

A SENSE OF PROPORTION AND A SENSE OF PRIORITIES: REFLECTIONS ON THE REPORT OF THE TASK FORCE ON CANADIAN UNITY

J. STEFAN DUPRÉ* PAUL C. WEILER†
Cambridge, Mass.

I. *Introduction.*

The elegantly written *Report* of the Task Force on Canadian Unity¹ is the most recent product of our constitutional reform industry. In many respects it is the most impressive. It deserves attention if for no other reason than the make-up of the group which produced it. The Task Force was composed of both men and women, politicians and scholars, persons with experience in the business community and in the union movement, and representatives of each of our far-flung regions. Its co-chairmen, Jean-Luc Pepin and John Robarts, are two of the most experienced and respected public figures in Canada. The Commissioners toured the entire country. They listened patiently to often vehement expressions of opinion about Canadian federalism. At the end of that exercise in constitutional consciousness-raising—intrinsically valuable in its own right—they emerged with a unanimous *Report*.

And yet, at least to the two of us, the *Report* is something of a disappointment. The Task Force does paint a vivid picture of the unhappiness that so many Canadians genuinely feel about their lot within Confederation. It marshals a formidable array of constitutional recommendations, just about each of which has the respectability of having been endorsed by one authority or other. What we missed, though, was a detached scrutiny of the current validity of the litany of complaints. We also missed a critical appraisal of whether the many constitutional proposals are really responsive to our current straits. What Canadians most need in our current round of navel-gazing about Canadian federalism is a sense of proportion about Confederation discontents and a sense of priorities about constitutional reform. These we did not receive from the Task Force on Canadian Unity. Admitting to what were “at times, sharp

* J. Stefan Dupré, Mackenzie King Professor of Canadian Studies, Kennedy School of Government, Harvard University, Cambridge, Mass.

† Paul C. Weiler, Mackenzie King Professor of Canadian Studies, Harvard Law School, Cambridge, Mass.

¹ The Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (Jan. 1979), hereinafter cited as *Report*.

disagreement",² the Task Force appears to have opted to compile an encyclopedia of constitutional reforms rather than separate the wheat from the chaff.

Such critical notices for this *Report* might not be terribly important taken by themselves. This document may pass from the scene, just as did the Liberal government which commissioned its authors. What stirs us to write this review essay is our growing conviction that much the same judgment is *à propos* of so many of the blueprints for a new Canada which have appeared on the landscape since November 15th, 1976.³ Like so many others, the Task Force Commissioners felt a profound urge to design a new, "renewed federalism" before the Quebec referendum whose time is now being counted down. We think it high time that our constitutional chefs stopped adding more and more dishes to our menu. Some serious questions must be posed about the entire exercise. Are our current troubles really attributable to our existing constitutional arrangements? Will a massive rewriting of the British North America Act⁴ really cure them? And if we do feel compelled to make some changes—if only as a gesture of good faith to the federalist forces inside Quebec—upon which of the items now on the agenda should we place our bets?

II. Confederation and its Discontents.

The nature of the current Canadian Disease has become only too familiar by repetition. As the Task Force put it, Canada is passing through a crisis of its very existence, of which the election of the *Parti québécois* is just a symbol. These are the major tensions from which the country seems to be drifting apart:

1. First is the centuries-old cultural dualism between French and English Canada which has attained a qualitatively different dimension since the modernisation of Quebec took hold with the Quiet Revolution. Forces of urbanization, industrialization, mass education, and secularization have eroded the traditional institutions of Church, parish, and rural community. For reasons of history, language, law, ethnicity, collective feelings and political action, *Québécois* of every description hold that it is the Province of Quebec

² Report, p. 118.

³ Among the other documents now in the public domain are Canada West Foundation, *Alternatives: Towards the Development of an Effective Federal System for Canada* (March 1978); Ontario Advisory Committee on Confederation, *First Report* (April 1978); Government of Canada, *A Time for Action: Toward the Renewal of the Canadian Federation* (July 1978); Canadian Bar Association Committee on the Constitution, *Towards a New Canada* (Aug. 1978); Government of British Columbia, *British Columbia's Constitutional Proposals* (Sept. 1978).

⁴ 1867, 30 & 31 Vict., c. 3, as am. (U.K.), hereinafter cited as B.N.A. Act.

which now bears the vocation of nurturing the French fact in North America.

2. Added to what is now a full-fledged *Québécois* nationalism is a resurgence of regional identification and aspiration in the rest of Canada. The illusion of many Quebecers notwithstanding, English Canada has never been a monolithic and homogeneous entity. In recent years, the traditional sources of diversity—geography, history, economics, and ethnicity—have reasserted themselves with a vengeance, increasingly articulated by the provinces. Many provincial governments have emulated the aggressiveness of Quebec in the Sixties in promoting their own regional economies and societies, and have become bitterly resentful of what they perceive as federal intrusion upon their plans and prerogatives.

3. At the best of times, a combination of these two centrifugal forces would pose an intractable challenge to Canadian unity. A further complication is the ailing Canadian economy. The sluggish stagflation which has afflicted the entire industrial world in the Seventies sharply restricts our freedom of manoeuvre. As the Task Force notes, "we can no longer hope to buy our way out of our difficulties".⁵ This circumstance helps to detract from the authority of our national government which is popularly held responsible for our economic well-being. Indeed Ottawa, the Task Force found in its travels, "is for many Canadians synonymous with all that is to be deplored about modern government—a remote, shambling bureaucracy that extracts tribute from its subjects and gives little in return".⁶

The Task Force captures the centrifugal forces that are abroad in Canada about as eloquently and as economically as anyone. To them the implications of their analysis seem all too clear. The legitimate aspirations of all the regions, in particular Quebec, are being stifled by a century-old British North America Act, drafted in a more centralizing era, and now contributing—or so the Task Force suggests—to the arrogance of power in an alien Ottawa. A radically restructured federalism seems like the only answer.

Yet, as we observed at the outset, it is high time we began viewing these complaints with a sense of proportion. Let us illustrate what we mean from the case of Western Canada. In the first place, we believe it was a mistake for the Task Force to subsume Western Canadian alienation under an undifferentiated sense of English Canadian regionalism. Within English Canada, Western feelings are distinctive and politically explosive. The West has its own history, its own multi-ethnic make-up (neither British nor French in character), its own industrial structure and political attitudes.

⁵ Report, p. 16.

⁶ *Ibid.*

Historically the West has a long list of economic grievances stemming from its quasi-colonial relationship with the metropolitan axis of Central Canada. To be sure, a lot of the Western case is spongy under skeptical economic analysis. Perhaps there is no better illustration than the time-honoured complaints about the impact of transportation policy, as some excellent recent work is beginning to show.⁷ By any yardstick it is the Atlantic provinces which have the better title to complain about the benefits of an economic union dominated by "the Empire of the St. Lawrence", to use Creighton's evocative phrase.⁸

But it is Alberta and British Columbia, not Nova Scotia and New Brunswick, that are calling for radical constitutional change. Western Canada is increasingly distinguishable from Atlantic Canada in that the roots of Western discontent lie not in ritualistically repeated grievances, but in the sense of power that commands an audience. Alberta is unquestionably the richest governmental jurisdiction in North America. British Columbia and Saskatchewan aspire to being not far behind. The current population of the Western provinces rivals that of Quebec and promises to outstrip the latter comfortably by the turn of the century. With people and wealth, the quest for political power follows close behind. The lesson of history is that those who previously were weak but have grown strong become impatient that "their reach now exceeds their grasp", and chafe under restraints they previously considered inevitable. That is what happened to Quebec in the Sixties. The same sentiment is abroad in Western Canada now. Not only is the West thus different from Atlantic Canada; there is an element in Western alienation that is comparable to the Quebec scene even though linguistic dualism unquestionably makes Quebec unique.

There is no better illustration than the coincidence of Quebec's Bill 101 and Alberta's Heritage Fund. The former is provincially legislated affirmative action that seeks to transform the linguistic face of Montreal. The latter makes available a multi-billion dollar fund to a provincial government intent on building a secondary manufacturing base and expanding local financial institutions, devising its own forms of affirmative action to that effect. So much for the argument that the current constitution is not elastic enough to accommodate regional aspirations. There is a subtler irony as well. These very government measures, both of which are left open to Quebec City and Edmonton under the B.N.A. Act as it now stands,

⁷ See Norrie, *Western Economic Grievances: An Overview with Special Reference to Freight Rates*, in *The Political Economy of Confederation* (1979), p. 199.

⁸ *The Empire of the St. Lawrence* (1956).

may well do more to allay *Québécois* and Western grievances than all the radical constitutional change that these grievances have led groups like the Task Force to espouse.

III. *The Constitutional Lever.*

We have already taken up the primary burden of this article. Just like almost everyone else in the flourishing business of reforming Canadian federalism, the Commissioners have reached too often for the constitutional lever. Not only do they find things to be seriously wrong in Canadian federalism, they also assume that we can and should fix them by rewriting the British North America Act. The main reason we have singled out the Task Force *Report* for critical review is to stake out our claim that constitutional reform should be the last, not the first, lever in a strategy to deal with the sources of Canadian disunity.

Ironically the Task Force itself embraces that philosophy when it deals with one of the most controversial issues on the current constitutional agenda: language policy. As is well known, Pierre Elliott Trudeau has devoted his public life—both scholarly and political—to try to establish in the Canadian constitution a fundamental *personal* right to use either French or English in dealings with governments across Canada, a right which would bind not just Ottawa but also the provinces. Most important of all, that constitutional principle would guarantee the right of an education in the minority language in any area where numbers warrant it.

The Task Force which Trudeau appointed has broken with that approach. A century of history has produced a situation in which language use and assimilation is going to be *territorial* in character, whatever a constitution might say.⁹ Thus, the Commissioners argue that provincial governments must have the constitutional latitude to deal with the current facts of life about cultural dualism in Canada: in particular that the French fact is now overwhelmingly the Quebec fact. Each provincial legislature should have the right to determine the official language within the province. To the extent that section 133 of the B.N.A. Act stands as a barrier to that aspiration—whether tangibly or symbolically—it should be deleted, not expanded.

Not that the Task Force was insensitive to the dilemma of two nations, which, somehow, must be rescued from *two solitudes*. Since the Bilingualism and Biculturalism *Report*,¹⁰ major steps have been taken to achieve greater degrees of bilingualism among elites in

⁹ See Guindon, *The Modernization of Quebec and the Legitimacy of the Canadian State*, in Glenday, Guindon, and Turowetz, eds, *Modernization and the Canadian State* (1978), p. 212.

¹⁰ *Report of the Royal Commission on Biculturalism and Bilingualism* (1967).

Canada. After all, how else can we have bilingual central institutions in Canada, a minimum need for a federal government which hopes to be legitimate in every part of the country? Having endorsed bilingualism in the central institutions of the federal government, the Task Force places its reliance on the political self-interest of provincial governments to see the need to provide equal linguistic opportunity for Canadian children to participate in these major institutions. In effect, the Task Force opts for a strategy of practical problem-solving, of statutory rights which can be tailored to the diversity of local situations, of intergovernmental bargaining to establish reciprocal language rights for citizens moving from one province to another; with the expectation, or at least the hope, that a national consensus will emerge "by appeal to the intelligence and the fairness of the population". Most emphatically, the Task Force chooses *not* "to brandish the club of the constitution".¹¹

This is the one setting in which the Task Force displays reticence about the value of constitutional cures. Indeed, having discarded a constitutional approach to the one fundamental right which figures so prominently in the question of Canadian unity, the Commissioners blithely go on to advise us to adopt a constitutionally-entrenched Bill of Rights. Here is the sum and substance of the argument they make to connect this proposal to their mandate. "There is a vital link between the protection of basic rights and Canadian unity. For only if Canadians feel individually and collectively confident of their rights can we expect them to display a positive attitude toward change and accommodation."¹² Further in the same vein, "a sense of individual and collective confidence in the security of their rights would contribute to a positive attitude of Canadian unity".¹³ We would not deny that a plausible case can be made for putting certain basic freedoms beyond the reach of temporary legislative majorities. The issue is a complex one, requiring among other things a delicate prudential judgment about whether our legal and judicial culture has displayed the aptitude for that charge; and thus whether it merits a higher degree of trust than our political institutions. Surely though, there has rarely been an odder claim for a Bill of Rights than the one the Commissioners have made.

The Task Force does not stop there. It goes on to argue for a thorough-going constitutionalization of our economic rights and freedoms. Under the heading of "Unity and the Health of the Economy" the Commissioners depict an environment "where there

¹¹ Report, p. 53.

¹² *Ibid.*, p. 107.

¹³ *Ibid.*, p. 108.

is constant haggling about which level of government is supposed to do what, where policies overlap and programs are duplicated, and where there are growing restrictions in interprovincial trade.¹⁴ . . . most provincial governments have developed a multitude of regulatory measures, have evolved practices such as preferential purchasing policies, quotas, and preferential pricing, and have established marketing boards, all of which have reduced interprovincial trade and therefore the efficiency of Canada's common market".¹⁵ We agree with the Task Force that the problem is there. We would like to have had an informed estimate from the Commissioners of the net loss in economic surplus from the restrictive provincial policies. We suspect that the aggregate magnitude would not be that high. Admittedly, the problem seems to be growing. As the example is set by one *cause célèbre* (Premier Bennett of British Columbia halting the take-over of MacMillan-Bloedel by that "foreign" corporation, Canadian Pacific) other governments are quick to follow suit, (for instance, in the recent Quebec budget, Finance Minister Parizeau has proposed a tax credit for investment in shares of Quebec-based companies).

Whatever the magnitude of the problem, the Task Force is bent on a set of constitutional remedies to enhance our economic union. In particular section 121 of the B.N.A. Act should be clarified in order to guarantee more effectively free trade between the provinces for all produce and manufactured goods, and be extended to include services. Preferential pricing policies should be permitted only in those cases "where the province requires them to alleviate acute economic hardship".¹⁶ Impediments to interprovincial movement within the profession and trades should be reduced, and barriers to movement of capital, especially corporate mergers and purchases of land, should be banned by the constitution.

Hopefully this would expand the size of the economic surplus generated in our common market rather than divert that surplus to finance constitutional litigation. On this assumption the Task Force, eager to insure that the surplus is more equitably distributed among the several regions than the free market would dictate, seeks to entrench in the constitution the responsibility of the central government for the principle of provincial revenue equalization—now embodied in a complex network of statutory transfers.¹⁷

¹⁴ *Ibid.*, p. 65.

¹⁵ *Ibid.*, p. 70.

¹⁶ *Ibid.*, p. 71.

¹⁷ Indeed the Task Force is much more ambitious than even that. Over and above mere equalization of standards of public services, they would make equalization of

With the Commissioners' economic intentions we have no serious quarrel. What we seriously question is the value of writing all of this into the constitution. Here are just a few of the questions which occurred to us in reading this part of the *Report*.

- (i) Has the experience with judicially-enforced constitutional guarantees of a free market been that happy in federations which have had them (for instance, Australia)?
- (ii) Why is rule by judges desirable for protecting the right of capital mobility, but not the right to education in the minority language?
- (iii) Is there ultimate compatibility between a free-flowing economic union and a territorially-based language policy?
- (iv) Should we entrench in our constitution the principle of equalization, and thus hamstring ourselves in making the adjustments which seem necessary for such sudden shocks as the OPEC hike in oil prices after the Yom Kippur War, to say nothing of a new structure of incentives which some economists feel must be imposed on the provinces to take some responsibility for tough measures to improve the lagging performance of their regional economies?¹⁸

In sum, we simply fail to see why a tack of statutory action, attuned to immediate practical problems, changing conditions, and diverse needs, one which is coordinated by reciprocal agreements achieved through executive federalism, is suitable for language policy but not for economic policy. The *Report* of the Unity Task Force makes no effort to tell us why.

IV. "A Restructured Federalism?"

Yet all of the above is just preliminary skirmishing. The flirtation of the Task Force with constitutional change becomes full-blown

social and economic opportunities between regions an objective of the Canadian federation. How do they propose to accomplish that? They would take half the revenues from non-renewable resources and distribute them as block grants to provinces whose economies had experienced relatively low rates of growth. The Task Force does not tell us whether that obligation should be constitutionalized as well, nor, in fact, who would pay for it and how. We are extremely dubious about this approach. It is one thing to prescribe equalization payments to compensate for measurable disparities in the fiscal capacity of provincial governments to raise revenue. It is quite another thing to try to equalize economic opportunities for individual citizens in whichever province they happen to live. Among other things, this would deny us the surplus which is gained from economic efficiency when resources are distributed in the locations where they are most productive.

¹⁸ See Courchene, *Avenues of Adjustment: The Transfer System and Regional Disparities*, in Fraser Institute, *Canadian Confederation at the Crossroads: the Search for a Federal/Provincial Balance* (1978), p. 143.

seduction when they present their conception of a "restructured federalism." Notwithstanding their disclaimer that they were *not* "primarily an advisory body on constitutional issues"¹⁹ the Commissioners observe that "we share the widespread public view that among the requirements of Canadian unity is the fundamental revision of the constitutional political structure".²⁰ They then put themselves on record about virtually every issue on the constitutional agenda. It is not necessary for the theme of our article that we grapple with each of these subjects in detail. Instead we want to probe beneath the surface of these issues to expose and appraise the tacit assumptions that inspire such an enterprise, one in which, as we have said, the Task Force has a great many collaborators.

The first and overriding assumption is that the future direction of Canadian federalism must be toward a much greater devolution of authority. There must be constitutional restraints placed on the exercise of jurisdiction in Ottawa, and a great deal more power to the provinces, presumably, in the eyes of the Task Force, because provincial governments are more sensitive to, and the prime engines of dualism and regionalism.

There are a variety of paths which may be followed to that goal. One of them is largely symbolic. Under the original "quasi-federal" understanding of our constitution, the provinces were placed in a subordinate position to the central government just as Ottawa remained in a subordinate position to the Imperial government. A number of relics of that relationship remain in the B.N.A. Act, several of which have fallen into disuse. The provinces resent these symbols of inferior status. There seems to be no particular reason why we should not use this occasion to tidy up the constitution, complete the transformation begun by Lord Watson, and make the provinces equal in legal status to the federal government as they now are in fact. Ottawa's unilateral powers of reservation, disallowance, and declaration should be removed and the provinces should be entitled to appoint their own Lieutenant-Governors and Superior and County Court judges. The last might have benign side-effects on the evolution of a rational system of administrative justice in this country. The Task Force endorses this "easy" package of constitutional reform.

The ground gets a little swampier when we approach issues of constitutional substance: the distribution of legislative authority. Given the reticence with which the Government of Canada has approached this issue it is likely that the federally appointed Task Force felt unusual pressure to declare itself on the subject. The

¹⁹ Report, p. 114.

²⁰ *Ibid.*, p. 81.

response of the Commissioners is nothing if not energetic. It looks quite literally to the complete rewriting of sections 91 and 92. It revamps the federal spending power. It invites the discreet emergence of special status for Quebec. It is as exhaustive as it is exhausting.²¹

The central thrust of the Task Force vision of a renewed Canadian federalism is contained in this passage which depicts the role they envisage for the provinces:

We see the essential role of the provinces as being to take the main responsibility for the social and cultural well-being and development of their communities, for the development of their economies and the exploitation of their natural resources and for property and civil rights. This implies exclusive [or occasionally concurrent] jurisdiction over matters pertaining to culture, education, health, social services, marriage and divorce, immigration, manpower and training, administration of justice, natural resources including fisheries, regional economic development, trade within the province, consumer and corporate affairs, urban affairs, housing and land use, and environment. It implies as well corresponding powers to tax. Provincial governments should also have the right, as long as they abide by Ottawa's overriding foreign policy, to establish some relations with foreign countries and to sign treaties in matters coming under their jurisdiction.²²

Not content with that range of responsibilities for all ten provinces, the Commissioners recommend additional powers for Quebec, the government responsible for the "French fact" in North America:

²¹ It may be pertinent to make some observations about the style of constitutional draftsmanship favoured by the Task Force. Some eminent constitutional lawyers had counseled against a brand new text, cut off from its moorings in the historic language that our judges, lawyers, and government officials have become accustomed to over this past century. The Task Force rejected that advice, feeling that our current arrangements "lack coherence and logical theme", Report, p. 91. As well, they ignored the suggestion that has been made that the B.N.A. Act suffered from the "vice of excessive particularity" in the drafting of lists of powers in sections 91 and 92. The Task Force wants a new Canadian constitution to allocate government authority among fully *seven* different lists. As a model for disentangling government jurisdiction, the Report, p. 92, offers us this draft proposal for immigration:

"Thus it is now possible to envisage a distribution of responsibility such that the settlement and integration of immigrants is an exclusive provincial responsibility, selection criteria and levels of immigration to a province are concurrent with provincial paramountcy, recruiting of immigrants abroad and the admission of refugees are concurrent with central paramountcy, and deportation of aliens and public safety are under exclusive central jurisdiction."

The Task Force tells us that this faithfully reflects what has been achieved in recent years through inter-governmental negotiations. Indeed it does. We wonder about the wisdom of taking the outcome of executive federalism at a given point in time and freezing that into the constitution, leaving that provision to an unknown destiny in front of judges who have had little or no experience in interpreting federal-provincial arrangements.

²² Report, p. 85.

In the case of Quebec, it should be assured of the full powers needed in the preservation and extension of its distinctive heritage. This would require either exclusive or concurrent jurisdiction, assigned to all provinces generally or to Quebec specifically, over such matters as language, culture, civil law, research and communications, as well as related power to tax and to establish some relations within these fields with foreign countries.²³

The Task Force proposes to protect the scope of provincial power from subtle federal incursions by drafting new, clear, and, as far as possible, exclusive jurisdictional lists.

The bemused ordinary citizen may well wonder how devolution of power to the provinces will contribute to a stronger sense of Canadian unity. Yet most close observers of Canadian federalism would agree with the Task Force that a more decentralized federalism is inevitable—though some are not quite as enamoured of the prospect as others. The attitude seems to be that if we do not loosen the reins on these powerful regional forces, the steed might bolt completely. On this point the Task Force sits quite comfortably in the middle of the “renewed federalism” camp, flanked by Claude Ryan and Peter Lougheed.

There is a logic to that decentralizing impulse, one which emerges clearly if we consider the situation of the *Québécois* in Canada. They are a distinct minority within the country as a whole. They now have about the same percentage of the population as at the time of Confederation. The declining birthrate in Quebec and the drift in economic activity westward means that *Québécois* can look forward to less than a quarter share of the Canadian population by the year 2000. The French Canadians have a profound sense of group identity and concern about the powers of the English majority fueled by the historic memory of such crises as the hanging of Riel, conscription, and the air traffic strike.

Yet we do live in a democracy, founded on the principle of political equality of the individual: wherever he lives, whatever his race, language or creed. The institutional expression of that principle is the procedure of majority rule. In parliamentary government, with its disciplined parties, the majority really can rule. The government they elect can get things done, and be accountable to the majority for the results. In turn, that exposes a minority to a considerable threat. There is far less chance of building coalitions and floating alliances on specific issues than there is in a congressional system, in which political entrepreneurs can take account of the relative intensity of views about issues that are crucial to a smaller group. It may be possible to fence out some areas of minority concern, which are made immune from the legislative majority by being entrenched in a

²³ *Ibid.*, p. 86.

Bill of Rights. That is possible only for a limited number of "fundamental rights," and difficult even for these. And the Supreme Court, which has the final say about these, must itself surmount that hurdle of the relationship between the majority and minority language groups.²⁴ As to the vast number of day-to-day issues of government policy, even if the *Québécois* minority need not fear the animus of the majority, it is always exposed to the majority's insensitivity towards its special needs and concerns, (to take some random examples from recent history, the strike at Radio Canada, immigration from French language regions in Europe and Africa, and macro-economic policies in a country with sharply varying rates of unemployment and growth).²⁵

There has always seemed to be one natural response to that dilemma. While French Canadians are a minority in Canada as a whole, they are a majority in Quebec. They have a provincial government in Quebec City which they control as a majority. So let us assign more and more power to that level of government, to assuage the feeling of the *Québécois* that they are a beleaguered minority. Hence the drift to a more decentralized Canadian federalism ever since the fall of the St. Laurent régime in Ottawa and the election of Jean Lesage in Quebec City.

Even abstracting for the moment from the plight of the Anglophone minority inside Quebec, there are evident limits to the erosion of central government authority as long as we are to remain a viable country which, presumably, is the aim of the exercise. The point is subtler and more far reaching than might be thought. There are powers that a government in Quebec City might want to exercise, but which it cannot wield nearly as effectively as part of a larger Canadian union as it could if it were governing a sovereign state of its own. Take immigration as an example, a subject in which the special *Québécois* interest is apparent. Suppose Quebec were given

²⁴ There can be no better testimony than the Task Force's own treatment of the Supreme Court. The Commissioners see it as "crucial that Quebec look upon the Supreme Court of Canada as a bastion for the protection of that province's responsibilities for a distinct heritage." Report, p. 101. To that end they propose that fully five out of eleven Supreme Court judges must be from Quebec (which, recall, contains slightly more than one-quarter of Canada's population). The Task Force seems to have cast about for a suitable vehicle among our national institutions to provide some affirmative political action for the benefit of the French Canadian minority, and ultimately settled on the Supreme Court as the candidate. A decent airing of these and other proposals for the constitutionalization of our Supreme Court requires an article all its own. One of us is now in the process of preparing that for publication elsewhere.

²⁵ The last topic is of growing concern to French-Canadian economists; e.g. Fortin, Paquet, and Rabeau, *Quebec in the Canadian Federation*, [1977] Can. Pub. Ad. 588.

jurisdiction over immigration to try to attract a much higher proportion of Francophones to that region, in accordance with the province's cultural mission. Quebec City would establish carefully tailored limits and priorities to that end. But the province of Ontario might follow quite a different policy, opening its borders wide in hope of attracting a substantial influx of newcomers. Foreigners, seeing that and wanting to immigrate to Montreal, need simply use Ontario to do an end-run around the Quebec programme. (We assume that a minimum attribute of Canada as a single political entity is that a province such as Quebec could not establish check-points at its own border to bar interprovincial migration.) Thus the operation of one province's policy is always capable of frustrating the objectives of another as long as they are both part of the same larger nation.

True, Quebec could always enter into an inter-governmental agreement with Ontario to co-ordinate their respective policies. This is a lot more difficult to do than to say, at least beyond isolated instances. That co-ordination would have to be secured among all ten provinces, each of which has its own needs and priorities, but which must be won over to a relatively coherent package. If and when initial agreement was achieved, it would be very difficult to alter it to adjust to changing conditions, lest the entire scheme come unraveled. Perhaps the major role of a national government in a federal system, one which exercises direct, independent authority, is that it can do the job of representing, compromising and welding together the competing interests of all of the regions of the country, at those many spots where they intersect.

Of course the illustration we gave of the self-contained arena of immigration is writ large across the entire length and breadth of economic policy. Again, a minimum attribute of a modern state is that it has a common currency, a single foreign exchange rate, a central bank operating monetary policy, a common market, and a central fiscal policy impacting on the entire nation. The result is that economic disturbances originating in one region ripple through into the other regions which, under a federal constitution, lack the key economic tools to insulate themselves. We live in an era in which our economic pain threshold is low. Governments are bombarded with cries for relief from high unemployment and high inflation. That puts Ottawa under inexorable pressure to maintain, even to extend the reach of its economic levers, to try to pilot our balky economy in an increasingly stormy world. An action that only a national government can take is to protect the citizens of some provinces from the harmful spillover effect (for instance, unemployment in factories in Ontario and Quebec) of economic initiatives taken in other provinces by governments responsible only for the interests of their own

citizens (for instance, Alberta and Saskatchewan raising the price of oil and gas).

There is a possible route out of that dilemma. Why not give Quebec alone those additional powers? After all, Quebec, as the home of the vast majority of French Canadians, is the only province with a special linguistic vocation. The other provinces making up English Canada can continue to live under a powerful Parliament. As long as negotiations can be confined to the bilateral level between Ottawa and Quebec City, there will be no great difficulties in co-ordinating and adjusting policies (as the example of old age security appears to demonstrate). That is the route of "special status" for Quebec, so popular among constitutional elites in the Sixties.

Unfortunately, in the real world rarely are we allowed to have our cake and eat it too. Many people believe there are serious problems with the concept of special status, both in principle and in practice. As Prime Minister Trudeau was so fond of reminding us, there is only a limited degree of special authority which can feasibly be conferred on a regional government as long as we pretend to have a single national government responsive to citizens everywhere in the country. If Quebec City is setting policy on immigration, communications, regional economic development, social security, and so on for the *Québécois*, eventually the people in the rest of the country will put the uncomfortable question. By what title do Quebecers elect and send to Ottawa Members of Parliament who help set those policies only for the rest of us—perhaps as the Cabinet Minister responsible, or even as Prime Minister?

As if in empirical confirmation of that thesis, the Seventies has brought home the fact that cultural dualism between French and English Canada is not the only cleavage in Confederation. There is an increasingly clear divergence between the economic interests of Western Canada and those of Central Canada. Much more consistently than French Canadians, Westerners have been in a political minority in Ottawa. As a self-perceived economic minority, they now feel much the same impulse as the linguistic minority to build up the authority of the provincial governments that they control. Whatever differences there may be about the details of constitutional proposals, there is one profound sentiment shared throughout Western Canada. If Quebec wins substantially greater authority in a new constitution to renew Canadian federalism, the West will want much the same deal for itself.

The Task Force does make a heroic effort to rehabilitate the special status option, under the rubric of an "asymmetric federalism". The Commissioners remind us that there are fundamental differences between the size and capacity of a province such as

Prince Edward Island and that of Quebec, and that Quebec has always been treated somewhat differently under the B.N.A. Act (for instance, in language guarantees under section 133 or in the immunity of its civil law from the uniformity provision in section 94). The Commissioners feel that Quebec does need special powers "over such matters as culture, language, immigration, social policy, communications and some aspects of international affairs" to protect and develop its distinctive culture and heritage. They warn that "any political solution short of this would lead to the rupture of Canada".²⁶ But the Task Force does not propose to offer these law-making powers to Quebec alone, and deny them to the other provinces. That might imply a "privileged" and "favoured" treatment for Quebecers. Instead these additional powers would all be *formally* available to all the provinces, but under a framework of interdelegation and concurrency with provincial paramountcy within which English-speaking provinces would not need to exercise them. Hopefully these areas would then remain within the jurisdiction of an effective national government, where, we can assume, the Task Force believed that they should naturally be located (except for the special needs of Quebec). Thus the Task Force maps out a constitutional route under which Quebec would inevitably—albeit indirectly—become a province *qui n'est pas du tout comme les autres*.

That is a fond but rather elusive hope. After all we are not talking about provinces like Prince Edward Island or about achieving uniformity in esoteric areas of common law. Rather we are talking about powerful provinces such as British Columbia or Alberta and attractive powers such as control over television. If the constitution were to make available jurisdiction over communication to each province, politicians and bureaucrats in Victoria and Edmonton would be sorely tempted by that prospect. They would likely be egged on by local citizens, who are not terribly enamoured of a CBC or CRTC which they see as dominated by Toronto or Montreal. We fear that the Task Force strategy of "asymmetric federalism" really is a recipe for decentralization to all of the major provinces, rather than a way-station for special status for Quebec alone.

V. *A Different Strategy.*

Our readers may be getting rather depressed from this litany. As fast as the Task Force throws up a new idea, we try to knock it down. Does that mean that we believe Canadian federalism is not really threatened? Do we have anything constructive to propose as an alternative? It is incumbent on us to make our commitments clear.

²⁶ Report, p. 87.

Obviously Canada does face a profound challenge to its continued existence. Rarely in the life of any country is a referendum conducted by the residents of a major region to determine whether they wish to leave. Clearly Canada is going to be one of the most decentralized federations in the world. In our judgment there must also be sufficient play in the constitutional joints to permit a discreet special status for Quebec, acknowledging the extraordinary circumstances of five million French Canadians beleaguered in the English-speaking sea of North America.

Where we part company with the Task Force is in the assumption that the rewriting of the constitution is either a necessary or desirable means to that end. In our view, constitutional revision has nothing to do with the referendum and indeed may be counter-productive. Furthermore, to assume that we could ever agree on a completely revised constitution flies in the face of our every experience with constitutional negotiation, and exposes Canada to the risk of less change than may be desirable. Our history should teach us the virtues of negotiating changes in legislative policies attuned to practical problems rather than the staking of abstract jurisdictional claims, and the need for a finer sense of constitutional morality exhibited in the day-to-day behavior of all of the governments in our Canadian federation.

Let us reflect for a moment on the dynamics of constitutional revision. In the first place, it was and it is totally unrealistic to try to revamp our constitution to defeat the *Parti québécois* referendum. Any significant constitutional changes require the consent of the government of Quebec City, politically if not legally. Why would René Lévesque ever agree to meaningful reform which would only make his sovereignty-association option seem less attractive? We think it was Donald Smiley who once observed that it is rather difficult to write the peace treaty in the midst of the war! Nor is failure to fashion a new constitution just a neutral step. The entire exercise simply detracts even more from the legitimacy and worth of our existing document—the only constitution we now have. Then the *Parti québécois* can appeal for swing votes in the referendum campaign through subtle suggestions that a strong mandate is needed to show English Canada that Quebec wants truly radical surgery on the *status quo*, whether just inside or just outside the federal option.

Of course, on the assumption that the federalist forces win the referendum, we could then settle down for some truly serious constitutional negotiating in the early Eighties. That is when our troubles may just begin. One difficulty we would face would be this. We have both a murky and an unwieldy procedure for constitutional amendment. The evolving consensus, tantamount to a constitutional convention, is that there must be agreement of all governments in

Canada, federal and provincial, about any major changes affecting the federal structure. That is a terribly difficult target to aim at: to achieve unanimous agreement from all eleven governments at one time, each of which has its own political setting and problems. For the past half-century we struggled for a new domestic amending procedure. As the fate of the Victoria Charter showed, Quebec will not agree to any formula until it has first secured the entire array of constitutional revisions it feels it needs. Alberta now seems to share that same view. The trouble is that we cannot secure anything like those substantive changes until we get a more realistic amending procedure. That is the Catch-22 of constitutional reform in Canada right now.²⁷

Suppose, perchance, that we did get a new amending formula. Even then consensus is unlikely. What is the atmosphere at the constitutional bargaining table? The participants are government leaders who are embroiled in the day-to-day conflicts of Canadian federalism. They will want to draft constitutional language that will clearly disentangle the problems that they have just experienced. We quoted earlier the kind of detailed language which the Task Force proposed for immigration. That pales by comparison with the frightening detail in the draft proposals exchanged by Ottawa and Alberta about natural resources and interprovincial trade. At the same time, the wording towards which these governments are groping is to be entrenched in a *constitution*. Thus our leaders know that any commitments they make will be well-nigh irrevocable. And their troubles in achieving consensus now simply reinforce their fear that they could never change that language in the future. Naturally each participant looks for wording which will protect it from all sorts of "hypothetical horrors" for an entire century. It is a wonder that we have secured any significant changes in the distribution of authority in our first century. That we have is the consequence not of constitutional change but of federal-provincial diplomacy in matters of public policy.

This is the path we advocate for dealing with our Confederation discontents. New policies, new understandings, must be pursued along the modest avenue of legislative change, rather than ambitious

²⁷ The Task Force weighs in with its variation on that time-honoured theme: an amendment formula which by-passes the provincial legislature in favour of a majority vote of the two Houses of Parliament (one of these a new House of the Provinces to be described shortly) plus ratification in a Canada-wide referendum requiring favourable majorities in each of our four regions: Quebec, Ontario, Western Canada, and the Maritimes. Understandably a lot of Canadians are fascinated with the subject of referenda these days. Still, whatever the merits of that device in principle, we question whether, in the existing climate, a formula for an end-run around a provincial government such as Quebec City or Edmonton really is the answer to that dilemma in Canadian constitutional change.

constitutional restructuring. There is no better example than immigration. This area poses abundant practical problems of public policy. From a functional standpoint, it is clear that all provinces have a legitimate concern about the impact of immigration on their local programmes. Quebec has a qualitatively distinct interest in the impact of newcomers on the francization of Quebec. At the same time, Ottawa must have an overriding authority for a variety of reasons, some of which we alluded to earlier. The sensible way to attack this problem area in federal-provincial relations is to work out an agreement which spells out the area of jurisdictional authority and policy judgment that each side will exercise to meet its needs. Because that bargain is to be expressed in a written agreement or statute, rather than in a constitution, consensus is relatively easy to achieve. Neither party need worry about making an irrevocable commitment, one which will foreclose its position about matters that it cannot now anticipate. Each party retains the right to go back to the bargaining table, and recognizes that the other may also be looking for revisions as positions change and adjustments are needed.

This is precisely how jurisdictional conflicts in immigration were sorted out in the last five years. That same avenue has been generally followed in Canadian federalism for the past fifty years. While the language in the B.N.A. Act remains largely untouched, the real distribution of political power between Ottawa and the provinces has shifted dramatically. In the Forties and the Fifties the pendulum swung towards Ottawa. In the Sixties, it veered towards "special status" for Quebec, but in the Seventies the pendulum of power has swung towards all of the provinces. Perhaps the epitome of the entire process is the Established Programs Financing Act,²⁸ whose fallout in our daily lives is now being seen in front-page stories in the newspapers about Medicare, eloquent testimony that no solution is a final solution.

In all of the tumult and shouting heard in the federal-provincial arena, most Canadians miss the message of how remarkably successful our system of executive federalism can be. For example, following the shock of the OPEC oil price increase in 1973, and after some initial fumbling, Ottawa and the provinces did quite a good job (certainly by American standards) in cushioning the impact of higher energy costs throughout our regions, in distributing the huge revenues from natural resources, and in adjusting the equalization formula to that phenomenon. They performed that task best when the government leaders stopped exchanging salvos about abstract constitutional "rights" and got down to meeting the tangible needs of their citizens. Ironically, the most difficult hurdle was recently

²⁸ R.S.C., 1970, c. E-8.

erected by the Supreme Court of Canada in its *CIGOL* decision,²⁹ when the court introduced new and unhappy constitutional doctrines. That put the touchy subject of natural resources squarely on the agenda for constitutional reform. As we might have anticipated, the terrain has proved much harder to explore from the air of constitutional abstraction, as it were, than on the ground of energy policy negotiations.

And the latter is the environment in which a decent level of asymmetric federalism, of *statut particulier* for Quebec, could be nurtured. We agree with the Task Force that there are a number of places where Quebec's distinct heritage and culture do warrant larger areas of policy-making authority being located in Quebec City: immigration, communications, social policy, even international affairs. In a relatively low-key, low-visibility environment, those areas should be identified. Understandings can be reached tailored to the immediate problems that are faced and the immediate policies that are to be pursued. Ordinarily those agreements will last for a fixed term and will be open to renegotiation as events move on. Most important, once agreement is reached in an area such as immigration, there is no reason why the same package must be offered to Halifax, for instance, at least to anything like the same degree. No more, we might add than that Ottawa must sign the same agreement with Saskatchewan about off-shore resources as it does with Newfoundland.

It seems to us that this is a far more sensible route to follow than the Task Force proposal of a new constitution which will offer an "open sesame" to all the provinces to exercise these powers; in the hope—we think a faint hope—that the other provinces will use self-restraint to preserve a viable national polity. Under the strategy we envisage, Ottawa would be there as a counter-weight. Before a province secured additional authority in a particular area, it would have to persuade the federal government that it needed that authority to respond to special regional needs.

No doubt all of that will look messily pragmatic, perhaps even offensive to the canonical mind, especially one as finely-honed as that of Pierre Trudeau, who did his best to dismantle the incipient arrangements for a special status for Quebec fashioned by Pearson in the Sixties. It will be unsatisfactory to those people in provincial capitals who want to spell out grand theories of constitutional principle—equating a renewed federalism with more power for them—and embody these in a new constitutional charter. As well, it will be argued that we place too much faith in Ottawa's receptivity to

²⁹ *Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545, 80 D.L.R. (3d) 449.

these agreements, in its willingness to cede its powers to the provinces if that seems desirable. As to the latter, we simply respond that if the government in Ottawa has a self-interest in preserving the unity of the country by healthy doses of regional autonomy, that will be considerably easier to achieve by these kinds of agreements than by writing a new constitution. The record of federal-provincial diplomacy in the last twenty years satisfies us that this task is perfectly feasible. As J. Alex Corry has so wisely pointed out, what the country needs now is a lot more day-to-day constitutional *morality*, and a benign neglect of constitutional *legality*.³⁰

VI. *Refurbishing Ottawa.*

The burden of our argument has been to stake out a position about the ideal *process* of institutional change within Canadian federalism. We should add some observations about *substance*. Some additional decentralization does appear inevitable in Canada. In places that would be desirable. It is in order to avoid undue and irreparable devolution of authority to all the provinces that we would rather see such changes kept out of the constitutional arena as much as possible. But that kind of containment strategy will only work in the long run if our national institutions in Ottawa can somehow be refurbished and made more attractive. The arrangements that were fashioned in 1867 were modeled after Britain, a unitary state, and were put in place by a quasi-federal B.N.A. Act. The emergence of a new and positive role for government, and the way that has shaped our party system, our cabinet, our bureaucracy, and the position of our Prime Minister, have made these original structures increasingly unsuited to the thoroughly federal society which Canada has become.³¹

We are offered two paths out of that dilemma. One is creation of a new and different second chamber in Parliament. The most fashionable version is known as the House of the Provinces (endorsed by the Task Force under the sobriquet "Council of the Federation"). This body would give provincial governments a direct role in governing Ottawa, through a permanent delegation headed by a Cabinet minister, and on occasion by the Premier. Modeled on the West German Bundesrat, the House of the Provinces would wield a variety of suspensive and mandatory vetoes, with different majorities required for different kinds of action.³² The objective of that new

³⁰ Corry, *The Uses of a Constitution*, in *The Constitution and the Future of Canada* (Law Society of Upper Canada, 1978).

³¹ Smiley, *Structural Problems of Canadian Federalism*, [1973] *Can. Pub. Ad.* 326.

³² Unlike West Germany, where a Constitutional Court resolves cases of conflict between the two chambers, the Task Force places its rather sanguine faith in a

institution would be to integrate our executive federalism into the parliamentary institutions in Ottawa in order to "insure that the views of provincial governments are taken into account before any central action [is taken] which might have an impact upon legitimate provincial concerns, thus inducing more harmonious federal-provincial relations".³³

Most emphatically we think that proposal is not a good idea for Canada at this time. One of us has devoted an entire article to developing the reasons why.³⁴ We will not use the limited space allocated to us here to repeat that case. We do make these observations about the sketchy analysis by the Task Force:

1. We believe that something of real value would be lost if the Senate were abolished. This is the role of "sober second-thought" by a *legislative* body, in contrast with the organ of executive federalism which the Task Force envisages for the House of the Provinces. The dimensions of that role are being seriously plumbed by the Senate in the last decade or two. We can think of few better tools than the Senate Committee on National Finances to alter Ottawa's image as a "remote, shambling bureaucracy". It is hardly likely that would be achieved in the "strengthened committee structure in the Commons",³⁵ shaped as that inevitably is by partisan concerns and party discipline in an elected House. Admittedly the Senate image of, in effect, "life peerages" should be refurbished, ideally through appointments for non-renewable terms of ten years, half appointed by provincial governments. With that caveat, a body that contains people like Messrs. Roblin, Manning, Robichaud, Lamontagne, Marchand, Forsey, and Goldenberg, should not be consigned to oblivion quite as casually as it is by the Task Force.

2. We confess that we are more impressed by the virtues of our system of executive federalism than was the Task Force, who harp on its supposed deviation from "normal" political processes in a democracy. That is why we are so concerned about a constitutional change which might well undermine the process. The dynamics of federal-provincial diplomacy require attention to practical problems and programmes, delicate negotiations to probe for priorities and trade-offs, and a federal government which often must switch roles from a party in interest to a conciliator-arbitrator between clashing regions (for instance, in the energy crisis we referred to earlier).

permanent committee of the Speakers and selected members from both the House of Commons and the House of the Provinces, but suggests no way of resolving deadlocks.

³³ Report, p. 99.

³⁴ Weiler, *Confederation Discontents and Constitutional Reform: the Case of the Second Chamber*, 1979 Wright Lecture, to be published in the U. of Tor. L.J.

³⁵ Report, p. 99.

Even now the major breakthroughs and accomplishments more often than not take place at a private dinner at 24 Sussex Drive. Surely everything we have learned about bargaining, whether in labour relations or in federal-provincial relations, teaches us how much more difficult it is to fashion compromises in an open forum, with the inevitable temptation to posture for an audience back home. The Task Force itself seemed to recognize that when it expected that "much of the preparatory work for the meetings of the Council would take place through its committees".³⁶ That is exactly how the German Bundesrat operates. Committees of civil servants stationed in Bonn do the negotiations and reach the compromises which are ratified by the politicians in the Bundesrat. How that model would improve the normal political process of parliamentary democracy in Canada is far from clear to us.

3. Finally, we are more worried than the Task Force that a House of the Provinces could be a recipe for partisan obstruction in Ottawa, thus weakening even further the legitimacy of our national political institutions.³⁷ We are also concerned that this idea has been put on the agenda in addition to, rather than in lieu of, the expansion of the independent jurisdiction of the provinces. Perhaps an apt, colloquial translation of the package is that the provinces will say to Ottawa: "What's mine is mine, and what's yours should be mine as well!" We are dubious that that is the most sensible gambit in our current straits.

That is not an objection which can be lodged against a final issue on the constitutional agenda—electoral reform. Change here would respond to a significant, tangible problem within Canadian federalism, and can be achieved without opening the Pandora's Box of the constitution. The Task Force endorses that idea, the first of our public reports to do so.

³⁶ *Ibid.*, p. 98.

³⁷ One intriguing feature of the Report seems to recognize the potential for obstruction in a House of the Provinces of desirable national programmes. The Task Force proposes that any use of the federal spending power in areas of provincial jurisdiction must be ratified in the House of the Provinces. But that is done only after the federal government is given an explicit power of its own to make unconditional payments to the provinces. That power is the lynch-pin of the equalization programme which the Commissioners believe is indispensable to an effective and equitable economic union. Earlier in the Report, the Commissioners intone that "federal systems are generally more stable and more effective than confederal systems in which the central institutions consist of delegates of the component state governments. . . . Furthermore, a crucial disadvantage of the confederal form of union . . . is the difficulty such systems have in achieving an effective redistribution of resources to correct disparities among constituent units". Report, p. 82. Accepting the cogency of that observation, the Task Force carefully insulates the federal operation of the equalization programme from scrutiny and possible obstruction in the House of the Provinces, the very confederal-type body they propose to clamp on the rest of governmental action in Ottawa.

Simply put, the problem we face is the disintegration of our national party system. The Conservatives traditionally win a tiny number of seats in Quebec (the NDP none at all) while the Liberals are now faring equally poorly in the West. That disparity reached its nadir in our most recent election in 1979, when the Tories won only two of seventy-five seats in Quebec, and the Liberals just three of seventy-seven in the West (two of these by razor-thin majorities). Neither major party caucus can remotely lay claim to being representative nationwide. This fact places the operation of national government under serious strain in Canada, a fragmented community at the best of times.

Those visible indices of party support in a region are somewhat deceiving. Building on the classic study by Allan Cairns, scholars have shown how our electoral system distorts the true distribution of party allegiance by region.³⁸ For example, the Liberals have consistently polled more than twenty-five percent of the vote in Western Canada, the Tories more than twenty percent in Quebec. But our single-member, "first past the post" electoral system just as consistently translates these sizeable numbers of votes into just a tiny handful of seats. The resulting disease, once it afflicts party caucuses, tends to be progressively debilitating. The fundamental actors in a parliamentary system are the party teams in the Commons. A caucus with little or no representation in Quebec or Western Canada may lose touch with the distinctive feelings and attitudes of these regions. If this lasts long enough, the caucus may not even be able to assimilate a sudden windfall gain of members: to wit, the difficulties of the Conservative caucus with the influx of Quebec members from the Diefenbaker landslide in 1958. Representational deficiencies become self-perpetuating as party organizations decide to expend their scarce campaign resources—not just money, but also the leader's time and planks in the party platform—to concentrate the party's appeal in those regions whose extra votes have a realistic chance of yielding more seats. We have reached the ominous position in 1979 in which the Conservatives, while forming the government, have actually dropped below fourteen percent in the popular vote in Quebec, almost beyond the reach of a proportional representation remedy!

The latter is of course the obvious medicine. Nor need we dispense with our traditional Anglo-Saxon system of local constituency ties between members and electorate. We need simply add to

³⁸ See Cairns, *The Electoral System and Party System in Canada: 1921-1965* (1968), 1 *Can. J. of Pol. Sc.* 55; Smiley, *Federalism and the Legislative Process in Canada*, in Nielson and MacPherson, eds., *The Legislative Process in Canada* (1978), p. 73; Irvine, *Alternative Electoral Systems*, in *The Political Economy of Confederation* (1979), p. 269.

that system a number of Commons seats—the Task Force proposes sixty—which should be filled from national party lists in proportion to their popular vote. That way, each region would effectively be guaranteed representation in the party teams which, in the final analysis, are the central actors in our system of parliamentary democracy.

That notion has this additional virtue. It can be accomplished without raising all of the hackles that are customary in debates about shifts in the balance of power between Ottawa and the provinces. It does not have to be negotiated and agreed to by all eleven governments. The difficulties with the constitutional amendment formula can all be finessed. The issue can be debated in Parliament by MP's who have had first-hand experience with the election system, with the role of the MP in Ottawa, and with the distorted make-up of their party caucuses. If, as we hope, this is an idea whose time has come, it can be accomplished in one stroke by an Act of Parliament. Nor could the *Parti québécois* decently lodge any objection. After all, electoral reform is an idea they have been toying with for Quebec itself.³⁹

It is fair to observe that the Task Force endorses this idea with a rather different emphasis than we do. Indeed the Commissioners, rather than prescribe like a physician who retains hope for the return of his patient to full health, appear to have approached the party caucuses somewhat like a mortician who applies his cosmetic skills to disguise a corpse from the ravages of a terminal disease that has run its course. A dose of proportional representation can dress up a party caucus with some semblance of national representativeness. The road to good health requires considerably more. It may be a matter, for example, of considering a variation on the Task Force proposal advanced by Donald Smiley. The candidates awarded Smiley's provincial seats would be elected not with reference to their position on a party list but by virtue of having been the strongest runner-up in the province's electoral districts. It follows that the provincial MP's from the regions in which a party is weakest start with at least some proven vote-getting ability as a base from which to resurrect local party fortunes. Does such a base promise more likelihood of recovery than high ranking on a party list that might be entirely composed of individuals with impeccable personal credentials but no aptitude for electoral campaigns?

To debate the point is interesting, but is rendered academic in the context of the Task Force proposals. The provincial MP's who

³⁹ In April 1979 the Hon. Robert Burns, Minister of State in the Government of Quebec, issued a green paper on the reform of the electoral system, entitled *One Citizen, One Vote*.

find their way into the reformed House of Commons are viewed by the Commissioners as anything but the workhorses in what must be a political bootstrap operation if a party's regional weaknesses are to be other than disguised. Instead, these MP's will find waiting for them the very functions of legislative refinement and investigation that the Commissioners' Council of the Federation forced them to export from the upper house. Why? Because these MP's are free, in the Commissioners' words, "of constituency problems which require, rightly, a great deal of attention".⁴⁰ Apparently a region in which party representation has long been deficient does not constitute a set of constituency problems, or so the Task Force would have us believe.

There is no better illustration than this of how the Task Force has let its sense of constitutional inventiveness triumph over its sense of priorities. They jot down proportional representation on a laundry list of fully *seventy-five* constitutional recommendations, many of which, like their revamped upper and lower Houses, would not live very comfortably together. We endorse that proposal with quite a different emphasis. We would use the limited momentum for renewal of Canadian federalism on this single important reform in Ottawa: to accomplish a manageable improvement in the representativeness of our major party caucuses, and thus to repair the most serious flaw in the capacity of our central institutions to contribute to national unity. For it is the House of Commons—not the Monarchy, the Governor General, the Senate, the Supreme Court, even the legal status of our fundamental rights—which we must strengthen in order to enhance the legitimacy of our national seat of government in Ottawa.

VII. *Conclusion.*

In retrospect we have been somewhat hard on the Unity Task Force. Nothing it says is outside the mainstream of current analysis of Canadian federalism. In many respects the *Report* is the most impressive of the lot.

Still, it is for that very reason that detailed scrutiny of this document is useful in exposing the set of mind which is widespread among our constitutional reformers. Canada is enveloped in twin crises of *Québécois* nationalism and Western Canadian alienation. Our constitutional arrangements, centered in Ottawa, are stifling these legitimate aspirations. Only massive surgery on the B.N.A. Act can (and will) cure these ailments. It is concerning the prescription that we cannot be too critical. We think it is a mistake. There are inherent limits in the degree of constitutional change which can be digested at any one time. Canadians are not starting

⁴⁰ Report, p. 106.

afresh (as were the Americans in the late 1780's). We are not rebuilding a polity devastated by war (as were the West Germans in the late 1940's). We have had a century of history, practices, and understandings in what we dare say ordinary Canadians feel has been a relatively successful experiment in government, its admitted flaws notwithstanding. Even if it were desirable—which we do not think for a minute—it simply is not feasible to rebuild our constitution from scratch.

Undeniably, there are powerful centrifugal forces abroad in our country, gnawing at the roots of the Canadian fabric. To the extent that our political structures are out of joint, and new power-sharing arrangements are needed (especially with Quebec) these will most sensibly and most likely be accomplished through Canada's modern invention of federal-provincial diplomacy: in the form of detailed, tangible agreements for sharing power in specific theatres of government action.⁴¹ Meanwhile the aptitude and the appetite for outright institutional innovation is a scarce resource in any ongoing nation. For the moment we would invest that capital in a single important reform: partial proportional representation in the House of Commons.

⁴¹ See McWhinney, *Quebec and the Constitution: 1960-1978* (1979), p. 147.