

RESHAPING CONFEDERATION: THE 1982 REFORM OF THE CANADIAN CONSTITUTION

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INTRODUCTION

The twelve papers that follow were presented at the McGill-Duke Symposium on *The 1982 Reform of the Canadian Constitution*, held at Duke University on April 26 and 27, 1982. The Symposium was organized jointly by Richard Leach, Director of the Canadian Studies Center at Duke University, and Paul Davenport, Chairman of the Canadian Studies Program at McGill University. The participants included seven McGill academics and five academics from Duke, covering the disciplines of Political Science, Economics, History, and Law. The conference was thus explicitly interdisciplinary in nature: the purpose was to bring together scholars from different disciplines and backgrounds, so that they might compare their academic theories and personal insights into the constitutional reform process which culminated in the Canada Act of 1982.

The process and the reformed constitution itself will undoubtedly play a central role in reshaping Confederation in the decades to come. The new provisions of the reformed constitution include many which will change the workings of Canada's federation: the expansion of provincial powers with respect to resource taxation and management; the entrenchment of language rights, particularly with regard to schooling; the Charter of Rights and Freedoms, which will certainly afford better legal protection of individual rights than the Canadian Bill of Rights; and the increased importance of the courts, especially the Supreme Court of Canada, in the interpretation and protection of individual rights. The process by which the reform was adopted will also influence the workings of Confederation. In particular, the failure to win approval from the Government of Quebec, and Quebec's subsequent feelings of betrayal, may complicate or indeed poison federal-provincial relations for some time to come. Finally, the new amending formula, which does not require unanimity of the provinces for constitutional amendments, may open the door to a more fundamental reshaping of Confederation, including a new distribution of powers between the federal and provincial governments. The distribution of powers, which has been at the center of constitutional debates over the last two decades, was one of the major issues left unresolved by the constitutional reform of 1982.

Just nine days before the McGill-Duke Symposium, on April 17, 1982, Queen Elizabeth II proclaimed the Canada Act in a ceremony in Ottawa. The event ended several decades of unsuccessful attempts to make Canada legally independent of the United Kingdom. Some 17 months earlier, in October 1980, the Government of Canada had presented a draft of a proposed constitutional reform to the House of Commons. The draft was opposed by all the provinces except Ontario and New Brunswick. Manitoba, Newfoundland, and Quebec took their objections to the courts, with the result that the Supreme Court of Canada

issued a judgment on September 28, 1981. The Court held that although the proposed constitutional changes were legally proper they violated a constitutional convention which required substantial provincial consent for constitutional changes; the Court did not, however, indicate how many provinces would define substantial provincial consent. The federal government then re-opened negotiations with the provinces, and on November 5, 1981, all the provinces except Quebec agreed to a revised draft of the constitutional reform. The revised draft allowed provinces to opt out of future amendments and of many of the provisions concerning individual rights; these were the most important of several concessions made by the federal government to reach agreement. In the following month the resolution to send the constitutional changes to the United Kingdom was approved by the House of Commons and the Senate of Canada.

The Canada Act was given Royal Assent in the United Kingdom Parliament on March 29, 1982, and proclaimed in Canada three weeks later. Schedule B of the Canada Act comprises the Constitution Act, 1982, which had been earlier approved by the Parliament of Canada. Part I of the Constitution Act is the Canadian Charter of Rights and Freedoms, including thirty-four sections which deal with fundamental freedoms, democratic rights, mobility, equality, legal rights, official languages, minority language educational rights, and enforcement and application of the Charter. The remaining twenty-six sections of the Constitution Act are divided into five parts, dealing with aboriginal rights; equalization and regional disparities; a future constitutional conference; the procedure for amending the Constitution; amendments to the British North America Act of 1867 with respect to natural resources; and general provisions.

The Canada Act of 1982 represented the culmination of a century of constitutional wrangling and will likely be the prelude to another century of legal and political infighting in Canada. The constitutional debates of the first 115 years of Confederation are reviewed in Filippo Sabetti's paper. Sabetti demonstrates that constitutional change in Canada can be divided into three periods. The first, extending from the 1870's to 1927, witnessed the growth in power of the provincial governments; the second, which extends into the late 1970's, involved the growth of federal and provincial institutions to deal with constitutional problems, short of actual constitutional change; and finally comes a third phase, involving the reform of the Constitution itself, which began in 1980 with the federal government's decision to attempt to reform and patriate the constitution—unilaterally, if necessary. Canada is still in this third phase and the results of the constitutional reform which the Trudeau government achieved in the short space of two years cannot yet be determined. Sabetti describes the historical background surrounding the great constitutional issues of the last few years, including six that deserve special mention: (1) the question of whether Confederation was a compact-of-provinces or a compact-of-peoples, the latter involving an implicit covenant between the French and English communities; (2) the importance of politics in constitutional change, including the difficulties of reconciling the objectives of many different political jurisdictions, each with its own independent base of support; (3) the great Canadian dilemma of how to protect the French language and culture, while at the

same time protecting minority rights; (4) the economic issues underlying many of the disagreements between the federal government and the provinces, and the implications of constitutional arrangements with respect to the distribution of income and the distribution of regulatory powers; (5) the essential issues of the rights of individuals as opposed to the rights of society, particularly with regard to language, culture, civil liberties, and the like; and (6) the fundamental issue, which was left completely unresolved at Confederation, of how the Canadian Constitution might be amended. These are the issues treated in the other contributions to this volume, to which Sabetti's paper serves as a very effective introduction.

The British North America Act of 1867 followed the American Constitution by some eight decades and represented a vastly different type of document in both style and content. These differences are the subject of Clark Cahow's paper. Cahow argues that constitutional change and agreement has been particularly difficult in Canada because the country lacks a national ethos, which might provide a framework for agreement and compromise. He traces the development of what he deems the American ethos from the New England Puritans of the Massachusetts Bay Colony through to the Civil War. Cahow finds that Americans were united in their belief that government received its authority only from the consent of the people and that this national belief, once enshrined in the new Constitution, was a unifying force, even in the face of such a shattering experience as the Civil War. He then follows the growth of Canadian political institutions from New France to Confederation and concludes that the lack of a national identity or spirit has been a continual obstacle to constitutional change in Canada. Some readers may disagree with this thesis, or find that the lack of an overriding national ethos in Canada has been desirable: it is, perhaps, the strength of Canadian regional and linguistic identities that has enabled the country to maintain a very diverse and unique character. Nevertheless, Cahow's interpretation of the Canadian identity and its manifest importance to the political process is a challenging one, in part because it brings to the fore the different meanings attached to such concepts as "nationalism" and "national identity," north and south of the 49th parallel.

Constitutional change in Canada has always been principally a political process involving governments who must please their electorates and stand for reelection. J.R. Mallory surveys the political aspects of constitutional change from both an historical and an analytical perspective. He reveals that the economic collapse of the 1930's and the mobilization for World War II created dramatic changes in federal-provincial relations, culminating in the period of "cooperative federalism" after the war, in which federal funding was used to promote social programs in areas of provincial jurisdiction. The distribution of powers, particularly in areas of social and economic administration, is undeniably one of the great pieces of unfinished business with which future constitutional change will have to cope. Mallory reviews many other issues which the reform of the Canadian Constitution left unsettled including: the question of Quebec's place in Confederation, and whether any sort of special status is possible or desirable; the issue of the optimal amending procedure for the new constitution, and whether the "opting out" clause with regard to amendments in the reformed Constitution will create a

“checkerboard” of constitutional rights, as Prime Minister Trudeau has warned; the growing importance of courts and particularly the Supreme Court of Canada in constitutional change, and the fascinating question of how the Supreme Court will interpret the Charter of Rights in the decades to come; and finally the institution of federal-provincial conferences, which has become an essential but expensive way of exchanging information and reaching policy compromises on areas of disagreement involving the two levels of government.

Mallory addresses at length the increasing difficulties encountered in conflict resolution between the federal government and the provinces since World War II. These difficulties arise in part from the growing power of the provinces, the increasing militancy of Quebec nationalism, and the inability of the federal government to manage the economy, especially over the last decade. A further problem is that while the accommodation of differences through federal-provincial negotiation was relatively uncomplicated in the early years when the objectives of both levels of government were congruent and complementary, accommodation quickly becomes nearly impossible when the objectives are in direct conflict, as in the case of energy, foreign investment, and industrial strategy. The emergence of a large degree of overlapping jurisdiction has led to a growing conflict over jurisdictional “space.”

The constitutional accord of 1981 involved the federal government and nine provinces. The resulting package of changes was sent to London despite the bitter opposition of the Quebec government. One of the unresolved questions of this process is whether the reformed constitution and the manner of its adoption will increase support for political independence among Quebecers. The paper by Allan Kornberg and Keith Archer investigates sources of support for the various constitutional options in Quebec, including the status quo, renewed federalism, special status for Quebec, sovereignty association, and independence. Kornberg and Archer attempt to explain constitutional preferences through a multiple regression analysis. Five variables are found to be significant determinants of support for sovereignty association and independence: identification with the Parti Québécois, indifference toward Canada, orientation toward provincial rather than federal politics, belief that Quebec does not benefit in fiscal terms from federalism, and the age of the respondent. Moreover, once these five variables are controlled the remaining variables are relatively insignificant: ethnicity, education, socioeconomic status, and the person’s judgment of his own costs or benefits from a particular constitutional option. A fascinating question remains at the end of the Kornberg-Archer paper. Will the young Francophones of today, who are heavily in favor of sovereignty association and independence, change their views as they age? If they do not, and if young Francophones continue to support independence, the years ahead will witness a growth in support for sovereignty association and independence in the province.

The constitutional discussions of the past decade have often seemed like a kind of open-air market, with eleven participants haggling over terms, each concerned only with his own self-interest and oblivious to any higher principles. Bill Watson reviews constitutional reform in just these terms, by making use of the emerging

economic literature on the behavior of politicians and bureaucrats. Watson considers not only the normative question of what *should* be the division of powers in an optimal federal state, but also the positive question—which he considers more interesting—of how the self-interested behavior of politicians and bureaucrats will bring about a particular division of powers. Not surprisingly, he finds that the behavior of politicians and bureaucrats often will *not* produce an optimal division of powers, a situation that leads him to question the usefulness of economic models of federalism that focus on optimal jurisdictional arrangements. He concludes that constitutional change is generally continuous, consisting of a never-ending series of deals and temporary arrangements. This process will be affected, but by no means terminated, with the constitutional reform of 1982.

The paper by Paul Davenport also treats of economic matters, in this case the sharing of wealth in Canada, particularly among the provinces. The difficulty of achieving a proper balance of personal income and government revenue among the provinces has been a pervasive constitutional problem in Canada since the British North America Act of 1867. During Canada's first nine decades, an inter-provincial balance of sorts was achieved by ad hoc federal subsidies and lump-sum payments to provinces experiencing short or long term difficulties. In 1957, a formal system of equalization was adopted, in which the provinces with below average government revenue were paid subsidies by the federal government. This scheme was expanded in 1967, but it encountered trouble with the unexpected large jump in oil prices in 1973. Although the Canada Act of 1982 entrenches the principle of equalization in the Constitution, the equalization formula itself has been changed so frequently in recent years that the significance and effect of entrenchment is uncertain. Wealth sharing in Canada has been greatly complicated by the problems inherent in dividing the very large revenues from oil and gas production among the producing companies, the producing provinces, non-producing provinces, and the federal government. Davenport suggests that many of the problems associated with equalization could be resolved with a re-structured equalization formula, based on total provincial income rather than simply government revenue, as is currently the case. These challenging issues will undoubtedly confront Canadian policy makers.

One of the crucial, yet unanswered, questions about the constitutional reform of 1982 is its long-term effect on the balance of power between the provinces and the central government within Confederation. This federal-provincial political balance is the subject of Richard Leach's paper. Leach reviews the history of the ebb and flow of political power between the provinces and the federal government after 1867, focusing on the notion of Confederation as a compact among the provinces. Provincial power tended to grow at the expense of the federal government from Confederation to World War II. While the size and importance of the federal government grew dramatically during the war, over the last three decades there has been a fairly steady erosion of federal power to the benefit of the provinces. Leach also considers the unfinished business of constitutional reform, including the constitutional conference on native rights called for in Section 37 of the Constitution Act, 1982; the conference on the review of the amending formula,

referred to in Section 49; the reform of the Senate, perhaps to make it representative of regional interests; the possibility of a proportional representation scheme for the House of Commons; reform of the cumbersome and often ineffective institution of federal-provincial conferences; and, finally, changes in the appointment of Supreme Court justices. Leach declares that it would be premature to conclude whether the Canada Act itself, and the reform that may follow it, will lead to a strengthening of the federal government, or a continuation of the trend toward greater provincial power within Confederation.

Daniel Latouche also analyzes the impact of the Canada Act on Canadian federalism. Latouche finds that the constitutional reform represents a crushing defeat for those Québécois who wanted to negotiate an independent country and for those who wanted to negotiate renewed federalism. Their error, in both cases, was the mistaken assumption that there existed a unified English group in Canada prepared to negotiate with Quebec on the central issue of the role that our two great linguistic communities would have in Confederation. The enthusiasm and pomp with which the Canada Act was greeted outside Quebec is a measure for Latouche of the failure of Canadian federalism. Instead of obtaining an equal or a special status, Quebec finds its political powers actually reduced, so that in the future the protection of the French language and culture will be largely at the discretion of federal officials and institutions, particularly the federally appointed judges who will interpret the linguistic sections of the Charter of Rights. Although Latouche believes that the linguistic and cultural heritage of French Canadians can best be protected by recognition of Quebec's status as a distinct nation, he concludes that there is no significant group within English-speaking Canada amenable to granting that recognition. Even among those English-speaking Canadians most sympathetic to Quebec's unique linguistic and cultural needs, there remains an overriding and uncompromising vision of a single Canadian nation with diverse provinces and cultures. There is no single English Canada with which Quebec can negotiate a new political arrangement—this for Latouche is the central lesson of the constitutional reform. The English Canadian majority was willing to entrench a special status for the French language, but not for the Government of Quebec.

William Tetley surveys the historical and political background to Sections 16 to 23 of the Constitution Act, 1982, which establish and clarify language rights. Tetley reveals that the British North America Act failed to protect the French language and culture outside Quebec, as evidenced in Manitoba by the Official Language Act and the School Acts of 1890, and in Ontario by Regulation 17, introduced in 1913 to curtail the use of French in Catholic schools. He traces in detail the evolution of language legislation in Quebec during the 1960's and 1970's, with the special insights and knowledge of one who served as a cabinet minister in the Bourassa government from 1970 to 1976. Tetley discusses in depth the political, constitutional, and practical difficulties of language legislation in Quebec in a number of areas: the language of the courts and National Assembly; the use of language in commerce and marketing; the language of instruction in schools; and the linguistic composition of school boards. Tetley clearly demon-

strates that the language problems to which Quebec is now searching for a solution have been intensely debated for at least twenty years. He compares the spirit and letter of language legislation under the Liberals with that of the Parti Québécois, with special reference to the differences between the Liberals' Bill 22, passed during the summer of 1974, and Bill 101 of the Parti Québécois, which became law just three years later. Tetley concludes by deploring the fact that the English and French languages, two great cultural assets for Canada, have more often been a source of disunity than unity in the country, and by urging greater linguistic cooperation and tolerance throughout Canada in the years to come.

One of the most controversial parts of the Canada Act is the Canadian Charter of Rights and Freedoms, which was criticized by the provinces as an unwarranted intrusion upon provincial jurisdiction over property and civil rights, and by various special interest groups as too weak and vague. A. Kenneth Pye's paper closely examines the likely impact of the Charter on the rights of persons accused of crime. Pye concludes that the Charter represents a significant improvement in legal protection over the Canadian Bill of Rights which has been a disappointingly ineffectual document. Nevertheless, in many areas the protections afforded by the Canadian Charter appear to be significantly less than those available in similar circumstances in the United States. For example, although the Charter provides for the right to retain and instruct counsel without delay when a person has been arrested, it is unclear how that will afford protection to poor people in provinces and regions where legal aid is inadequate. Furthermore, in many cases the real impact of the Charter will become clear only as the courts give life to its provisions through judicial interpretation. Thus, while the Charter prohibits unreasonable search or seizure, there is no way of predicting what will be interpreted as "unreasonable." Difficult decisions will have to be made with respect to electronic surveillance and writs of assistance, or general search warrants, which may be several years old and not relate to any specific person or offense. In large measure, therefore, the responsibility for protecting individual rights and liberties has passed from Parliament and the provincial legislature to the courts. Pye points out that if this transfer is perceived as successful, Canadians may wish to strengthen the provisions of the Charter itself.

During the past several decades of constitutional debate involving the provinces and the federal government, one of the most difficult areas in which to reach agreement was the amending formula. The amending procedures actually adopted in part 5 of the Constitution Act, 1982, are subject to a searching analysis by Stephen Scott. Under the British North America Act, the provinces had the right to amend their own constitutions (with the exception of the office of lieutenant-governor) and the federal parliament had the power to make amendments affecting the institutions of central government. Other amendments, however, such as those affecting the distribution of legislative power, remained victim to the exclusive province of the British Parliament at Canadian request. In general, the practice was that such amendments would not be pursued without unanimous provincial consent, even though it was not clear whether this was a binding constitutional convention. Under the Constitution Act, 1982, the general procedure for

amendments affecting the distribution of power now requires the assent of Parliament together with the assent of two-thirds of the provincial legislatures representing at least fifty percent of the population. Any amendments so passed will have no effect in those provinces which did not support them, although the provinces may at any later date remove their dissent with a majority vote of the legislature. Prime Minister Trudeau argued that this opting-out provision would produce a "checkerboard" Canada, but he reluctantly agreed to it in his effort to win provincial support for the entire constitutional package.

In addition to this general procedure, however, the Act enumerates four other procedures for amending the Constitution. The consent of the Senate, the House of Commons, and of all the provincial Assemblies is required for certain sorts of amendments, including those dealing with the office of the Queen, membership in the House of Commons, the use of the English and French languages, and the composition of the Supreme Court; amendments to provisions that apply to some but not all of the provinces require the consent of the affected provinces; Parliament may act unilaterally to amend the constitution in relation to the executive government of Canada, the Senate, and the House of Commons; and finally, each province may unilaterally amend its own constitution. Scott shows lucidly that the scope of these various procedures is not always clear, nor is their apparent relation to each other. Ultimately, much will hinge on how the terms "the Constitution of Canada" and "the constitution of the Province" are interpreted. Scott argues that the provincial constitutions should be interpreted as part of "the Constitution of Canada," but whether this interpretation will prevail remains to be seen.

Walter Dellinger's paper also scrutinizes the amending formula in the Canada Act, comparing it to the amending process in Article 5 of the United States Constitution. Dellinger points out that in a federal system of government the division of powers between the federal government and the provinces is absolutely crucial. According to Dellinger, it is necessary to agree not only on an initial division, but also on an amending process through which that division can be altered. Where there is a disagreement on the initial division, as there is in Canada, agreement on the amending process will be manifestly more difficult. It is significant that the American Constitution was drawn up by a special convention chosen for that purpose and was submitted for ratification to similar special conventions in the states. Conversely, in Canada it has been the existing legislatures which have drawn up the constitutional reforms; this creates a problem if the legislatures themselves are in need of reform.

Dellinger reviews the rather complicated amending formula contained in the Constitution Act, 1982, and praises it for addressing specifically many questions that are not adequately considered in Article 5 of the American Constitution. The Canadian Constitution, for example, clearly indicates how and when those provinces which dissent from amendments may change their dissent to approval. It also unambiguously indicates which parts of the Constitution require unanimous agreement—for example those parts dealing with representation in the legislation of the central government. Despite these salutary provisions, Dellinger does criti-

cize the Canadian Constitution for limiting future constitutional changes to those suggested by the national government or the provinces. He suggests that alternative means of constitutional amendments, such as a national referendum or specially elected conventions in each province, might provide for amendments that would have wide popular support but would be opposed by existing legislatures. Finally, Dellinger comments on those provisions that allow provinces to opt out of constitutional amendments with which they disagree and to override the Charter of Rights. Even though they may seem objectionable to those familiar with U.S. constitutional law, these provisions accurately embody the current character of Canadian federalism.

For those concerned with the future of Canada's federal system, the twelve papers in this volume provide ample scholarly thought on the subject for both the layman and the academic. The past decade has been a tumultuous one for Canadian federalism, which has been forced to cope with the conflicts engendered by prolonged and seemingly insoluble economic problems, the strains of western alienation, an *independentiste* government in Quebec, and the bitter divisions produced by the constitutional reform process itself. These salient problems have reacted with each other in a manner that makes the interpretation and analysis of any one of them very difficult. Thus, the constitutional reform of 1982 and its implications for Canada's future represent a remarkably broad and variegated landscape, of which the papers that follow can of necessity give only a partial view. Yet by their interdisciplinary nature, the papers emphasize one essential aspect of the process of constitutional reform: the complex interweaving of political, economic, linguistic, and legal issues that make up the fabric of Canadian federalism. Whether that fabric will hold together, or be torn asunder, is a question implicit in all of the papers, and one which only the future can answer.

