Québec Confronts Canada
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The denouement of the Canadian drama may well unfold in the prosaic death struggle of a constitutional impasse. The British North America Act of 1867, which for all practical purposes is the Canadian constitution, has been a remarkably flexible instrument. The only older written constitution still in force is that of the United States. The B.N.A. Act has permitted wide fluctuations of power from an initial period of federal ascendancy to broad provincial autonomy in the late nineteenth century, and back to the almost unitary centralized state which emerged from World War II. In the early 1960s the pendulum swung partly back again, but this time the new dynamic aspect of French-Canadian nationalism threatens the very basis of the constitutional relationship on which the Confederation rests.

Although some of the most astute legal minds in Quebec insist that the current manifestation of political restiveness in their province can be accommodated without changing the B.N.A. Act, it seems increasingly doubtful that constitutional modification can be avoided. The question took on an air of urgency after World War II because Ottawa's incursions into wide areas formally under provincial jurisdiction aroused resistance not only in Quebec but in most of the English-speaking provinces as well. Subsequently the problem has re-emerged more clearly as a conflict between French and English Canada. So far, Ottawa has responded to Quebec's demands for broader autonomy by ad hoc solutions available to all the provinces. Eventually, however, Canada must deal with demands for more explicit recognition of rights peculiar to all French-speaking Canadians as a group.

When Canadian independence was formally acknowledged by the 1931 Statute of Westminster, no agreement on constitutional amendment was in sight and Ottawa side-stepped the issue by asking for a continuation of British parliamentary approval on any new modification in the B.N.A. Act. Since then, numerous efforts to "repatriate" the
Constitution have been fruitless, almost entirely because of Quebec's obsession with entrenching French language rights against possible future assaults.

As long as the "repatriation" issue hung on French Canada's defensive reflexes, immediacy appeared to be of little moment and the question drew slight attention outside academic circles. No real substantive issues seemed to be at stake, and the only noticeable pressure was that deriving from embarrassment over the hint of tutelage implicit in external ratification of constitutional amendments and its negative effect on the search for a Canadian "identity."

The new mood which has developed in Quebec in recent years puts the problem in a different perspective, however. French Canadians have long fretted under the limitations they felt the federal constitution placed on their status as first-class citizens. They suffered an essentially intolerable situation because they doubted their ability to change it. This is no longer their feeling; they are increasingly convinced they have the political strength to establish a new position for themselves in Canada regardless of how the B.N.A. Act has been interpreted in the past or may be in the future. Enough of the old defensive mentality remains, however, to make them want to ensure the permanency of the gains they anticipate. This is partly due to a Latin feel for a neat legal package, but it stems also from apprehension that the future may not fulfill its promise.

In such an atmosphere it is no longer simply a question of finding an acceptable amendment formula. It seems increasingly unlikely that Quebec will agree to "bring the constitution home" without some express guarantees for wider French-language rights. This attitude must eventually force the issue. It will oblige English-speaking Canadians to undertake a searching review of what their constitution is and what it means to their fellow citizens of different stock and region.

THE CONSTITUTION

The British North America Act of 1867 was a pragmatic solution to three practical problems. A political impasse had been developing in the Union of Upper and Lower Canada which had evolved from the abortive rebellion of 1837–38. In the legislative union with what is now Ontario, which had been imposed on Quebec in 1841, the day-to-day operation of the assembly depended on dual majorities—one in each language group. This had become almost impossible to achieve in the 1860s. Pressure from commercial interests for economic expansion was
an additional factor, giving increasing importance to the need to extend communication and transportation facilities to open up the West. No less pressing was fear of American expansion. This danger had been growing in the West before the Civil War in the United States began, and the uncertain state of Anglo-American relations in the war years made the threat seem increasingly imminent.

For Upper Canada and the English-speaking residents of Lower Canada, economic development and resistance to U.S. expansionism were paramount considerations. For the French Canadians, the overweening objective was to assure control of their own civil and social organization and guarantees that they would not be deprived of local autonomy later. The English elements preferred a highly centralized federation or even a legislative union. John A. Macdonald was particularly concerned over the divisive aspect of federation; the American Civil War was vivid in his mind. As large a degree of decentralization as possible was the aim of the French Canadians, however, as the only gauge of cultural independence, and Macdonald acquiesced, partly because the Maritimers were also reluctant to expose themselves too directly to domination by Upper Canada. Since Macdonald believed that the federal framework would be temporary, he considered it a small price for union.

The resultant compromise cites the British system as its model, but the combination of federalism and parliamentarism it embodies is actually closer to the American type of organization. Section 91 enumerates the powers of the federal parliament and Section 92 the exclusive rights of the provincial legislatures. These are largely straightforward and unambiguous, with the noteworthy major exception of the question of taxation, which has been one of the most serious sources of friction. Conflict stems from subsection 3 of Section 91, which gives the federal Parliament "The raising of Money by any Mode or System of Taxation," and subsection 2 of Section 92, which assures each province "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes." Section 93 is devoted to a clear delineation of provincial rights in education. Tacit recognition of Quebec's civil law is embodied in Section 94, which specifies the other provinces as those for which the federal Parliament may legislate on property and civil rights. The use of the French language in the federal Parliament and in Quebec is guaranteed by Section 133.

Several important provisions of the B.N.A. Act are in contrast to its American counterpart. Largely because of Macdonald's predilection for a unitary state and partly because of general concern over the constitutional background of the Civil War in the United States, residuary
powers are assigned by subsection of Section 92 to the federal government. The federal executive appoints the provincial lieutenant governors and all judges down to those assigned to county courts. Finally, the Crown has the right to disallow any provincial law within two years of promulgation.

Macdonald seems to have been confident that these provisions were sufficient to assure the rapid evolution of the new Confederation into the unitary state he favored, and indeed the preponderance of power was clearly in the hands of the federal government in the years immediately following inauguration of the new system. Questions of interpretation aside, an important reason for this state of affairs was the participation in the federal Parliament of the most prominent leaders of the several provinces. In any event, the national government made frequent use of the right of disallowance, changed financial provisions, and admitted new provinces without consulting the provincial governments.

The credit (or the blame) for tempering the federal government's dominant position goes to the Privy Council in London. Its Judicial Committee tended to give a restrictive interpretation to the opening clauses of Section 91 and denied full sovereignty to Parliament. In successive decisions it upheld the legislative rights of the provinces under the Constitution. Whether, as some antifederalists maintain, the spirit and force of the Constitution were drastically altered by Privy Council decisions, there seems to be little doubt that the trend was in accord with the desires of the population in general and with that of the provincial governments. In other words, the court's interpretation of where the power lay adjusted the Constitution to the political realities of the period, and the Confederation was spared the strains which might have resulted from a denial of provincial rights.

The refusal to accept a position of subordination in relation to Ottawa was more or less unofficially consecrated in 1887 when the premiers of the two major provinces arranged for a conference of provincial premiers. Their purpose was to propose limits to the powers of the federal government. They aimed specifically at limiting the right of disallowance of provincial legislation and at obtaining broader financial support for their governments. Though only local leaders whose party was in opposition in Ottawa attended this meeting, its enunciation of provincial rights was a popular theme. The federal government was at a disadvantage because it lacked wide support. It had been brought into existence as the result of the deliberations of a small group of political and business spokesmen whose meetings took place behind closed doors. It still seemed relatively remote, particularly at a time when economic
hardship tended to emphasize the long-term aspects of its national policies.

The Privy Council's liberal interpretations countered, therefore, in a crucial period of national development, the tendency toward centralization that all federations experience. Without such intervention, it is unlikely that provincial powers could have evolved as they did, and no expansion beyond currently recognized limits seems possible short of constitutional modification. Although the central government has benefited more than the provinces from the various amendments that have been made since 1867, the Constitution needs no such adjustment for an expansion of federal responsibilities. This is especially true in the light of developments in the past half-century. The two world wars and the rapid industrialization that accompanied them vastly increased the role of the central government. Ottawa bases its claim to dominance on three broad areas: national defense, economic stability, and social security. It has found constitutional sanction for wide exercise of power in these fields through its general authority to legislate and in its fiscal jurisdiction.

The fiscal question has been central to the federal-provincial problem in recent years. In view of the constitutional provisions according taxation in general to the federal government and direct taxation for provincial uses to the provinces, both levels of government can make use of direct levies. In times of national emergency the prior claims of the national government are hard to gainsay. Friction has developed because Ottawa has been loath to relinquish this privilege after hostilities ceased and because it has been increasingly interested in spending for purposes that are unquestionably within the constitutional prerogatives of the provinces. Defenders of provincial rights argue that federation is meaningless unless both levels of government are protected against encroachment from each other in fiscal matters. If the federal government gains the upper hand in the tax field, political equilibrium is broken, they maintain, and legislative union becomes inevitable. They insist that federalism's only safeguard is to restrict fiscal authority to the legislative powers attributed to each level of the government. A constitutional amendment would be necessary to put the point beyond dispute.

The centralists object that fiscal policy in a modern context plays a double role. Although the provinces think only in terms of a source of revenue, the national government must also look on fiscal matters with an eye to economic control. The federal government argues that it must retain both direct and indirect tax powers if it is to do its job in maintaining economic stability.
Two exhaustive official studies, one on the federal the other on the provincial level, have sought solutions to this problem. The first, the Rowell-Sirois Report, was published in 1940 by a federal commission created in 1937 to study the constitutional and financial relations between the federal and the provincial governments.

Though the Rowell-Sirois Report laid great stress on the importance of provincial autonomy for the continued health of the Confederation, it recommended the transfer of specific provincial responsibilities to the federal authorities and the sharing of functions the Constitution allotted to the provinces. In an effort to find ways for the federal government to combat the depression, it recommended that exclusive powers of direct taxation be given to Ottawa. The more prosperous provinces blocked discussion of the Rowell-Sirois Report, but the wartime situation gave the federal government essentially the same tax rights the commission had proposed.

The Tremblay Report, published by a Quebec provincial commission in 1957, is a strong defense of provincial autonomy. Emphasizing the prime requirement for the federal system to provide a framework for two different cultural entities to live together on the same territory, it rejected technical efficiency as an acceptable alternative. Quebec leaders subscribe wholeheartedly to this thesis.

THE AMENDMENT HASSLE

The increasing reliance on the state in various fields has tended to sharpen the divergent views French- and English-speaking Canadians hold on their constitutional relationship. French Canadians are inclined to fear that their partners are too ready to see in the Constitution merely a law of the imperial Parliament. As such, it could presumably be changed by a parliamentary majority. This apprehension has led them to stress the "sacred" aspect of the written constitutional instrument.

The Tremblay Report emphasizes the tripartite process by which the British Parliament ratified a "compact" between the provinces, which was essentially an accord between the two national groups. The pact-between-provinces concept has a long history, although English-speaking Canadians counter it by pointing out that nowhere in the texts themselves is there any specific reference to substantiate such an interpretation.

Particularly since 1931, when the Statute of Westminster formally confirmed Canadian independence, English Canadians have taken on an increasingly critical attitude toward the compact theory. The Trem-
blay Report sees in this development a deliberate effort to pave the way for a constitutional-amendment procedure which would leave no safeguards for the French language and culture in Canada. If the compact theory is admitted, then the federal government cannot ask the British Parliament to amend the Constitution without the assent of the provinces. The Tremblay Report charged that English Canadians sought to undermine the basis for such a practice. An informal process of consultation with provincial governments has long been the normal procedure where provincial interests are clearly involved.

In recent years French Canadians have developed at great length the biethnic aspect of the compact theory. They argue that the basis for any real accord henceforth must be acceptance of the idea that the Confederation is a marriage of two cultural groups with equal rights. They maintain that the spirit of the B.N.A. Act can be perceived in the document as a whole rather than in a legalistic search for the scope of its separate provisions.

French Canada is no longer content, however, to look to the intentions of the fathers of confederation in an effort to resolve today’s disputes. There is a new attitude which increases pressure for early modification of the Constitution and at the same time enhances the difficulty by demanding sweeping changes. Laymen tend to discount the dimensions of the problem. They are also much more amenable than the lawyer to the appeal of a totally new constitution. Welfare Minister René Lévesque, the “conscience” of the Lesage cabinet, for example, and André Laurendeau, editor of the influential Montreal daily *Le Devoir*, consider it a matter of complete indifference whether the B.N.A. Act is “repatriated” or not. What they want is a new understanding that takes into account today’s realities in Canada.

To the legal specialists, however, such impatience is naïve and could be disastrous. They point out that earlier proposals for fundamental revision got nowhere and insist that it is utopian to hope to achieve a definitive answer to the division of powers. They argue against any attempt at total revision, maintaining that federalism must be continuously made over as the functions of the state change.

Lawyers cite the forty-year deadlock over efforts to find an acceptable amendment procedure and urge faith in the pragmatic adaptation of the Constitution to new conditions. English-Canadian legal specialists in particular assert that the B.N.A. Act has worked fairly well. Edward McWhinney, University of Toronto law professor, believes that the spirit of change inherent in the common law has assured adaptation without major rewriting in the 100-year life of the Confederation. He
points out that indirect change has gone on right along through judicial interpretation and executive and administrative practice. Most recently, federal-provincial conferences and confidential discussions between dominion prime ministers and various provincial spokesmen have added a new dimension. McWhinney urges patience, arguing that things seem to be working out slowly. He feels that formal statements in the Constitution may be forthcoming with time, but fears that demands for them now can only serve to rile English Canadians.¹

This view is not rejected out of hand by political leaders or legal experts in Quebec. Ex-Premier Lesage is formally on the record in favor of a “special status” for Quebec in the Confederation, but he insists that this is being achieved by applying laws long on the books but never really applied in the past. If the provinces avail themselves of the powers the Constitution gives them, he argues, it will be possible for the various parts of Canada to develop as they wish.² Professor Pierre Elliott Trudeau has long maintained that French Canada can fully satisfy its demands for self-expression and development in the framework of the present constitution. He warns, however, that the remarkable stability of the Canadian consensus has been due in the past to Quebec’s inability to do anything about it.³ This no longer holds.

The dilemma posed by constitutional reform is apparent from a review of the series of efforts Canada has made since the mid-1920s to achieve the status of a completely independent state with full possession of its national charter. Technically, the problem had been merely to eliminate the practice of making a formal request to London to amend the B.N.A. Act.

The Act of 1867 made no provision for amendment, and recourse to further acts of the British Parliament has been necessary for important changes, particularly in the distribution of legislative power. Since 1868, twenty-one such acts have been forthcoming from London, in addition to three Orders in Council which adapted the provisions of the B.N.A. Act to new provinces. Various procedures have been resorted to, but since 1915 the practice has been to submit a draft bill which the British Parliament enacts without modification.

The simple solution to the "repatriation" problem would be to make the B.N.A. Act a Canadian law and then argue about amendment, but such a suggestion always ran head on into Quebec's fears about its minority position. The French Canadians have traditionally been in a paradoxical position on this question. They have constantly striven for the fullest degree of Canadian autonomy, but they have been unwilling to abandon any external safeguard against possible encroachments by the central government on the rights of provinces or minorities. Provin­cial apprehensions about the possibility of federal intrusion into the jurisdiction of provincial legislatures led Canada to maintain the anom­alous provision for British concurrence in Canada's constitutional amend­ments when the Statute of Westminster, in 1931, in effect recognized Canadian independence.

Parliament has frequently devoted time to the amendment question, and since 1926 seven federal-provincial conferences have undertaken to find agreement on a way to amend the B.N.A. Act without going through the formality of seeking the legal sanction of the British House of Commons. For most of the period of negotiations the Quebec government maintained a defensive attitude. It feared that the transfer of the amending power would permit a majority of the provinces to modify the constitutional balance to the detriment of the one province with a French-speaking majority. The emphasis on centralization after the war gave some substance to these fears, because federal interest in social legislation brought Ottawa more and more into fields the Consti­tution clearly assigned to provincial jurisdiction.

As the result of four major conferences between the federal govern­ment and the provinces from 1935 to 1964, however, the main areas of concern were delineated and a compromise seemed in prospect. Under the Fulton-Favreau formula—after the two ministers of justice responsible for its elaboration—the eleven governments were asked to accept an agreement which specified a complicated amendment procedure with varied steps depending on the content or scope of the proposed amend­ments. The consent of all the provincial legislatures was to be required for any change proposing to alter their powers to make laws, or to modify the use of either the English or French language, or to disturb educational rights. On other issues where all the provinces would be involved, two-thirds of the provincial legislatures representing at least half of the Canadian people would have to concur. Amendments affect­ing one or more but not all provinces were to be subject to approval by the legislatures of the provinces concerned. In each instance, concurrence of the federal Parliament would be required. An innovation with
wide implications provided for the delegation of powers in certain specified areas from federal to provincial legislative jurisdiction, and vice versa.

The ten provincial premiers and Prime Minister Pearson agreed on October 14, 1964, to back the Fulton-Favreau formula. Partly as a result of Premier Lesage's announced intention to seek the concurrence of the Quebec legislature, the other provinces quickly approved the proposed compromise, and Ottawa awaited action by Quebec before seeking parliamentary approval. Strong opposition became apparent in Quebec almost immediately, however, and Lesage was obliged to reverse himself. On January 28, 1966, he wrote Pearson that Quebec had decided to postpone indefinitely consideration of the formula, citing contradictory interpretations of the extension-of-powers clause, the different opinions in Canada on how the country should evolve, and the prospective reports of the Bilingualism and Biculturalism Commission, of Quebec's Special Commission on the Constitution, and of the Quebec Tax Structure Commission. Since any of these reasons could have been cited over a year earlier when he had agreed to seek support for the Fulton-Favreau proposal, there was little doubt that the real reasons for his about-face lay elsewhere.

It is true that some expression of misgivings had been forthcoming from the English-speaking provinces, where second thoughts had resulted from a deeper exploration of the rigidities apparent in the Fulton-Favreau formula. Many commentators in English-speaking Canada had objected that the requirement for the concurrence of all provincial legislatures ensured the right of veto to a single province. This merely gave legal sanction to accepted practice, however, since it had long been a political if not a constitutional necessity for the federal government to consult the provinces on proposed changes which concerned their jurisdiction. There was, nevertheless, an element of rigidity in the innovation which would require full debate in the provincial legislatures, whereas the current arrangement has permitted informal consultation with the provincial premiers.

But even as they were being formulated, such objections were beside the mark. They failed to take into account, as Lesage himself had realized after initially agreeing to back the Fulton-Favreau proposal, that the new mentality in Quebec was on the offensive in constitutional as well as in other fields.

Lesage's change of heart was based on the new situation in Quebec, where constitutional concern is no longer centered on defending the status quo. Instead of its earlier preoccupation with preserving minority
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rights, the province is now reaching out for new areas of jurisdiction. It is in no mood to accept what Jacques-Yvan Morin characterized as a formula of constitutional mummification aimed at blocking any evolution unfavorable to centralization. He and other proponents of a high degree of provincial autonomy agree that attempts to freeze the present constitutional system would doom any move for a special status for Quebec. The delegation-of-powers clause drew their heaviest fire because it would prohibit a province from acting alone. Even with the accord of four provinces, they point out, parliamentary approval would be necessary before any proposed change in legislative jurisdiction could be effected. In their view, therefore, the reciprocal delegation of legislative authority between the national Parliament and the provincial legislatures was only a one-way street toward legislative union.

The Fulton-Favreau formula was both too simple and too complex. The extremely involved set of rules it proposed for meeting various amendment contingencies was a gimmick made necessary by the failure to come to grips with the basic problem—the need for a real adaptation of the Constitution to current needs. It is probably unfair to charge, in retrospect, that it was naïve to attempt a solution of the amendment problem without facing up to the growing estrangement of the two main national elements. To the degree that the rapid evolution of Quebec’s thinking on the confederal relationship was taken into account in the last round of negotiations, it served to make the proposal more palatable to English Canada by assuring Ottawa control over any change. Lesage's withdrawal of support, however, showed how illusory was any hope that the Constitution could be frozen in the status quo before French Canada could get up steam to press for broad change. Now there is no doubt that the new dynamism in Quebec threatens to upset the existing constitutional equilibrium.

SCOPE OF CHANGE

Within the relatively small part of the Canadian population which concerns itself with the question of constitutional change, there is a wide range of opinion—from those who see no need for any modification to those who would scrap the present document and start afresh. There is no simple classification to characterize these various views. Those who resist any change in the B.N.A. Act are by no means standpatters. For example, Pierre Elliott Trudeau and Frank R. Scott, two top-notch Montreal law professors sympathetic to French-Canadian aspirations, believe that the present constitutional framework is ade-
quate to any new interpretations required to satisfy them. Federal Minister of Mines Jean-Luc Pépin considers constitutional reform a useless exercise. He reasons that a written constitution can never really keep in step with changing requirements, so it is better simply to depend on a constitution flexible enough to meet new situations. Many lawyers and legal experts would be content with a few judicious wordings here and there, or at most the elaboration of a bill of rights including collective guarantees which would give education in the French language status in any province.

Some of the most extensive current proposals for rewriting the Constitution are tangential to the French-English confrontation or have failed to allow sufficient flexibility to accommodate it. Peter J. T. O'Hearn, a law professor from the Maritimes, presents an excellent theoretical study in his *Peace, Order and Good Government: A new Constitution for Canada*. In practical terms, however, it would face tremendous hurdles and it is doubtful whether many of his specific proposals would be acceptable, particularly such clauses as the limitation on divorce. His proposals fall considerably short of Quebec's demands for provincial autonomy.

Similarly, *Ten for one*, the joint effort of Marcel Faribault, a French-Canadian business tycoon with a legal background, and Robert M. Fowler, an English-speaking Montrealer with comparable training and experience, proposes a total revision little different in its essentials from the current constitution. They profess to present a clear delineation of powers attributed to each level of government, but on fiscal matters they would make a broad tax field available to both national and provincial governments so that constant consultation would be required according to the needs of the moment. Here again it is questionable whether sufficient recognition is given to Quebec's ambitions, and the very flexible fiscal arrangements proposed are unlikely to satisfy the French-Canadian's Latin instinct for orderly arrangements.

Much more drastic changes are envisaged in some of the sweeping proposals put forward by French-Canadian nationalists. The present constitutional relationship of the Canadian provinces to Ottawa would be altered profoundly by some of the submissions to the Quebec legislature's Committee on the Constitution. This body, composed of members of the Quebec lower house, was assigned in 1963 an exhaustive study of the relationship between Quebec and the central government. It is expected to assess the effect of the federal-provincial relationship on the preservation and exercise of the rights which Quebec should enjoy.
It is obliged to define and suggest the instruments and the judicial, economic, and social means which should make up the constitutional system that Quebec needs to ensure the development of the French-Canadian community. Its findings will probably be more far-reaching than either the Rowell-Sirois or Tremblay reports because of the dynamics of the situation and the scope of the assignment.

The constitutional reform issue can no longer be viewed as only a question of French-language rights in Quebec and the rest of Canada. The gamut of disputed jurisdictions now covers a wide range of political, economic, social, and cultural areas. Any solution must take into account both provincial autonomy and the problem of biculturalism on a national scale. These may not be reconcilable.

Although many of the areas in dispute are presented in terms of their social or cultural impact, on a practical basis the problem must be faced on the fiscal level. Quebec and Ottawa have been at odds for years on the distribution of tax revenues, particularly direct taxation. This has specific bearing on grants to the universities and loans to students as well as on the whole panoply of social security and welfare: health, retirement pensions, family allowances, social pensions, and jurisdiction over Indians and Eskimos. Radio and television are similarly in question. On more strictly economic matters, not only the development of natural resources but labor, transportation, communications, and especially finances are at stake when provincial spokesmen speak of a full role in economic planning. Political points at issue include the need for a special constitutional tribunal, a change in the nomination and status of senators, and an international role for Quebec.

In many of these fields the provinces now have substantial or preponderant authority. These areas have been subject to various inroads from the national government, however, particularly in the postwar era. Where hitherto undisputed federal prerogatives are in question, the impetus comes from the extension of nationalist doctrines which automatically envisage all problems in a Quebec-first ambience.

Largely because there is little agreement about what powers should be assigned to each level of government, there is a wide range of opinion on the eventual form the Confederation should take. In recent years "cooperative federalism" has been the central government's panacea for Confederation ailments. It has been variously described as the system the Pearson government has been implementing and as the goal for a lasting accord between the provinces and the two major language groups.
The concept of co-operative federalism is linked to the Pearson regime, although both major parties have taken steps in recent years to make working relationships with the provinces less haphazard than had been the practice. The conference of provincial premiers was initiated in 1960. This was a clear advance, from the provincial point of view, over the previous individual meetings in which each premier had little choice but to accept the package deal the federal government offered him.

The need for more systematized federal-provincial relations had been recognized for some time. While Maurice Lamontagne, former secretary of state of Canada in the Pearson cabinet, was a professor in Laval’s social science faculty, he had strongly advocated a co-ordinating committee and a permanent secretariat as the basis for a true federal organism to resolve intergovernmental problems. The formal organization he envisaged has not materialized, but the more frequent co-ordination of policy has become an accepted procedure.

The essence of co-operative federalism is close contact between ministers and civil servants of both levels of government. In frequent meetings common problems are discussed. Consultation is encouraged with an eye to co-ordinated action.

One of its most enthusiastic defenders, federal mines minister Jean-Luc Pépin, characterizes co-operative federalism as constitutional pragmatism. It is illusory, he says, to expect the Constitution to cover all circumstances; the broad distinction between general and particular interests has never really been valid. The aim should be to achieve the joint participation of all the governments in the principal functions of the state. Each level of government nominally retains separate jurisdiction over different aspects of the same subject, but the distinctions disappear as close co-ordination of policy is attained. The criterion is aptitude: jurisdiction is determined by what each order of government is best equipped to do in principle, but also in accord with the needs of the moment. Specialization is decided on the basis of competence, with the best-qualified government assuming responsibility regardless of any additional requirement except the agreement of the two nationalities. Proponents of co-operative federalism insist that it is essentially decentralizing. They maintain that priority to the provincial governments is assured as independence develops. Provincial officials participate in the determination of policies which are made possible through federal largesse, and provincial agencies carry them out.
However attractive this picture may be in theory, it embodies several major weaknesses. It is vulnerable to attack both from watchdogs of democratic prerogatives and from French-Canadian autonomists.

Opponents charge that neither the federal Parliament nor the provincial legislatures are given an adequate role under this system. In closed sessions with a few dozen subordinates, the prime minister and the provincial premiers reach decisions on major matters of mixed jurisdiction. The premiers then seek legislative approval, but at both levels the legislators are called upon merely to ratify, with a minimum of change, bills which in effect have already been approved. In an effort to mend this defect, a Saskatchewan political scientist, Professor Norman Ward, recommends a ministry of federal-provincial affairs in Ottawa. This would bring problems on to the floor of the House of Commons on a continuing basis and abolish the need for federal-provincial conferences, which tend to be executive rather than democratic meetings. It could be a practical way of exchanging views on a wide variety of policies. An interesting historical footnote is that a secretariat of state for provincial affairs was abolished in 1873, during the initial era of federal ascendancy.

French-Canadian nationalists' apprehensions about co-operative federalism center on the blurring of jurisdictional lines implicit in an ad hoc appreciation of legislative or administrative competence. They charge that the clear distinction in the domains of the provincial and federal governments is lost as co-operation in the exercise of all powers advances. This, they hold, is a direct threat to provincial autonomy and a giant step toward a unitary state. Co-operative federalism, they say, is a myth. Its basic orientation toward centralized control is exemplified by the continuing intrusion of federal power into areas the Constitution allots to the provinces. Otherwise, Ottawa would have no direct concern with education, regional economic agencies, or any of the various social security programs it promotes. These are areas which now have financial needs far beyond anything envisaged by the fathers of confederation. By attempting to meet these demands the federal government is resorting to political solutions to fill the judicial gaps in the Constitution. The philosophy of co-operative federalism minimizes the importance of a written constitution and its guarantees. The danger for Quebec in such a situation, the nationalists argue, is that fundamental rights are left at the mercy of governments and politicians whose successors may feel free of all restraint where the minorities' constitutional rights are concerned.

In the long run, the aspect of co-operative federalism which may have the most serious constitutional impact is the government's espousal of
biculturalism. Moderate elements in French Canada and sympathetic opinion among English-speaking Canadians look to an expansion of French-language rights as the answer to most of Canada’s ethnic antagonisms. There is growing willingness in English Canada to make some accommodation on language rights for French-speaking Canadians, particularly if not to do so threatens the constitutional status quo. To some degree the concept of cultural dualism has tended to mislead English Canadians who hope that minor concessions on the use of French in the federal service will satisfy Quebec’s desires without constitutional revision.

There has been a definite record of accomplishment in extending French-language rights in recent years, but there is still a wide gap to be closed, especially because Quebec’s appetite has been whetted. The expansion of radio and limited television facilities in the West and in the Maritime Provinces has met with little opposition. There is general agreement among thoughtful English-speaking Canadians that claims for bilingualism in the federal civil service and in military service are justified, and the Pearson government has taken a number of definite steps to improve the situation in that regard. The right of French Canadians to the use of their own language in all courts and in the various provincial legislatures would begin to present constitutional problems, however, and the question of French-language public schools still arouses emotional opposition in many parts of English-speaking Canada. Some English-Canadian apostles of good will, who believe such steps necessary, would also go so far as to propose establishment of a bilingual federal district embracing Ottawa and Hull. The last of these proposals could probably be satisfied by a compromise solution permitting Ontario and Quebec to co-ordinate regional administration without surrendering control over provincial territory. The remaining changes will be necessary if substance is to be given to the demands for fundamental equality of the two cultures, which moderate elements in Quebec are putting forward today.

The problem is further complicated by the concomitant Quebec demand for a “special status” within the Confederation. English-Canadian apprehensions in this regard are beginning to find expression over the “opting-out” issue. The anomalous position caused by Quebec’s refusal to participate in a number of federally sponsored joint programs, largely in socioeconomic areas, is causing worry and resentment in the other provinces. The fact that this situation is developing because the other provinces are relinquishing their constitutional prerogatives and Quebec is well within its constitutional rights in opting for separate
programs does little to mollify English-Canadian opinion. There is an inclina­tion to attribute the Quebec situation to an unfathomable perversity which should not be encouraged.

Academicians on both sides of the language barrier have long been intrigued by this problem, of course, and their proposals range from the usual admonitions against boat-rocking to a wildly radical suggestion to abolish the provincial governments and establish bilingualism across Canada. A thoughtful proponent of caution, Toronto law professor Edward McWhinney, suggests that, since the war, what he calls dualistic federalism has been developing in Canada. He argues that on issues of political, social, and economic policy, decision-making comes close to a condition of concurrent English-speaking and French-speaking majorities. French Canadians would have some difficulty in seeing the compromise McWhinney cites on the World War II conscription issue or a double majority on the constitutional-amendment stalemate. In any event, he maintains that a quiet constitutional revolution is in progress, and biculturalism is already part of constitutional "law-in-action" in Canada. He urges patience and the weight of developing custom, warning that early insistence on formal constitutional amendment may only elicit defensive black-and-white public positions which postpone the inevitable reconciliation of conflicting interests.4

Although nationalist elements in Quebec will react with impatient scorn to such appeals for more time, most French-Canadian spokesmen would be less likely to accept out of hand an audacious proposal by Laurier L. La Pierre of McGill’s French-Canadian Studies Program. His ideal solution would be a legislative union. He would base a new constitution on the equality of the two cultural traditions and require the principle of the double majority on any issue which might affect the use of French or English in any part of the country or alter the relationship between the two cultures. It would be difficult enough to win English-Canadian acquiescence to the equality of the two cultures or to overcome the objections of legislative experts who are fond of citing the woes of double-majority governments under the preconfederation Union. For French Canadians this would seem a foolhardy venture, because it would deprive them of their fortress Quebec and put their cultural existence at the mercy of the English-speaking majority—the one guarantee confederation assured them.

There is widespread suspicion in Quebec nationalist ranks about any bicultural program. Extremists see bilingualism as a trap; they fear

French Canada will be swamped in an English-speaking sea. They decry any talk of guarantees through constitutional changes alone, arguing that French Canadians must be themselves the guarantors of their collective rights. There is, however, strong support in Quebec for biculturalism and bilingualism in a slightly modified political framework, with a “special status” for Quebec.

**SPECIAL STATUS**

It is a commonplace in Quebec that the province is “not like the others.” Though practically every Quebecker will defend this belief, it has almost as many gradations of meaning as there are French Canadians in Canada. For many, the phrase amounts to no more than a recognition of the cultural uniqueness of the French-speaking province. Increasingly, however, it implies the idea of a particular political capacity beyond the desire, if not the potential, of any other province in the Confederation. This is preponderantly the thought conveyed in growing demands for a “special status” for Quebec. Although it is certainly true that some of the most enthusiastic proponents of a “special status” envisage a “State of Quebec” capable of opting for complete independence, it is probably unjust to blanket in this category all who defend the concept of a unique political framework more suitable to the French-speaking province than to any other.

This is an increasingly touchy political question, however, and it is understandable that Quebec officials who insist on a “special status” for the province do so in general terms and reject the possibility of a rigid timetable for attaining their objections. Although detailed proposals of what a “special status” for Quebec would involve have been fairly widely publicized, Quebec government spokesmen have been cautious about identifying themselves with any specific blueprints. When Jean Lesage was premier, he exemplified this attitude in the combination of firm resolve and almost complete imprecision of detail which characterized his public utterances.

Lesage missed no opportunity to proclaim that the people of Quebec want a special status in the Confederation. He has stated that he is convinced Quebec is heading more and more toward a new political framework which will take into account both the characteristics of its people and the more extensive role they want to give their government. Almost in the same breath, however, he professed to see this role devolving on Quebec less as a result of its own initiative than as the consequence of the centralizing tendencies of the other provinces. Be-
cause Quebec is unwilling to relinquish to Ottawa the jurisdiction the Constitution reserves to the provinces in a number of social and economic fields, its position in the Confederation is increasingly unique. Lesage rebutted demands for more explicit statements by questioning whether anyone can say exactly what the eventual constitutional relationship of Quebec to the rest of the country will be. He stressed, however, that he expected a new constitution would be required to take account of the changed political situation he envisaged.5

Lesage insisted that Quebec seeks only to exercise to the fullest the rights granted it by the Constitution, and on such grounds he did not hesitate to take positions at variance with Ottawa’s. In his exposition of government policy at the beginning of the 1966 legislative session, he directly challenged Prime Minister Pearson’s interpretation of federal responsibility in economic and fiscal matters.6 He said Quebec must administer, without intervention by Ottawa, all its own social programs, and to that end it must control the necessary economic and financial means. He has made similar claims of complete responsibility in the exploitation of the province’s natural resources without federal intervention. He was on firm ground here, as far as the Constitution is concerned, although such ideas run head-on into practices widely accepted for many years.

He was not overly concerned, however, about straying verbally beyond the strict limits of the Constitution. The thought that the present constitution is too restrictive is implicit in some of his statements which deal specifically with extraprovincial matters. On his speaking tour of the Western provinces in the fall of 1965 he said that Quebec is not only a province in the Confederation, but also the fatherland of a whole people.7 He clearly considered himself a spokesman of all French Canada when he said in November, 1965, that a renewed confederation should guarantee the French-speaking minorities the same rights the English-speaking minority enjoys in Quebec.

The attitude of the Lesage government reflected the view that sooner or later Quebec must seek a juridical basis for the special relationship it will maintain with the rest of Canada. In the meantime neither the Lesage nor the Johnson regime exhibited much of the sense of urgency more insistently nationalist elements manifest. Whether under Liberal or Union Nationale leadership, the provincial government proceeds on

the assumption that for all practical purposes Quebec already has a special status in the Confederation. Despite Ottawa's attempts to make it look as though equality among the provinces is preserved, everybody is highly conscious of the differences. Quebec's language, culture, education, civil law, financial institutions, professional associations, press and broadcasting organs, and, increasingly, its welfare regime set it apart from the other provinces. The provincial government has been less concerned about the form than about the substance. It takes the position that as long as Quebec's demands are being satisfied there is no need to hurry to formalize the situation. Lesage cautioned the legislature in February, 1966, that in the final analysis the constitution of a country is determined by the facts, and not vice versa. He feels that a position of strength is being established which will be its own argument when the time for legal justification arrives. His hope is that by the repetition of precedents Quebec can create a new situation which will assure it special status.

The theoretical possibility of granting Quebec a special position within the Confederation is admitted by leading Canadian legal specialists. Frank R. Scott, former dean of McGill Law School, for example, sees no contradiction between the idea of a special status for one province and the federal concept. He thinks there is room for many adjustments. Edward McWhinney grants that it is not unique for one constituent unit within a federation or plural legal system to receive special legal status. He points out, however, that the Central European precedents are hardly promising.

Although Jean Beetz, professor of constitutional law at the University of Montreal, does not consider realization of a special status for Quebec an insurmountable difficulty, he is pessimistic over the possibility that Quebec could maintain a distinctive place in the Confederation indefinitely. Citing the normal tendency of federations to concentrate power in central institutions, he raises the strong possibility that federations have no choice but gradual centralization or dissolution. He points out that none of the changes the Canadian Constitution has undergone since 1867 have enhanced the power of the provinces. Moreover, he believes, the B.N.A. Act gives wide leeway to the expansion of federal competence through judicial interpretation without recourse to

amendment, whereas the provinces have little hope of extending their jurisdiction without constitutional change.\(^\text{10}\)

The dearth of viable precedents for a loose confederal system throws the burden of proof on those who press for a new constitutional regime in which Quebec would enjoy prerogatives not open to the other provinces. By rejecting both Canada's federal past and the bicultural promise of co-operative federalism, they are faced with the alternative Beetz propounds. Some frankly acknowledge that they are advocating a halfway house to independence. Others insist that they are not separatists and deny that precedent automatically makes failure inevitable.

Among the proponents of a special status, those who have attempted a systematic presentation of their proposals for formal constitutional change go appreciably beyond the vague adjustments Quebec official spokesmen profess to prefer. A fairly elaborate chart for a new constitutional framework has been worked out by Maurice Allard, a law professor at the University of Sherbrooke and Member of the House of Commons. He proposes what he characterizes as a positive and bicultural federalism with a special status for Quebec. He puts forth a list of principles which would determine relationship between Ottawa, the provinces, Quebec, and French Canada. They include governmental equality between Ottawa and the individual provinces, a clear delineation of powers and tax bases according to need and priorities, and constitutional primacy over parliamentary and administrative precedents.

Among the constitutional reforms he proposes are to abolish the federal government's right to disallow or reverse legislation; to assign residuary powers to the provinces; to establish a constitutional court half of whose judges would be named by the federal government and half by the provinces, population being taken into consideration; to make the Senate elective and give it expanded powers; to recognize the Quebec Court of Appeal as the final tribunal in civil law matters; to permit Quebec to appoint the judges of the Court of Appeal and the Superior Court; to permit Quebec to exert officially international competence in educational, economic, and representational domains; to give the provinces jurisdiction in coastal waters to a three-mile limit.

On fiscal matters he would give the provinces access to indirect taxation, 75 per cent of income tax on individuals and corporations and 100 per cent of inheritance taxes. Quebec would not be subject to

\(^\text{10}.\) \textit{Ibid.}, pp. 131–33.
national norms of compensation for the joint programs it would withdraw from. A federal-provincial economic orientation council made up of experts, half appointed by Ottawa and half by the provinces, would advise on financial and monetary policy. The provinces and French Canadians would be assured participation in the management of the Bank of Canada. In addition, a number of specific economic, administrative, and cultural reforms would extend provincial and French-language rights and limit the freedom of action of Crown companies.¹¹

Some of Allard's proposals are much less revolutionary than they seem at first glance. In practice, the right of disallowance of provincial legislation, in which John Macdonald placed great faith as a curb on provincial autonomy, is practically a dead letter. In many respects, as a result of Privy Council decisions, effective residuary power has seemed to be located in the provinces. The Rowell-Sirois Report conceded that there was much truth in the contention that the property and civil rights clause has become the real residuary clause of the Constitution. In regard to fiscal matters, readjustment of tax reviews has been in progress for several years, assuring the provinces an increasingly greater share of the direct-tax sources Allard specifies.

Other of his proposals are much more far-reaching. Quebec's right to some degree of international competence in cultural matters has been acknowledged, and accords have been signed with France; in economic matters, however, where provincial jurisdiction covers natural resources, the prospects of friction between Ottawa and Quebec are great. The court question is one of the most serious problems impinging on the "repatriation" and modernization of the Constitution. Moreover, the specific recommendations Allard makes to assure French-Canadian representation in various national institutions offer sure sources of friction in any future efforts to reach a solution.

Despite the very real obstacles Allard's program places in the way of an accord on a new constitution, it is aimed at a revision within the framework of federation. He seems sincerely desirous of maintaining the Confederation, albeit in a form significantly different in very important aspects from the relationship that has evolved since 1867. Although others who have proffered fairly specific suggestions on constitutional reform also profess the intention of maintaining the Confederation, they go much further than Allard on the road toward the "associated state" formula, which offers little positive appeal to English Canada.

Certainly English-speaking Canadians can find little assurance of any lasting accord in the frankly interim type of special status proposed by Richard Arès, S.J., editor of the Jesuit monthly Relations. One of the chief architects of the Tremblay Report, which has been the most exhaustive review of the Canadian constitutional situation from the provincial, and specifically Quebec, points of view, Father Arès has studied in depth the constitutional implications of Quebec’s position. He supports a special-status formula as the solution likely to command the widest agreement among French Canadians at the present time. He states flatly, however, that such an arrangement would be merely a way station on the road to the eventual rank of an associated state or of independence. He favors it because it gives Quebec time to organize its forces and strengthen itself. After all, he points out, Canada itself achieved its independence in successive steps.

Father Arès starts with the assumption that Quebec has the embryo of a special status because the Constitution makes it the only bilingual province, the only province where the minority language (English) is protected, and the only province with French-inspired civil law guaranteed, albeit negatively. To want merely to preserve this state of affairs is a static conception which he rejects. The dynamic approach he recommends aims at increasing steadily the zone of freedom of action for the provincial government by establishing precedents which can be consolidated through constitutional revision. He suggests, first, three negative constitutional modifications: (1) assurance that Quebec would never be placed in the minority where the vital interests of French Canada are concerned; (2) protection against constitutional amendments which would be undesirable to Quebec; (3) a supreme court under which only Quebec judges would sit on cases based on civil law. Once these safeguards are assured, he envisages three broad areas in which state action will be increasingly important and in which Quebec must have greater freedom of action than at present. These fields are economic planning, taxation, and international representation.\(^\text{12}\)

Father Arès acknowledges his debt on questions of constitutional revision to Jacques-Yvan Morin, professor of international law at the University of Montreal. Professor Morin also feels that Quebec can achieve the associated-state position he favors by stages. He considers

\(^\text{12. Le Devoir (December 9, 10, 1965), p. 4.}\)
the various moves the Lesage government took to assert its autonomy as valid steps toward a special status which will evolve toward the regime he envisages. Although he acknowledges his desire to see Quebec progress internally into a modern socialist society, it is clear that the degree of autonomy he considers necessary for such a development raises almost insurmountable obstacles to the maintenance of a strong federal regime.

Morin’s basic premise is the existence of two nations on which the growing acceptance of biculturalism is founded. Cultural duality makes no sense, he argues, without political equality. The political consequences must be acknowledged by according full power duality. Therefore Canada needs a new confederation, a new compromise embodying the contradictory aspirations of the two nationalisms. It must recognize the bicultural character of the country, the complete equality of the two nations, and the special status of Quebec. This “strict minimum” he says is “the price English Canadians must pay to keep Canada.”

Autonomy is the keystone of the new division of powers as Morin conceives it. Quebec would be a welfare state with jurisdiction not only over social security, natural resources, and agriculture, but with a long-term economic planning role co-ordinated with but not subordinate to Ottawa. Treaty-making would be shared, and Quebec would have 50 per cent of Canada’s representation to international organizations, including the U.N. itself. The rest of Canada would find the way free to greater centralization, either by giving the federal government broader competence or by allowing the provinces to delegate power to Ottawa. He would permit Ottawa to retain jurisdiction in foreign affairs, defense, and interprovincial commerce and transportation, monetary policy, and customs. The federal government would continue to be responsible for broad-scale economic planning. Parliament would have access to certain precise sources of revenue according to its needs, which would include equalization grants to the economically backward provinces. French-Canadian participation in all levels of the federal apparatus—legislative, jurisdictional, executive, and administrative—would be much greater than at present.

Morin appears to have quite definite ideas on the new federal institutions a binational federation would require. He would make the upper house elective, with equal representation for both language groups elected on a national rather than on a provincial level. Its powers would include safeguarding minority rights, approval and application of trea-

ties made by the federal government, approval of diplomatic nominees and of federal judges, broadcasting, and constitutional amendments. Its members would be eligible for cabinet posts. A number of governmental boards, binational in composition, would be created to participate in policy-making in the various fields of federal competence. Finally, a special constitutional court would be set up, with equal numbers of French- and English-speaking members.  

The Court is one of the prime concerns of all French-Canadian proponents of constitutional reform. Since 1949, when appeal to the Privy Council was eliminated, French Canada has been fearful that it has no real protection against the tyranny of the English-speaking majority. The Privy Council was independent of both the federal government and the provinces, but critics of the Supreme Court of Canada complain that it is a creature of Ottawa. They maintain that when it was created in 1875, it was meant only to be a general court of appeal in "Common Law and Equity." They deny emphatically that it was envisaged initially as a final arbiter in constitutional matters.

Morin objects also to the judicial concept of a "principle of growth." He maintains that adaptation of the fundamental law to new circumstances should be left to the constituent organ of federation or to the political arm of the government. It is not up to the Court to fill the shoes of the legislators, he argues. The essential reason for federalism in a binational country should be to protect the values and rights of the constituent groups and of their autonomy, even against the will of the majority group. Therefore, Morin insists, a Canadian constitutional court should not be a creature of the federal government.

It is not easy to determine how much of this is wishful thinking and how much is an effort to establish a bargaining position. Only English Canada can determine the practical limits. Those who put forth such proposals are rarely sure in their own minds how firmly they feel a given position should be defended. Despite the impression of uncompromising single-mindedness such a blueprint as Morin's conveys, its author does not feel irrevocably committed to every article in it. He has more recently indicated that he is moving away from the idea of equality in

the Senate, for example. His change of mind depends more, however, on
the lack of response this proposal has aroused in Quebec than on the
adverse reaction from English Canada. The disturbing aspect of this
situation is that it cannot be determined with any degree of certainty
whether the absence of support in Quebec reflects a recognition of po­
litical realities or total indifference to any need to take English Canada's
attitude into consideration.

Morin professes to believe that English Canadians could find their
way to accepting the broad constitutional framework he proposes. Other
French Canadians who have elaborated schemes for a union of asso­
ciated states are less optimistic that the other provinces would find such
an arrangement acceptable.

Radical as these proposals are, they are not necessarily the preferred
solutions of the people who propose them. They are hopeful expressions
of compromise which their authors believe English Canadians might be
led to accept. The real desires, more or less openly expressed, of most of
the theorists of constitutional reform are based on the concept of two
nations. The logical outcome of the application of this idea in the
political realm is independence, but most of those who insist on the
two-nation formula stop short of the final step. They justify their
positions on various grounds of political expediency but there is proba­
bly a solid basis for the charge that those who demand a special status
for Quebec are separatists at heart.

The type of relationship that such unavowed separatists propound
would be the loosest possible sort of confederation. For example, Marcel
Rioux, University of Montreal sociologist, wants an association of two
equal and sovereign states freely linked in a union which would leave
Quebec all the basic powers of a modern state, including a certain
measure of international competence.16 For Maurice Allard, “co­
operative independence” would permit two absolute and independent
states to rely on a confederal association for shared problems on the
basis of treaties negotiated for five-year periods. A confederal chamber
with equal representation for the two nations would require a double
majority for all legislation. The governments of the two states would
form a supreme council over which the premiers of each state would
preside alternately.17 Both Rioux and Allard dismiss the possibility of
English-Canadian acquiescence in such schemes; nevertheless they per­
sist in exploring some of the problems these suggestions would raise. By

17. La Presse (September 9, 1965), p. 5.
giving in to the temptation to indulge in such admittedly academic exercises, are they acknowledging a basic unwillingness to renounce the separatist alternative?

It is interesting to follow the reasoning which leads Allard to put forward such a suggestion even as he admits that English Canadians could not even be brought to discuss it. He argues that it would correspond to a certain Canadian reality in that it would conciliate two different mentalities. He contrasts French- and English-speaking Canadians' attitudes on the basic political question: the French obsession with a written constitution and the secondary role constitutional texts play in the English view; French insistence on the predominance of principles and the ascendancy of parliamentary and administrative precedents in the English system; Quebec's predilection for political and fiscal decentralization, as against Ottawa's centralizing spirit in regard to powers and revenues; demands for a special status for Quebec, in contrast to pressure elsewhere in Canada for national norms in all fields; the cultural and national dualism proclaimed by French Canadians, as opposed to the one Canada and one nation sought by most of their compatriots; French Canada's claim for equal treatment, in the face of English Canada's confidence in majority strength; the need for radical reform compared with repugnance for profound change; and, finally, the locus of residuary powers.

Most French Canadians would agree with Allard's analysis of national differences, and many who could hardly be described as extremist or unrepresentative of political power have expressed opinions in basic accord with his long-range hopes. René Lévesque, provincial family and welfare minister under Lesage, is notorious for off-the-cuff expressions with an outrageously nationalist flavor, but more thoughtful and measured statements in similar vein by fellow ministers are not difficult to find. For example, Gérard Lévesque, Quebec's ex-minister of industry and commerce, is on record as suggesting that an arrangement similar to the European Common Market would provide the balance of sovereignty and interdependence Quebec seeks.18 Even though this statement was made in 1963, before de Gaulle blocked any hope of political integration for the six Common Market countries, it was clear that only rudimentary political union was in question. The Gérard Lévesque position would certainly fit in neatly with Professor Allard's views. A similar lack of faith in Canada's present constitutional framework was

18. To a seminar of the Canadian Productivity Council, Financial Post (November 2, 1963), p. 32.
expressed by Lesage's minister of municipal affairs, Pierre Laporte. He told the Quebec legislature in 1963 that perhaps the only way to avoid separatism would be to evolve toward a federation of sovereign states.19

Even Quebec's representatives in Ottawa propound a degree of provincial autonomy that few English-Canadian juridical experts are prepared to accept. Minister of Mines Jean-Luc Pépin professes to be a convinced proponent of co-operative federalism, but the dividing line becomes cloudy when he speaks of a special status for Quebec, including the right to consult with Ottawa on national fiscal, monetary, and tariff policy, or when he defends Quebec's right to representation abroad or on U.N. special agencies.20

Commitments by Liberal Party spokesmen are not needed to spur Union Nationale emulation on this topic. Premier Daniel Johnson is careful to avoid committing himself to a particular solution, but he incorporated the two-nation thesis into the title of a book he wrote while leader of the opposition, Égalité ou Indépendance. In it he demands early constitutional reform; a new constitution or separatism is his threat. This sort of thing cannot be summarily rejected as an election gimmick. The provincial legislature must eventually consider the report of its special committee on the Constitution. The submission of the Montreal Société Saint-Jean-Baptiste illustrates the problems facing the committee. This proposal is essentially Allard's conception of a two-nation association with a unicameral legislature, where a double majority would be required for all laws. A Supreme Council of the Confederation with an equal number of ministers from each state would be responsible for economic planning, monetary policy, customs, transportation, and foreign policy. The prime ministers of the two states would preside in turn over the Supreme Council. The Council would create a Confederal Court to hear cases involving both states.21

Presumably such extreme views will be counterbalanced by more prudent recommendations. It is difficult to see, however, how the Committee can avoid a recommendation based on the two-nation concept. Although this is not necessarily catastrophic in terms of the specific constitutional instruments that could result, over the long term the decisive factor will be the attitude of the other provinces. If they are

19. In Scott and Oliver, op. cit., p. 128.
unwilling to adopt a constrictive interpretation of the present constitution insofar as Ottawa's jurisdiction is concerned, the chances for the wider provincial autonomy Quebec insists on will be correspondingly reduced.

ENGLISH-CANADIAN VIEWS

Although English Canada has evolved considerably in the postwar years on the question of French-language rights within the Confederation, it has exhibited little real effort to come to grips with the constitutional problems implicit in even the mildest proposal to expand language prerogatives in the provincial area, let alone to consider any hint of special status for Quebec. The most specific proposal in that regard on the national political level is T. C. Douglas' formal statement in the House of Commons in February, 1966, in which he set forth the New Democratic Party stand in favor of constitutional revision. He thinks the Constitution should recognize without equivocation the special status of Quebec as evidenced in its language, culture, and tradition. He would have the Constitution guarantee equal language rights across Canada, with the right to education in either language. There is more than a little suspicion, in Quebec and elsewhere, however, that Mr. Douglas' solicitude stems in large part from a desperate desire to expand his meager political base in Quebec. Whether there is substance to this suspicion or not, sympathy in Quebec for his proposal will be tempered by consideration of the first principle he enunciated in enumerating his goals for constitutional revision. His primary concern is a clear delineation of federal and provincial powers in order to permit Ottawa to resolve problems caused by economic growth, unemployment, and economic upheaval. The social implications of federal action in these fields impinge directly on prerogatives the provinces now enjoy, or which Quebec anticipates.

An earlier suggestion of Mr. Douglas would create a Confederation Council of equal numbers of French- and English-speaking Canadians to keep under continual surveillance the issues that tend to divide Canadians. Professor Michael Oliver of McGill thought such a council might be given veto power over federal or provincial legislation affecting relations between the two language groups.22 This proposal comes close to the idea of a rejuvenated senate with special watchdog duties, which

several French Canadians have suggested. The chances such innovations have are evident in the reaction to an imaginative if admittedly far-out proposal Toronto history professor Trevor Lloyd put forth in 1964 for a binational senate.\(^{23}\)

A critique of Lloyd’s proposal by Eugene Forsey is revelatory less for its assumption (undoubtedly valid) of adverse English-Canadian reaction to such a scheme than for its defensive attitude on the question of constitutional modification. Mr. Forsey has followed Quebec developments closely, and on the whole he is probably far ahead of most of his fellow English-speaking Canadians in sympathetic understanding of the language issue and in his desire to improve the position of French throughout Canada. It is remarkable, however, that he finds it almost impossible to accord any validity to the political implications of the cultural concessions he is willing to support. He tends to fall back on historical justification in an effort to side-step the problem of present-day relationships as they impinge on constitutional questions. His reaction to the binational senate suggestion is that since it would recognize two political nations, it cannot be considered. In his view it would be a step toward associated states on even separation. That, he says, is the road to or through the preconfederation system of a binational state, which broke down because either element was in a position to block what the other wanted.\(^{24}\)

To a large degree this type of reaction has characterized the English-speaking Canadians’ attitude vis-à-vis the demands emanating from Quebec. Emphasis has been on rebuttal rather than on dialogue. There has been little evidence of willingness to discuss fundamental points of constitutional revision. A partial explanation may be found in the uncertain national political situation. The failure of any one party to win a clear parliamentary majority in the national elections of recent years has had an unsettling effect on English Canadians. This has been reflected in hesitation to face national political problems squarely. It has been particularly evident on the constitutional issue.

In such an atmosphere, English Canadians have been torn between a desire to postpone discussions which might lead to a formal impasse and fear of the deteriorating effect of delay. Toronto historian Ramsay Cook, a lucid and well-informed student of developments in Quebec, would impose a moratorium on pressure for a new constitution until conditions in Canada became more stable. He argues that the country is too divided at present to risk a confrontation. In pleading for a relaxa-

tion of pressure from Quebec he cited not only French-English conflicts but also regional economic differences and social divisions.25

On the other hand, as Quebec’s reluctance to endorse the Fulton-Favreau formula became more apparent, some English-speaking Canadians gave increasing thought to the advantages of achieving a new *modus vivendi* quickly. Donald Smiley, political science professor at the University of British Columbia, raised doubts about the continuing willingness of English-speaking Canadians to accord an important role in federal affairs to Quebec’s civil servants and Members of Parliament. He pointed out that the initial phases of Quebec’s struggle against centralization coincided with similar desires in other provinces. This policy seemed to have run its course in the English-speaking provinces, where apprehension had been growing over the possibility of weakening the federal government beyond the danger point. Rather than wait until the position of the other provinces hardens and strengthens the determination of Ottawa, Quebec might be wise, he suggested, to seek quickly the constitutional adjustments it wants. Although rejecting any possibility of a special status in the political sense, he would admit constitutional recognition of a special position for Quebec in regard to cultural matters. He would also agree to a veto right for the national French-Canadian community on questions directly affecting its distinctive interests and juridical guarantees for the cultural identity of French-speaking minorities outside Quebec.26

It may be reading too much into Professor Smiley’s recommendations to see in them the real opening of a dialogue with French-Canadian constitutional theorists. The interdependence of cultural and political facets of the problem must be given greater weight outside Quebec. French Canadians can hardly object to proposals which would promise them language rights on a national basis, but they are understandably skeptical about how effective this assurance could be in practice, especially over the long term. They believe that experience has made clear the close tie between political power and their cultural rights. They feel that they cannot permit their cultural identity to be dependent on the good will of a majority other than their own.

Ultimately, broader constitutional recognition of bilingualism must be achieved if French is granted official sanction beyond Quebec’s borders. Even *de facto* acceptance of French as a normal vehicle of communication in areas adjacent to Quebec implies a new interpreta-

tion of both federal and provincial constitutional instruments. The possibility that a pragmatic adjustment to the weight of numbers may produce such a situation in some parts of Ontario and New Brunswick in the near future makes the question more pressing than most Canadians realize. Neither the emotional climate in English Canada nor any of the proposed constitutional modifications encourage hope of an early solution.

How can French-Canadian fear of majority arbitrariness be reconciled with English-Canadian resistance to privileging a particular group? The extreme positions on each side point to deadlock. The status quo, represented by the B.N.A. Act as it has been applied in the first century of its existence, is increasingly unacceptable to French Canada. The binational theory in its most extravagant expression offers precious little hope for confederation; in the almost totally unlikely event English Canada could be persuaded to give it a try, the confrontation of two sovereign states would be such a constant threat that the tenuous strands of interdependence would have no chance to develop the requisite resiliency.

If Quebec nationalism can be reined in, a gradual adaptation to some acceptable middle ground is entirely possible. The limiting factor may be the contradiction implicit in granting a special status to Quebec, if French Canada is conceded a bilingual and bicultural existence from coast to coast. A workable alternative might assure the Canadiens the political supremacy they enjoy in Quebec, acknowledge the primacy of French there, guarantee equal treatment for French in the federal government, and grant the right to the use of French as an official language on an optional basis outside Quebec. Even such a compromise anticipates a spirit of concession much of English Canada shows no inclination to consider. If Quebec nationalism takes the bit in its teeth, the odds will be against the continuation of any legal tie to the rest of Canada.

Both Ottawa and the two major provinces are preparing to forestall such an adventure. Ontario Premier Robarts has set up a counterpart to the Quebec committee on the Constitution, and new federal moves to find a solution were launched in 1966 when a committee of high-level civil servants undertook a broad study of the Constitution under all its facets. Subsequently, Prime Minister Pearson announced that a special committee of the national Parliament would act on the results of that study. Those involved in all three endeavors are convinced that bold innovations must be introduced soon to meet the needs of the second century of confederation.