A West Indian Looks At Canadian Federalism

Fred. A. Phillips *

One who has witnessed the birth and death of a federal system (viz., the West Indies Federation)[1] within the span of four years, and who was also fortunate enough to observe at close quarters the attempt to make it work may perhaps be excused for presuming to express his thoughts on Canadian federalism and constitutionalism at this juncture. The questions which have exercised the writer's mind after a year's sojourn in the Province of Quebec include the following, which will be considered in this paper : —

(a) How far can the Federal government go to accommodate Quebec if Confederation is to be preserved ? Can any lesson in this connection be learned from recent federal experiences in the West Indies

(b) Have "the people" of Canada been sufficiently consulted ?

(c) Is there any good reason why there should continue to be in a revised Canadian constitution no reference to the existence and add jurisdiction of the Supreme Court ?

(d) Is there not a case for the inclusion of human rights provisions in any new constitutional instrument ?

(e) What is the possible future of Canadian Federalism ?

General Principles

Before considering these questions seriatim, the writer must emphasize his full awareness that, unless those concerned in Canada

* LL.B. (Lond.); Senior Lecturer, University of the West Indies; Member of the English Bar; Ex-Cabinet Secretary, Federation of the West Indies; Research Fellow, Faculty of Law and Centre for Developing Area Studies, McGill University, 1964/1965.

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[1] The Federation was inaugurated at the beginning og 1958 and comprised the territories of Jamaica, Trinidad and Tobago, Barbados, Grenada, St. Lucia, St. Vincent, Dominica, Antigua, St. Kitts and Montserrat. It was dissolved on 31st May, 1962, the very day it was due to become an independent country. Thereafter two of the constituent units became independent within the Commonwealth. The other eight are still British Colonies.

are prepared to see each other's view-points, Confederation will continue to be in jeopardy. No one knows this better than a West Indian, for we have seen (and continue to see) the principle of compromise at work. We have in fact adopted as our own, the view of a distinguished Canadian writer, set out in these terms :

> "Modern federalism is essentially a compromise. It grows out of an attempt to reconcile the views of those who prefer provincial or state independence. Between these two groups stand the trimmers, who frame a scheme which strikes a balance and enables union to take place." [2]

There can be no doubt that in the case of Canada the problem has from the start been one continual adjustment and accomodation. Indeed it may well not have been possible to devise a federation at all unless the Founding Fathers had decided that (to cite but one example) payment of unconditional subsidies would be made by the Federal Government to the Provinces.[3] But there must always be a limit to compromise and this brings us to the first question posed above.

(a) The Position of Quebec

Quebec has always stated, and continues to state, her case.[4] It is no doubt a powerful case which must be studied with scrupulous care by all who wish to see federalism preserved in Canada. There was, however, a time in the early days of confederation when even the understandings which now prevail were lacking. One notable example was when it became necessary shortly after the union to sever the government of the United Province of Canada, when the question of the disposition of assets and liabilities arose. This became a major issue, as a result of which the matter was referred to the "arbitrament" of three arbitrators. The arbitrators had nothing to guide them as to the basis on which they could proceed and upon a formula being proposed,[5] there was violent disagreement between the Quebec representative — Judge Day — and the Ontario arbitrator, as a result of which the Quebec representative resigned. It will be recalled that

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[2] J. A. Maxwell, Federal Subsidies to the Provincial Governments in Canada, p.vii-Preface. In this work the author graphically describes the extent to which the device of increasing subsidies sometimes on a fictitious basis (in dealing with population figures, for example) was adopted to lure some provinces into confederation, e.g., Prince Edward Island, and also to keep others in, e.g., Nova Scotia.

[3] On the basis of sec. 118 of the B.N.A. Act 1867 (now repealed).

[4] Scott and Oliver, Quebec States her Case. See also Jean-Luc Pepin, Federalism: Canadian Forum Dec. 1964, 206-210.

[5] By the Dominion representative, Col. J. H. Gray.

the only course left at that stage was for the Dominion and Ontario arbitrators alone to render a report.[6]

The Dominion representative was of the opinion that the division of the surplus debts "should be based upon the origin of the several items of the debt... and be apportioned and borne separately for Ontario and Quebec as the same may be adjudged to have originated for the local benefit of either". Quebec, however, violently disagreed with this decision, mainly on the ground that its finances were unhealthy and that such finances could not withstand a further expenditure of nearly five million dollars assessed as Quebec's share. In the long run the Federal Government decided that it would be in the interest of all concerned to assume the excess debt — Sir John A. McDonald urging at the time that such an assumption would "establish harmony" between the two provinces.[7] The Dominion assumed the excess debt in 1873 by scaling up the joint debt allowance due to Quebec and Ontario by $10,506,100, but in making this concession to Ontario and Quebec it clearly became necessary to increase by a proportionate amount the debt allowances to the other provinces as well.[8]

As one contemplates the position at the time of Confederation one cannot help asking the question : Would it have been possible to retain Quebec as a contended province unless the Fathers were prepared to ensure that its financial welfare should be protected at a time when its resources were scarce and it was anxious to play its part as a partner in the union.

In granting a concession to one province, it is always necessary for a federal government to consider the effect on the other sections of the union; and the early history of Confederation illustrates this pointedly. One further example will suffice. As a result of the terms granted to the provinces of Manitoba and British Columbia upon their entry into the union, New Brunswick evidently felt that it too should receive some increased subsidy. It accordingly despatched a delegation to Ottawa to plead its cause to no avail. But it will be recalled that just about this time the U.S.A. happened to be negotiating a treaty[9] with Canada for the abolition of the export duty on timber floated down the St. John's River for shipment to the U.S.A. The B.N.A. Act had provided for New Brunswick to be permitted,

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[6] S. P. Dom. 1873, No. 27.

[7] The Ottawa Times May 17th and 19th, 1873, for reports of Sir John A. McDonald's speeches.

[8] Dominion Statute 1873 c. 30.

[9] The Washington Treaty 1871.

despite the statutory provision for a Customs Union, and abolition of excise duties,[10] to levy an export duty on provincial timber.[11] Since no treaty with the U.S.A. denying New Brunswick's right to export timber could be negotiated without the latter's approval and the Dominion was proposing a complete removal of the duties, the question arose as to how the quantum of compensation was to be determined ? Although the sum that accrued to the province yearly from the dues amounted only to $60,000 to $70,000 — and even though the amount of timber being floated down the river was declining — the Federal Government offered New Brunswick compensation to the tune of $150,000 a year — thus granting the province in another guise the increase it had sought only a short time before.

In more recent times it has become clear to Canadians that the Hungarians, the Jews, the Ukranians, the Italians, the Poles, the Irish and other minority groups in various parts of Canada continually object when they see special attention being paid to the rights of French Canadians without similar thought being given to theirs. Minority consciousness is thus fostered.

There is here a striking parallel in some respects with the West Indies Federation. Because of a number of compromises that had taken place in the pre-federal period and in the early days of Federation, the Federal Government was weak at the centre. Jamaica, which was largely responsible for this situation, continued to make requests for special concessions and arrangements on the ground that it was different from the others in a number of respects, including population, area and resources. Each time a concession was granted one or other of the territories would come up with some special request which could not lightly be ignored. A particular instance in the economic sphere would serve to underscore this point.

When the Federal Government was inaugurated in 1958 there was only one oil refinery in the British West Indies and that was in Trinidad. In March 1959 the Government of Jamaica announced that agreement had been reached between that Government and Esso Standard Oil (S.A.) for the establishment of a Jamaica oil refinery. Every effort was at the time being made by the Federal Government to introduce Customs Union and internal free trade within a resonable time and when the Government of Trinidad was asked for its comments on the Jamaica project, the former quite understandably reacted violently. It severely criticised the Federal Government's stand that the project was in the interest of the Federation as a whole,

[10] B.N.A. Act 1867, sections 121 and 122.
[11] Ibid. section 124.

in the light of the clear admission by the Federal Cabinet that although the agreement between the Government of Jamaica and Esso did not confer a legal monopoly on the company, it effectually eliminated competition from outside. In a letter to the Prime Minister of the Federation from the Premier of Trinidad and Tobago, the Premier expressed the "considerable concern" of his government and made these comments, inter alia :

> "If notwithstanding the Federal Government's responsibility under the constitution the intention is to delay the introduction of Customs Union until the special requirements of every vested interest have been met, then it would appear that the Govrnmnt of Trinidad and Tobago should retain its freedom of action in respect of the parallel principle of freedom of movement of persons within the Federation. It would be unfair to expect of this governement that it should continue to pursue a liberal policy in respect of the movement of persons when, with the endorsement and sanction of the Federal Government, other unit territories are pursuing a contrary policy in respect of the movement of goods".[12]

The fact is that there was at all material times a sharp conflict of opinion between the governments of Jamaica and Trinidad as to the type of federal structure that was appropriate to the West Indies. The Trinidad Government wanted a strong central government [13] capable of developing and integrating the economy of the area while the Jamaica Government insisted on greater provincial autonomy and a week centre.[14]

After more and more concessions had been granted to Jamaica, the Premier in the summer of 1960 (without reference to the Federal Government or any constituent unit) procured the passage of an Act to provide for the holding of a referendum to decide whether the territory should remain in the Federation. This was the extent to which it was prepared to stretch its ideas on provincial autonomy.[15] The result was that a majority of the Jamaica electorate in September 1961 voted against that country remaining in the Federation, which was accordingly dissolved on 31st May, 1962, to the great distress

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[12] Economics of Nationhood (published by the Office of the Trinidad Premier and Minister of Finance 11th Sept., 1959) Appendix "A" (iii) p. 29, para. 11.

[13] A full statement of the case for a strong central government is set out in the "Economics of Nationhood" op. cit.

[14] The Jamaica case is set out in their Ministry Paper No. 3 of 1959.

[15] The matter is fully discussed by J. B. Miller in the West Indian Economist, Vol. 4 No. 9 March 1962, 11-26. The whole issue of the causes of dissolution of the Federation are set out by J. H. Proctor in an article "Constitutional Defects and the collapse of the West Indies Federation": Public Law, Summer 1964, 125-151. See also H. W. Springer: Reflections on the Failure of the first West Indian Federation (Harvard University Centre for International Affairs: Occasional Paper No. 4 July 1962).

of all West Indians who have the welfare of the whole area at heart. Trinidad and Jamaica then became independent countries in August 1962. Before long British Guiana, which did not join the union, is likely to become independent; so will British Honduras. Barbados, the Leeward Islands and the Windwards are also likely to form a new federation [16] and become a separate independent state if they can iron out their differences. The net result is that there are likely to be at least five independent Commonwealth states with a total population of under five million in the Caribbean.

This is the price the West Indies area is paying for failure to insist on a central government which could command the respect of, and at the same time be able to collaborate with, the various island governments for the good of all concerned. This is the price the people of the area are paying for complacency in the face of mounting political and economic tensions. As the writer has contemplated the Canadian scene over the past year, he thinks he has in some quarters detected a measure of unconcern and over-complacency which cannot do the Canadian federation any good if it is to be preserved. Quebec's problems must clearly be squarely faced; but they must also be sensibly tackled with due consideration for the rest of the union.

(b) Consultation with the People

I have felt impelled to ask myself whether a new "home-grown" constitution for Canada would by now have become a reality if "the people" had from the start (say from 1950) been permitted to take an active part in discussing and thinking about it. It does not seem enough that only the legal representatives of the people (in the form of Provincial Attorneys General and the Federal Minister of Justice) should have been allowed to become involved in such an exercise. The preparation and drafting of a Bill to repatriate the Canadian Constitution is the concern of all.[17] It has struck me as inconceivable that it should have taken so advanced and progressive a country as Canada fifteen years' negotiation and discussion in arranging the

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[16] At the present time it is felt in some quarters that Barbados wishes to become independent on its own. The island has an area of 166 square miles and a population of over 220,000.

[17] In this respect the writer respectfully endorses the words of Prof. F. R. Scott in "Our Changing Constitution": Proceedings of the Royal Society of Canada (Third Series. Vol. iv, 1961). Prof. Scott states at p. 93: "It is our country and our future that is being planned and we — the citizens — should have our chance to be heard at the appropriate time before our governments have taken up fixed positions".

repatriation of the constitution and in finding an amending formula — the end not being in sight, even now. One writer charitably attributes this to the fact that constitutional development in Canada has been "piecemeal, protracted and accomplished with propriety".[18] When one thinks of the place of constitutional development in other lands over the past decade, one is puzzled over the length of time that has elapsed without any decision being reached. On January 10th, 1950, the then Prime Minister, Mr. Louis St. Laurent, in opening the proceedings of a constitutional conference, seemed to sound a note of urgency, thus :

> "The purpose of this conference is to seek together to devise a generally satisfactory method of transferring to authorities responsible to the people of Canada the jurisdiction which may have to be exercised from time to time to amend those fundamental parts of the constitution which are concern alike to the federal and provincial authorities".[19]

Later in the same proceedings the Prime Minister admitted :

> "The constitutional act which established the Commonwealth of Australia in 1900 and the South Africa Act which established the Union of South Africa in 1909 both made provision for amendment of those constitutions within the borders of the respective countries... Canada is today the only nation in the Commonwealth lacking full capacity to amend its own constitution by its own action and our country is indeed the only sovereign state in the world which lacks this power".

That was fifteen years ago but the position today is still the same. Since then the other Commonwealth countries which have become independent and capable of amending their constitutions include Ghana, Malaya, Tanzania, Uganda, Kenya, Trinidad and Tobago, Sierra Leone, Jamaica, Malawi, Zambia, Gambia and Malta. These countries may be under-developed economically but, by comparison with Canada, they are highly developed constitutionally.

There can be no doubt that in the case of Trinidad and Tobago consultation with the people hastened the process of constitution-making. In January 1962 the People's National Movement — the governing Party — decided that Trinidad should become an independent country within the Commonwealth thereby severing its ties with the Federation, as Jamaica had elected to do three months previously. The Trinidad Governement appointed a Constitutional Adviser, drafted a constitution which was then circulated to all sections of the community in every corner of the island — to the Bar Council, the

[18] Laskin, The Supreme Court of Canada: A Final Court of and for Canadians. 1951 C.B.R. Vol. No. 10: 1038-1079. See also F. R. Scott: Our Changing Constitution op. cit 93.

[19] Proceedings of the Constitutional Conference of Federal and Provincial Governments. January 10-12, 1950, p. 6.

Law Society, Medical and Dental Associations, Teachers' Groups, the Civil Service Association, Cane Farmers' Groups, Village Boards, County bodies. Memoranda were invited from organizations and individuals. These were submitted in their hundreds to the Cabinet which then convened a series of public meetings at Port of Spain's main Civic centre (Queen's Hall) where public debate on the issues took place. The proceedings were broadcast. Several revisions of the Draft Constitution resulted from this public canvassing and debate. The Bar Association was represented by one of Trinidad's most outstanding lawyers who attacked several points in the draft (that lawyer having since been appointed as Chief Justice). It was therefore fit and proper that the Trinidad Constitution should begin with the words: "We the people of Trinidad and Tobago".[20] The constitution was subsequently taken to London for further consideration by the U.K. Government and enactment by Parliament. In this connection it is respectfully submitted that no constitutional instrument or amendment should be considered by reference to individual Ministers of Justice — as is the so-called "Fulton/Favreau" formula. Politicians come and go, but the union is and should be a creation of the People.[21]

(c) The Judicial Arm

I turn now to what strikes me as a most fundamental omission from all the Canadian Government's proposals for repatriation of the constitution, viz., why the judiciary and its jurisdiction are not part of the basic law in the Draft Bill. The Fulton-Favreau formula

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[20] This is the kind of expression that, according to K. C. Wheare, characterises an outochthonous constitution. Eire furnishes the best illustration of a truly "home-grown" type of constitution. When the Irish Free State Act of 1922 was re-enacted in 1937 to give Eire its new constitution, the draft was presented to, but not enacted by, the Dail. This body was asked simply to discuss, amend and approve it. After it had performed that function, the constitution was submitted to the people in a referendum — their approval constituting the actual enactment of the Constitution — The Plebiscite (Draft Constitution) Act, 1937 (No. 16 of 1937) which was referred to as the "draft constitution approved by Dail Eireann".

In the opinion of K. C. Wheare, the Irish procedure created a break in legal continuity. He concludes: "It showed to other Commonwealth countries a method of making a break with the past and of conducting what in law was a revolution" Wheare: Constitutional Structure of the Commonwealth, 1961 Chap. 4, 93/94.

[21] The Constitution of the United States begins with the words: "We, the People of the United States in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of Liberty to ourselves and our posterity, do order and establish this Constitution for the United States of America".

is silent on the fundamental importance of the Supreme Court. It is quite unnecessary at this stage to plead for its inclusion since so many Canadians, including some of Canada's most eminent constitutional jurists,[22] have already done so in no uncertain terms. Such a provision is made in the constitution of every independent country which I have been able to examine. Is there any reason why the omission of 1867 and subsequent years should not now be corrected? In urging this, it is not that one has any apprehension that the sanctity of the rule of law is in jeopardy or that the judiciary will not continue to maintain the high traditions which now distinguish it. Here clearly is a case where constitutional "propriety" is not being observed; and there is still time to remedy it.

(d) Human Rights Provisions

Enough has already been said over recent years on the desirability of enshrining human rights provisions in the Federal Constitution. But it is puzzling to understand what could have motivated the enactment of a Bill of Rights for Canada [23] at a time when active (if unduly protracted) consideration was being given to arriving at some autochthonous expedient for "nationalising" the constitution. It seems so elementary to emphasise the importance of embodying such provisions in the basic law of the country rather than in an ordinary Act of the Legislature which can be revoked at any time, but it may be that the framers of the Bill of Rights despaired of ever being able to reach agreement on a new constitution in the immediate future.

It was out of a recognition of the basic importance of such provisions that the independence Constitution of Trinidad and Tobago [24] adopted a large part of the opening section of the Canadian Bill of Rights as its first Chapter. It is also revealing to see what use the Trinidad draftsmen made of the Preamble to the Canadian Bill of Rights which begins as follows:

> The Parliament of Canada, affirming that the Canadian nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions".

The Preamble to the Trinidad Constitution opens with these words:

> "Whereas the people of Trinidad and Tobago — (a) have affirmed that the Nation of Trinidad and Tobago is founded upon principles that acknowl-

[22] For example, Laskin op. cit. p. 1039.

[23] *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms.* 8-9 Eliz. II, S.C. 1960, ch. 44.

[24] Sections 1 and 2 of the Second Schedule to the Trinidad and Tobago (Constitution) Order in Council 1962. (S.I. 1962 No. 1875).

> edge the supremacy of God, faith in fundamental human rights and freedoms, the position of the family in a society of free men and free institutions, the dignity of the human person and the equal and unalienable rights with which all members of the human family are endowed by their Creator".

Whereas in the Canadian Act it is the "Parliament" which affirms, in the case of the Trinidad Constitution it is the "people" who do the affirming.

There is no lack of precedent from which Canada can draw for similar constitutional provision if it does not want to follow Trinidad's example — itself derived from a Canadian precedent. The Federal Republic of Germany,[25] after reciting that all the power of the state derives from the people, goes on/to include a caption "Rights of the People" under which will be found the following three articles:

> "6. All citizens have equal rights before the law.
>
> 7. Men and women have equal rights.
>
> 8. Personal freedom, the inviolability of domicile, the secrecy of correspondence and the right to reside in any place are guaranteed".

In the Indian Constitution adopted in 1949, Part III deals with fundamental rights which will be mentioned here, in the interests of space, only under the broad headings of the right to equality, the right to freedom of religion, cultural and educational rights, the right to property, and the right of constitutional remedies. The Republican Constitution of Nigeria provides for cognate rights.[26] Similarly Jamaicia [27], Uganda [28], and Kenya[29] all made human rights provisions in their Constitutions on attaining independence. So did Tanganyika [30].

Here again, therefore, Canada remains aloof in constitutional terms, in that fundamental human rights are expressly provided for only at the federal level by Act of Parliament. Two courses are open to the constitutional experts if the matter is to be put right, viz, either that the provinces enact separate Bills of Right, as has been done in the U.S.A. or that there be specific provisions made in any

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[25] See Constitution of the Federal Republic approved on 30th May 1949 and Known as the Bonn Constitution.

[26] See Chapter III of an Act to make provision for the Constitution of the Federal Republic of Nigeria, 1960. No. 20 passed 1st Oct. 1963.

[27] Chapter 3 of the Second Schedule of the Jamaica (Constitution) Order in Council 1962 (1962 No. 1550).

[28] Chapter 3 of the Schedule of the Uganda (Independence) Order in Council 1962 (1962 No. 2175).

[29] Chapter 2 of Schedule 2 of the Kenya (Independence) Order in Council 1963 (1963 No. 1968).

[30] Preamble to Constituent Assembly Act No. 1 of Tanganyika passed on 9th December 1962.

new constitution for these rights to operate in respect of all citizens throughout Canada. In the latter case the Canadian Bill of Right of 1960 will presumably have to be revoked.

(e) The Future

What then can be said of the future of Canadian Federalism? It is common ground that federalism is not a static concept, and that in a federal union there must always be adjustment to meet changing needs and altered circumstances. There are those who even believe that federalism is a form of government which has outlived its usefulness. Foremost among these was the British political scientist, Harold Laski, who after a visit to the U.S.A. in 1939 wrote an obituary on Federalism [31] In his paper Laski spoke of the unsuitability of the federal form of government for America in this way:

> "Imposed solutions from a distent Washington, blind as it must be blind, to the subtle minutiae of local realities, cannot solve the ultimate problems that are in dispute. The wider the powers exercised from Washington, the more ineffective will be the capacity for creative administration. Regional wisdom is the clue to the American future. The power to govern must go where the regional wisdom resides. So restrained, men learn by the exercise of responsibility the art of progress".

There seem to be many today in Canada who would readily endorse Professor Laski's assessment in general terms and with specific reference to Canada. In so far as the U.S.A. is concerned there can be no doubt that Laski's strictures have proved inaccurate. Dean Roscoe Pound once said:

> "No domain of continental extent has been ruled otherwise than as an autocracy or as a federal state".[32]

On this basis, Canada will have to decide which of the two masters it will serve.

But an even more direct answer to Laski is furnished by Nelson D. Rockefeller, the present Governor of New York, who has written as follows:

> "Why has our federal system worked so well? Why has it been able to foster and adapt itself to fantastic growth and change over 175 years while preserving our fundamental human goals? The answer lies in the nature of the federal idea and in the leadership which it summons. The truth is that in our federal system the sources of productive power, initiative and innovation are to be found at all levels of government, and

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[31] Harold Laski: "The Obsolescence of Federalism" in the New Republic, May 3rd, 1939, pp. 367-8.

[32] Pound: "Law and the Federal Government" in Federalism as a Democratic Process (1942) p. 23.

> they forever interact on each other, with the initiative depending importantly on where the most dynamic leadership exists..." [33]

There can be no doubt that what the author says of the U.S.A. is even more applicable to Canada at the present time.

Canada is an affluent society but it has still to come of age constitutionally. The design of its own flag is clearly a step in the right direction. But the matter does not end there.

The writer cannot escape the feeling that Confederation in Canada has not moved with the times. He submits that the country must decide once and for all whether it will move forward (constitutionwise) from prosiac conservatism to dynamic progress and what route it wishes to follow. When that decision is made those who control the country's destiny must be not only courageous but cataclysmic.

Quebec with its very special position in the union must of course do nothing to obstruct that process — so long as the Federal Government is prepared to recognise Quebec's unique position [34] and arrive at reasonable and constructive compromise. At present there seems to be something more than an uneasy truce which the Royal Commission on Bilingualism and Biculturalism characterises as a crisis: their "initial diagnosis" beng described thus:

> "All that we have seen and heard has led us to the conviction that Canada is in the most critical period of its history since Confederation. We believe that there is a crisis, in the sense that Canada has come to a time when decisions must be taken and developments must occur leading either to its break-up or to a new set of conditions for its future existence. We do not know whether the crisis will be short or long. We are convinced that it is here. The signs of danger are many and serious... We are convinced that it is still possible to rectify the situation. But a major operation will perhaps be unavoidable. The whole social body appears to be affected. The crisis has reached a point where there is a danger that the will of the people to go on may begin to fail".[35]

These are strong words. My year of research at McGill has convinced me that there is abundant merit in them but that the people of Canada have the capacity to rise to such occasions of crisis in the interest of their future well-being and continued prosperity.

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[33] Rockefeller: The Future of Federalism 1962, pp. 34-37.

[34] One wonders whether the fact that Quebec has recently opted out of twenty-nine "share cost" programmes is not a case of the writing on the wall as far as the maintenance of Canadian Federalism is concerned and whether Quebec may not collaborate with the Federal Government in a more positive way.

[35] A Preliminary Report of the Royal Commission on Bilingualism and Biculturalism (English and French Version) Chapter 7, p. 133 (English Section).