

Book Review: Canada Challenged: The Viability of Confederation, by R. B. Buyers and Robert W. Reford (eds)

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Book Review

CANADA CHALLENGED: THE VIABILITY OF CONFEDERATION.
Edited by: R.B. BUYERS and ROBERT W. REFORD. Toronto: Canadian Institute of International Affairs. 1979. Pp. vii, 358.

Most Canadians are familiar with the well-worn adage that the Canadian federation is an anomaly—a union of ten provinces and two territories which defies both geography and political logic. Nevertheless, many would agree that history has woven together the strands of the country and sustained a distinct Canadian identity. But this historical attachment has been increasingly attenuated in recent years. The election of a political party committed to the separation of Québec has precipitated an identity crisis in Canada—a crisis which will not be eliminated cyclically as in the past, but which will persist and fester until the Canadian federation is renewed to the satisfaction of all Canadians, both French and English-speaking, or the union dissolves.

Against this background a strong impetus to constitutional reform has once more surfaced. But this time, Canadians are alarmed. They realize that the federal structure urgently requires change, and that Canada cannot afford to have the constitutional reform process frustrated again as occurred in 1971 with the abortive Victoria Charter. Consequently, since November, 1976 much constitutional literature has been published, and there have been many national unity commissions and committees.

It is within this context of intellectual and political hyperactivity that the Canadian Institute of International Affairs published in 1978 a collection of essays entitled *Canada Challenged: The Viability of Confederation*. The editors, R.B. Buyers and Robert W. Reford, have compiled contributions from respected constitutional experts, economists and political scientists that focus on an extremely important, though hitherto largely neglected, aspect of the current constitutional debate—jurisdictional change.

The essays are grouped into three parts which reflect three different though not mutually exclusive facets of the constitutional debate. The first part focusses on the political context; the second deals with the socio-cultural context; and the third concentrates on the more concrete, less esoteric economic context. All the contributors were asked to consider the merits and faults of greater centralization or decentralization of jurisdiction in respect of their topic and to recommend which trend they consider to be more desirable.

Implicit in the choice of this common theme is the assumption that, although alterations in federal institutions must more realistically reflect the heterogeneous regional and cultural interests in Canada, it is “the distribution of powers between the two levels of government, particularly federal involvement in areas of provincial jurisdiction, [that] has been a major cause of current difficulties.” The duality of legal sovereignty is an essential feature of our federal system and its constitutional formulation fundamentally influences the pattern of governmental development. There is widespread dissatisfaction

with this evolution. Therefore the distribution of jurisdiction must be accorded top priority in any comprehensive constitutional review, even at the expense of controversial, largely unattainable structural changes. For example, the provinces are unlikely to agree to institutional changes until the substance of the allocation of jurisdiction is decided upon, since the latter will ultimately and intimately affect the functions of those institutions.¹

Permissive and muddled judicial interpretation and a veritable explosion of uncoordinated intergovernmental arrangements have made it necessary to redefine this division of jurisdiction along more efficient, functional lines. Confusion over which level of government holds the primary responsibility for the regulation of various matters (for example, consumer protection, environmental protection and labour relations), and the consequent legal and administrative entanglement have had an adverse effect on federal-provincial relations and on individual Canadians who must pay the cost of this over-government and mismanagement.²

However, as the editors and contributors point out, the constitutional division of legislative authority that ultimately emerges must in addition achieve other goals that are as important as efficiency and "disentanglement." It must reflect a balanced compromise among the diverse interests of various groups. Pre-eminent among these groups is Québec, which has a special, collective interest in protecting its cultural identity within the federation. Tangible and intangible factors must be taken into account. Moreover, a new constitutional division of powers must be flexible and must attempt to capture the dynamic quality of federalism and accommodate the reality of a constantly shifting balance of power between the two levels of government.

The general conclusion arising from the collection of essays is that each level of government should retain its own exclusive sphere of jurisdiction as under *The British North America Act* so as to minimize costly regulatory duplication. Nevertheless, there must be a larger area of concurrent legislative authority with paramountcy allocated to the appropriate level depending on the relative degrees of national or local importance. Finally, efforts must be directed towards facilitating and formalizing coordination and federal-provincial consultation in areas of joint concern such as industrial strategy, agricultural development, communications, transportation and social policy. Clearly, only major surgery will be sufficient to ensure that the "viability of Canada will no longer remain a perennial question mark."³

In Part One, Murray Beck sets the tone of the book in his essay, "Over-

¹ The editors castigate the federal government for overemphasizing the importance of institutional reform in its *Constitutional Amendment Bill*—Bill C-60—simply because such change could be effected unilaterally and it seemed politically expedient so to proceed. One contributor, Murray Beck, similarly refers to Bill C-60 as an "ill-conceived mish-mash of proposals . . . at most peripheral to the major questions raised in the constitutional debate. . . ." Buyers and Reford, eds., *Canada Challenged: The Viability of Confederation* (Toronto: Canadian Institute of International Affairs, 1979) at 37.

² Richard Simeon has been largely responsible for the focus on "disentanglement." See, for example, Simeon, "Federal-Provincial Decision Making," in *Intergovernmental Relations* (Toronto: Ontario Economic Council, 1979) at 25, 26. See also, Trudeau, *A Time for Action: Toward the Renewal of the Canadian Federation* (Ottawa: Prime Minister's Office, 1978) at 19-20.

³ *Supra* note 1, at 11.

lapping and Divided Jurisdictions: The Nub of the Debate." He points out, albeit in a somewhat cursory manner, how the current degeneration in federal-provincial relations is largely a result of jurisdictional clashes. Although *The British North America Act* has proved in the past to be a flexible document, Canada has not been able to make the necessary pragmatic adjustments in the 1960s and 1970s.⁴ The recent softening of the federal position, for example with regard to immigration to Québec, is too little and too late, and, according to Beck, the major blame for this inactivity at the federal level falls on the shoulders of inflexible and insensitive federal politicians. The solution to the present crisis lies in a much greater accommodation of provincial demands in contentious areas such as the federal spending and taxing power, the communications media, mineral resources, social policy and "culture."

Edward McWhinney also argues that recent action by federal politicians is "too little, too late." He observes that many changes now advocated were "timely and relevant in the 1960s when special status and indeed associate state status was presented as a constitutional arrangement within confederation." McWhinney compares these suggested changes with the nascent impetus towards the so-called "new pluralism" which seeks explicitly to preserve heterogeneous cultural interests within a new constitutional structure. However, this movement is predicated on major political and societal compromises within the federation, and would entail an appreciation by English Canadians of the difference between English and French attitudes to Québec's demand for extensive constitutional reform. French Canadians believe that a written constitution must be a comprehensive, detailed document which minutely delineates the division of jurisdiction, leaving as little as possible to whimsical judicial interpretation⁵ and loose administrative arrangements.⁶ The constitution, in addition, must unequivocally guarantee Québec's special status as the guardian of the collective cultural destiny of French Canadians.

McWhinney concludes that there is "therapeutic value . . . in the act of general constitutional novation . . ." advocated by the Québécois and he contrasts the Anglo-Saxon approach to constitutional reform that emphasizes gradual, organic change.⁷ Indeed, he suggests that a constitutional assembly would be the ideal means of resolving such fundamental questions as the division of powers, the restructuring of federal institutions, the fiscal autonomy of the provinces and other such matters, but that such an assembly would only be useful after the provinces, including a post-referendum Québec, have reached their own consensus as to the future shape of Canada.⁸

⁴ In respect of judicial review, Beck argues that the Supreme Court of Canada has not made the accommodation that the harmonious working of the federal system requires. He specifically refers to the recent decision on cable television. However, one may take issue with this observation insofar as the problem lies not with the judiciary, but with *The British North America Act* itself.

⁵ In fact McWhinney himself argues that the Supreme Court of Canada should restrict the rules as to *locus standi* so as to avoid becoming embroiled in controversial constitutional *causes célèbres*.

⁶ See, for example, Daniel Johnson, *Egalité ou Indépendance* (Montréal: Editions Renaissance, 1965) at 73, where he states: "Au lieu d'une véritable constitution, nous avons un régime mouvant, qui est constamment en mutation et qui est le produit des accords formels ou tacites entre Ottawa et la majorité des provinces".

⁷ *Supra* note 1, at 52.

⁸ *Id.*

The final two essays in Part One deal with more discrete aspects of the political debate. Donald Storey discusses the merits of giving the provinces an entrenched role in the formulation of foreign policy in areas of provincial legislative concern, while retaining federal paramountcy. The next article by Michael D. Ornstein, H. Michael Stevenson and A. Paul M. Williams contains an interesting discussion of public perceptions of the future of Canada based on an analysis of the data from a national survey of 3,300 Canadians between June and July 1977. The subjects canvassed included Québec independence, the status of the French language in the public service and education and federal-provincial relations. Many of the results are not unexpected, especially with respect to support for provincial autonomy within Québec or for a special status for the French language in Québec. Nor is it particularly startling to discover that Canadians outside Québec feel that Québec has been given too much attention within confederation, whereas the Québécois feel Québec has generally been neglected.

The authors, however, make the interesting observation that the marked divergence of opinion between English Canadians and French Canadians is largely explained by the fact that English Canadians tend to view both the Québec problem and linguistic and cultural issues in terms of the protection of civil liberties—questions that are quite distinct from general political and economic problems of Canada as a whole. This attitude prevents the development in English Canada of a “coherent response to the Québec independentist sentiment.” As a result, public opinion on the future of Canada is often inaccurately reflected in the debates among the established elites of politicians, civil servants, businessmen and labour.⁹ Clearly, English Canadians must become more involved in the ongoing debate so as to ensure that crucial political decisions adequately mirror the views of individual Canadians.¹⁰

Part Two consists of four essays set in the socio-cultural context. The first two—“Government and Cultural Affairs, 1867-1977” by Robert Painchaud, and “Quebec’s Right to Develop In Its Own Way” by Pierre Patenaude—highlight the marked differences between the approaches of English and French Canadians to that amorphous subject, culture. Painchaud notes the concurrent and conflicting interests of the different levels of government—federal, provincial and municipal—in the encouragement of a sense of cultural heritage, as evidenced by an increasing number of governmental programs designed to achieve this end. Arriving at a consensus as to the best division of jurisdiction in this area will be a difficult task and it will be essential to resolve satisfactorily such crucial issues as special status for Québec and more mundane questions such as the value of having ten or more film censorship boards.

Pierre Patenaude directly examines the situation of Québec and firmly asserts the need for greater decentralization of legislative powers in areas of jurisdiction which impinge on the ability of Québec to direct the cultural des-

⁹ The authors note the divergence between public opinion and the prevailing attitudes of politicians, as revealed in their survey. For example, despite public political pronouncements to the contrary, there is widespread receptivity to the idea of an economic association being negotiated with an independent Québec. Also, the Ontario government’s adamant stand against making French an official language is not reflected in public attitudes.

¹⁰ The authors also remark on the lack of unanimity and the ignorance of issues among English Canadians. One-fifth of all those questioned were unprepared to voice an opinion on French language schooling.

tiny of its national minority.¹¹ This entails, among other things, increased provincial powers in respect of education including greater control of radio and telecommunications and universities. Consistent with this broadened jurisdiction, Québec must achieve fiscal independence, which will necessitate strict limitations on the federal spending power and the federal proclivity to preempt taxing room. Finally, provincial powers over immigration must be explicitly written into the formal constitutional document in view of the Québécois' healthy distrust of ad hoc federal-provincial administrative agreements.

The remaining two essays in Part Two deal with two areas of muddled jurisdiction where federal-provincial relations have deteriorated considerably due to overlapping and conflicting regulatory regimes. These are the areas of communications and income security and social services. "Communications" is a comprehensive term which, owing to rapid technological advance, now encompasses such diverse operations as radio and television broadcasting, cable, educational and pay television, as well as all aspects of telecommunications. The present division of legislative competence in this field is in a sorry state, given the anachronistic wording of *The British North America Act*. Nevertheless, Martha and Frederick Fletcher do an admirable job of outlining, in simple and comprehensible terms, the present distribution of authority with useful reference to recent judicial pronouncements of the Supreme Court of Canada. The authors also analyze incisively the proposed federal *Telecommunications Act*—Bill C-24. While praising the stated legislative objective of more harmonious federal-provincial coordination, they are critical of the emphasis on bilateral delegation agreements which ignore inter-provincial problems and fail, for example, to promote the goal of equality of access to broadcasting facilities for all regions in Canada.

Given the inevitable conflict in the priorities of different governments, as a result of which goals of economic efficiency, maximum competition and user pay compete with the public utility approach and the goal of maximizing availability of services, the authors conclude that the best solution to the regulatory overlap is a "combination of disentanglement and cross delegation with some aspects of concurrency." This would, for example, involve delegation agreements in respect of broadcasting in order to streamline the regulatory regime, but would require that such agreements be ratified by a federal-provincial conference. Program content in respect of both radio and television broadcasting and cable television should be regulated by a federal agency with provincial representation. Federal paramountcy should prevail in respect of broadcasting in order to guarantee access to cable systems for national broadcasting networks and to permit federal control of competition in the public interest. However, control over cable television program content could be concurrent with provincial paramountcy in respect of educational programming (broadly defined) and non-programming uses.¹²

In his discussion of Income Security and Social Services, Magnus Gun-

¹¹ The Québécois, according to Patenaude, constitute a *national* minority as opposed to a mere cultural minority, since they have the means to live fully within their own culture and create a society in their own image.

¹² The authors suggest for example, that standards for video games should be set by interprovincial agreement. The recent federal attempt to intrude on this area under the federal *Radio Act* was greatly resented by the provinces.

ther also makes some concrete and realistic proposals regarding the reallocation of jurisdiction in a new constitution. He recognizes the important federal role in setting and enforcing national standards for such schemes and in ensuring the portability of benefits which is so essential to maintaining the mobility of labour. However, it is equally clear that the provinces have their own individual perceptions of the requisite social priorities and have been justified in the past in criticizing insensitive and disruptive use of the federal spending power. Much of the tension has now been removed by a shift of federal policy in favour of unconditional block funding as embodied in the new *Federal-Provincial Fiscal Arrangements and Established Programmes Financing Act* of 1977. Gunther recommends that a new constitution seek "to retain a maximum degree of concurrence in the area and permit and facilitate coordinate arrangements provided national standards are met." Broadly speaking, this would enable a national perspective to be brought to bear on the matter while accommodating provincial socio-cultural goals and objectives.

In contrast to the more esoteric and elusive themes of Part Two, the essays in Part Three attempt to present the jurisdictional debate in economic terms. Grant Reuber makes some interesting observations on the desirable degree of decentralization of monetary, fiscal and debt management policies, all of which are firmly entrenched in federal hands under *The British North America Act*. Michael Treddenick bases a similar analysis of "Commercial Policy" on the fact that the federal government has jurisdiction over the instruments of commercial policy, namely, tariffs, import restrictions, exchange rate adjustments, and international trading arrangements. Both authors note that in recent years, the central government's role has diminished, mainly because of the increasing economic strength of the provinces. Both argue that the development of heavy industries based on provincially-owned resources, as well as the rising demand for provincial public services, with a concomitant need for increased provincial revenues, are responsible for this new-found provincial strength. Reuber discusses the evolution, within governmental circles, from the post-war Keynesian approach that emphasized central control of the economy and the discretionary use of monetary and fiscal policies to the monetarist theory that postulates control of the money supply as the key element in any economic strategy. To followers of the latter school of thought, increased provincial participation in stabilization policies and industrial strategy seems less forbidding.

Reuber considers many of the complex issues involved in any attempt at decentralization of jurisdiction over the management of the economy. Unfortunately, he is unable to elaborate on them more fully. He does suggest changes in the formulation of monetary policy. For example, he argues that the Bank of Canada should be urged to hold provincial securities in its portfolio in order to facilitate provincial access to credit. The central bank would also be given the power to control potentially destabilizing activity by the provinces in respect of their bond issues in the open market. Certainly the provinces would find it desirable to have an additional outlet (the central bank) for their bonds. But Reuber does not discuss the related question of whether the provinces would be willing to have the Bank of Canada sell provincial bonds at its discretion in order to manipulate interest rates. Similarly, would the provinces agree to adhere to prescribed schedules in marketing their bonds? Both measures could seriously compromise the present freedom

of the provinces to determine the most advantageous investment conditions for their bond issues, and it is unlikely that they would forego such flexibility, even if they were constitutionally guaranteed representation on the Board of Directors of the Bank of Canada.

Michael Treddenick discusses regional/national conflicts in the field of commercial policy. For instance, areas which have industries primarily producing for the Canadian market favour a configuration of policies different from that of areas where industries are producing for export or for local markets. Similarly, governmental priorities vary widely. Some emphasize economic efficiency; others emphasize the protection of employment. Treddenick traces the emergence of a "new mercantilism" in which the nation-state is emerging as the principal animator, displacing the traditional dominance of market competition. With this development, in combination with recent multilateral trading agreements, the focus of commercial policy is shifting to the manipulation of more selective controls such as export subsidies. Provinces have thereby been able, steadily and perceptibly, to increase their role in commercial policy formulation since, unlike the traditional commercial instruments, they do have jurisdiction to implement non-tariff barriers.

In general, both Reuber and Treddenick conclude that centralized policy formulation in respect of economic strategy is essential in order to preserve the valuable equalizing role played by the federal government and to "protect the Provinces from themselves." Massive decentralization of jurisdiction¹³ would result in "distintegrative fractionalization" and would create insuperable barriers to the mobility of goods, labour, technology and capital. However, constitutional reform can be useful in improving the atmosphere in which economic strategy is designed, and consequently, in improving the efficacy of macro-economic and commercial policies. It can ensure that provision is made for increased consultation and intergovernmental coordination on a regular basis, and for facilitating the introduction of mechanisms designed to avoid regulatory duplication.

The three remaining essays in Part Three deal with discrete subject matters. The essay on "Employment, Labour and Future Political Structures" by Robert Cox seems out of place. Nevertheless it is an interesting historical and sociological analysis of the labour movement in Canada and the ideological and political divergence between the movements in Québec and in English Canada.

Another essay deals with "Transportation Policy and National Unity." The authors, M.W. Westmacott and D.J. Phillips, note how, historically, national policies have aggravated regional discontent, and how, with the increasing economic autonomy of the provinces, it is essential to harmonize federal and provincial transportation policies. As in earlier essays, the recommended solution for jurisdictional harmony is legislative concurrence in respect of transportation policy and federal paramountcy, similar to section 95 of *The British North America Act*. In addition, there must be explicit provision for provincial contribution to the formulation of federal policy, whether

¹³ For example, if the provinces were permitted to establish tariffs, quotas and excise taxes.

at the ministerial or administrative agency level, as a further means of reconciling conflicting national and local interests.¹⁴

The final essay in Part Three is a discussion of "Energy Policy and The Future of Federalism." Its author, Ian McDougall, castigates the federal government and its agency, the National Energy Board, for failing to develop effective national controls over the exploitation of natural resources. Not surprisingly, he advocates considerably increased central control in the sphere of resource development in order to ensure that the welfare of all Canadians is served. This would necessitate, for example, the establishment of Federal Energy Marketing Boards which place "export producers on a utility-based reserve basis with all differentials between costs and export prices being centrally taxed and shared between producing provinces and the federal government." Despite its merits, such a proposal is unlikely to be negotiated and, as the editors later point out, it is perhaps more useful to acknowledge legislative concurrence in this area and concentrate instead on ensuring more federal-provincial cooperation and coordination.

Canada Challenged achieves its stated objective of bringing into focus the crucial issue of jurisdictional change and of emphasizing the importance of comprehensive constitutional reform as the only solution to our present crisis. At the moment, Canadians desperately need to develop a consensus as to what the future shape of the Canadian federation should be. In order to do so, they need a deeper understanding of the basic issues and a greater appreciation of the differing views and attitudes of other Canadians. The collection of essays in *Canada Challenged* reflects a balanced presentation of the constitutional debate. Within its relatively narrow limits, the book succinctly outlines the basic problems underlying the distribution of legislative authority and provides a useful framework for analysis of the conflicting interests involved. Those who read this book will find themselves considerably more informed on the issues and better able to participate in and contribute to a renewed federalism.

By DEBORAH COYNE*

¹⁴ The authors discuss the stormy history of the introduction of the *National Transportation Act*, S.C. 1967-68-69, c. 69, which established the Canadian Transport Commission and gave it broad regulatory as well as research and policy advisory functions, all with a minimum solicitation of provincial input.

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