he would hold a Conference of Prime Ministers and Premiers on the Constitution in February of 1968, was compelled by these developments to alter the variety and scope of the agenda from a rather simplistic concern with a possible Bill of Rights to a wholly open-ended conference on the future of constitutional review and possible reform, and a new emphasis on language rights. That Conference is now historic for a number of reasons. It demonstrated the growing political significance of the Conference of Prime Ministers and Premiers as a kind of authoritative "constitutional" device for policy making in Canada—with implications that have yet to be fully explored and understood. It demonstrated the gulfs between Quebec on the one hand, Ontario and New Brunswick and as a second group, and perhaps all the other Provinces as three separate points of view on the character and content of possible constitutional reform, with the Federal government itself then anxious to confine the immediate dialogue to language rights and possibly a Charter of Human Rights. But its most important achievements were the clear victory—and more particularly of federal leadership—in obtaining a kind of consensus on language rights without prejudging methods of enforcement by constitutional entrenchment or otherwise. Of equal significance, perhaps, was the agreement to establish permanent decision-making machinery, through the creation of the Constitutional Conference of Prime Ministers and Premiers, and consultative and study machinery in a Continuing Committee of Officials to examine the whole question of constitutional review and possible change. These officials have now met on five occasions since May of 1968.

Meanwhile, the late Daniel Johnson has been succeeded by Mr. Bertrand; Mr. Manning, a conservative participant in the Constitutional dialogue has departed; Mr. Roblin and Mr. Stanfield are no longer provincial leaders; and Mr. Smallwood, an enthu-

siastic supporter of Mr. Trudeau may soon retire. In New Brunswick an Official Languages Act will soon make the province officially bilingual—schools, government, agencies, courts, legislatures, etc. In Ontario much the same policy is being evolved without the full New Brunswick programme being officially adopted in an official languages act. Newfoundland is to bilingualize, essentially a cordial gesture to its Labrador minority and to the development of French as a second language in Newfoundland schools. The Federal Official Languages Bill is soon to be enacted possibly with modifications to meet some western objections. Elsewhere throughout Canada the movement toward bilingual opportunities, certainly at the Federal level, and slowly, variously but steadily in many of the Provinces, suggests that one great Canadian watershed may one day soon be reached. Indeed were it not for the irony of the new language issue in Quebec—where English-language school rights are now seen to be in partial jeopardy because they depend upon denominational protection, not on language rights as such—the picture would be one inviting a moment of optimism.

III. *Where Do We Go From Here?*

There is now a good deal of public knowledge about the work of the Constitutional Conference and in particular, the discussions that have taken place in the Continuing Committee of Officials and in the Sub-Committee on Language Rights. In preparation for the February 1969 Conference most provinces had made public some of their main ideas on methods of constitutional review and on certain questions of substance as well. Indeed, Quebec and New Brunswick, and to an almost equal extent the Federal government and Ontario, had put forward very extensive lists of concepts and proposals in "propositional" form and covering a great variety of issues touching on both methods of constitutional review and on substantive questions of constitutional change. To a greater extent than was believed possible a year ago the majority of the Provinces and the Federal Government now are fully engaged in the exercise of considering the constitutional future of Canada. It is now clear that most Provinces increasingly are ready for constitutional discussion even if only a few are ready for serious constitutional changes. At the same time there is much more sympathy for an entrenched Bill of Rights than could have been predicted a year ago although here again there is formidable opposition in some Provinces, particularly to the entrenchment of language rights in such a Charter. Here, too, there is also some concern for the changing role of the Courts in relation to the legislative process which a Bill of Rights almost necessarily will effect. Indeed, the central debate over such

a Bill may, in the end, turn less on the question of the inclusion of language rights, which clearly has a justifiable claim to a place in such a Bill, than, on the issue of how to prevent legislatures from being controlled too severely on questions of substance by "due process" or analogous clauses in any well-designed and comprehensive Bill.

But even more important than these evidences of "progress" has been the re-opening, in a systematic and orderly manner, and with sufficient frankness and clarity for the public to understand, of the central issue of Federalism which in the long run may be less the language problem than balancing federal and provincial powers with their respective revenues and resources. It is significant that the most striking debate of the three day conference last February, was on the first morning when the Premier of Manitoba, supported by the Prime Minister of Ontario, opened up the question of the taxing and spending powers and the effect of certain federally initiated programmes on provincial administrative and budgetary operations. Nothing dramatized more the dilemmas of Canadian Federalism than this debate over revenues and jurisdiction, over joint programmes and cost-sharing, and over the equities and pragmatics of effective Federal and Provincial Governments each with its own responsibilities, often mixing exclusive jurisdiction with overlapping powers, but none compelled, except by custom or by need, to consult and to plan for their common and conjoint administrative and budgetary futures.

To pull all of this together, the February Conference established much new machinery for the ongoing work of constitutional review. Rightly or wrongly, certain assumptions were made that some subjects being examined by the Continuing Committee of Officials had reached a stage where these were ready to be explored at the political level and that no further attempts to achieve clarification or consensus by officials was necessary, desirable or possible. There was established, as a result, four new ministerial committees dealing with language rights; the Charter or Bill of Rights; the Senate; and the judiciary and the Supreme Court of Canada. In addition, the Tax Structure Committee was to be revived consisting of the Ministers of Finance, and officials, and to it was given the immediate task of looking at the presently controversial questions of shared programmes, common budget control or consultation and similar matters. At the same time a new ministerial committee was to be established to consider the coordination of existing and potential programmes dealing with 'regional disparities.'

In the same final statement of the Constitutional Conference the Continuing Committee of Officials was given instructions to proceed with its work but it was to have as a priority subject the 'taxing and spending' powers and their relationship to the general question of the distribution of powers—itsself to be examined in full—and as a matter of almost equal and related priority, the constitutional aspects of regional disparities. It was hoped that there would be liaison and cooperation between the short-run study of immediate questions before the Tax Structure Committee and these longer-run taxation, spending and distribution of powers questions, before the Continuing Committee. Similarly, it was expected that there would be inter-relationships between the work of the Continuing Committee of Officials in discussing regional disparities from the constitutional aspect, and the proposed Ministerial Committee on Disparities to be created for programme coordination and study in this sensitive field.

Finally, the Conference unexpectedly proposed a new and imaginative forum in recommending that the First Ministers and the Continuing Committee of Officials meet together from time to time for informal and non-public discussions. In all of this it was recognized that the final decision-making body was the Conference of First Ministers with the material for constitutional change coming to them through the Continuing Committee and the various ministerial committees.

It is now possible to look at this long search for a viable Federalism and to draw some conclusions as to where that exploration stands today.

First

The new pessimism about Federal-Provincial economic relations in Western Canada and the continuing resistance to the extension of language rights there, at least in constitutional form, combined with support in Quebec of the "priority doctrine" for the French language on the part of René Levesque's Parti Québécois, and by both the Union Nationale and provincial liberals, together testify to the continuing potential of tension that must temper any too rosy a description of the Federal future. When to this is added the failure as yet to resolve the English language school rights question in Quebec, dramatized by the St. Leonard affair, and by the recent march on McGill University by unilingualists demanding that it be converted into a French language institution, an observer may be forgiven for not believing that the Canadian dilemma is on its way to easy or early solution. To put it plainly, it would be a mistake to pretend that the new nationalism in Quebec is strongly

in retreat and that some permanently moderating force has now triumphed for the long run.

Nevertheless, Mr. Trudeau's strategic victory on a strong, federalist, "one-Canada" but two language' platform, was supported heavily in Quebec (including the Creditistes) and this suggests that for the moment at least, the Quebec belief in a viable French-English speaking Canada is stronger than its aspirations towards some semi-sovereignty of its own. Yet even here there is a kind of political schizophrenia that would have French-speaking support in the Province for 'nationalist' parties at the provincial level and federalist bi-lingually oriented leaders at the Federal. Will the real Quebec stand up (?) is a question not easily to be answered, but Mr. Trudeau's "coast-to-coast" option offers the most constructive alternative that Quebec has had presented to it since the 'quiet revolution' awakened anew the double ambition of Franco-phonetic Quebec to survive and to be fulfilled.

Second

Quebec's likelihood of choosing, in the long run, the bilingual coast-to-coast option, instead of 'Fortress Quebec' as a way of life, will be greatly influenced by the provision of French language and school opportunities in all Provinces where numbers justify such policy in accordance with principles of the Report of the Royal Commission on Bi-lingualism and Bi-culturalism. This must be said despite the possible reaction elsewhere in Canada to the St. Leonard business. Indeed, Quebec here must find its own solution and it is clear that Prime Minister Bertrand, to the extent that he will have his way, will try to find a fair one. But, if Quebec does not behave fairly, if language and school rights are not wholly and fully re-protected in Quebec, constitutionally or otherwise, then bilingualism and biculturalism are in danger even there, and once in danger in Quebec, they cannot succeed elsewhere in Canada. Quebec and particularly Montreal are now the prime laboratories for the success or failure of the Canadian experiment. Yet nothing would retard a moderate solution to the present Quebec English language apprehensions than to have some growing backlash in other Provinces inspired by a premature, mistaken judgment as to the Quebec future for English language rights and community survival.

Third

No one can predict the full results that will come from the present exercise into constitutional review. An optimist will believe that only good can emerge from common study by the First Ministers,

their colleagues and officials and that these discussions will often lead to de-politicizing many subjects which tend to be escalated artificially into confrontations when in essence, there may be technical, linguistic or symbolic solutions that could do justice to many of the claims concerned. The present machinery of ministerial committees, committees of officials (and their sub-committees and task forces which they may have to create) together with the decision-making Conference of First Ministers is becoming quite complicated and very soon some judgments will have to be made on the mechanism of bringing to a head the work of these various agencies and determining in what form constitutional change shall or can take place. Very little attention has yet been paid to the sophisticated difficulties involved in converting a consensus of First Ministers into actual legislative consequences. Do member governments contemplate piecemeal amendments to the present British North America Act? Do they consider it desirable to plan for a possible re-writing of the whole Constitution if the amendments are many and the new symbolism for a new Canada impossible to graft onto an 1867 Statute without torturing language and political imagination? Do we have to go to Westminster or can we assume that at some point desuetude has ended that obligation? But if so, where and how will the amending power be exercised and does this not mean beginning to examine at least something approximating the Fulton-Favreau Formula?

Fourth

Clearly with so many problems before it such a constitutional study, to succeed, must have the active participation and the full commitment of all eleven governments. There is yet a reluctance in some quarters to demonstrate too much commitment. Certainly this is true of several of the western provinces and it is even true, somewhat, of the Federal Government, in a very special way, because naturally it would not, with comfort, wish to open the door to any serious diminution of its powers—except perhaps in certain minor, negotiable areas. Indeed, several Provinces are anxious to maintain a strong Federal Government because they are too weak to depend upon their own fiscal or administrative resources and there is no foreseeable time when they will be able to do without powerful Federal support. Hence there is no room now for any of the eleven governments to “opt” out of the review programme or any serious part of it. And while the primacy of the Federal Government must be maintained in the exercise, and in any result, all governments are or should be in some sense “equal” around the discussion table for purposes of the study itself.

Fifth

It is now urgent that public opinion ask itself questions as to its role in these proceedings. How does the popular will get a reasonable chance to penetrate the high screen of political authority and fonctionnaire privacy? How shall we be certain that the best minds in Canada, in the universities and among writers and journalists, in labour, business and agriculture have a chance to influence the search for means to constitutionalize "the just society"? This is not an easy question to answer and a wise response also requires some new understanding of the authority under which the Premiers themselves operate to agree upon and to implement constitutional change. On one level their mandate is easily recognizable as a necessary aspect of the general purposes of government. Yet that mandate may not be so easy to identify for all the problem of fundamental constitutional revision, should it take place.

Sixth

There is public knowledge that reform is desired by some governments in the matter of the Senate and the Supreme Court of Canada, while Quebec is insistent on a total re-examination of the division of powers, with a particular concern for such matters as international agreements, offshore mineral rights, radio and television, immigration, and some other questions. All provinces are interested in the future of tax-sharing arrangements, and they should be interested if they are not, in some national approach towards common budget control and planning. It is possible we may have to consider converting the Tax Structure Committee into some kind of formal or informal agency for permanently dealing with revenues and expenditures by all governments, particularly in view of the fact that the combined budgets of the provinces and municipalities now almost exceed that of the Federal Government.

Seventh

Finally, the human condition requires satisfaction for the spirit, and, if there is to be an identifiable Canadian community, it may be that the syntax and the symbols that unite us must somehow be designed and restated for new times and new men. But such a restatement should leave us stronger than we were, not weaker; otherwise the search for a viable Federalism will have been all vanity and frustration.

I believe that we possess the wisdom, the compassion and courage to achieve a bilingual federal society in the 'one Canada' and create a people unique and united.

MAXWELL COHEN, Q.C.*

* Macdonald Professor of Law and Dean of the Faculty of Law, McGill University.