

THE "THIRD OPTION"

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A "third option" implies that there are at least two other choices. In the present debate on the future of what is now Canada, the other two are usually presented as "the *status quo*" and "sovereignty-association", a formulation which indicates how far the rest of us have allowed the *Parti québécois* to set the rules for the debate. I do not propose to be bound by these rules. They take far too much for granted.

The formulation is in fact unreal.

In the first place, is there a constitutional *status quo* (which implies something fixed, something unchanging, in the context even something unchangeable), or is there a developing constitution, a constitution which has changed enormously since 1867, is still changing, and is certain to go on changing? Does anyone argue that we should simply preserve the existing constitution at the point it has now reached, that there should be no changes? Are there any "stand-patters" in this debate? If so, on their demise, they should be stuffed and put in the national museum, which, by charging admission, could soon pay off the national debt.

In the second place, is sovereignty-association really an option at all? The concept, certainly until recently, has been imprecise, to put it mildly. But we now have a tolerably clear statement of what the *Parti québécois* means by it. For practical purposes, that is what we are concerned with.

There would be two sovereign states, Quebec and Canada. Their relations would be governed by a treaty. The treaty would provide for a common external tariff, a common monetary system, a joint decision-making body on matters which, under the treaty, were of common concern, and a joint court to interpret the treaty if differences arose about its meaning in a particular case. The joint decision-making body would have an equal number of members from each government; each state would have one vote, and each would have a veto. The joint court would have an equal number of judges from each state, with a chief judge approved by both governments. Each state would retain the right to protect its own agriculture (which could mean two internal tariff walls for that not inconsiderable industry, and two external tariffs for agricultural products), and the right to protect "temporary aid to development" (which might cut

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another large swath through that common tariff and internal free trade area). There would be two central banks, but under a joint co-ordinating body, with, apparently, equal representation from each state, and a veto for each. The joint bodies would be constituted on "the general principle of equality", but the costs of their operation would be "subject to negotiation" between the two states: Equal power for each state, but not necessarily equal costs.

Can anyone really believe that this is an "option" for either state?

Take the common external tariff. Quebec would undoubtedly want this raised on such products as textiles, clothing, boots and shoes and furniture, to protect its ailing industries. Canada, just as undoubtedly, would want those same duties lowered. The Canadian members of the joint decision-making body would say: "We are very sorry about your ailing industries. They used to be Canadian industries, and, as long as they were, we had to do something to protect them. But now they are not Canadian industries any more. They are foreign. You are, by your own choice, a foreign country. We see no reason why Canadians should subsidize the industries of a foreign country. On the contrary, we see every reason why they should get these goods as cheaply as possible. So we want those duties lowered." Quebec would say, "Up", Canada would say, "Down", and each would have a veto on something the other considered essential.

The *Parti québécois* laughs that off by saying that Ontario would insist on the "association". What this overlooks is that Ontario would be in no position to insist on anything. As long as both Ontario and Quebec are in Canada, Central Canada has a majority in the House of Commons. Take Quebec out, and that majority disappears. The new majority will be the low-tariff West and the low-tariff Atlantic provinces.

The same holds for the common monetary policy, which would be settled by the joint co-ordinating body, on which each side would have an equal number of members, and a veto. Quebec would almost certainly want a more expansionary monetary policy to relieve its heavy unemployment. Canada might very well want a less expansionary policy, for fear of galloping inflation. Again, Quebec would say, "Up", Canada might well say, "Not up", and each would have a veto on something the other considered essential.

How long could that last? Quebecers would say, "We thought we'd got the damned English off our backs, and here they are, worse than ever! We can't even raise our own tariff to protect our own industries. We can't even set our own monetary policy to relieve unemployment. Fine kind of 'sovereignty'!" English-speaking

Canadians might well say: "We thought we'd got the French off our backs, and here they are, worse than ever. We can't even lower our own tariff to get the cheap goods we want, and we can't set our own monetary policy to suit our own needs."

Can anyone seriously believe that either the new independent Quebec or the new independent Canada would be stupid enough to let itself in for this sort of economic paralysis? "Surely in vain the net is spread in the sight of any bird."

So sovereignty-association is no option at all. It is a horse that won't even start, let alone run; and this not because of the nastiness, or narrow-mindedness, or prejudices of the nine provinces or their leaders, but because of sheer economic fact. To talk of negotiating sovereignty-association is to talk of negotiating the squaring of the circle.

Of course an independent Quebec and an independent Canada could, and would, negotiate trade agreements, just as Canada now negotiates trade agreements with the United States, Japan, China, the Soviet Union or India. But such agreements are negotiated between two totally independent states, on a basis of pure national interest, and without any joint decision-making bodies. Trade agreements are as different from sovereignty-association as chalk is from cheese.

If the *status quo* and sovereignty-association are ruled out as non-options, what are the options?

One is independence, neat: two sovereign states, Quebec and Canada, dealing with each other on the same basis as any other two sovereign states: their own national self-interest.

A second used to be a special constitutional status for Quebec, a notion very much in vogue ten or fifteen years ago, but so much less fashionable now that it can be dealt with very briefly.

In certain respects, of course, Quebec already has a special constitutional status, under our present constitution. So have at least five of the other provinces. But Quebec's special status is much more special than the others!

First, Quebec is the only province where a linguistic minority is given special constitutional protection for the use of its language in the legislature and courts.

Second, Quebec is the only province which cannot divest itself of its jurisdiction over property and civil rights in the province. Under section 94 of the British North America Act,¹ all the others (Ontario, Nova Scotia and New Brunswick explicitly, the other six by necessary intendment, as Mr. Meighen and Professor Frank Scott have argued) can, if they choose, hand over any part, or the whole of

¹ 1867, 30 & 31 Vict., c. 3, as am. (U.K.), hereinafter cited as B.N.A. Act.

their jurisdiction over property and civil rights to the Parliament of Canada, absolutely and forever. This was almost certainly intended to cover only a very narrow field (wills, mortgages and the like). The Judicial Committee of the Privy Council extended it to cover a very wide one. Section 94 has, so far, been a dead letter. It could, belatedly, take on great importance, enabling the nine provinces to unify, for example, the whole of their labour and social legislation; and the specialness of Quebec's position would become correspondingly important. It need hardly be added that any such development is fantastically unlikely, and that, even if it were not, it is not what the Quebec proponents of special status had in mind.

What they wanted was a massive transfer of powers, legislative and executive, from the Dominion to the province of Quebec, without, however, any diminution in Quebec's representation in a Parliament and Cabinet which would then, over a very wide range of subjects, be legislating for, and administering, the affairs of the other nine provinces only. Over these subjects, within its territory, Quebec would be sovereign; the rest of the country, within its territory, would not. On these subjects, the rest of the country would have nothing to say about what went on in Quebec; but Quebec would have just as much as ever to say about what went on in the rest of the country.

Take one concrete example. One of the leading advocates of special status proposed that Quebec should have its "State Bank and legislate with respect to industrial and consumer credit". This sounds uncommonly like a separate Quebec banking system, under the sole jurisdiction of the Quebec Legislature. The Dominion Ministers, Senators and Members of the House of Commons from the nine provinces would have no more to say about the Quebec Bank Act than about the Mexican. The nine provinces would have a banking system under the sole jurisdiction of the Parliament of Canada. But the Dominion Ministers, Senators and Members of the House of Commons from Quebec would still have the fullest right to take part in framing, passing, amending, rejecting, administering the Canadian Bank Act, which would now apply only to the nine provinces. Quebec would have a banking system wholly its own. The rest of the country would have a banking system only partly its own. And this would repeat itself for subject after subject. "You get out of our affairs; we stay in yours."

Nor is this all. The Quebec Members of the House of Commons would have the right to vote on motions of want of confidence. Their votes could defeat a Government which for many, perhaps most, purposes, had become the Government of the nine provinces only; could force it to resign, or to go to the country in a fresh election, where the votes of Quebec electors might throw it out, even though

the rest of the country returned a majority for it. The people of the nine provinces would become less than self-governing.

Someone may object: "But can't the votes of Quebec electors now throw out a Government with a majority of the Members from the other nine provinces, and put in one which a majority from the nine provinces don't want?" Yes. But the Parliament which the people now elect is a Parliament for the whole country with jurisdiction over the whole country. The Parliament which the people would elect under "special status" would be, for many, perhaps most purposes, the Parliament of the nine provinces only. If the transfer of powers to Quebec were massive enough, it would not be long before the people of the nine provinces would demand full self-government. By the same token, it would not be long before the people of Quebec would weary of sending Members to a Parliament whose powers over Quebec were minimal, and where they would have little to do except interfere in the affairs of the nine provinces. Either way, special status would be only a chilly, transitory half-way house on the road to two sovereign states.

Here, someone may object: "But surely precisely the same problem would have arisen if, as the Fathers of Confederation expected, the common law provinces had promptly surrendered to the Parliament of Canada their jurisdiction over property and civil rights?" No; because for the Fathers "property and civil rights" was, as already noted, a very narrow field (it is worth remembering that Macdonald's first government passed the Trade Unions Act, and his second introduced into Parliament three Factory Bills). The Fathers were practical men, and they would have laughed at the idea of Quebec members trying to interfere with the laws on wills or mortgages in the other provinces, or overturning a government because they objected to changes in such laws.

However, as "special status" seems to have sunk, hull down, below the horizon, it is hardly worthwhile labouring such points. For practical purposes, it is no longer an option.

Rejecting, or putting aside, special constitutional status for Quebec does not, of course, rule out special arrangements for Quebec within the existing constitution. Such arrangements already exist in various fields, for example, hospital insurance and family allowances.

A second option which is now very fashionable is decentralization: a more or less massive devolution of powers from the government and Parliament of Canada to the legislatures of all the provinces. (Some of the proposals for this bring in special status for Quebec by a side-wind: all the provinces would get more powers, but only Quebec might choose to use them. Given the new assertiveness

of Alberta and British Columbia, this assumption seems questionable; and even the peaceable kingdom of Ontario, endowed with extra powers, might well decide to use them.)

The fullest and most authoritative presentation of this option is to be found in the *Report* of the Task Force on National Unity.² This is a most remarkable document, alike for its specific proposals and for the assumptions on which they rest.

The assumptions are by far the more important, because if they are accepted, the way is open to specific proposals much more destructive to national unity than those of the *Report* itself.

What are the assumptions?

First, that the provinces are primary, the nation secondary; that the central government and Parliament are really little more than conveniences to do things that the provinces cannot easily do for themselves. "The provinces and the northern territories are the basic building blocks of Canadian society";³ "Canadian unity . . . is the sum of the conditions upon which the various communities and governments of Canada agree to support and sustain the Canadian state";⁴ "in their own interests, the provinces need a central government which can do things which benefit them all".⁵

Second, that one of the three "major objectives" of constitutional revision should be "to provide greater institutional responsiveness to the regional and provincial self-confidence reflected in current demands for greater provincial autonomy and for more effective provincial influence upon central policy formation".⁶ Note: not only greater provincial autonomy, but also greater provincial influence upon central policy formation. Even the central government, shorn of some of its powers, "cabin'd, cribb'd, confin'd" in its exercise of others, is itself to be decentralized, made more completely the instrument of the provinces to promote provincial interests.

Third, that loyalty to one's province is primary. "Loyalties to the province, which are particularly marked throughout Canada, antedate loyalty to the federation for English Canadians just as they do for French Canadians".⁷ (The "antedate" is, of course, nonsense for the three Prairie provinces, which never existed till they were

² A Future Together: Observations and Recommendations, Report of the Task Force on Canadian Unity (1979), hereinafter cited as Report.

³ *Ibid.*, p. 26.

⁴ *Ibid.*, p. 6.

⁵ *Ibid.*, p. 71.

⁶ *Ibid.*, p. 81.

⁷ *Ibid.*, p. 29.

created by the Parliament of Canada.) "It is very clear to us that the social and cultural diversity of Canada is stronger than its political institutions and will predominate, should there ever be a head-on clash".⁸ "We believe that any general reform effort . . . which offends the principle of regionalism is unlikely to increase harmony and unity in Canada".⁹

"Regionalism", in practice, means provincialism. True, the report says that "there is a multiplicity of meanings and associations that can be attached to the notion of regionalism in Canada",¹⁰ and "we will use the concept of regionalism in more than one way"¹¹ (a nice touch of Humpty-Dumptyism, this: "'When I use a word', said Humpty-Dumpty, 'it means just what I choose it to mean'"). But: "The provinces and the northern territories are . . . the logical units on which to focus a discussion of Canadian regionalism", and "more often we will use the term regionalism to designate the provinces themselves. The provincial political institutions are the primary frameworks through which regional populations can organize and express themselves, and their existence serves in turn to develop the social networks and interests based on them, thus reinforcing the provincial focus of regionalism".¹² "For many, perhaps most, English-speaking Canadians, a key element in how they evaluate their federation lies in the treatment it accords, or is thought to accord, to their province"¹³ ("their province", note; not to themselves, or their industry, or their class, or their town, or their neighbourhood: their *province*). "The B.N.A. Act served to reinforce Canadian regionalism by permitting the development of provincial political institutions of sufficient size, authority and importance to undertake, in addition to the provision of certain services, a more general role of expressing regional views without regard to jurisdiction. Aggressive, well-staffed provincial governments have come, in other words, to represent the people of the provinces they serve in a number of ways and not solely in the ways set out as provincial responsibilities in our constitution." (It wasn't the B.N.A. Act, which set out to do exactly the opposite of "reinforcing regionalism", but the Judicial Committee of the Privy Council, under the leadership of those Stepfathers of Confederation, Lords Watson and Haldane.) "This", the *Report* goes on, "is certainly the case in Quebec In English-speaking Canada, several provinces have taken similar, if less dramatic, initiatives to

⁸ *Ibid.*, p. 38.

⁹ *Ibid.*, p. 36.

¹⁰ *Ibid.*, p. 25.

¹¹ *Ibid.*, p. 27.

¹² *Ibid.*, pp. 26-27.

¹³ *Ibid.*, p. 29.

support and encourage what amounts to little less than the development of provincial societies".¹⁴ "The text of the constitution should ensure that the government of Quebec has the powers it requires to protect and develop its French heritage. Although the Task Force is of the opinion that the importance of this cultural domain in most provinces of English-speaking Canada is not yet as vital as it is to Quebec, a constitution should make provision for the future . . . The evolution of Canadian regionalism may well reach the point at which provincial governments of English Canada are looked to for leadership in the field of culture in the way the government of Quebec is now. . . . We suggest that all provinces be given additional powers to undertake new programs in the broad domain of culture. Whether or not they wish to avail themselves of these powers immediately, the provinces should take the primary role in supporting local and regional cultural and artistic development, particularly by encouraging wide public participation in cultural activities and by the establishment, where they do not as yet exist, of provincial arts councils to assist in this process."¹⁵

This last passage deserves careful examination.

First, mark the words, "the broad domain of culture"; for, for the authors of the *Report*, broad it is indeed. True, they make a distinction between "high culture" and "culture in its broadest meaning", which latter "includes the complete fabric, values and life in a community"; and they add, at once: "If this is what is meant by culture, it seems clear that the provinces have, and ought to have, a large role to play in the formation of cultural policy".

Just how large becomes clearer from the report's specific recommendations, where we find: "Under culture . . . might be grouped legislative powers over: language, education, schools, universities, archives, research, exchanges" (whatever that means), "copyrights, books, films, arts, leisure, marriage and divorce, property and civil rights" (which, by judicial decision, includes almost the whole of social security). The *Report* does not specify that all this list should be handed to the provinces: "each specific legislative power should . . . be attributed, exclusively or concurrently, to an order of government according to the criteria established in our previous recommendations". But, as the "criteria" say that "the principal roles and responsibilities of the provincial governments should be: i- the social and cultural well-being and development of their communities; ii- provincial economic development . . . ; iii- property and civil rights; and iv- the management of their territory" (a delightfully omnibus phrase), and

¹⁴ *Ibid.*, pp. 30-31.

¹⁵ *Ibid.*, p. 61.

that "A new distribution of powers should, whenever it is desirable or needed in order to fulfil the objectives of dualism and regionalism, recognize the distinctive status of any province or make it possible for a province to acquire such status",¹⁶ they can hardly be regarded as restrictive.

The *Report* goes on to concede that the "central government" has done much for Canadian cultural and artistic life, and that it should have a role to play. But "Three examples will serve to illustrate the kind of cultural policies which would now be appropriate for the central government. It should use its agencies to encourage individuals throughout Canada to develop their talents". It should "encourage travel and exchange programs" (in which, of course, we know how warmly it would be supported by the present Government of Quebec). "Finally, the central government through such tools as the tax system can play an important role in assisting our cultural industries which find themselves in difficult and uncertain straits."¹⁷

Second, the *Report* clearly expects Canadian regionalism to blossom into something like ten provincial cultures "in their broadest" (or Quebec nationalist) sense; indeed, almost, if not quite, into ten provincial nationalities.

Third, this blossoming should not be left to chance, or the sluggishness of those backward, slow-witted English-speaking Canadians: steps should be taken to see that it does happen, or at any rate that it is positively and strongly encouraged to happen.

Fourth, the bland assumption that all the provinces are able to go in for this sort of thing flies in the face of reality. The big, rich provinces can do it (with what consequences for that "national unity" which the Task Force was presumably set up to enhance?); the small, poor ones cannot, at any rate without massive help from that central government which the *Report's* recommendations would enfeeble.

The whole tenor of these first three assumptions is that we all are, or ought to be, provincial nationalists, and that if we are not, we should be encouraged, helped, pushed, prodded into becoming so.

There is a fourth assumption, which is really central to the whole *Report*: "duality".

What is "duality"? Here the *Report* resorts again to Humpty-Dumptyism: "It is clear to us that duality is a multifaceted concept. The general understanding of it can be expected to alter as the society which it describes evolves, and the particular dimension which is

¹⁶ *Ibid.*, pp. 125-127.

¹⁷ *Ibid.*, pp. 60-61.

emphasized will vary according to one's preoccupations, experience and situation in the country. . . . The essential condition in recognizing duality within Canada at the present time is to come to terms with modern Quebec."¹⁸

What, precisely does that mean?

"Quebec is distinctive and should, within a viable Canada, have the powers necessary to protect and develop its distinctive character; any political solution short of this would lead to the rupture of Canada. What are the implications of this? One is to assign to Quebec formal law-making powers, denied to other provinces, over such matters as culture, language, immigration, social policy, communications and some aspects of international affairs. The second and, in our view, much the preferable approach is to allot to all provinces powers in the areas needed by Quebec to maintain its distinctive culture and heritage."¹⁹ One of the three major objectives of constitutional revision should be "... to provide the majority of *Québécois* with an acceptable federalist response to their desire to maintain their distinctive cultural and social identity and to their deep-rooted grievance that our political institutions do not adequately reflect the dualistic character of Canada".²⁰

These passages also call for careful examination.

First, "power over culture". "High culture", or "culture in its broadest meaning"? Plainly, the latter. That is clear from the words "social identity" and from the specific areas of jurisdiction mentioned: "language, immigration, social policy, communications and some aspects of international affairs".

Quebec can already do what it pleases about language, except for the constitutional guarantees for the English-speaking minority, and except, of course, for industries under Dominion jurisdiction. Every other province can do absolutely what it pleases about language, again, of course, except for industries under Dominion jurisdiction. So what the proposal amounts to is that the English-speaking in Quebec should lose their guarantees, and the French-speaking outside Quebec should be refused guarantees, and that the provinces should be able to impose any language they choose on the banks, inter-provincial and international railways, airlines, telegraphs, telephones, shipping, and so on.

To make assurance doubly sure, the *Report* explicitly says that there should be no language guarantees. In Quebec, as the conflict

¹⁸ *Ibid.*, pp. 22-23.

¹⁹ *Ibid.*, p. 87.

²⁰ *Ibid.*, p. 81.

over Bill 101²¹ proves, they lead to "frustration and antagonism". The invasion of rights leads to trouble (fancy that!); so, of course, abolish the rights! Besides, "the rights of the English-speaking minority in the areas of education and social services", which "are not now guaranteed by the Canadian constitution . . . are recognized under Bill 101. Thus, we already have proof that the rights of the English-speaking community in Quebec can be protected without any constitutional obligation. . . . We are confident, . . . indeed we are convinced, that the removal of the constitutional obligations created by Section 133 will not undermine the will of French-speaking *Québécois* and the government of Quebec to maintain the rights of the English-speaking community freely, openly and with generosity, by ordinary legislation".²²

Bill 101, the *Report* admits, purported to take away the rights guaranteed by section 133. This, of course, is "proof" of that "will to maintain the rights of the English-speaking community freely, openly and with generosity". The question of whether the Bill also violates the rights of the English-speaking community in education is still before the courts. There are good grounds for saying that it does.

There was no representative of the Quebec English-speaking community on the Task Force, which ought to have made it the more imperative for the members to read, mark, learn and inwardly digest the Bill. Plainly, they did nothing of the sort. If they read it at all, they were like the deaf adder which stoppeth her ear. They suggest that the Bill is merely an "extension" of what "most of the English-speaking provinces" had already done. Bill 101, they say, "delimits those situations in which institutions and individuals must use, deliver services or receive services in the language of the provincial majority".²³ Which English-speaking province ever did anything of the sort? Manitoba did, in 1890, purport to make English the sole language of the legislature and courts, and, many years later, the sole language of the public schools (this latter Act has now been repealed). Ontario, in 1912, did enact that English should be (with minor exceptions) the sole language of the public and separate schools (this was repealed in 1927). But which English-speaking province ever passed a language Act which reached into every nook and cranny of community life, as Bill 101 does? Which English-speaking province ever passed an Act which makes it illegal to put up a sign in any language except English? Which English-speaking province ever passed an Act prohibiting the use of any language but English in catalogues or advertising brochures unless the other

²¹ S.Q., 1977, c. 5.

²² *Report*, p. 52.

²³ *Ibid.*, p. 48.

language is requested in writing? Which English-speaking province ever loaded with conditions and restrictions the exercise of right after right of its non-English-speaking citizens, as Bill 101 does right after right of Quebec's non-French-speaking citizens?

In recent years, the predominantly English-speaking provinces, notably New Brunswick and Ontario, where most of the French-speaking outside Quebec live, have done a great deal to enhance and protect their French-speaking minorities' rights, though even the Franco-Ontarians, let alone the French-speaking minorities in all the other provinces except New Brunswick could, and do, point out that much remains to be done. But whence the *Report's* serene "confidence", nay, "conviction", that their "concept of duality" may not "evolve" and "vary" according to their "preoccupations, experience and situation in the country" in a direction which would really be an "extension" of Bill 101, especially if Quebec maintains that legislation untouched?

On language, "duality" seems to mean leaving both minorities defenceless.

Now for "immigration". Every province already has concurrent jurisdiction with the Dominion in this field, with Dominion paramountcy in case of conflict; and every province can have, as Quebec already has, an agreement with the central government giving it very wide powers in practice. The Task Force proposes concurrent jurisdiction "with provincial paramountcy with respect to selection criteria and levels of immigration to the province, and with federal paramountcy with respect to the recruitment of immigrants abroad and the admission of refugees".²⁴ So the provinces could decide what kinds of immigrants we should have, and how many (except for the Yukon and the Northwest Territories, which also would receive the refugees admitted by the Dominion and barred by the provinces).

"Social policy": this, presumably, includes the whole of social security. But, except for unemployment insurance (where the Dominion has exclusive jurisdiction), family allowances (where jurisdiction is concurrent), and pensions (where jurisdiction is concurrent, with provincial paramountcy), social security is already an exclusively provincial field. So the Task Force would presumably hand over unemployment insurance to the provinces. This would impose an intolerable burden on the Atlantic provinces, unless they received massive aid from the Dominion under its "spending power. But the *Report* proposes that the exercise of that power "should be subject to ratification by [the] reconstituted second

²⁴ *Ibid.*, p. 127.

chamber",²⁵ the "Council of the Federation", "composed of delegations representing the provincial governments and acting under instruction". The provinces would be represented "roughly in accordance with their respective population up to a maximum of one-fifth of the Council". Ratification of expenditures for cost-shared programmes would "require a two-thirds majority". This would not apply "with respect to expenditures related to equalization",²⁶ though whether these would need only a simply majority, or would be outside the Council's powers altogether, is not clear. Perhaps that exception would give the Atlantic provinces enough money to look after unemployment insurance. For the shared-cost programmes, the Task Force would no doubt be "confident", "convinced", that the governments of the big, rich provinces would vote to give money to the small, poor ones, "openly, freely and with generosity". The people of the Atlantic provinces may feel rather less confident.

And think of the effect on labour mobility!

"Communications": how much does this include? Telegraphs, telephones, radio, television (in their various forms)? No clear answer.

"Some aspects of international affairs": which aspects? Again, no clear answer.

Yet both of these are absolutely crucial to Canadian unity.

"Duality" and "regionalism" (and regionalism, on examination, proves to be little more than an illegitimate son of duality) are two cardinal principles of the "new constitution" which the Task Force would give us. There is a third: "the principle of non-subordination",²⁷ "the equality of status of the central and provincial orders of government".²⁸ This is declared to be "A definitive characteristic of any federal system".²⁹

That last statement is simply untrue. It is manifestly untrue of Canada. It is certainly untrue of India, whose constitution gives the central authority the power (which it has exercised, more than once) to dismiss state governments and take states under trusteeship. It is untrue also of Germany, where the federal Parliament has most of the legislative power, and the *Länder* are charged mainly with administrative functions. It is most decidedly untrue of the United States,

²⁵ *Ibid.*, p. 127.

²⁶ *Ibid.*, p. 128.

²⁷ *Ibid.*, p. 86.

²⁸ *Ibid.*, p. 125.

²⁹ *Ibid.*, p. 86.

where article I, section 10, forbids the states to enter into any agreement or compact with each other, or with any other state, without the consent of Congress, and where article IV, section 4, confers on the central authority the duty and power of guaranteeing to every state a republican form of government. The "definitive characteristic" is something excogitated from the Task Force's inner consciousness, "a little thing of its own invention", "all carved from the carver's brain". And of course it completely negatives any idea of a Canadian nation.

Canada is already either the most, or almost the most, decentralized federation in the world. Unmistakably, the Task Force would make it even more decentralized. What would the three cardinal principles leave to the central, once-upon-a-time national, government and Parliament?

The provinces would apparently have authority to conduct foreign relations within the areas of their domestic jurisdiction. That includes "social policy" and "communications", and of course education, and whatever their jurisdiction over "culture", "high" or "broad", may be taken to mean. The central government would retain, presumably, the power to make war and peace, the power to recognize new regimes abroad, and the power to make treaties or agreements dealing with international trade. Treaties "or parts of treaties, which deal with matters within provincial jurisdiction, should require the approval of a majority of the provinces in the Council", of the Federation (of the provinces, note; not of the members), "on the understanding that legislative measures implementing such treaties are to remain within provincial jurisdiction". "Articles of treaties deemed" (by whom we shall see in a moment) "to belong to the category of powers described as concurrent with federal paramountcy should be subject to a suspensive veto of short duration by the Council"; articles "deemed" to fall within concurrent powers, but with provincial paramountcy, to a longer suspensive veto.

The same applies to "federal legislation".³⁰

"To determine the classification of a bill or treaty and hence the powers that the Council may exercise, a permanent committee should be created and be composed of the Speakers and some members from" both Houses.³¹ This is delightfully vague; but it appears to oust the jurisdiction of the courts. If it does not, we could see some horrendous snarls if the committee assigned a bill or treaty to one category, and the courts decided it belonged to another.

³⁰ *Ibid.*, p. 128.

³¹ *Ibid.*, p. 129.

Elsewhere, however, we are told that "concurrent jurisdiction should be avoided wherever possible". In general, powers should be assigned exclusively either to Parliament or to the provincial Legislatures, on the basis of "i- general and particular concern; ii- effectiveness, efficiency and responsiveness" (this last suggests a presumption in favour of provincial powers, the provinces, we are told, being "closer" to the people—an opinion on which it would be interesting to hear the comments of people in Northern Ontario or Western Quebec, for example); "iii- common agreement" (that should keep Parliament firmly in its place!); "iv- continuity" (a trifle mysterious, this, as it presumably means, "Make as few changes as possible", which sits very ill with the rest of the *Report*); "v- overall balance" (this is really baffling: balance between what and what? or is it simply like "that blessed word 'Mesopotamia' in Scripture", from which the legendary old lady derived such ghostly consolation?). But, "Finis coronat opus", "The residual power should be assigned to the provincial legislatures".³²

"The declaratory power of Parliament" (to take jurisdiction over local works it declares to be "for the general advantage of Canada") should be retained, "but its use should be subject to the consent of the province concerned".³³ The national interest would be subject to a provincial veto. One wonders what would have happened to the grain trade, or atomic energy, if this provision had been in force from the beginning.

"The power of reservation" (of provincial bills, by the Lieutenant-Governor) "and the power of disallowance" (of provincial Acts, by the Dominion Government) "should be abolished".³⁴ These powers were put into the constitution to enable the central government to stop the provinces from doing things harmful to the national interest. The Task Force would give the provinces greatly enhanced powers, and in fields where they manifestly could act contrary to the national interest, on a majestic scale. So the need for some central power to stop them would seem shatteringly obvious. But no; instead, the central government and the House of Commons (which, the Task Force seems to forget, is elected by the people of the whole country to represent the people of the whole country) are to be hobbled by a Council of the Federation made up entirely of provincial Government delegates, acting under their governments' instructions, and with no representatives of the central government at all, except as "non-voting" members (a concession which merits Florence Nightingale's response when she received the Order of

³² *Ibid.*, p. 126.

³³ *Ibid.*, p. 127.

³⁴ *Ibid.*, p. 127.

Merit: "Too kind, too kind!").³⁵ Take away the power of the central government to prevent the provinces from injuring the whole country; give the provincial governments the power to hinder the central Parliament from benefiting the whole country.

"The power to appoint the Lieutenant-Governor of each province should be vested in the Queen on the advice of the provincial premier".³⁶ With the power of reservation of bills gone, and the obligation of the Lieutenant-Governor to send provincial Acts to the Governor General for possible disallowance, the mere appointment and removal of Their Honours would presumably not be of much practical importance. But the proposal is another sign of the *Report's* determination to exalt the provinces at the expense of the nation.

But it may be said that I am forgetting what the Task Force says about "The principal roles and responsibilities of the central government". These "should be: i- the strengthening of Canadian identity; ii- the preservation and enhancement of the integrity of the Canadian state" (in the light of most of the other recommendations, these two are tragicomic: the central government is to make bricks without straw); "iii- the overriding responsibility for the conduct of international relations; iv- the management of Canada-wide economic policy (including monetary policy) and participation in the stimulation of regional economic activity; v- the establishment of Canada-wide standards, where appropriate" (and "Where would that be?" Say the bells of Stepney. 'How should I know?' Says the great bell of Bow"; and how, within the limits proposed by the Task Force would the central government do the job, even if the provinces kindly permitted it?); "vi- the redistribution of income" (how, with the whole of "social policy" under the provinces?).³⁷

But surely I am forgetting also that the *Report* would give the central government "an emergency power . . . for both wartime and peacetime"? No. I am not forgetting that; nor am I forgetting the spider's web of conditions and provisos which surrounds it. First, "The proclamation of any emergency" (in wartime or peacetime) would have to "receive the approval of both federal houses, within a specified time limit, to remain in force"; in other words, the provincial governments, through their instructed delegates, would have to approve. Second, Parliament "should stipulate by legislation the powers it needs in cases of emergency; safeguards for provincial powers and for individual rights should vary depending on whether the country is facing a wartime or a peacetime emergency". Third,

³⁵ *Ibid.*, p. 128.

³⁶ *Ibid.*, p. 127.

³⁷ *Ibid.*, p. 125.

"The proclamation should stipulate the reasons for the emergency and the intended duration of its application". Fourth, "The peacetime emergency power may be invoked only in highly exceptional circumstances" (such as? Haldane's "war, famine or pestilence"! would galloping inflation qualify? and when does inflation start to gallop, and who decides?).³⁸

The Task Force recognizes that "industrial strategy, the main weapon for economic adjustment", is a field where "there appears to be no substitute for further concentration of power in the central government".³⁹ But a strong central government "runs counter to the realities of dualism and regionalism",⁴⁰ it "offends the principle of regionalism"⁴¹ (that is, provincialism), and of course it cuts straight across what provincial responsibility for "provincial economic development". Happily, however, the problem is not, for the Task Force, insoluble. There is a "substitute"! Hand it to the Conference of First Ministers!⁴² True, "the use of intergovernmental meetings by provincial leaders to score points against the central government for partisan advantage at home has exasperated representatives of the central government" (nobody else?). "The spectacle of Canadian governments wrangling constantly among themselves has done nothing to reduce cynicism about public affairs and it has presented Canadians with an image of a country deeply divided against itself".⁴³ So of course this is the ideal body to take on the task which would otherwise have to be given to that dreadful monster, the central government.

This is "the triumph of hope over experience". But the Task Force bids us be of good cheer: it calls on us to "stimulate a consciousness on the part of the participating units in Canada" (that is, the provinces) "that their local activities are likely to have a national aspect to them, and that some thought should be given to how their particular activities and aspirations fit into the whole and contribute to the country's general well-being".⁴⁴ Who could ask more than that: "some thought" by those "wrangling Governments" as to how their activities and aspirations "contribute" to a "general well-being" which, as one reads this *Report*, becomes more and more a "dissolving view"? If one may paraphrase Sir Winston Churchill: "Some thought! Some well-being!"

³⁸ *Ibid.*, p. 127.

³⁹ *Ibid.*, p. 74.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, p. 36.

⁴² *Ibid.*, p. 74.

⁴³ *Ibid.*, p. 95.

⁴⁴ *Ibid.*, p. 39.

"Confederation", says the Task Force, "associated the English-speaking people of four provinces in a single state and provided a set of indigenous institutions having a claim on their loyalties larger than the colony or province".⁴⁵ "The *English-speaking* people of four provinces"! And where, pray, were the French-speaking people? There were only about 900,000 of them. They just vanish into a political limbo. Canada has no "claim on their loyalties". And the French-Canadian Fathers of Confederation: Cartier, Langevin, Taché, Belleau, Chapais? Apparently, just "un-persons". A curious tribute to "duality", this.

The Fathers of Confederation, English-speaking and French-speaking, set out to create, and thought they had created, "a new and great nation", "a new political nationality" (to use a phrase common to Lord Acton and Sir George Cartier), "a single great power" to "take its place among the nations of the world". The Confederation Debates in the Legislature of the Province of Canada are studded thick with phrases of this kind, in French and in English. The Task Force would substitute a loose common market. Already, our provinces are far stronger than the American states, and "the powers of the provinces to interfere with the Canadian national market are greater than that [sic] of the constituent states of the European Economic Community".⁴⁶ The Task Force would strengthen the existing guarantee of interprovincial free trade, to include services, and would also have a constitutional prohibition of barriers to the interprovincial movement of capital.⁴⁷ But even this would do little to counteract the disruptive effect of the other recommendations.

The Fathers of Confederation set out to give, and thought they had given, "the General Legislature", in Sir John A. Macdonald's words, "all the great subjects of legislation. We have conferred on them, not only specifically and in detail, all the powers which are incident to sovereignty, but we have expressly declared that all subjects not distinctly and exclusively conferred upon the local governments and local legislatures, shall be conferred upon the General Government and Legislature. We have thus avoided that great source of weakness which has been the cause of the disruption of the United States. . . . We thereby strengthen the Central Parliament, and make the Confederation one people and one government, instead of five peoples and five governments, with merely a point of authority connecting us to a limited and insufficient

⁴⁵ *Ibid.*, pp. 28-29.

⁴⁶ Towards a New Canada, Committee on the Constitution, The Canadian Bar Association (1978), pp. 40, 65.

⁴⁷ Report, pp. 123-124.

extent". Elsewhere in the same speech he spoke of "joining these five peoples into one nation, . . . with the local governments and local legislatures subordinate to the General Government and Legislature".⁴⁸

The Task Force would reverse all that. It would confer on the provincial Legislatures many of "the great subjects of legislation", many of "the powers which are incident to sovereignty". It would explicitly provide that all subjects not distinctly and exclusively conferred upon the central government and Parliament shall be conferred upon the provincial governments and Legislatures. It would thus implant in our constitution that great weakness which almost proved the disruption of the United States, and by the same token could easily prove the disruption of Canada. It would explicitly make the provincial governments and Legislatures equal in status to the central government and Parliament. It would weaken the central Parliament, and make the Confederation ten peoples and ten governments, with merely a point of authority connecting us to a limited and insufficient extent.

It would put the appointment of the judges of the provincial superior courts, and the county courts, into the hands of the provincial governments (though, for the superior courts, it would graciously allow the central government to be consulted). It would provide that the Supreme Court of Canada should have almost half its judges (five out of eleven) from Quebec, and would split the court into "three benches, one of provincial jurisdiction which would be subdivided into a Quebec law section and a common law section, one of federal jurisdiction, and one of constitutional jurisdiction"; and the appointment of all the judges would have to be approved by a committee of the Council of the Federation, the instructed delegates of the provincial governments.⁴⁹

This analysis of the *Report* is far from exhaustive. But it is quite enough to warrant the conclusion that the Task Force interpreted its instruction to "assist in the development of processes for strengthening Canadian unity"⁵⁰ in a Pickwickian sense. Its *Report*, which it says was intended "to assemble concepts and policies which could constitute some of the elements of a third option for Canada",⁵¹ is, in fact, an "option" only for those who would replace the Canadian nation by a "boneless wonder" which would be little more than a highly decentralized common market. The *Report* is, in fact, a

⁴⁸ Confederation Debates in the Parliament of the Province of Canada (1865), pp. 31, 33, 41-42.

⁴⁹ Report, p. 130.

⁵⁰ *Ibid.*, p. 135.

⁵¹ *Ibid.*, p. 141.

constitutional parody of a familiar passage in the psalm, "Venite exultemus Domino": "O come, let us worship and fall down, and kneel before the Provinces, our Maker. For they are the Lord our God, and we are the people of Their pasture and the sheep of Their hand. Today, if ye will hear Their voice, harden not your hearts."

But harden our hearts against this siren song is precisely what those of us who want to preserve a real Canada, a real country, capable of doing real things for real people, must do. If we want a Canada which is something more than a mere geographical expression, a splash on the map with a six-letter label, is there in fact, a real "third option"? Yes. We do not have to choose between a territory split into two sovereign states, and a North American ghost of the deceased Holy Roman Empire, sitting crowned upon the grave thereof. We can revise our existing constitution; first, by adding to it a constitutional guarantee of individual rights, linguistic minority rights and native rights; second, by readjusting the division of powers between the Dominion and the provinces on a functional basis, a basis of which authority, central or provincial, can best do the job. This may involve transferring some Dominion powers to the provinces, or some provincial powers to the Dominion, or (more probably) both. It may also involve some changes in the structure of the House of Commons or the Senate, or both. It might involve making the principle of responsible cabinet government explicit in the text of the constitution (though this, like the constitutional Bill of Rights, would need very careful drafting; we do not want a repetition of Bill C-60's subversive proposal that a Prime Minister defeated in the House of Commons could advise the Governor General to ask him to form a new Administration). It would almost certainly involve entrenching the Supreme Court of Canada in the constitution. It emphatically should not involve filling in all the "gaps", the "silences", in the existing constitution. Most of those "silences", far from being defects in the B.N.A. Act, are among its greatest glories. They leave us room to breathe, to move, to develop, to improvise, to innovate, to meet new situations by what Sir Robert Borden called, "the exercise of the commonplace quality of common sense". The B.N.A. Act was never meant to be, nor should it be, exhaustive, to be our whole constitution. It was meant to be, and is, just the skeletal framework of the constitution. The people who want to get rid of the "silences" would transform it from a skeleton into a straitjacket.

For instance, if you insist on a complete, exhaustive list of specific powers of the national Parliament, and jettison "peace, order and good government" (that is, if you give the residual power to the provinces, à la the Task Force *Report*), and then some totally new discovery or development, unmistakably of national scope and

importance, pops up, you cannot cope with it effectively except by a constitutional amendment, "whose margin fades forever and forever as we move". Till you get that amendment, and that may mean for decades, you are boxed in: the nation and the provinces alike are powerless to deal effectively with the new situation. Under our present constitution, the courts can decide under which of our two residual clauses it falls: "peace, order and good government", or "matters of a merely local or private nature in the province".

Does this rule out special arrangements for a particular province, or provinces? No. We have such arrangements now. We could, if need were, have more of them, to meet particular problems. There is administrative delegation (as with agricultural marketing, and interprovincial and international highway traffic). There is concurrent legislation (as with family allowances). There is formal agreement between the central government and a provincial government or governments (as with immigration). The advantage of such arrangements, as against constitutional change, is that they can be fairly easily and quickly changed if they do not work well.

Finally, let us remember that, as I have said elsewhere, a constitution "is not a toy for politicians or professors to play with; or a canvas on which they can plaster constitutional surrealism or modern abstracts or pop art. Nor is the amending or re-writing of it an opportunity to show how clever they are; nor an exercise in providing children with inspiring memory work; nor a chance for constitutional tailors to fashion for us something rich and strange out of a rag-bag of bits and pieces from other Constitutions. A Constitution should be a working plan for governing a community, and the emphasis is on 'working'. The constitutional draftsman is an architect, not a painter".⁵² In constitutional revision, we are dealing not with abstractions but with lives: the lives of Canadians now living, and of Canadians yet unborn. It is, therefore, in sober truth, like marriage in the Anglican *Prayer Book*: "Not by any to be enterprised, nor taken in hand unadvisedly, lightly, or wantonly; . . . but reverently, discreetly, advisedly, soberly, and in the fear of God."

⁵² Freedom and Order (1974), p. 319.