

THE FOUNDATIONS OF CANADIAN FEDERALISM

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TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.....	1
THE INTENT OF CONFEDERATION.....	2
MACDONALD AND THE CONFEDERATION PROPOSAL	8
CHRISTOPHER DUNKIN AND THE CRITIQUE OF THE CONFEDERATION PROPOSAL.....	16
MOTIVES FOR CONFEDERATION.....	22
REVISIONISM.....	25
SELECTED BIBLIOGRAPHY	29



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INTRODUCTION

Change in art is not like change in law; for law has no strength with respect to obedience apart from habit, and this is not created except over a period of time. Hence the easy alteration of existing laws in favour of new and different ones weakens the power of law itself.

Aristotle, *The Politics*, Book IV, Ch. II

Aristotle well understood that the fundamental laws of the polity should not be tampered with lightly. Politics "... is not like the other arts where better knowledge leads automatically to better results."⁽¹⁾ Political institutions do not easily lend themselves to rational manipulation and, as Burke warned, visionary schemes may often lead to worse excesses than those they are meant to cure. More often than not, reverence for the law is less the consequence of enlightened reason than of "prejudice." We would, therefore, not quarrel with Madison when he observed that "... a nation of philosophers is as little to be expected as the philosophical race of kings wished for by Plato. And in every other nation, the most rational government will not find it a superfluous advantage to have the prejudices of the community on its side."⁽²⁾

Canada has recently undergone major constitutional change and, with the Meech Lake agreement, may do so again. However, in order fully to understand the present state of union, we need to come to terms with the intentions of its founders. It is during times of crisis and rapid change that we often return to an examination of original intentions, for it is the original "intent" that goes a long way in determining the unfolding of the political process. Confederation "not only represented the compromises arrived at by a political elite in such areas

(1) Steven E. Rhoads, *The Economist's View of the World*, Cambridge University Press, Cambridge, 1985, p. 195.

(2) Benjamin Wright, ed., "Federalist Paper No. 49," *The Federalist*, Harvard University Press, Massachusetts, 1961, p. 347-351.

as culture, politics, economics, and external relations, but these initial founding decisions largely set the parameters in which these problem areas have continued to be debated.”⁽³⁾

Some might be inclined to view our examination of first principles as little more than the treading of well worn ground. Yet we cannot fully appreciate the present without an understanding of the past and must recognize that the success of any political programme will depend on the soundness of its foundation. What we find in the humanities is that solutions to problems are as often as not arrived at via critical reflection and the examination of first principles rather than through the discovery of new evidence. This is not to say that new evidence is not welcome but simply to assert that moments of reflection are of equal importance — for, after all, the most important methodological tool to which we have access lies between our ears. Those recognizing the importance of such reflection, and who often find themselves defending it against the data gatherers and methodological purists, may find some solace in the following observation.

Obviously, historiography cannot be a science. It can only be an industry, an art, and a philosophy — an industry by ferreting out the facts, an art by establishing a meaningful order in the chaos of materials, a philosophy by seeking perspective and enlightenment. The present is the past rolled up for action, and the past is the present unrolled for understanding.⁽⁴⁾

THE INTENT OF CONFEDERATION

The importance of intent in the development of Canadian federalism was clearly seen by Donald Creighton in a piece entitled “The Use and Abuse of History.”⁽⁵⁾ According to Creighton, much of the contemporary malaise concerning federalism is due to our ignorance of the original intentions of the founding fathers. This repudiation and distortion of the past has put

(3) R. Nelson, R. Wagenberg and W. Soderland, “The Political Thought of the Fathers of Confederation,” Paper presented at the annual meeting of the Canadian Political Science Association, University of New Brunswick, June 1977.

(4) W. and A. Durant, *The Lessons of History*, Simon and Schuster, New York, 1968, p. 12.

(5) Donald Creighton, “The Use and Abuse of History,” in *Towards the Discovery of Canada*, Macmillan of Canada, Toronto, 1972, p. 65-84.

the very future of federalism into jeopardy for Canadians no longer have a sound basis from which to take action. As Creighton argues:

They are confused and uncertain about the direction they should be taking, partly because they do not know whence they have come, or by what route, or with what aims and ideals as guides for the journey. Ignorance readily accepts myth and is vulnerable before propaganda.⁽⁶⁾

However, despite challenges and reinterpretations, the original intentions continue to play an important role.

The past is not dead. It stands at bay, confronting the revolution with its legal barriers, historical memories, and inherited convictions; and if the revolutionaries are to succeed, they must overcome these obstacles, silence these fears, eradicate these inhibitions.⁽⁷⁾

For a conservative like Creighton, federalism can survive only if it remains true to its founding principles. Once the original intentions are abandoned and wholesale change is attempted, destabilization will set in. If Canadian federalism is to endure, its original intention needs to be clearly understood and continually recaptured. According to Creighton, there is nothing inevitable about the increasing decentralization of the federal system except insofar as certain agencies have consciously pursued this end in the fulfilment of their own interests.

History must be defended against attempts to abuse it in the cause of change; we should constantly be on our guard against theories which either dismiss the past or give it a drastically new interpretation. Such theories are likely to abound in an age of doubt and uncertainty about the future; and most of them, whether consciously or unconsciously, have been developed to serve the radical programs of the moment. From this, the path to historical propaganda is short and easy... A nation that repudiates or distorts its past runs a grave danger of forfeiting its future.⁽⁸⁾

The distortions concerning the original intentions of the architects of Confederation cannot be ascribed to any lack of historical evidence. Their intentions were

(6) *Ibid.*, p. 69.

(7) *Ibid.*

(8) *Ibid.*, p. 83.

clearly stated in a variety of speeches prior to Confederation and even a casual reading of these should suffice to establish the original purpose of Confederation. The ultimate aim was to found a transcontinental nation “in the form of a constitutional monarchy under the British Crown.”⁽⁹⁾ The monarchical principle was never seriously challenged and a model based upon the American precedent was not to be considered. A strong central government was desired and if a legislative union was impossible because of the peculiarities of Quebec and its desire to retain these, then a strong and highly centralized federal union would be the answer. As John A. Macdonald argued:

The fratricidal conflict now unhappily raging in the United States shows us the superiority of our institutions, and of the principle on which they are based. Long may that principle — the Monarchical principle — prevail in this land. Let there be no looking to Washington ... but let the cry, with the moderate party, be “Canada United as One Province, and under One Sovereign.”⁽¹⁰⁾

The Americans had made the mistake of investing the states with too much power. This was an error that Macdonald was not about to make and in 1861, while discussing the American problem, we already find him enunciating the principles that would be applied in 1867.

... let it be a warning to ourselves that we do not split on the same rock which they had done. The fatal error which they had committed — and it was perhaps unavoidable from the state of the colonies at the time of the revolution — was in making each state a distinct sovereignty, and giving to each a distinct sovereign power, except in those instances where they were specially reserved by the Constitution and conferred upon the general government. The true principle of a confederation lay in giving to the general government all the principles and powers of sovereignty and that the subordinate or individual States should have no powers but those expressly bestowed on them. We should thus have a powerful Central Government — a powerful Central Legislature, and a powerful decentralized system of minor legislatures for local purposes.⁽¹¹⁾

The importance of the British connection was also stressed by the French Canadian delegates. It was the British Crown and British parliamentary institutions that would

(9) *Ibid.*, p. 69.

(10) Macdonald Papers, Public Archives of Canada, Vol. 158, p. 64011-64012 (Speech delivered at Kingston, 1861).

(11) *Ibid.*, p. 64121 (Speech delivered in the Legislative Assembly, 1861).

continue to afford French Canadians those rights necessary for their cultural survival. Of paramount importance to this survival was the continuance of the Catholic clergy in Lower Canada and this was something Britain had permitted. There was also no desire on the part of the French Canadian elite to further the cause of “republican democracy” and an adherence to monarchical principles was one way of staving off any such trend. According to Cartier, the French Canadians understood that:

If they had their institutions, their language and their religion intact today, it was precisely because of their adherence to the British Crown.⁽¹²⁾

Whereas the Americans had sought purely democratic institutions, the principle behind the federal program, according to Cartier, was that of perpetuating the “monarchical element.” It was only by ensuring the continuance of this institution and its principles that one could prevent the unfortunate train of events that had overtaken the American experiment. Though Cartier offered an overly simplistic analysis of the American situation, the basic elements of the theme were reiterated by others.

They had founded Federation for the purpose of carrying out and perpetuating democracy on this continent; but we who had the benefit of being able to contemplate republicanism in action during a period of eighty years, saw its defects, and felt convinced that purely democratic institutions could not be conducive to the peace and prosperity of nations... Our attempt was for the purpose of forming a Federation with a view of perpetuating the monarchical element. The distinction, therefore, between ourselves and our neighbours was just this: In our Federation, the monarchical principle would form the leading feature, while on the other side of the lines, judging by the past history and present condition of the country, the ruling power was the will of the mob, the rule of the populace.⁽¹³⁾

More often than not, the notion of the monarchical principle comes to entail the idea of a limited franchise exclusive to the property-holding elite. By “legitimate authority,” not only was parliamentary rule to be understood but also the limiting of participation in government to those deemed worthy. As Cartier went on to argue:

(12) *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, Hunter and Rose and Co., Quebec, 1865, p. 59 and 838.

(13) *Ibid.*, p. 838.

Every person who had conversed with the most intelligent American statesmen and writers must have learned that they all admitted that the governmental process had become too extended, owing to the introduction of universal suffrage, and mob rule had consequently supplanted legitimate authority; and we now saw the sad spectacle of a country torn by civil war.⁽¹⁴⁾

Similar sentiments were to be found in Macdonald's attitude toward the franchise. Despite the fact that the eventual legislation (1885) helped to widen the franchise considerably, the property qualification remained an important aspect thereof. The main principles underlying the Act were "a uniformity of the suffrage, and the recognition of a property qualification as determining the right to vote." According to Pope, the property qualification was "intended to be a barrier against the domination of a mere mechanical majority." Macdonald, he goes on to note, was of the opinion that "no man who advocated universal suffrage had any right to call himself a Conservative."⁽¹⁵⁾ Macdonald's opinion on the matter had remained consistent from as far back as 1861.

Experience has shown that (universal suffrage) leaves a nation weak and leads it towards anarchy and despotism. Unless there is a middle power, unless property is protected and made one of the principles on which representation is based, they might perhaps have a people altogether equal, but they will soon cease to have a people altogether free.⁽¹⁶⁾

Despite Cartier's confidence in the practicability of the federation scheme and its appropriateness for ensuring French Canadian cultural survival, there were those who disagreed. Joly, for example, felt that the establishment of a strong central government would do little more than sound the death knell for French Canadians. The very principle of "Confederation" would be contradicted by such a provision. Under such a condition, the provinces would have increasingly to obey the bidding of the central authorities. Federalism, he argued, is a principle properly suited for strong independent states that find it necessary to come together to meet certain exigencies that they could not otherwise deal with — defence being the obvious example.

(14) *Ibid.*

(15) Sir J. Pope, *Memoirs of the Right Honourable Sir John Alexander Macdonald*, Oxford University Press, Toronto, 1930, p. 616.

(16) Macdonald Papers, Public Archives of Canada, Vol. 158, p. 64123 (Speech delivered in the Legislative Assembly, 1861).

For Joly, the Confederation proposal was a disguised attempt at legislative union and such a union could not be in the interests of Lower Canada. A strong central government would mean that the arrangement

... will no longer be a Confederation; it will be a legislative union — a union which the most zealous advocates of Confederation reject as incompatible with the various interests of the different provinces ... the latter will no longer have an exclusive existence; they will become the authorized delegates of the central power, their offices and every vestige of confederation will disappear from your constitution... The weakness of the central power is not the fruit of the federal system; it is its root, it is itself. This is the reason why states which are perfectly independent of each other adopt the federal principle solely as a means of defence against foreigners, because the central power in a confederation cannot be other than weak.⁽¹⁷⁾

In the case of Canada, there already existed an authority which could deal with the problem of defence, and that was Great Britain. By retaining close ties with Britain, Canada's sovereignty would be guaranteed and the question of Confederation, at least for Joly, would become redundant.

We already possess under our present Constitution, and without confederation, a central power stronger than any power which you can create, and to which we submit without complaint, because it is perfectly compatible with the exercise of our local powers — I mean the power of England.⁽¹⁸⁾

Among the French Canadians, there were, then, two schools of thought concerning the benefits of Confederation. Those who sided with Cartier were convinced that the pluralism of a federal system could best serve the interests of the French Canadians in the long run. It was generally agreed that the basic rights of minorities had been well protected by the British and would continue to be respected if the British tradition in Canada and close links with Britain were maintained. Federalism would further provide the appropriate amount of local power to ensure that French Canadian culture continued to thrive.⁽¹⁹⁾

The other group, largely arguing for the maintenance of the *status quo*, were not so trusting when it came to British and Upper Canadian motives. According to these delegates,

(17) *Parliamentary Debates* (1865), p. 350.

(18) *Ibid.*

(19) Nelson *et al.*, p. 6-7.

the rights enjoyed by the French Canadians had not been easily won and needed to be jealously guarded. Rather than viewing Britain as the magnanimous guarantor of minority rights, this group believed that these rights “had to be extracted from the British, and then only when there were threatening outside forces or internal rebellion.” Federalism, in turn, was seen as little more than a veiled attempt to bring about an eventual legislative union and representation by population.⁽²⁰⁾ As Dorion argued:

The British Government is ready to grant a federal union at once, and when that is accomplished the French element will be completely overwhelmed by the majority of British representatives. What, then, would prevent the federal government from passing a set of resolutions in a similar way to those we are called upon to pass, without submitting them to the people, calling upon the Imperial Government to set aside the federal form of government and give a legislative union instead of it.⁽²¹⁾

In a similar vein, Perrault argued that

... the scheme of Confederation is not expedient. But even if the scheme of Confederation was expedient, I maintain that the object of it is hostile. I gave an historical sketch of the encroaching spirit of the English race on the two continents. I pointed out the incessant antagonism existing between it and the French race. Our past recalled to us the constant struggle which we had to keep up in order to resist the aggression and the exclusiveness of the English element in Canada. It was only through heroic resistance and a happy combination of circumstances that we succeeded in obtaining the political rights which are secured to us by the present Constitution. The scheme of Confederation has no other object than to deprive us of the most precious of those rights, by substituting for them a political organization which is eminently hostile to us.⁽²²⁾

MACDONALD AND THE CONFEDERATION PROPOSAL

Perhaps the most eloquent statement on behalf of Confederation was made by its chief architect, John A. Macdonald. If there has been one term consistently used to describe

(20) *Ibid.*, p. 5-6. See also *Parliamentary Debates*, p. 585-626.

(21) P.B. Waite (ed.), *The Confederation Debates in the Province of Canada, 1865*, Carleton Library Series No. 2, McLelland and Stewart, Toronto, 1963, p. 95.

(22) *Ibid.*, p. 128.

Macdonald's approach to politics, it is "pragmatic." Indeed, this is not an unfair characterization for in political matters his tendency was to proceed cautiously, always paying due heed to circumstance. However, to suggest from this, as some have, that Macdonald "was not a man of ideas at all" would be to do him an injustice.⁽²³⁾ It may be, as MacDermott charges, that Macdonald was not overly reflective but then he was a political practitioner and not a political philosopher. Macdonald accepted the dominant ideological principles of the system in which he was working and never felt any need to transcend them. This unquestioning acceptance no doubt helped in establishing his reputation as a pragmatic political actor and may also have been one of the reasons why Macdonald never felt it necessary to go out of his way to enunciate a "systematic corpus of political principles." We must be careful not to equate his acceptance of the dominant ideology and existing social structure with a lack of "ideas." Macdonald was a "conservative-liberal," that is, a conservative in the Burkean tradition of English conservatism. Macdonald summarized his approach to politics rather well in 1865:

... I am satisfied to confine myself to practical things — to the securing of such practical measures as the country really wants. I am satisfied not to have a reputation for indulging in imaginary schemes and harbouring visionary ideas that may end sometimes in an annexation movement, sometimes in federation and sometimes in a legislative union, but always utopian and never practical.⁽²⁴⁾

Macdonald is here not objecting to the adherence to a set of political principles or ideas but rather to the pursuit of goals set in an *a priori* manner. The opposition is not to political philosophy but to visionary schemes. Solutions to political problems were to have the same basis for Macdonald as they did for Burke. The best or most appropriate solution would be one based upon the traditions of the policy and not on rational precept. Macdonald was not one

(23) See P.B. Waite, "The Political Ideas of John A. Macdonald," in M. Hamelin (ed.), *The Political Ideas of the Prime Ministers of Canada*, Les Éditions de l'Université d'Ottawa, Ottawa, 1969. Also, T.W.L. MacDermott, "The Political Ideas of John A. Macdonald," *Canadian Historical Review*, No. XIV, 1933. Macdonald came to Canada from Glasgow, Scotland, at the age of five. His family settled in Kingston, where the future Sir John received his early education and where he later practised law. He remained in the practice of law throughout his life with a series of partners, in Kingston until 1874 and then in Toronto. His firm engaged primarily in commercial law; his most valued clients were established businessmen or corporations. Macdonald first entered politics at the municipal level, serving as alderman in Kingston, 1843-46. In 1844, at the age of 29, he was elected for Kingston to the Legislative Assembly of the Province of Canada. (For a good biographical account, see *The Canadian Encyclopedia*, 2nd Edition, Vol. II, p. 1260-1261.)

(24) *Parliamentary Debates*, p. 1002.

to raise issues before their time. However, once public opinion was such that reform became desirable or necessary, he would be more than willing to proceed. A change of stance on a particular matter can be other than the result of mere opportunism. In typically Burkean fashion, Macdonald recognized the dangers inherent in raising fundamental and quarrelsome issues before their time. In 1853, he argued that:

If there is one thing to be avoided, it is meddling with the constitution of the country, which should not be altered till it is evident that the people are suffering from the effects of that constitution as it actually exists.⁽²⁵⁾

A rather overly sympathetic biographer of Macdonald made a similar observation about his willingness to change position on a given issue. In discussing Macdonald's attitude towards the question of vote by ballot, Biggar notes that:

The question of vote by ballot was now coming and it is worthy of remark that John A. Macdonald is found opposing it, as in after years we will find that he opposed more than one reform, which, however, he would subsequently help to shape and carry out when he found that public opinion demanded it. The reason he gave against vote by ballot now was that "the people in Canada had no one exercising an illegitimate influence over them as in England and European countries."⁽²⁶⁾

Unless circumstance required it, there was no reason for bringing about reform. In this instance, the situation, in Macdonald's eyes at least, had not reached a point where reform was necessary. To bring in vote by ballot because it was intellectually appealing, because some thought it was a good idea, or because it was being carried out elsewhere was not sufficient reason. If reform was in fact required, then it was best that it be moderate and well thought out for it is such reform that has lasting value. As Pope noted of Macdonald:

He preferred, as a general rule, to "hasten slowly," to weigh well all the circumstances, to keep his hand free as long as possible, and to act only in the light of the fullest knowledge he could gather. Such a course, he has observed, often saved him from the disastrous consequences of hasty and ill-considered action. He was a firm believer in the efficacy of time as a solvent of many difficulties which

(25) *Globe*, 12 April 1853.

(26) E.B. Biggar, *Anecdotal Life of Sir John Macdonald*, John Lovell and Son, Montreal, 1891, p. 64.

beset his path, and his wisdom in this regard has time and again been exemplified.⁽²⁷⁾

Thus, when Waite approvingly quotes MacDermott's characterization of Macdonald as "an empiricist through and through," he is not doing him an injustice. He is also quite right in pointing to the fact that Macdonald "would adjust his views and policies to the temper of the time, abandoning cheerfully, though cautiously, any policy that seemed outdated or impossible to work."⁽²⁸⁾ This is not to suggest, though Waite might be inclined to do so, that Macdonald changed his fundamental principles in the same way as a chameleon changes colours, but only that he was well aware of the fact that one cannot begin with a set of *a priori* principles and mould one's environment according to their dictates. Like Burke, he was not in favour of rationalist-deductive models. Again, Waite goes on to note that Macdonald distrusted the "reforming temperament; he distrusted that view of society which sees in changes of institutions or of laws the panacea for the problems of human society."⁽²⁹⁾ Once more, Macdonald was here being quite consistent with respect to conservative principle. In the case of conservative doctrine, the statesman is properly concerned with situations and objectives in regard to which he can act. His good is a concrete good and not the abstract good of the philosopher.

Waite attributes Macdonald's rather cynical approach to politics to his equally cynical view of human nature. Macdonald had no illusion concerning the innate virtue of the human animal; "he never shared that sublime belief in the perfectability of man which was the great inheritance of the dissenting churches."⁽³⁰⁾ Macdonald's attitude should come as no surprise. A fundamental belief in the perfectability of man has never been a part of conservative teaching. Whereas the "revolutionists" of the eighteenth century may have "expressed confidence in the moral goodness of men in general, and in their intellectual competence to select measures dictated by science and reason," Burke continued to remain sceptical. According to him, our "naked and shivering human nature" would always need the support of the "established traditions of an old society."⁽³¹⁾ Faith in the virtues and benefits of progressive

(27) Pope (1930), p. 653.

(28) Waite (1969), p. 52.

(29) *Ibid.*, p. 53.

(30) *Ibid.*, p. 54.

(31) Louis Bredvold and R. Rose, eds., *The Philosophy of Edmund Burke*, The University of Michigan Press, Ann Arbor, 1977, p. 156.

reform is often accompanied by a belief in the essential goodness and perfectability of man. Many a reformer has been disillusioned on this score as have those who have been subject to the so-called altruism of revolutionary practitioners.

What is disturbing about Waite's analysis is that, having discerned the foregoing characteristics of Macdonald's approach to politics, he still goes on to conclude that Macdonald was a man devoid of ideas. In fact, on the basis of Waite's own analysis, it becomes quite clear that Macdonald fits well within the conservative tradition. It is difficult to know what Waite would consider as evidence for the influence of ideas or what, according to him, a man of ideas is. He addresses neither of these questions directly and simply concludes that because Macdonald was pragmatic and paid due attention to circumstance, his thought and action could not possibly have had a consistent philosophical or ideological basis. Waite seems to imply that to act on the basis of ideological conviction necessarily entails an attempt to reshape or transcend one's immediate environment. However, this is not something that one should expect from a conservative and Macdonald did not exhibit any such tendency in either his thinking or in his political behaviour.

If there was one question on which Macdonald expressed himself in typically conservative fashion, it was that of representation. The role of the representative must never be reduced to that of a mere delegate. Nor did Macdonald ever entertain the notion that the general population might from time to time be invited directly to participate in matters of legislation. Democracy according to plebiscite or referendum was complete anathema to British constitutional practice as understood by Macdonald. When the question of putting the matter of Confederation to the people came up, Macdonald responded in character:

By what contrivance known to our Constitution could we take such a vote? There is none such. There is no means, no system, by which we could make an appeal of that kind, and in order to do it we should have to subvert the principles of the British Constitution ... we in this House are representatives of the people, and not mere delegates...⁽³²⁾

Although Macdonald's position is quite consistent with conservative doctrine, we must also recognize that, like most successful politicians, he was not about to suffer too dearly at the hands of principle. Had the question of Confederation been put to a public vote, there is the distinct

(32) *Parliamentary Debates*, p. 1004.

possibility that it would have been defeated and along with it Macdonald's vision of a united Canada. It would nevertheless be unfair to suggest that Macdonald's stand was one of mere opportunism. The independence of the representative was an essential ingredient of the democratic process. Popular despotism — the tyranny of the majority — was as undesirable as the despotism of the tyrant. The former might, in fact, lead to or at least help in the maintenance and legitimation of the latter. By putting major issues of legislation to the consideration of the general population, one might only be providing or sanctioning “the means by which a despot ... may get that popular confirmation and approval which he desires for the laws necessary to the support and continuation of his usurpation.”⁽³³⁾ There is little doubt that Macdonald overstated his case and that a responsible use of the plebiscite can indeed be an effective aspect of democratic government; but this would not be accepted by someone with the conservative's suspicion of popular rule. One might also note that at various points throughout the debate, Macdonald used the term “conservative principles” and came to equate it with traditional British constitutional practice.

The principle of “representation” was an important ingredient of constitutional practice and it was believed that propertied men of “good character” could be relied upon to make sober political judgments. While Macdonald believed this to be true, he also recognized that principle and good conscience were in themselves not enough. Like any good conservative, he was no democrat and felt that the principle of representation also required its checks. Representation needed to be balanced by hierarchy and structure. In support of this argument, Macdonald approvingly quoted a speech by the British parliamentarian, Leatham.

It is the essence of representative government that the electing class, which is analogous to the class paying rates, shall possess no direct legislative power; and the principle of parliamentary representation is that not even the representative principle shall alone legislate. We have taken the caution to protect the rights and property of Englishmen by the prerogatives of the Crown, the privileges of the Lords, and the authority of a representative assembly. All these constitute the threefold and invaluable shelter which we have raised over the rights and property of the meanest subject of the realm.⁽³⁴⁾

(33) *Ibid.*, p. 1004-1005.

(34) *Ibid.*, p. 1005.

Macdonald summed up the importance of Leatham's argument with a typically Burkean aphorism: "The ... speech contains very shortly the wisdom of ages."⁽³⁵⁾

For Macdonald, the rights and property of Canadian constituents were to be protected by essentially the same measures that Leatham had considered so important for Britain, albeit with certain unavoidable modifications. As we have already noted, the monarchical principle was to be retained as were the closest possible ties with Britain. The new union was one which was to ensure "British laws, British connection, and British freedom."⁽³⁶⁾

The monarchy was an important part of tradition and beyond partisan politics. In light of the latter consideration, it would be able to provide the appropriate symbolic vehicle behind which disparate elements could unite. Macdonald considered the absence of such a non-partisan unifying symbol to be a serious drawback of the American system. The president, although being both the symbolic and political head of state, could really never be more than the "successful leader of a party." He could never be looked up to by all as "the head and front of the nation" because partisan politics dictated that in reality he was only the representative of a part of the nation. The monarchical principle, Macdonald believed, provided for a different set of circumstances. Here one had a Sovereign,

who is placed above the region of party — to whom all parties look up — who is not elevated by the action of another, who is the common head and sovereign of all.⁽³⁷⁾

With modifications and due consideration of local circumstance, the "privileges of the Lords" could also be transplanted. A replica of the British Upper House was not possible in Canada for here there was no landed aristocracy, there were no "men of large territorial positions — no class separated from the mass of the people." The best practical solution and the one most "in accordance with the British system" that circumstance would permit was to confer the power of appointment on the Crown and to make appointments tenable for life. The Senate was to provide for an effective check on the Lower House, particularly in those instances where the latter might exhibit too much democratic or egalitarian exuberance. In the words of Macdonald:

(35) *Ibid.*, p. 1006.

(36) *Ibid.*, p. 31.

(37) *Ibid.*, p. 33.

It would be of no value whatever were it a mere chamber for registering the decrees of the Lower House. It must be an independent House, having a free action of its own, for it is only valuable as being a regulatory body, calmly considering the legislation initiated by the popular branch, and preventing any hasty or ill considered legislation which may come from that body...⁽³⁸⁾

The principle of a representative assembly based upon British precedent would also require some adjustment. Although Macdonald preferred the British model of a legislative union, the necessity of appeasing provincial demands precluded such a move and the best that could be hoped for was a federal union. Macdonald clearly realized that he would have to assuage Upper Canada's desire for representation by population, provide for Quebec's demands of cultural autonomy, and permit the Maritime provinces to retain a certain level of political identity. A federal union emerged as the logical choice. Such an arrangement would provide for equitable representation in the national parliament, allow Quebec to see to its cultural matters, and grant the Maritimes enough local power to retain their political identity. While certain concessions may have been made, there was little doubt that the central authority was to be the dominant one. As Macdonald was quick to point out:

In the proposed Constitution, all matters of general interest are to be dealt with by the General Legislature, while the local legislature will deal with matters of local interest, which do not affect the Confederation as a whole, but are of the greatest importance to their particular sections.⁽³⁹⁾

The overriding interest was to be the national interest. Here Macdonald's thinking is once more quite consistent with that of Burke.

Although Macdonald may not have written a treatise, or even a series of pamphlets, there can be little doubt that his political actions were guided by a set of consistent principles of which he had a good understanding. Macdonald was conscious of the ideas upon which he based his actions and therefore his pragmatism was a philosophical pragmatism and not merely the kind that is founded upon opportunism — though this is not to suggest that opportunism did not play a significant role. However, to reduce the motivation of political actors to pragmatism and opportunism would give us an inaccurate picture.

(38) *Ibid.*, p. 35-36.

(39) *Ibid.*, p. 30.

CHRISTOPHER DUNKIN AND THE CRITIQUE OF THE CONFEDERATION PROPOSAL

Macdonald's vision for the proposed federation carried the day, although this is not to say that it did so without opposition and scrutiny. The most eloquent attack against the proposed plan came from the independent, though ideologically conservative, Christopher Dunkin of Lower Canada. Dunkin may not have shared Macdonald's enthusiasm for the proposals under consideration, but he did share Macdonald's reverence for tradition and distrust of democracy.

I have no fancy for democratic or republican forms or institutions, or indeed for revolutionary or political novelties of any sort. The phrase of "political creation" is no phrase of mine... All we can do is to attend to and develop the ordinary growth of our institutions; and this growth, if it is to be healthy at all, must be slow... I do not believe in any of those violent and sudden changes which have for their object the creation of something entirely new.⁽⁴⁰⁾

His general criticism of the proposed constitution was that it had been hastily constructed. Rather than paying due deference to traditional practices, it was in fact a new and previously untried form of government. Dunkin gave no credence to the claim that the new constitution was equal to, if not better than, that of either Britain or the United States.⁽⁴¹⁾ Not enough attention had been paid, he felt, to detail and the fundamental impossibility of the scheme lay in its attempt to combine a "federal" form of government with the British cabinet system.⁽⁴²⁾ Despite the fact that Dunkin was in favour of a legislative union and no friend of republican institutions, his admiration of the American founders was genuine. They had been men confronted with major issues and had taken great care in considering the best possible alternatives. Whereas the Canadian experiment had "a character of hurry"⁽⁴³⁾ about it, the American had been carefully and judiciously considered. As Dunkin argued:

The framers of the Constitution of the United States were, indeed, great men — living in, and the product of a great age, who had passed

(40) *Ibid.*, p. 486.

(41) *Ibid.*, p. 487.

(42) *Ibid.*, p. 497.

(43) *Ibid.*, p. 482.

through a great ordeal and been brought up to the level of their work by great events in which they had been leading actors; and their work was a great work, which cost much time and much discussion, and underwent long and painstaking revision of all sorts, in all quarters, before it was adopted. Yet we are called upon to admit now, and to admit it without examination, that this work of thirty-three gentlemen, done in seventeen days, is a much better work than that; and not only so, but that it is even better for our people and situation than the time-honoured Constitution of our Mother Land; that it combines essentially the advantages of both, with the disadvantages of neither.⁽⁴⁴⁾

In certain respects, Dunkin's criticisms were not only valid but turned out to be somewhat prophetic. By trying to arrive at an expedient compromise, the framers had granted the provinces certain prerogatives but had at the same time left the overall "style and rank" of the state that was to be created in "most delightful ambiguity."⁽⁴⁵⁾ "The game of all things to all men," Dunkin observed, "is a game that cannot be played with success in the long run."⁽⁴⁶⁾ Dunkin's prediction has been all too frequently confirmed in the continuing rounds of federal-provincial bickering. One of the more important sources of ambiguity was the central government's power of disallowance. Dunkin argued that, on the one hand, the provision was presented as a real power with which to control local legislatures, thereby satisfying those who preferred a legislative union; on the other hand, it was presented as a provision which, although helping to enhance the central authority, would never be used, thereby satisfying those who preferred a federal union. When it came to the protection of minority rights, Dunkin was again not impressed. For example, the general nature of educational guarantees for minorities in Upper and Lower Canada would only lead to future misinterpretations, ambiguities and the potential denial of those very rights.⁽⁴⁷⁾

Dunkin's reservations were not about the expressed intentions and general principles of the constitutional proposals. The intention of providing for a strong central government was one which he supported wholeheartedly. His grievance was with the provisions that were to ensure that the intention would be carried out. There was no disagreement with the

(44) *Ibid.*, p. 490-491.

(45) *Ibid.*, p. 488.

(46) *Ibid.*, p. 489.

(47) *Ibid.*, p. 490.

“ideological” principles that provided the overall justification of the plan; but Dunkin realized that principle was not enough. Careful attention would also have to be paid to detail, or the whole exercise might well prove to be for naught in the long run.

We have to deal with no mere question of a nationality, or of union or disunion, or of a federal as opposed to a legislative union. It is idle to talk vaguely about the maintenance of British connection, or to go into magnificent speculations about the probable results of independence, or blindly to urge this scheme as a sure preventative of annexation to the United States. These cheap and easy generalities are thoroughly unreliable. The only question is, how is this plan, in its entirety, going to work? And this question is one which is not easy to answer, and is one requiring much patience, and a close examination of details.⁽⁴⁸⁾

This is not to suggest that Dunkin was not concerned about maintaining close ties with Britain or with preventing annexation to the United States. These were matters of great concern to him, but he believed that the proposals presented could not ensure the former nor prevent the latter. Dunkin’s call for a consideration of detail did not stem from any rationalist premise but rather from the belief that by merely debating vague generalities and hastily considering a series of rapidly drawn up proposals, those traditions upon which the constitution was to be based and which it was to maintain would be lost. According to him, the framers of the constitutional proposals had not even had the foresight to provide for a clear distinction between the functions of the central and provincial governments — something which would no doubt create problems in the future.

We have not even an intelligible statement as to what powers are to be exercised by the general, and what by the local legislatures and governments. Several subjects are specifically given to both; many others are confusedly left in doubt between them; and there is the strange and anomalous provision that not only can the general government disallow the acts of the provincial legislatures, and control and hamper and fetter provincial action in more ways than one, but that wherever any federal legislation contravenes or in any way clashes with provincial legislation, as to any matter at all common between them, such federal legislation shall override it, and take its place.⁽⁴⁹⁾

(48) *Ibid.*, p. 483.

(49) *Ibid.*, p. 514.

If the division of powers was deserving of criticism, then so were the other major features of the new constitution. The House of Commons, which was presented as a model faithful to the British Commons, was, Dunkin argued, nothing of the kind. Its representative function was more akin to that of the American House of Representatives. Dunkin's main objection was to the shifting nature of the electoral districts that was guaranteed to occur after each decennial census. For representation to be effective, it needed a continuing and steady influence. The provision suggested would bring together "electors who have not been in the habit of acting with each other."⁽⁵⁰⁾ The prospect of frequently redrawing electoral boundaries would tempt the party in power to use the provision to its advantage. Whereas the British system ensured, at least so Dunkin argued, that all representatives be considered "members of the one House of Commons" with a view to the national interest, the Canadian system, with its shifting electoral boundaries, and with those boundaries lying exclusively within provincial borders, ran the risk of becoming little more than a forum for provincial grievances. The Canadian situation seemed here more like the American than the British and could very well prove to be detrimental to the future prospects of union.

The House of Representatives is an aggregate of state delegations, and our mock House of Commons is to be an aggregate of provincial delegations. Each man is to come ticketed as an Upper or Lower Canadian, a New Brunswicker, a Nova Scotian, a Newfoundlander, a Prince Edward Islander, or what not. These distinctions, which, if we are to be a united people, we had better try to sink, we are to keep up and exaggerate.⁽⁵¹⁾

Dunkin also had little hope for the effectiveness of the Senate. In response to the claim that the Senate was to represent the federal element of the constitution, he retorted that "there is not a particle of the federal principle about it."⁽⁵²⁾ Nor did he feel that it in any way approximated the virtues of the House of Lords but rather regarded it as a pale copy of the United States Senate, with none of that body's more important powers. The American Senate had the "important judicial function of impeachment" whereby even the actions of the President came under its scrutiny. Along with this, it was given the executive power to examine and disallow treaties and

(50) *Ibid.*, p. 492.

(51) *Ibid.*, p. 493.

(52) *Ibid.*

certain presidential appointments. With the House of Representatives, the Senate also exercised “coordinate legislative functions, as to expenditure and taxation.”⁽⁵³⁾ Compared to this, the role of the Canadian Senate was indeed small. Canadian Senators were to be chosen neither by the legislatures of the provinces nor by the people in general. As a result, Dunkin argued that the Senate could not be regarded as representing a federal element in any true sense of the term. The Canadian Senate, he commented:

... constituted so differently from the Senate of the United States, presided over by a functionary to be nominated by the General Government; having no such functions of a judicial or executive character as attached to that body, and cut off from that minute oversight of the finances which attaches to the Senate of the United States; although it may be a first-rate deadlock; although it may be able to interpose an absolute veto, for no one can say how long, on all legislation, would be no Federal check at all.⁽⁵⁴⁾

In Dunkin’s opinion, the Canadian Senate was “a very near approach to the worst system which could be devised in legislation.”⁽⁵⁵⁾

The Cabinet, in Dunkin’s evaluation, fared no better than the Senate as a bastardization of British constitutional practice. Insofar as the provinces were not “really represented to any Federal intent” in the Senate, they would have to be represented elsewhere. The federal check which was provided by the Senate in the United States, “as an integral part of the Executive Government” would have to be performed in Canada by the Cabinet; the Cabinet would have to take on the character of “federal composition” and be made the “representative of the provinces.” Dunkin considered such a prospect completely contradictory to British practice.

... I must say that this sort of thing is utterly variant from, and inconsistent with British practice and British principle; with the constitutional system which makes the whole Cabinet responsible for every act of government. The British Cabinet is no Cabinet of sections, but a unit.⁽⁵⁶⁾

(53) *Ibid.*, p. 494.

(54) *Ibid.*, p. 495.

(55) *Ibid.*

(56) *Ibid.*, p. 497.

Dunkin was then primarily concerned with the structural defects of the constitution and not with its intention. It was these structural defects that would, however, not permit the realization of the intention of bringing in a highly centralized form of government. In trying to accommodate various federal elements, so his argument went, the framers of the constitutional package had in fact woven in the seeds of its future destruction. When compared to either the avowedly federal constitution of the United States or the centralized constitution of Great Britain, the Canadian constitution emerged as a deficient compromise between the two. Dunkin's response to the constitutional question was a consistently conservative one. Whereas Macdonald had been willing to compromise on certain aspects in order to deal with local circumstances, Dunkin was not. Yet both were ideologically conservative and used conservative precepts to justify their positions. Both recognized the importance of tradition, were anti-democratic, favoured slow imperceptible growth in a society's development, and both believed that the rights of the individual could best be guaranteed by inherited custom and practice. At no point during the Confederation Debates was there a call for the protection of the "abstract" rights of the individual, nor was it ever suggested that these be enshrined in a bill of rights. On this question, the approach was once more empirical and characteristically conservative. As Creighton notes:

In general, the liberties of the subject are assumed as part of the unwritten constitution inherited from Great Britain; and it is only in a few particular cases that the act concerns itself with rights or liberties, and then in a characteristically practical and empirical fashion. It provides safeguards for the distinctive Civil Code of the Province of Quebec, for the already established sectarian schools of religious minorities, and for the use of the English and French languages in the Parliament and courts of Canada, and in the legislature and courts of the Province of Quebec.⁽⁵⁷⁾

There was no motion whatsoever of making Canada a bilingual or bicultural nation; in fact, the "modern use of the latter term was unknown in 1867." The use of the French language was granted only in those parts of Canada in which it "had already been established by law of convention."⁽⁵⁸⁾ Had anyone at the time thought that the provinces were to achieve their present status, they might well have heeded Dunkin's warnings and proceeded more cautiously.

(57) Creighton (1972), p. 72.

(58) *Ibid.*, p. 72-73.

Thus, the intention of the framers of the constitution was to provide for a strong central government where the provinces would play only a minor role; their purpose was to provide for those conditions in which the “inherited” social and constitutional (political) practices of the British tradition could flourish.

MOTIVES FOR CONFEDERATION

In determining the motives behind Confederation, we can delineate three major areas of concern. First, there were those internal difficulties stemming from the 1841 *Act of Union* and Quebec’s desire to preserve its French culture. Second, there was the problem of defence arising from the perceived threat of American aggression. Third, were a variety of economic considerations.

With respect to the first, it quickly became apparent that the effort to govern both ethnic groups under the purview of a unitary, “or at least quasi-unitary state,” would prove to be difficult at best. A variety of solutions were tried in the attempt to stave off disintegration. Quebec was permitted to retain its civil law, the status of the French language was eventually recognized despite initial attempts — based on Durham’s recommendations — to make unilingualism the order of the day, and cabinets were constructed so as to include representation from both cultural groups. In addition, Quebec governments were headed by two party leaders, one from each section, rather than by a single Prime Minister, and separate attorneys-general were also provided. In order to permit “matters such as education and municipal affairs” to be dealt with differently in the two sections, “some of the legislation adopted by the provincial Parliament applied only to one of the sections, with parallel but distinct legislation applying to the other.”⁽⁵⁹⁾ Despite these provisions, the solution did not work. As Stevenson has argued:

Each section of the province harboured the belief that it was being constrained and dictated to by the other. Since they were of roughly equal size and had equal representation in the Parliament, such a belief was equally plausible on both sides. Legislation could be adopted pertaining to either section without the support of a majority of its representatives. The equal representation of the two sections was discovered by residents of the western half to be an intolerable affront to liberal principles once the western half became the more

(59) G. Stevenson, *Unfulfilled Union*, Macmillan of Canada, Toronto, 1979, p. 28-29.

populous, although the injustice of it had somehow managed to escape their notice when they were a minority of the total population. Ethnic and religious antagonisms were exacerbated by many of the issues which came before the legislature, and were reinforced by divergencies of economic interest between the sections. Farmers and manufacturers in the western part of the province, like their counterparts in the larger western hinterland of a later date, resented the commercial hegemony of Montreal and the measures that were taken with the aim of funnelling their commerce through that city.⁽⁶⁰⁾

It is small wonder that the *status quo* could not continue long. A variety of solutions were proposed, but each suffered from major defects. Representation by population would have left the Lower Canada minority in a subordinate position to Upper Canada. The provision for double majority would have made it virtually impossible to form a government at all while a federation between the two major provinces meant that each of the parts could very well have emerged as more powerful than the central authority. The option of granting the sections independence would have ensured the destruction of the “economic and commercial unity of the St. Lawrence system.”⁽⁶¹⁾ These internal difficulties provided a strong motive for finding some workable solution.

As already noted, the problem of defence also occupied the attention of many of the delegates. Thus, “the perceived hostility of the United States as exemplified by the Trent Affair, the Alabama Claims, border incidents, and New York editorialists promoting northern expansion, formed the backdrop for speeches which concentrated on defence policy, possible annexation to the United States, need for Canadian western development and Canada’s place within the British Imperial defence system.”⁽⁶²⁾

With the expectation that the United States would abrogate its reciprocal trade agreement with the colonies, as it actually did in 1866, the provinces were presented with a strong economic motive for Confederation. Trade would now have to be re-oriented on an east-west basis and the Maritimes were confronted with the added burden of defending their coastline and fishing rights.⁽⁶³⁾ The various economic benefits were stressed by Alexander Galt, the then Minister of Finance. Galt argued that one of the chief benefits of Confederation would be an

(60) *Ibid.*, p. 29-30.

(61) *Ibid.*, p. 40.

(62) Nelson *et al.* (1977), p. 37.

(63) Stevenson (1979), p. 34.

economy that did not have to rely on any one industry alone. With the addition of the Maritimes, Canada had the potential of becoming a seafaring power and with the removal of tariff barriers, provinces would benefit from the resulting increase in trade and would no longer be dependent on the threatened U.S. market.⁽⁶⁴⁾

There were, of course, also those who considered the economic benefits of Confederation as less than certain. J.B.E. Dorion could not see any particular advantage in having the Maritimes as a trading partner in that their products were similar to those of central Canada. As he argued, “What trade could there be between two farmers who produce nothing but oats? ... They might stand and stare at each other with their oats before them, without ever being able to trade together; they would require a third person — a purchaser.”⁽⁶⁵⁾ According to Dorion, any trading advantages could just as well be obtained without union. For some, the entire Confederation scheme was “nothing more than a machination to further the interest of the Grand Trunk Railway.”⁽⁶⁶⁾

However, despite criticisms and reservations, it was the recommendations of the “chief architect,” Macdonald, and his supporters that prevailed. In view of the motivating factors and the response to these given by Macdonald and others, there can be little doubt that there was an important ideological element to the debate with Macdonald emerging as a consistent conservative-liberal. Other solutions to the constitutional problem could have been entertained and provided. A more “republican” form of government would just as well have provided for an effective union and could just as easily have enjoyed the protection of Britain in matters of defence. The rights of citizens and minorities could have been enshrined in a bill of rights. Neither of the foregoing came to pass.

Macdonald did not approach the question of constitutional reform in a merely reactive or incrementalist manner; nor were the ideas upon which he based his actions mere rationalizations of what had been brought about by independent forces. The confederation proposal shows a definite connection to a set of ideas and values. There is no doubt that in both tone and content, the “formal” constitution emerged as a very “practical” document,⁽⁶⁷⁾ but to

(64) Nelson *et al.* (1977), p. 26.

(65) *Parliamentary Debates*, p. 862. Quoted in Nelson *et al.*, p. 27.

(66) Nelson *et al.* (1977), p. 29-30.

(67) W.L. Morton, *The Kingdom of Canada*, McClelland and Stewart, Toronto, 1968, p. 320.

infer from this that it formalized an expedient political compromise is to do it an injustice. The *B.N.A. Act* did not seek to advance any new principles or rights, but it did seek consciously to preserve the inherited rights and freedoms of a particular tradition and Macdonald showed a good understanding of the philosophical ideas which underlay that tradition.

REVISIONISM

The present condition of the Canadian nation is certainly not that envisioned by the founding Fathers. Their intention of providing for a strong central authority where the provinces would be subordinate to the national interest has not been realized. During one round of federal-provincial constitutional wrangling, the Premier of Newfoundland, Mr. Peckford, even went so far as to suggest that the real purpose of Confederation had been to set up a central government whose function was to provide for the interests of the provinces and to act at their behest! As well, Quebec has ceased to be a province with a few peculiarities and has come to define itself as a completely distinct entity deserving of special status. The contemporary situation is one in which “the balance of power between federal and provincial governments, which the Fathers believed should incline decisively toward the Dominion, has now fallen sharply towards the provinces.”⁽⁶⁸⁾ The federal authority is not the only one to have suffered a decline. The role of Parliament as a legislative decision and law-making body has also suffered shrinkage and come to be assumed by the executive, bureaucracy and federal provincial bargaining units.

The devolution of the central authority is now often attributed to the economic and social developments which took place subsequent to Confederation. As a result of these developments, it is argued, the intentions of the Fathers of Confederation have become largely irrelevant and their plan obsolete. Those who support this argument contend that the founders did not foresee the inevitable growth of the state with its attendant responsibilities. Thus, they did not envision “the tremendous expansion of education, or the coming of the welfare state, with its pensions, family allowances, medical care, and various forms of insurance.” Compounding this lack of foresight was the equally shortsighted assignment of natural resources to the provinces, which deprived the federal government of a potentially important source of

(68) Creighton (1972), p. 74.

revenue. The Fathers were further remiss in their “expectation that the great public improvements of the future would be federal enterprises such as transcontinental railways” rather than those areas of contemporary public enterprise such as schools, universities, roads and hospitals, which were assigned to the provinces. As a result, “the whole trend of modern development has placed more power and responsibility in the hands of the provinces, and this inevitably means such a large degree of decentralization as to make the centralist scheme of the Fathers seem obsolete.”⁽⁶⁹⁾

The second line of revisionism deals with the cultural aspect of the Confederation agreement. Here it is argued that Confederation was in fact a union, or agreement, “between two cultures or nations” rather than a union of provinces. Even though there is no substantial evidence to support this thesis in the pre-Confederation conferences and debates, so the argument goes, the agreement was of an extra-legal nature, “an unspoken moral commitment, which was meant to inform the whole union with its spirit.” As evidence, the “historical revisionists” point to the fact that the first “Conservative government gave legal status to the French language in Manitoba and the first Liberal government after Confederation did the same for the Northwest Territories.” The argument goes on to conclude that this unwritten agreement between the two cultures has not been adequately lived up to and that therefore “substantial amends must now be made.”⁽⁷⁰⁾

Creighton quarrels with these arguments not simply because he considers them historically inaccurate, but also because of the subtle attempts on the part of their protagonists to rewrite history to suit their objectives. As noted earlier, both history and the intentions of the founding Fathers stand as limitations in any attempt to alter fundamentally the provisions of Canadian federalism. Thus, any attempt to bring about significant changes can more easily succeed if it is accompanied by an interpretation of history which favours it. The argument presented for the natural devolution of the central authority claims that the founders were shortsighted in their provision for future contingencies and did not invest the federal government with enough authority to prevent decentralization. At the same time, too much responsibility was given to the provinces. As a consequence, the centralist thesis no longer holds and the provinces should therefore be granted those powers necessary to carry out their responsibilities

(69) *Ibid.*, p. 77.

(70) *Ibid.*, p. 77-78.

effectively. The cultural argument calls for a fundamental reconsideration and re-interpretation of the assumptions upon which Confederation was based. If the argument is that union was indeed a cultural compact, instead of merely the coming together of provinces, then the claims for special status for Quebec — one that would be more representative of the French fact in federal institutions, with the right to negotiate international treaties, etc. — take on a new light. Indeed, the argument can be taken so far as to claim that Quebec should be treated as an equal partner vis-à-vis the rest of Canada, despite its numerical inferiority.

According to Creighton, the argument of inevitable decentralization is not one that bears up well under scrutiny. Decentralization was not due to any lack of foresight on the part of the founding Fathers, nor was it the inevitable consequence of socio-economic evolution and change. The major factor which furthered and initiated the trend towards decentralization was human intervention.

... the Fathers did make ample provision by founding a strong central government which could have coped very effectively with modern social and economic problems. And the fact that it is not now capable of playing the role which the Fathers intended it to play is not the result simply of natural social evolution and economic change, but also, and more importantly, of arbitrary human intervention — of the decisions of the courts and the arrangements of politicians. The *British North American Act* ... has not often been formally amended, but its whole character has been drastically changed, and, indeed, almost exactly reversed, by the decisions of the courts, and particularly of the Judicial Committee of the Privy Council, which in effect has transferred residuary authority from the central government, where it was intended to lie, to the provinces, which were never meant to have it. There was nothing natural or inevitable about this at all; it might, it ought, to have happened the other way.⁽⁷¹⁾

Although the courts were responsible for initiating and furthering the process of decentralization, the politicians were not blameless. Whereas the courts transferred “powers and responsibilities” to the provinces, the politicians “continued and hastened” the process by transferring large sums of money. As Creighton again argues:

During the depression of the 1930s and 1940s, the Dominion government still maintained its dominating economic and financial control, but since then provincial pressures and federal concessions

(71) *Ibid.*, p. 79.

have altered this state of affairs, and with accelerating rapidity ... financial agreements between the provinces and the Dominion have steadily increased the provincial share of the Canadian tax dollar.⁽⁷²⁾

When confronted by historical fact, the assumptions of the two-nation theory fare no better than the theory of inevitable decentralization. According to Creighton, “the Manitoba Act of 1870, which gave provincial status, the French language, and sectarian schools to the first prairie province of Canada, was not at all the original intention of the Fathers of Confederation.” Rather, that intention had been expressed in an Act passed the previous year and little remembered by historians — the *Act for the Provisional Government of Ruperts Land*. This “gave the northwest the government of a territory, not of a province, and made no mention of language or schools.” The original plan had to be abandoned with the advent of the Riel Rebellion of 1869-70. As a result of the rebellion and its attendant problems, the institutions of Manitoba were set up prematurely.

It was Louis Riel, backed by five thousand Métis, the partial support of the Red River community, together with British pressure and Anglo-Canadian fears of American intervention in the north-west, which compelled the Fathers of Confederation to fix the institutions of Manitoba prematurely, before the true character of the province had declared itself.⁽⁷³⁾

The actions of the legislators were here motivated by considerations other than the desire to fulfill a bicultural agreement or understanding. Despite the provisions of the *Manitoba Act*, there was no subsequent concerted effort on the part of either party to provide for a bicultural West. The *North-West Territories Act* of 1875, “which first set up a territorial government for the prairies beyond Manitoba, made no mention whatever of language rights.” The 1877 amendment to the Act, “which gave the French language legal status in the territories, was proposed, not by the Liberal government of the day, but by a private member in the Senate.” The amendment was not welcomed by the then Minister of the Interior, David Mills, and was only grudgingly conceded to by the government in order that the revised bill be passed before the end of the session.⁽⁷⁴⁾

(72) *Ibid.*, p. 80.

(73) *Ibid.*, p. 80-81.

(74) *Ibid.*

The problematic character of Canadian federalism is one that will likely remain with us for some time. Even given patriation, provincial and federal claims will continue to clash, and competing social and political groups will attempt to rewrite history to suit their own purposes. It is during times of such fundamental questioning as we are now experiencing that Creighton's warning becomes particularly important. One must always try to ensure that the interpretive understanding of history is not confused with conscious distortion. Creighton rightly recognizes that if solutions to political problems are to be effective, they must be arrived at with a view to, and an understanding of, history.

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