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Notes and Comments

Eugene Forsey*

In Defence of Macdonald's
Constitution

To-night I propose to sing the praises of the Canadian Constitution of 1867.

I call it "Macdonald's Constitution" for two reasons.

The first is that, though of course it was the work of all the Fathers of Confederation, Macdonald, incontestably, was the chief architect.

The second is that what I am concerned to defend is the basic document Macdonald left us: Macdonald's Constitution as distinct from Haldane's; Macdonald's Constitution before it was defaced and ravaged by the Judicial Committee of the British Privy Council; before it was distorted by those wicked Stepfathers of Confederation.

Does it need defence? Yes. Against what? Against the demands voiced, notably, by the recent Joint Parliamentary Committee on the Constitution, for a "new Constitution", "a fundamental recasting", "a Constitution rethought and reformulated in terms that are meaningful to Canadians now."¹

And why are we supposed to need this new Constitution?

First, because the Constitution of 1867 (which, despite the Watsons and the Haldanes, remains the basis of our present Constitution) is not "distinctively Canadian";² because it was "imposed by British overlords",³ or "granted by a colonial power",⁴ or because the Fathers were "thinking as colonials".⁵

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This is the text of a paper delivered at the Annual Dinner of the Dalhousie Law School on September 24, 1974.

1. *Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, Final Report* (Ottawa: Information Canada, 1972) at 3, 7 [hereinafter "Constitution Committee Report"].

2. *Id.* at 1.

3. Jay Walz, "Canada, A Holiday from Tensions?" *New York Times*, July 9, 1967 at E7.

4. *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada* (November 18, 1970) no. 14 at 48.

5. *Id.* at 51.

These allegations are “fond things, vainly imagined, grounded upon no warranty” of history, “but rather repugnant” to the historical record.

True, the British North America Act of 1867 is a statute of the United Kingdom. The British Parliament passed it. But, except for two points I shall come to in a moment, the British Parliament simply registered in statutory form the resolutions drawn up, at the Charlottetown, Quebec and London Conferences of 1864 and 1866-67, by the British North American delegates. At those Conferences, not one single representative of the British Government was even physically present.

What were the two exceptions?

First, the title of the new federation. The British North American delegates wanted to call it “the Kingdom of Canada.”⁶ The British Government took fright. “Kingdom” would grate upon the delicate republican sensibilities of the Americans, with whom the British Government was most anxious to keep on good terms. So “Kingdom” had to go. But even then the British Government did not so much as suggest an alternative title. It was the Fathers themselves who, at the instance of Sir Leonard Tilley, proposed the old Anglo-French title “Dominion”, as an expression of what they felt was Canada’s “manifest destiny” to reach “from sea to sea and from the river [St. Lawrence] unto the ends of the earth”⁷ [the North Pole], and as “a tribute to the monarchical principle, which they earnestly desire to uphold.”⁸

The second thing in the Act which owes its existence to a British Government intervention is the sections designed to break a deadlock between the Senate and the House of Commons. The Quebec and London Resolutions made no provision for this. The British Government, remembering how only the threat to swamp the Lords had carried the First Reform Bill, felt there must be some swamping power in the Canadian Constitution. It even suggested clauses. The Fathers refused to accept these, but reluctantly produced some of their own, which the British Government and

6. G. P. Browne, *Documents on the Confederation of British North America* (Toronto: McClelland and Stewart, 1968) at 265-9, 272, 279, 282 (third and fourth drafts of the British North America Bill).

7. Psalm 72.

8. *Letters of Queen Victoria*, 2nd Series, vol. 1 (London: John Murray, 1926) at 394; D. G. Creighton, *The Road to Confederation* (Toronto: Macmillan, 1964) at 421-24.

Parliament accepted and wrote into the Act as sections 26-28.⁹ These sections, incidentally, have never been successfully invoked. Mr. Mackenzie tried, twice, in December 1873 and January 1874, and failed.¹⁰ No one else has ever even tried.

Apart from these two features, neither of them crucial (to put it mildly), the British North America Act, 1867, is one hundred *per cent* "Canadian" (in the post-Confederation sense of that word).

There is one other feature of our Constitution which, though it appears not in the Act but in the Letters Patent, owes its existence to the British Government. The Fathers wanted to vest the pardoning power in the Lieutenant-Governors of the provinces; the British Government insisted that the exercise of this royal prerogative could not be entrusted to mere representatives of the Dominion Government but only to the representative of the Queen herself.¹¹

As for the allegation that the Fathers were "colonial-minded": nothing could be sillier. The *Confederation Debates* are studded thick with resounding declarations by Macdonald, Cartier, McGee and Langevin, that they were creating "a new nationality", "a great nation", "a powerful nation", "to take our position among the nations of the world". Macdonald spoke of the relationship with Britain as a "permanent alliance", and as developing more and more into "a healthy and cordial alliance."¹² In 1879-1880, seeking the establishment of a *quasi*-diplomatic High Commissionership in London, he recurred to the "alliance" concept and compared Canada's relationship to Britain to the Austro-Hungarian dual monarchy.¹³ These are not the words, nor the tone, of cringing "colonials", nor of what Macdonald once called "overwashed Englishmen", mere commuters from Britain.

The second alleged ground for demanding a "new Constitution" is that Macdonald's Constitution "did not attempt explicitly to set

9. *Id.* at 415-16, 419-20; Browne, *supra*, note 6 at 170, 186-87, 211-12, 249-50.

10. Eugene Forsey, *Freedom and Order* (Toronto: McClelland and Stewart, 1974) at 50-7.

11. Brown, *supra*, note 6 at 84, 161, 170, 189, 225, 240.

12. *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 3rd Session, 5th Provincial Parliament of Canada* (Quebec: Hunter, Rose & Co., 1865) at 31, 43-45, 53, 56, 60, 125-26, 128, 139, 145, 363, 369, 372 [hereinafter *Confederation Debates*]; see also E. P. Whelan, *Confederation of the Provinces Together with a Report of the Speeches delivered by the Delegates from the Provinces, on Important Public Occasions* (Charlottetown: G. T. Hazard, 1865) at 23-25, 43-46, 52, 72, 93, 101, 119.

13. D. G. Creighton, *John A. Macdonald: The Old Chieftain* (Toronto: Macmillan, 1966) at 271.

forth any values or goals of that time except to adopt a Constitution similar in Principle to that of the United Kingdom.”¹⁴

This statement is, to begin with, not accurate. Section 91 of the Act empowers the Parliament of Canada “to make laws for the peace, order and good government of Canada.” Is that not explicit? Does it set forth no “values or goals”? The Constitution of the United States affirms that it was adopted “to establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.”¹⁵ Our “peace, order and good government” stands up, I think, very respectably by comparison. To the British-American statesmen of 1864, looking south at the Americans, locked in a sanguinary and prolonged Civil War, “peace” and “order” may well have seemed “values or goals” of some validity and significance. To the British-American statesmen of 1866, contemplating the excesses of “Reconstruction” in the American South, and the none too savoury politics of the American North,¹⁶ the prosaic phrase “good government” may likewise have seemed to possess some virtue and some importance. I dare to add that “peace, order and good government” seem to me “values or goals” not altogether negligible or irrelevant even for 1974.

And the Committee’s “exception” to its statement about the absence of explicit “values or goals” is no small one: “a Constitution similar in Principle to that of the United Kingdom.” That is just the statutory translation of the Fathers’ “the well understood principles of the British Constitution”;¹⁷ in other words, constitutional monarchy as against republicanism; parliamentary cabinet, responsible government as against presidential-congressional. For a “new nation” in an otherwise solidly republican, presidential-congressional North America, this was not only an explicit, but a bold, almost a defiant, statement of a “value” or “goal.” It still is; and its relevance, its importance, is no less now than it was a hundred and ten years ago. For parliamentary, cabinet, responsible government remains the most delicate, the most flexible, the most efficient system of government yet devised, and the one most responsive to the public will.

14. Constitution Committee Report, *supra*, note 1 at 6.

15. Constitution of the United States, Preamble.

16. *Confederation Debates*, *supra*, note 12 at 59, 62.

17. Quebec Resolutions, no. 4 in Browne, *supra*, note 6 at 154.

The third allegation against Macdonald's Constitution is that it was a Constitution for a "horse-and-buggy age." This also is not accurate. It would be more plausible (though still not accurate) to say, "for a railway-and-telegraph age." In either case, however, it follows that it won't do for a jet-and-space age.

But in fact Macdonald's Constitution was marvellously framed precisely to provide for change, for the new, the unexpected, the unforeseen and unforeseeable. That, indeed, is one reason why it contained no general amending clause. Parliamentary responsible government is supple enough to adapt itself to an infinity of change; and the Macdonald Constitution's federalism could meet, easily and effectively, almost any challenge thrown down by technological development.

These are large claims. To prove that they are warranted requires us to examine the central features of Macdonald's Constitution. I suggest that they are eight in number.

First, the monarchy and the "Anglo-Canadian alliance" (as Professor Creighton has called it). It is important to note that the Fathers did not choose these because they were too timid, or too ignorant, or too stupid, or too unimaginative, to do otherwise. On the contrary, they chose both the monarchy and the alliance consciously, deliberately, resolutely, with their eyes wide open. Macdonald, in the *Confederation Debates*, took great pains to make it abundantly clear that the Quebec Conference could have chosen to reject the monarchy and break the British connection, and that he was firmly convinced that the British Government would have raised not the slightest objection, would have placed no obstacle in the way of a declaration of republican independence. But the decision to keep the monarchy and the British connection had been "unanimous."¹⁸ Cartier's monarchism was, if anything, even more emphatic.¹⁹

Nor is this surprising. The British system of government was then at the very height of its success and reputation. The American system, in 1864, seemed on the verge of collapse, and even by 1867 its prestige was not high. The Fathers of Confederation were very close students of American federalism, and Macdonald, in particular, had a great admiration for many of its features.²⁰ But for

18. *Confederation Debates*, *supra*, note 12 at 33-34; see also, Whelan, *supra*, note 12 at 44.

19. *Id.* at 57, 59, 62; see also Whelan, *id.* at 26, 51, 116.

20. *Id.* at 32; Whelan, *id.* at 43.

certain of those features, notably “states’ rights” and excessive “democracy”, they had nothing but horror.²¹ They, and especially the French-Canadian Fathers, had an equal, or even greater, horror of abstract principles. To the Loyalists, these recalled the American Revolution, to the French-Canadians the French. And of course the British connection was, in the 1860’s, and long after, the indispensable condition of Canadian survival (and, it may be added, French-Canadian survival).²² It was almost the sole protection, not only against American military aggression (a menace which remained almost to the turn of the century), but against American economic aggression by cancellation of the Reciprocity Treaty and the bonding privilege (the Intercolonial Railway, central Canada’s insurance against economic strangulation by the United States, could not have been built without British aid; nor could the CPR). Britain, to use a favourite phrase of Mr Trudeau’s, was the “countervailing force” which alone could save Canada from being swallowed by the United States.

The second main feature of Macdonald’s Constitution was its emphasis on a strong central national government. This was a conscious revulsion from American experience. What was threatening to destroy American federalism? “States’ rights.” The American Founding Fathers had given the central Government and Legislature only a short list of specific powers; everything else was “reserved to the states and to the people.”²³ Macdonald’s verdict on this was unequivocal: “They commenced at the wrong end.”²⁴ So the Canadian Fathers did just the opposite: they gave the provinces only a short list of specific powers; and

. . . everything not distinctly and exclusively conferred upon the local governments and legislatures, shall be conferred upon General Government and Legislature . . . This is precisely the provision which is wanting in the Constitution 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 . . . one united province, with the local governments and legislatures subordinate to the General Government and Legislature.²⁵

21. *Id.* at 33, 41, 59, 62, 1002; Whelan, *id.* at 43-44.

22. *Id.* at 57-59 (*per* Cartier).

23. Constitution of the United States, Tenth Amendment; Whelan, *id.* at 43-44.

24. *Confederation Debates, supra*, note 12 at 34.

25. *Id.* at 33, 41-42.

Elsewhere, Macdonald speaks of “a powerful Central legislature, and a decentralized system of minor legislatures for local purposes.”²⁶

I have said that Macdonald's Constitution was “marvellously framed to provide for . . . the new, the unexpected, the unforeseen and unforeseeable.” How? Chiefly by the enacting words of s. 91 of the British North America Act, 1867, Parliament's power “to make Laws for the Peace, Order and good Government of Canada” except for matters not explicitly given to the provincial legislatures. That was the statutory translation of Macdonald's rule that matters of general interest should come under the “General Government and Legislature”, matters of local interest under the “local governments and legislatures.” So, if a new, unforeseen matter arose, the test for jurisdiction would be perfectly simple and clear: “If it's not explicitly given to the provinces, it's Dominion; unless it is plainly a matter of ‘a merely local and private Nature’ in one province.”

We are sometimes told that the Dominion and the provinces are co-ordinate authorities, equal in their respective spheres. Not in Macdonald's Constitution! For proof, we have only to look, not merely at the Quebec and London Resolutions, and Macdonald's speeches, but at the British North America Act itself. It used, for the central authority the strong word “Dominion” (not the weak “federation”), and for the “local” divisions of the country the weak word “province” (not the strong word “state”). It gave the Dominion Parliament the power “to make Laws for the Peace, Order and good Government of Canada”, except for “those matters coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.” “For greater certainty, but not so as to restrict the Generality of the foregoing terms of this Section”, it added a list of twenty-nine examples of the exclusive legislative authority already conferred; that wayfaring judges might not err therein. These included unlimited taxing power, regulation of trade and commerce, money and banking, interprovincial and international communications, and criminal law; all far wider than the corresponding powers (if any) of the United States Congress. In addition to all this, it gave Parliament power to bring any local “work” under the exclusive jurisdiction of the Dominion by declaring it to be a work “for the general advantage of

26. *Id.* at 1002.

Canada or of two or more of the Provinces.’’ (This power has been exercised hundreds of times²⁷; it is the basis of Dominion control over the grain trade, which the Courts had ruled to be within provincial jurisdiction²⁸ — ‘‘The law,’’ said Mr. Bumble, ‘‘is a h’ass.’’) The Act also provided for unification of all or any of the laws respecting property and civil rights in the Common Law provinces if those provinces agreed to surrender jurisdiction to the Dominion.²⁹ (This provision has never been used. It is one of the Cheshire Cats of our Constitution.) The Dominion Government and Parliament were given power to implement any obligations of Canada or any province under treaties between the British Empire and foreign countries,³⁰ and to protect the educational rights of Protestant and Roman Catholic minorities.³¹ (The special treaty-implementing power of Parliament has been virtually wiped out by the disappearance of the Empire; the power to protect Protestant and Roman Catholic school rights, invoked in the Manitoba School Question of the 1890’s, proved so ineffective and politically disastrous that it has become another Cheshire Cat.) Finally, Parliament was given power to set up a Court of Appeal and other Dominion Courts,³² and paramount power over immigration and agriculture.³³

Nor did the subordination of the provinces to the Dominion end with these legislative provisions. The Dominion Government was given power to appoint all judges of County Courts and up (except the Nova Scotia and New Brunswick Courts of Probate),³⁴ and to appoint, instruct and dismiss the Lieutenant-Governors of the provinces³⁵ (two have been dismissed).³⁶ The Lieutenant-Governor was empowered to reserve provincial bills for the Governor-General’s pleasure (that is, send them to Ottawa in a state of suspended animation), and unless the Dominion Government

27. Andr e Lajoie, *Le pouvoir d claratoire du Parlement* (Montr al: Presses de l’Universit  de Montr al, 1969) at 123-51.

28. *R. v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434; [1925] 3 D.L.R. 1.

29. British North America Act, 1867, 30 & 31 Vict. c. 3, s. 94 [hereinafter BNA Act].

30. *Id.*, s. 132.

31. *Id.*, s. 93(3) and (4).

32. *Id.*, s. 101.

33. *Id.*, s. 95.

34. *Id.*, s. 96.

35. *Id.*, ss. 58, 59, and 55-90.

36. J. T. Saywell, *The Office of Lieutenant-Governor* (Toronto: University of Toronto, 1957) at 233-54.

gave assent within one year, the bills died³⁷ (70 bills have been reserved; only 14 received Dominion assent).³⁸ The Dominion Government was empowered to disallow (wipe off the statute book) any provincial Act within one year of its receipt at Ottawa³⁹ (112 Acts have been disallowed).⁴⁰ The provinces co-ordinate sovereign authorities within their jurisdictions? My eye and Betty Martin!

The third basic feature of Macdonald's Constitution was the preservation of distinctive provincial communities, with wide powers in cultural and social matters,⁴¹ and with power to change their Constitutions in any way they saw fit, except that they could not touch the office of Lieutenant-Governor,⁴² which was necessary to preserve essential Dominion authority, for example in relation to reservation and disallowance of provincial legislation.

Fourth, of course, comes parliamentary responsible government, nowhere specifically mentioned, but guaranteed, in fact, by the preamble's "Constitution similar in Principle to that to the United Kingdom."

Fifth, and crucially important, is the amazing flexibility of our Constitution, in blazing contrast to the American. An enormous field is left to judicial interpretation, to usage, to ordinary legislation. There is not one syllable in the British North America Act about the Prime Minister, or the Cabinet, or the dependence of the Cabinet on a majority in the House of Commons or at the polls. There is no Bill of Rights. There are no specific guarantees (except for interprovincial free trade,⁴³ the Quebec Civil Law,⁴⁴ the limited bilingualism of s. 133, the protection of Protestant and Roman Catholic school rights in s. 93). The whole question of amendment is left to be worked out by usage. The nation is given room to *grow*; the people are left to *use their heads*, to meet problems as they arise;

37. BNA Act, ss. 55, 57, 90.

38. G. V. La Forest, *Reservation and Disallowance of Provincial Legislation* (Ottawa: Department of Justice, 1955) at 102-15; J.R. Mallory, *The Lieutenant-Governor as a Dominion Officer: The Reservation of the Three Alberta Bills in 1937* (1948), 14 Can. J. Econ. & Pol. Sci. 502; J. R. Mallory, *The Lieutenant-Governor's Discretionary Powers: The Reservation of Bill 56* (1961), 27 Can. J. Econ. & Pol. Sci. 518; J. T. Saywell, *Reservation Revisited: Alberta* (1937), 27 Can. J. Econ. and Pol. Sci. 367.

39. BNA Act, ss. 56, 90.

40. La Forest, *supra*, note 38 at 83-101.

41. Whelan, *supra*, note 12 at 44 (*per* John A. Macdonald).

42. BNA Act, s. 92(1).

43. *Id.*, s. 121.

44. *Id.*, ss. 92(13), 94.

not to be “cabin’d, cribb’d, confin’d” by a rigid legal text. Freedom can “slowly broaden down from precedent to precedent.”

A sixth main feature of Macdonald’s Constitution is the provision for regional balance, in the Senate. The Senators, appointed by the Dominion Government, not the provinces, were to give equal representation not to each province but to each region (the equality was to be breached only if Newfoundland came in),⁴⁵ and were to be guardians not of provincial jurisdiction (amply protected by the Courts) but of regional interests within Dominion jurisdiction.

Seventh, Macdonald’s Constitution provided, in the Senate, for “sober second thought”; for revision of “blank and imperfect” bills from the Commons; for a dike against hasty and ill-considered legislation. There was in the 1860’s, every reason to expect that Governments would be short-lived, so that no party would ever build up a large majority in the Senate. This, of course, has not been so; and the fears of radical legislation from the Commons have dwindled to almost nothing, so that the Senate’s theoretically unlimited veto has become in fact purely suspensive (though it is worth remembering that in 1936 the Senate threw out a constitutional amendment that might have allowed the provinces to set up tariffs against each other).⁴⁶

The eighth main feature of Macdonald’s Constitution was a limited official bilingualism, for the Dominion Parliament and Courts and the Quebec Legislature and Courts; the degree of bilingualism called for by the needs of the time; a *minimum*, guaranteed to the French-speaking at Ottawa, to the English-speaking at Quebec; with room for administrative or legislative adaptations or extensions beyond that minimum at Ottawa and at Quebec, and elsewhere total freedom in the matter.

Perhaps it was not such a bad Constitution after all! Perhaps it was not the work of ignoramuses, or fools, or petty provincial “colonial minded” politicians, or “mixed-up kids”? Indeed it was not. It was the work of statesmen; knowledgeable, widely read (Macdonald knew his Bagehot and Hamilton; Cartier can scarcely have hit by accident on the precise expression, “political nationality”, which was central to Acton’s thought on these matters); shrewd, sensible, realistic, pragmatic; but also wise, imaginative and far-seeing. Macdonald’s Constitution is, in fact,

45. *Id.*, ss. 22, 147.

46. *Debates of the Senate of the Dominion of Canada* (June 10, 1936) at 469.

one of the constitutional masterpieces of all time. Indeed, considering the circumstances in which it was framed, that is but tepid praise. Here were a group of small communities, sparsely peopled, scattered over immense distances; separated by natural barriers that might well have seemed insurmountable, and by deep divergences of economic interest, language, religion, laws, education; with poor communications, and those mainly with the world outside British North America. Against such odds, that the Fathers of Confederation produced any Constitution at all is astonishing. That they produced the Constitution they did is scarcely less than a miracle.

No "ideals"? Nothing to "inspire" us? Nothing "memorable"? Nothing to fire our imaginations, lift our hearts, expand our minds? Nothing to "summon up the blood"? Even today, even after the havoc wrought upon it by the Judicial Committee and by pushful provinces, Macdonald's Constitution, in most of its main features, stands: not only one of the oldest, but also one of the most successful, Constitutions in the whole world.

A hundred and one years ago Macdonald suffered political eclipse. Eighty-three years ago he made the last journey. But if, now, in that "undiscover'd country from whose bourn no traveller returns", he looks down upon his heirs, upon the nation which he, more than any other, created, and which his Constitution has shaped and sustained, surely he may well say, "*Exegi monumentum aere perennius*", "I have builded a monument more enduring than bronze." God help us to be worthy of the mighty heritage Macdonald left us! God grant us wisdom, strength and spirit to preserve it!