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The other crisis of Canadian federalism

Abstract. This article examines 'the other crisis' of Canadian federalism, which is identified as a declining capacity for the effective use of government authority for the attainment of public goals. Central to this crisis is the negative impact of competitive big governments at both levels on the effective functioning of the federal system. In one sense the crisis is simply a particular version of the widespread crisis in government capacity characteristic of all big governments in the modern era. In another sense it is argued that contemporary Canadian federalism makes a distinct contribution to the growth of the governments whose competitive tendencies it cannot effectively restrain or channel. In sum, escape from the destructive spiral of interaction between collectivism and federalism is unlikely without an intellectual and political transformation of the frames of reference which motivate and control political behaviour.

Sommaire. L'auteur de cet article étudie « l'autre crise du fédéralisme canadien », identifiée comme étant l'impuissance croissante du gouvernement d'utiliser son autorité dans l'atteinte d'objectifs publics. L'impact négatif de la concurrence entre des « gros » gouvernements, aux deux niveaux, sur le système fédéral lui-même est au coeur de la crise actuelle. En un sens, la crise est simplement une version particulière de l'impuissance générale des gouvernements, caractéristique de tous les « gros » gouvernements de l'époque moderne. Dans une autre optique, l'auteur soutient que le fédéralisme canadien contribue manifestement à la croissance des gouvernements dont il ne peut ni réduire ni canaliser les tendances compétitives, de façon efficace. En conclusion, il y a peu de chance d'échapper à la spirale destructrice de l'interaction entre le collectivisme et le fédéralisme, sans une transformation intellectuelle et politique des cadres de référence qui motivent et régissent le comportement politique.

... I have called my talk 'The Other Crisis of Canadian Federalism.' Accordingly I will not focus on that most fashionable contemporary topic of Canadian after-dinner speakers, the French-English, or Quebec-Ottawa manifestations of our lengthening winter of discontent. The other crisis which constitutes my theme is the crisis of a political system with a declining capacity for the effective use of the authority of government for the attainment of public goals. This too is a constitutional crisis in the sense that the working constitution of Canadian federalism can no longer

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control and channel the activities of governments in order to minimize their self-defeating competition with each other. Far from existing in splendid policy-making isolation from each other, these governments jostle and compete in an ever-more destructive struggle which reduces the beneficial public impact of the massive public sector produced by their conflicting, overlapping, and discordant ambitions.

In Canada direct concern with the role and efficiency of government has been relatively sidetracked for two decades by the overwhelming application of limited political energies to the task of either keeping Quebec in Confederation, or getting it out. In this situation of an apparently irresistible concentration on the issue of survival, other equally important but less visible problems are left unattended by our political leaders who, try as they may, cannot escape the pressures of the immediate and the short run.

The crisis of which I speak is of recent vintage – essentially a product of the last two decades. Therefore a brief historical survey of happier times in the evolution of Canadian federalism may provide helpful background to our present impasse.

Historical background

The evolution of Canadian federalism is frequently described in terms of alternations between periods of centralization and decentralization. While this perspective has been primarily descriptive, it has captured basic tendencies in our history. Periods of centralization are customarily considered to be the early post-Confederation years, both world wars, and the post World War II period up to 1957. In these periods Ottawa's ascendancy is held to reflect the necessary performance by the central government of tasks which by their nature could not be performed by provincial governments, and which because of their compelling importance or urgency gave to the only government capable of their undertaking an unchallenged priority in the political system. In the immediate post-Confederation period the task of fleshing out the incipient and weak political community, of nation-building under the leadership of centralist-inclined politicians in Ottawa, gave the national government a precarious hegemony, subsequently eroded by the relative failure of its policies to produce the thriving economy which was a prime *raison d'être* of its dominance. In both world wars the ascendancy of Ottawa was a response to the need for centralized authority in periods of international crisis. The continuing dominance of the central government after World War II was sustained by the momentum built up by its successful administration of a wartime economy, concurrent with extensive military involvement on the side of the victorious allies. The postwar rationale for Ottawa's continuing leadership was found in the demanding task of converting a

wartime economy to peacetime, and of performing the new economic management role publicly assumed by the central government in response to Keynesian theories.

The intervening periods, from the breakdown of centralized leadership in the late 80s and 90s of the nineteenth century to World War I, during the 1920s, and from the late 50s to the late 60s, are variously described as periods of provincial ascendancy, or as periods in which both government levels handled important responsibilities with neither enjoying a clearly dominant position.

Most English Canadian scholarship, imbued with a central government bias, has tended to view with alarm those periods in which Ottawa did not play a leading role. The provinces, with the important exception of Quebec and the French Canadian scholars who addressed themselves to the relation between French Canadian survival and provincial autonomy, have found few defenders in the social science community, and indeed have been viewed with contempt. From a historical perspective, however, it is evident that central government ascendancy hitherto has been restricted to periods of emergency and crisis, while the provincial role has always re-emerged in periods of relative normality.

Growth of big government at both levels

The federal-provincial contest, and the resultant periodic alternations of the relative *de facto* significance of the two levels of government, previously took place in eras when the task of governments, and the scope of the joint public sectors they managed were, as can now be seen in retrospect, limited. Nevertheless, the general tendency through time has been a growth in the effective power, scope, and responsibilities of each level of government, a growth not always proceeding at the same rate for each level, a growth occasionally glacial, sometimes interrupted, and sometimes rapid, but always, and unmistakably, growth. This growth of government at each level necessarily affects the patterns of competition and cooperation between governments. We have now reached a stage where the necessity of intergovernmental coordination and collaboration is not matched with an equivalent capacity for its attainment. We are approaching a condition of federal-provincial paralysis if existing trends continue.

The evidence of big government is ubiquitous. It is manifest in the total size of the taxing bite which is now a much larger share of GNP, at 33 per cent, than at its highest level in the Second World War, of 27 per cent.¹ It is revealed in the extent of public employment, with both levels

1 Canadian Tax Foundation, *The National Finances 1976-7* (Toronto, 1977), p. 16. Total government revenue, excluding transfers, was 39.3 per cent of gross national product in 1975. *Ibid.*, p. 20.

directly responsible for the employment of more than one of every ten Canadians in the work force, and indirectly responsible for many more. It is reflected in the profusion of experts and professionals who guide our lives from their niches in the byzantine complexity of the multiplying bureaus and agencies of the modern federal state. Its most important and emphatic indication, however, is found in the fact that the central government and major provincial governments now view their task as the direct management of the economies and societies under their respective jurisdictions. For all of these indicators of big government, the proportion falling under provincial jurisdiction has increased steadily for a quarter of a century. The new circumstances of Canadian federalism now include, therefore, the coexistence of powerful, *dirigiste* government at both levels. As a result, as I will subsequently indicate, the ratio of cooperative to competitive tendencies has shifted to the detriment of the former, and the stakes of that competition have increased. In addition, future cyclical changes in the responsibilities and powers of the governments of Canadian federalism will occur at a higher threshold of government activity than in the past. Quite distinct, therefore, from the Quebec crisis, although impinging on it, is this larger crisis which has transformed Canadian federalism in the direction of an increased incidence of federal-provincial conflict.

This pessimistic appraisal is strengthened by a recent study of political cleavages in Canada. The three most salient cleavages in Canada, according to Professor John Meisel – the ethnic cleavage which pits French against English, the regional cleavage which pits the peripheries against the centre, and the economic-regional cleavage which pits poor provinces against rich provinces – all produce clashes between governments.² Clearly, it is not because these cleavages are the most important that they acquire government sponsorship, but they are the most important because they have government sponsorship, which reflects the profound interest of governments in the outcome of the contests they generate. The consequences of government sponsorship are most strikingly illustrated by the dramatic increase in the intensity of the controversy over French-English Quebec-Ottawa relations which followed the election of the Parti Québécois government on November 15, 1976.

Useful background for understanding our present situation is provided by the economic crisis of the great depression of the thirties, and the reaction of Canadian academics and intellectuals to it. In its most general terms the depression gave an immense boost to the belief that both society and economy could and should be planned. The future was to be tamed

2 'Cleavages, Parties, and Values in Canada,' paper presented to the International Political Science Association (Montreal, 1973), mimeo. pp. 3, 6.

and brought under human control by the exercise of political authority. The planning task required, it was taken for granted, a major change in Canadian federalism. The English-speaking academic community agreed with Harold Laski's famous article "The Obsolescence of Federalism,"³ which asserted that the planning imperative required the concentration of planning capacity in a single government, and hence the attrition of provincial powers of self-government. The economic crisis of the 1930s was transformed by numerous Canadian commentators into a political, constitutional crisis. The inadequacies of political leadership were attributed to the divided power structure of the federal system, which prevented that singleminded mobilization of resources by Ottawa that the resolution of economic paralysis required. There was a tendency to assume that federalism was an appropriate form of government only for bygone periods of laissez faire when the tasks of government were light, and the economy was largely self-regulating. Thus not only did the depression erode the belief in the beneficence of the liberal economic order, but by necessary implication focused hopes for secular salvation on a single central government, and consequently undermined the long-standing belief in the virtues of federalism. The possibility of powerful collectivist governments coexisting at both levels was not foreseen by would-be planners.

In spite of the then prevalent hostility of English Canadian intellectuals to the provinces, the depression did not produce a decisive shift in the balance of power to Ottawa. Amongst its many consequences, it contributed to demagogic political leadership in several provinces, notably Quebec, Ontario and Alberta, whose premiers vigorously espoused provincial autonomy and resisted pressures to centralization.

The culmination of the centralist dream finally emerged not in the depression but in the Second World War when the federal authorities ran the country virtually as a unitary state. Although the peak of federal dominance receded after the allied victory, the central government continued to play the leading role in economic management and welfare provision. To many observers the federal system appeared to be tilted permanently in a centralist direction. In the mixed economy fleshed out in the postwar years the central government was benignly viewed as a good and faithful servant of the public interest – controlling capitalist excess, engaged in the piecemeal construction of the welfare state, and fostering full employment with a nonchalant competence which elicited the profound respect and gratitude of those whose memories extended to the prewar depression years.

3 Originally published in 1939, and reprinted in A.N. Christensen and E.M. Kirkpatrick, eds., *The People, Politics, and the Politician* (New York, 1941).

Although the government of Quebec continued to fight ritual battles for provincial autonomy, this was easily disregarded. A minority nationalism which could be labelled reactionary and conservative, and which was embodied in a corrupt governing party, could be ignored by the centralists in Ottawa and their supporters in the universities of English Canada.

Nevertheless, the provinces had numerous factors working in their favour. They possessed impressive constitutional responsibilities in areas of expanding government concern, notably welfare, education, highways and natural resources. Further, and belatedly, their own administrative competence experienced major improvement in the postwar years. Several of them came to be headed by ambitious political leaders who sought to manage their provinces in the pursuit of enlarged public purposes. They took full advantage of the historical accident that gave them jurisdictional control of the growth areas of government. The provinces were no longer the overblown municipalities that the Fathers of Confederation had intended them to be. The leaders of the larger provinces managed mini-states, impressive in wealth and geographic extent. They saw their tasks as positive and managerial, and they developed visions commensurate with their enlarged responsibilities. They began to take deliberate control of their provincial societies and economies. They took up the slack in their constitutional powers and extended them into new domains.

One of the most impressive examples of this new breed of provincial leaders, Premier Lougheed of Alberta, recently asserted the need for Albertans 'to reduce the dependency for our continued quality of life on governments, institutions or corporations directed from outside the province.'⁴ A recent analysis locates the source of this demand for provincial 'long-range economic planning ... and a consistent strategy of economic development'⁵ in the governing elite of the province.

Confident of its administrative competence to manage the huge revenue surpluses of the 1970s and committed to provincial economic planning, this state-bureaucratic elite sees the province as the logical arena for the advancement of its career opportunities and ... is fiercely loyal to the province as a semi-sovereign economic and political unit and deeply engaged in the process of province-building. Much of the pressure to use Alberta's remaining energy resources as a catalyst for industrialization appears to originate within the public bureaucracy.⁶

Further evidence of the increasingly extensive reach of provincial governments is provided by Ontario which, by 1972, had trade offices in

4 Quoted in L.R. Pratt, 'The State and Province-Building: Alberta's Development Strategy, 1971-1976,' Occasional Paper 5, Department of Political Science, University of Alberta, mimeo, p. 26.

5 Ibid., p. 23.

6 Ibid., pp. 21-22.

Dusseldorf, Brussels, Vienna, London, Stockholm, Tokyo, New York, Boston, Atlanta, Cleveland, Minneapolis and Los Angeles.⁷

Provincial histories in the last two decades are replete with grandiose plans for development, manifested in mammoth hydro-electric schemes, nationalization, massive highway programs, and ambitious strategies for economic growth. This transformation of the role of provincial governments has been particularly evident in Quebec. The ancient values of agriculturalism, anti-statism and spirituality no longer serve as guides to the new political leaders of a province bent on rapid modernization under the aegis of the provincial state. It is not nationalism which is new in Quebec, for in some form that has been a constant, but its new linkage with the provincial state, viewed as a prime lever for the attainment of national goals. The traditional anti-statist attitudes of Duplessis have been replaced by a philosophy which has consistently advocated the vigorous use of state power since the first Lesage government of the early sixties. The state, asserted René Lévesque in 1963, was to be 'a creative agent,' the chief instrument of the French-Canadian people of Quebec in a society in which the bulk of private economic power was in English hands.⁸ Although provincial leaders elsewhere employed less resounding language, and grappled with different problems, their basic orientation was similar.

From the mid fifties to the late sixties the weak leadership of Diefenbaker and the minority governments of both Diefenbaker and Pearson, his Liberal successor, seemed to indicate a concurrent eclipse of the federal government. This tendency was thwarted by the renewed vigour of the federal role under Trudeau, who came into politics for the express purpose of redressing the drift of power to the provinces. Thus, the assertiveness of the provinces, after a brief transition period, was met by a renewed countervailing assertiveness of the federal role.

The resultant federal system can no longer be captured under yesterday's labels as either centralized or decentralized. Rather it is characterized by strong government at two levels, with the admitted exception of the weaker provincial governments of the Atlantic region.

The chief hallmark of the new federalism is the attempt of both levels of government to mould the society and economy under their jurisdiction

7 Donald V. Smiley, 'The Federal Dimension of Canadian Economic Nationalism' (June 1973), mimeo, p. 18. The transformation of the role of government in Quebec is also manifest in the international arena, evidenced by a proliferation of Quebec bureaus abroad, and by a highly developed participation in various international organizations, especially those that pertain to the Francophone communities of Africa. See Louis Sabourin, 'Quebec's International Competence,' *International Perspectives* (March/April 1977). See also Claude Morin, *Quebec versus Ottawa* (Toronto, 1976), chapters 6 and 7.

8 Cited in Donald V. Smiley, *The Canadian Political Nationality* (Toronto, 1967), pp. 62-63.

for specific purposes. Both levels of government now control and manipulate impressive public sectors, and both are less willing than formerly to conduct their affairs in an ad hoc manner. Governments at both levels have tried to systematize their own policy process to eliminate contradictions and to exercise control over the centrifugal forces in their own administration. The resultant intergovernmental struggle is not a minor battle between small platoons of politicians and administrators but a contest between big battalions with often opposed plans for the societies and economies for which they hope to play an enlarged steering role.

The bias in favour of bigness

As the crisis of federalism is a product of the big governments which have evolved in its midst, a brief overview of the factors contributing to the growth of government is essential.

Any historical overview of the process of expansion of the public sector runs the risk of imputing to the key actors a degree of far-seeing deliberateness which they clearly lacked. It must be made clear, therefore, that a process is not a plan. What we observe is not the fulfilment by successive generations of a conscious plan articulated by a founder. On the contrary we observe little more than the efforts of particular groups of political and bureaucratic decision-makers to grapple with the cluster of problems, in society and in their own governments, placed on the public agenda at their point in time. The future beyond the next election is often conspicuously absent from their deliberations. Indeed in many cases it is inappropriate to describe the frequently chaotic process of decision-making as characterized by deliberation.

To speak of a process is to imply the existence of an enduring, pervasive bias of pressure, opinion, or 'logic' which moulds and skews the responses of elites in ways they may not comprehend. One of the tasks of social science is to raise to the level of consciousness the determining or influencing factors at work. While it is unlikely that the clarification of the sources or causes of underlying tendencies will easily allow their reversal, where such is deemed appropriate, it does at least enhance the possibility, however slim, of modifying the forces which have us in their grip. Even if, as often will be the case, the possibility of changing direction is minimal, there remains an intellectual satisfaction in understanding how we have reached our present situation.

In the Canadian case the simultaneous coexistence of big government at two levels is not attributable to left wing governments in office or to any well-articulated, or conscious philosophy of collectivism. With the partial exception of contemporary Quebec, big government represents the end result of the incremental collectivism characteristic of the modern social democratic state. The ad hoc, piecemeal advance of the state at

both federal and provincial levels is powered by the general bias of a political process in which the benefits of state action are seldom contrasted with the costs, by an ingenious tax system which makes the raising of revenues by governments as painless and invisible as possible, and makes the provision of benefits highly visible, by the outbidding process of competitive elections at frequent intervals, by the tendency of every past advance to build up quickly a coterie of supporters in those who benefit from its existence,⁹ by a process in which for governments 'means become elevated into ends in themselves ... [and] achieving the goals of policy becomes less important than maintaining past policies,'¹⁰ by the supporting propensity of decision-makers and administrators to 'acquire political and psychological stakes in their own decisions and [to] develop a justificatory rather than a critical attitude towards them,'¹¹ by the bureaucratic self-interest which dictates a continuing expansion of personnel and budgets as the tools to improvements in power, status and salary, and by the existence of a level of affluence capable of supporting both the efficiencies and inefficiencies of a large public sector by increased taxes. In view of the above, Galbraith's much-cited claim of a bias against the public sector generated by the stimulus to private consumption elicited by the engines of capitalist advertising¹² is a reversal of the truth. The bias of the modern social democratic state is hostile to the existence of autonomous decision-making by key social and economic centres of competing non-state power.¹³

Public opinion and the electoral process may hold back the expansion of old programs, or the creation of new ones, but they have little capacity to roll back existing programs. In any case, as the late Harry Johnson observed, we are influenced by a pervasive climate of opinion sympathetic to collectivism:

At the general philosophical level – the level of fundamental presumptions about the nature of organised human social life – the new synthesis can be summarised in the view that the market is guilty until proved innocent, while the government is never guilty, however criminally or irresponsibly particular governments may have behaved.¹⁴

Even if Johnson is wrong and a newer synthesis is slowly crystallizing, the

9 Harry Eckstein, 'Planning: the National Health Service,' in Richard Rose, ed., *Policy-Making in Britain* (London, 1969), p. 233.

10 Roger Opie, 'The Making of Economic Policy,' in Hugh Thomas, ed., *Crisis in the Civil Service* (London, 1968), p. 72.

11 Eckstein, *op. cit.*, p. 233.

12 J.K. Galbraith, *The Affluent Society* (London, 1958), esp. chapter 18.

13 F.A. Hayek, *Law, Legislation and Liberty*, Vol. 2, *The Mirage of Social Justice* (London, 1976), p. 68.

14 Harry C. Johnson, 'The Relevance of *The Wealth of Nations* to Contemporary Economic Policy,' *Scottish Journal of Political Economy* xxiii (June 1976), p. 171.

political agenda is nearly always forward-looking, always querying what is to be done, and almost never asking what is to be undone. The incredible inertia and rigidity of government, sustained by this bias, provides indiscriminate support for both the policy achievements and the policy blunders of our governing predecessors. Also, as Dicey astutely observed long ago, legislation often reflects the received opinions of the thinkers and writers of yesterday, 'when in the world of speculation a movement has already set in against ideas which are exerting their full effect in the world of action and of legislation.'¹⁵

Further, the role of government responds not only to the world of ideas, but to the facts of power and self-interest. Collectivist policies have tied the welfare position of countless citizens, the economic profitability or survival of innumerable firms and organizations, and the self-interest of a legion of administrators to the status quo to which their fortunes are intimately linked.

It is easy to exaggerate the public pressures for collectivism, and equally easy to underestimate the extent to which new programs reflect the interests and ambitions of political and bureaucratic elites,¹⁶ not only for their societies, but for their own political and bureaucratic significance, prestige and roles in the political system. Much of what is justified in the public interest reflects that species of organizational pathology by which means become ends, by which the power of government acquires its own justification to our governors. Regulations become more valuable to the administrators than to the administered,¹⁷ and agency filing cabinets are ransacked for possible expenditures because a surplus is available, and the end of the fiscal year approacheth.

The interests of governments only partially coincide with the interests of the population they govern. Two centuries ago Adam Smith observed that businessmen seldom met but for the purpose of conspiring against the public. While Smith's thesis has lost none of its validity as a description of business behaviour, it is no less applicable to the behaviour of governments. The decisions made by governments are no less likely than business decisions to sacrifice public interests for the varied interests of those who make the decisions.¹⁸ This is particularly so in Canadian fed-

15 Cited in F.A. Hayek, *The Constitution of Liberty* (London, 1960), pp. 445-46n.

16 See Richard Simeon, 'The "Overload Thesis" and Canadian Government,' *Canadian Public Policy* II (1976), p. 546 and John Meisel, 'Citizen Demands and Government Response,' *Canadian Public Policy* II (1976), p. 568.

17 In the words of a former federal cabinet minister, Paul Hellyer, 'We all know, needless to say, the universal law of bureaucracy: the civil servants multiply arithmetically, while the rules multiply geometrically, but the results do not multiply at all.' Cited in David M. Cameron, 'Urban Policy,' in G.B. Doern and V. Seymour Wilson, eds., *Issues in Canadian Public Policy* (Toronto, 1974), p. 246.

18 Richard Simeon, 'Current Constitutional Issues,' pp. 19-20, and Richard Simeon, 'The Federal-Provincial Decision Making Process,' pp. 28, 35, both in Ontario Economic Council, *Intergovernmental Relations* (Toronto, 1977).

eralism, the very complexity of which contributes to elite dominance since inevitably only few can be well informed of its intricacies and its jargon.¹⁹

The size of governments on the landscape of Canadian federalism is, therefore, sociologically understandable, but only partially justified in terms of democratic responsiveness to popular demand. It is not even clear that our political masters could control, if they wished, the process of expansion over which they seem to preside. It is grudgingly admitted at the highest level that it is virtually impossible for politicians to hold back the bureaucratic pressures for growth.²⁰

In the Canadian case a conventional acceptance of a vaguely collectivist philosophy has been characteristic of opinion leaders for nearly half a century. The displacement of the intellectual hegemony of collectivism is, therefore, not an imminent possibility. Thus, although the image of government efficiency has been badly battered by a series of well-publicized misadventures in the public sector in recent years, and although there is growing disinclination to attribute unquestioning virtue to state action, the complexity and multiplicity of the overlapping and reinforcing factors supporting big and bigger governments are likely to provide irresistible impetus to at least the retention of the present extent of government activity, and more probably to its continued incremental growth. This growth, it is evident, has little to do with individuals, and everything to do with the system which distributes incentives and disincentives to conduct which reflect the biases just described.²¹

The decline of the constitution

What, it may well be asked, has become of the constitution? Surely the BNA Act, as amended and as interpreted, with its written division of powers, exercises a significant constraint on intergovernmental competition. While the BNA Act cannot yet be described as completely irrelevant, it clearly cannot be described as determining.²² After all, the fluctuations

19 Edwin R. Black, *Divided Loyalties: Canadian Concepts of Federalism* (Montreal and London, 1975), p. 227.

20 'I am deeply concerned that, on the evidence of the two-year examination carried out by the Audit Office, Parliament – and indeed the Government – has lost or is close to losing effective control of the public purse.' *Conspectus of the Report of the Auditor General of Canada to the House of Commons* (Ottawa, 1976), p. 3.

21 In the succinct words of Adam Smith, referring to an earlier era: 'It is the system of government, the situation in which they are placed, that I mean to censure; not the character of those who have acted in it. They acted as their situation naturally directed, and they who have clamoured the loudest against them would, probably, have not acted better themselves.' Cited in Alan Peacock, 'The Credibility of Liberal Economics,' Seventh Wincott Memorial Lecture, Institute of Economic Affairs (London, 1977), p. 13n.

22 See W.R. Lederman, 'Some Forms and Limitations of Co-operative Federalism,' *Canadian Bar Review* 45 (1967), p. 410 on the continuing significance of the legal distribution of powers for the intergovernmental bargaining power of the federal and provincial governments.

over more than a century in the de facto power and responsibilities of the two levels occurred with only minimum explicit change in the act.

Dicey asserted in 1885 that federalism means litigation rather than legislation, the predominance of the legal mind in the working of a federal system, and the substitution of legal arguments for policy arguments in the rhetoric of federal debate.²³ However, it can be argued persuasively that Dicey's thesis no longer applies. Since World War II necessary flexibility has been obtained by a developing willingness to override legal considerations by a pragmatic approach. This has transformed the federal system from an instrument for increasing lawyers' incomes into a political arena for the free play of contending socio-economic, political and governmental forces which, in the pursuit of self-interest, vie with each other to influence the system's working.

Viewed as a political arena it is not surprising that political actors have approached the BNA Act from the strategic perspective of the requirements for effective intergovernmental competition. This manifests itself in the self-interested allocation of the most extensive meaning to those responsibilities over which one's own government has control, and the most restricted meaning to those assigned to the other level of government.²⁴ The resultant never-ending word game is irritating to those who seek certainty in human affairs, and amusing to those who delight in human ingenuity, but above all unavoidable to those who work the system. It is simply one of the ways of playing the federal game.

The BNA Act, and particularly the division of powers, has always been approached in a spirit of political calculation by those who worked it. Attitudes to the courts and to judicial review have not been immune from strategy considerations determined by the possibility of winning or losing in that cloistered arena of decision-making. More generally, the division of powers has been exploited by partisan governments intent on enhancing their freedom of action whenever openings for manoeuvre presented themselves. However, until recently, these strategems have occurred within at least a diluted tradition of constitutionalism, an underlying assumption that the BNA Act, for all its age and rigidities, was, in the last analysis, a constitutional document to be approached with at least a mild deference.

Up to a point the flexibility attained by these strategies served the country well, but the contemporary success in playing fast and loose with the division of powers has begun to produce diminishing returns. Flexibility now looks dangerously like intergovernmental anarchy. The federal-

23 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London, 1968), pp. 175-80.

24 See Morin, *Quebec versus Ottawa*, pp. 78-79, and Donald V. Smiley, *Canada in Question*, 2nd ed. (Toronto, 1976), pp. 30-33 for Ottawa's efforts to find a language of justification for a strong federal role in education.

provincial game has gotten out of hand, and we are in danger of being left not with a flexible division of powers, but a non-existent division.

In the last analysis the sources of this change lie in the minds of those who work the constitution. There is adequate evidence to suggest that key political and bureaucratic actors now accord even less concern to the intended restrictions of the BNA Act on their sphere of action than hitherto, and stress their own capacity to roam beyond its hampering confines with little likelihood of a check by the courts.

This decline in the aura of the constitution is partly the product of the lengthy French-English crisis in the Canadian polity. That crisis has produced one major process of constitutional review, which had the effect of diminishing the authority of the existing constitution but proved incapable of replacing it. Nearly ten years ago Prime Minister Trudeau stated that 'the whole Constitution is up for grabs,'²⁵ and it has been up for grabs ever since. Such a constitution elicits little respect. Indeed, it is not clear that it can any longer be properly called a constitution. Since November 15, 1976, there has been in power in Quebec a government deeply committed to some form of independence of Quebec from Canada, and thus prepared to accord only a conditional and short-run allegiance to a constitution it is pledged to destroy.

In this climate of accelerating constitutional uncertainty the leaders of Canadian governments almost inevitably respond by adopting strategies less and less determined by an ancient statute whose future is questionable. For example, it can no longer be taken for granted that Supreme Court decisions will be accepted as binding by governments whose 'rights' are adversely affected. More significant is a tendency for governments to devise policies for which little constitutional support can be found. Thus, a recent Ottawa task force on urban policy deliberately disregarded the federal-provincial division of powers with an 'uncompromising assertion of a strong and legitimate federal role in urban affairs.'²⁶ In the area of social security the policy advisers of Prime Minister Pearson were prepared to act 'without being intimidated by the federal constitution.'²⁷ The DREE program of regional economic development treated 'constitutionally

25 Cited in Donald V. Smiley, 'Rationalism or Reason: Alternative Approaches to Constitutional Review in Canada,' paper presented to the Priorities for Canada Conference of the Progressive Conservative Party of Canada, (October, 1969), mimeo, p. 7.

26 Cameron, 'Urban Policy,' p. 233. In a classic case of special pleading the task force asserted that 'it is illogical, if not inconceivable, that the Government of Canada could have ministers dealing with fisheries, forestry, veteran affairs, and other matters which involve a minority of the population, but none to deal on a full-time basis with the urban problems which involve more than 70 per cent of the population, not to mention housing which involves virtually everyone.' Ibid., p. 233.

27 Anthony G.S. Careless, *Initiative and Response: The Adaptation of Canadian Federalism to Regional Economic Development* (Montreal and London, 1977), p. 128.

assigned jurisdictions ... as expendable luxuries.'²⁸ According to a recent analysis justification for government action no longer springs from the constitution, or from 'the rights and privileges derived from a federation supposedly respecting diversity as well as unity,' but from 'sheer economic or fiscal power.'²⁹ In summary, according to the same author, '(g)overnments at both levels have freely chosen to set aside the BNA Act and interpret spontaneously what they feel to be their mandates arising from their commonly-shared populace ... The dynamic between governments has tended to turn upon each level's broad-scale policy initiatives, noble in the scope of response to problems, but consciously poor in recognition of the objectives of federalism or clarity of government mandates.'³⁰

Thus the existing constitution is a lame-duck constitution, cursed with increasing impotence as it awaits its eventual allocation to the dustbin of history. A basic feature of our present troubles, therefore, is a diminished respect for the constitution manifested in a serious decline in its capacity to regulate the competitive conduct of governments, which, in turn, produces further disrespect.

Federalist causes of the federal crisis

The prevailing constitutional weakness in the Canadian polity is only partially caused by the French-English crisis of recent decades. An additional contribution comes from the steady growth of governments in the past half century. But this growth occurs within a particular federal system which makes its own contribution both to the generation of demands and to the effectiveness of the response to them. In this sense we are experiencing not only a crisis of federalism, but a crisis to which federalism has contributed.

Stated simply, the increase in demands is a product of the multiplication of political arenas with its attendant increase in the points of citizen and interest group access to the political system. In earlier times, particularly in the thirties, the simultaneous access of groups to the different levels of government in the federal system thwarted the capacity of governments to act. The confusion and multiplication of jurisdictions were transformed into instruments of delay or blockage by interests seeking to avoid the regulatory tentacles of incipient collectivism.³¹ That era has been succeeded by new circumstances and philosophies which have transformed access into a vehicle for increasing rather than blocking government output. The overall result is to enhance the pressure on governments to act. Probably more important is the fact that federalism increases the

28 Ibid., p. 169.

29 Ibid., p. 212.

30 Ibid., pp. 216-17.

31 J.R. Mallory, *Social Credit and the Federal Power in Canada* (Toronto, 1954), pp. 53-56, and chapter 3.

opportunity for what Easton calls withinputs. It multiplies the incidence of discrete and separate political and bureaucratic pressures for a larger level of services and for ever more extensive regulation. Eleven governments pursuing visions instead of one, two hundred ministers building empires instead of twenty-five, several hundred distinct departmental hierarchies of civil servants seeking expansion of their activities instead of a tenth as many – all these provide an extensive supplementary impetus to the normal pressures for expansion of the public sector which are present in other polities.

It might be argued that this is simply an optical illusion: that one strong government presiding over a unitary state would combine the present aggregation of dispersed demands into an equivalently sized demand from one government. Even if this were true, which I doubt, Canadian federalism contributes to the generation of pressure for government action in other ways. The nature of the federal system with its fuzzy lines of jurisdictional demarcation, and extensive overlapping of the potential for government response, means that in innumerable fields there is, in fact, an intergovernmental competition to occupy the field, and slackness by one level of government provides the occasion for a pre-emptive strike by the other.³² Further, the prevailing French-English crisis of Canadian federalism, with the federal and Quebec governments vying for the allegiance of the Quebec voter, encourages an elaborate competition between governments not just for party support but for regime support. Thus contemporary Canadian federalism reduces the likelihood of unoccupied or only lazily exploited fields, and often encourages wasteful competition.

A further consequence must not be overlooked. The diminution of respect for those constitutional procedures and rules of the game capable of policing the boundaries of federal and provincial jurisdiction adds to the insecurity of all governments. The security and certainty of jurisdictional responsibilities which cannot be gained by reference to the constitution are sought by the exercise of sheer power, the staking of claims for popular support by the manufacture of constituencies of allegiance tied by free-wheeling policies and expenditures to a government seeking to maintain its position. Ottawa's regional economic development policies, for example, are based on a political desire, regardless of the BNA Act, to increase the number of satisfied consumers of federal services beyond those satisfied by provincial governments.³³

So much for the contribution of federalism to the generation of demands

32 See Morin, *Quebec versus Ottawa*, chapter 5; Robert S. Best, 'Youth Policy,' in Doern and Wilson, *op. cit.*, p. 143; Careless, *op. cit.*, pp. 3, 6; and Richard Simeon, 'Regionalism and Canadian Political Institutions,' in J. Peter Meekison, ed. *Canadian Federalism: Myth or Reality*, 3rd ed. (Toronto, 1977), p. 303.

33 Careless, *op. cit.*, p. 177.

for government activity.³⁴ What of its capacity to produce effective responses to those demands? The answer to this question is ambiguous. The traditional justification for federalism, that it increases the sensitivity of policy-making in a regionally diversified society, undoubtedly retains some cogency even in our second century of existence. The capacity to allow local majorities in provincial settings to go their own way without having to consider the wishes of residents of other jurisdictions clearly contributes to sensitivity in policy and its administration. However, this virtue has been eroded in several areas by federal-provincial programs which inhibit the freedom of response available to provincial governments.

A further traditional advantage of federalism merits brief discussion, its capacity to reduce the management burden on any single government and thus facilitate political control and policy coherence by restricting the range of interests it is necessary for a particular government to juggle. This, however, like the above mentioned reputed advantage, presupposes a form of classical federalism in which governments do not get in each other's way, and do not subject their respective societies, which, after all, are composed of the same people and the same interests, to conflicting objectives.

But such a federalism no longer exists. Thus a recent analysis of economic nationalism noted the inadequacy of assuming that only Ottawa pursues nationalistic policies *vis à vis* the economy under its jurisdiction. In addition, there are powerful provincial economic nationalisms which reflect the desire of incumbent provincial elites to plan their own economic development in terms of specific provincial values, with reference to the particularities of the various provincial economies, and employing the set of policy instruments under provincial control. The provinces accordingly have 'embarked on policies usually associated with sovereign states – provincial fiscal policies toward full employment and growth; various kinds of restrictions on the free movement of people, goods and capital between provinces; [and] economic relations outside Canada apart from the supervision and control of the national government.'³⁵ The result is a competition of objectives capable of frustrating the aims of both levels of government in such fundamental policy areas as energy, resource development, foreign investment, full employment and inflation.

Even within areas of supposed intergovernmental agreement competitive tendencies often outweigh cooperative tendencies. It is understandable and was probably unavoidable for classical federalism to break down

34 For the contrary assertion that federalism, or devolution, increases incentives for citizens to participate in the political process and by the resultant greater understanding of government produces a 'recognition of its limitations,' see Peacock, 'Credibility of Liberal Economics,' p. 27. See also p. 13.

35 Donald V. Smiley, 'Federal-Provincial Conflict in Canada,' in Meekison, *op. cit.*, p. 16.

under the weight of problems which could not be handled by a single level of government. This has led to an intermeshing of jurisdictions, typically of a nature in which Ottawa provides funds to the provinces on condition that their expenditures meet federal criteria of performance even where legislative jurisdictions are provincial. In two of the most expensive areas covered by such programs, medicare and hospital insurance, federal criteria have contributed to excessive expenditures by providing severe disincentives to provincial governments to economize by the employment of para-medical personnel, and the use of cheaper institutional forms than hospitals, for these less expensive responses were not eligible for federal payments. These federal programs also militated against the desire of both Ontario and Quebec governments to integrate health services with other aspects of social policy.³⁶

Federal-provincial competition is not abnormal, or sporadic. It is frequent and widespread. Thus in the late sixties major federal proposals for tax reforms affecting the mineral industry were successfully thwarted by the provinces who feared that implementation would slow down resource development crucial to provincial economies.³⁷ On a smaller scale recent federal attempts to change the regulations relating to the extra-provincial trucking industry were fought to a standstill by the provinces.³⁸ A recent case study of a federal-provincial arrangement for adult occupational training in Ontario described it as a vehicle for a clash between the competing grand designs of the federal and Ontario governments, and their respective officials. 'The clash of these designs can be likened to a collision of ships at sea that results in both vessels remaining afloat and steaming off on their respective courses, taking water, displaying gaping holes in their superstructure, and relatively oblivious to the number of passengers and crew crushed by the impact.'³⁹

The contribution possible under classical federalism to simplifying the managerial task of governments disappears under a system of big *dirigiste* governments at both levels. Like lumbering mastadons in tireless competition these governments are possessed of an infinity of weapons capable of wreaking deliberate and inadvertent harm on each other, but incapable of delivering a knockout blow.

The federalism of contemporary big government at both levels can best

36 Peter Aucoin, 'Federal Health Care Policy,' pp. 62-63, and G.R. Weller, 'Health Care and Medicare Policy in Ontario,' pp. 98-99, 96, 108, both in Doern and Wilson, *Issues in Canadian Public Policy*.

37 M.W. Bucovetsky, 'The Mining Industry and the Great Tax Reform Debate,' in Paul Pross, ed., *Pressure Group Behaviour in Canadian Politics* (Toronto, 1975), pp. 98, 100-101.

38 Richard Schultz, 'Interest Groups and Intergovernmental Negotiations: Caught in the Vise of Federalism,' in Meekison, *op. cit.*

39 J.S. Dupré, et. al., *Federalism and Policy Development: The Case of Adult Occupational Training in Ontario* (Toronto, 1973), p. 109.

be understood in terms of the tendency of each government to seek to minimize the policy contradictions in its own jurisdiction and reduce the environmental uncertainty emanating from the conduct of other governments.⁴⁰ Hundreds of officials at both levels are employed in this enterprise. Each government, in brief, strains, to exaggerate somewhat, to attain and exercise the powers of a unitary state. This tendency is unavoidable as long as each government views the conduct of the other governments as threatening to its own pursuits.

It is logically impossible for each government simultaneously to succeed in controlling the environmental uncertainties caused by its rivals. The effort to do so produces struggles between governments, and innumerable 'cooperative' ventures which are serious failures.⁴¹ It is the dramatic emergence of this previously concealed structural incompatibility in Canadian federalism which constitutes the 'other crisis' of Canadian federalism. Whereas Lévesque himself has described the conflict of two nations in Canadian federalism as equivalent to 'two scorpions in the same bottle'⁴² I consider it more accurate to speak of eleven elephants in a maze. The uncertainties confronting policy-makers in Canadian federalism come not so much from private groups, or even from competing ethnic-linguistic communities, but from other governments in the system.

I have described this situation elsewhere in the following terms:

We have stumbled into a peculiar Canadian version of the American separation of powers. The reaching of agreement on the innumerable major issues which clog the federal-provincial agenda requires the approval of independent political authorities with distinct, and separate bases of electoral, party, group, and bureaucratic support. They are not constitutionally beholden to each other and they are aligned with large and powerful constituencies of interests that can be mobilized behind the evocative labels of provincial rights and the national interest. Indeed, the Canadian version of the separation of powers may be more difficult to work than its American counterpart, for it involves not just the separate legislative and executive strata of the policy-making process but governments, conscious of their historic position, jealous of their prerogatives and aggressively enterprising in the performance of their managerial responsibilities for their societies.⁴³

40 See *ibid.*, and Careless, *Initiative and Response*, for relevant case studies.

41 The Rt. Hon. Patrick Gordon Walker notes the tremendous resistance of ministers in the same cabinet to policy coordination, because of its tremendous drain on the time and energy of men with departmental responsibilities. 'Beyond a certain point - the more you plan, the less you do.'

'Ministers conceive a deep distaste for embarking upon projects that will entail more and longer meetings with their colleagues. This means that even Socialist Ministers are selective about the sectors of the national life that they can attempt to plan.' 'On Being a Cabinet Minister,' in Rose, ed., *Policy-Making in Britain*, pp. 123-24. The resistance is obviously greater when, as in Canada, policy coordination requires the agreement of politicians in another government, perhaps thousands of miles away.

42 'For an Independent Quebec,' in Meekison, *op. cit.*, p. 491.

43 'The Governments and Societies of Canadian Federalism,' *Canadian Journal of Political Science* x (December 1977), p. 724.

Conclusion

The situation just described portrays major barriers to a viable federalism of big governments. The political thought which underlies the evolutionary collectivism of the past half century was inspired by the noble aim of disciplining private concentrations of power and making them accountable to the community. The collectivist solution has left us with the problem of how to make public concentrations of power accountable to the community.

An argument addressed to the problems of big governments can be applied, with only minor modifications, to the governments of contemporary unitary states. Governments which combine bigness with inefficiency, which manage pyramids of power never before experienced by mankind, and yet elicit widespread frustration and cynicism in their citizenry, are indeed the veritable hallmarks of our era. Big government now joins the lengthening queue of gods that failed, yet one more noble aspiration shattered by the world it was intended to uplift.

In the Canadian case, the crisis of big government has produced a crisis of federalism. The federal system served Canadians well in simpler times of more limited government. It proved capable of accommodating big government at one level, notably in World War II and its aftermath. But contemporary Canadian federalism founders on the coexistence of big government at both levels. Contemporary Canadian federalism cannot restrain big government, and big governments do not respect federalism. It was probably inevitable that as governments extended their reach into every nook and cranny of our lives they would view the federal system itself as no less amenable to manipulation than the other legacies of a simpler order now subject to political discretion and control. As recently as twenty years ago the language of constitutional debate referred constantly to the intentions of the Fathers of Confederation. Now the language of the original Confederation settlement is a dead language, replaced by a more pragmatic language which speaks of needs, interests and functions. The handiwork of the Fathers of Confederation recedes into history.⁴⁴

The federal aspects of the BNA Act no longer serve their intended purpose of clarifying and controlling the exercise of power by competing governments. Whether it is even technically feasible to devise a federal

44 In the words of Claude Morin when he was Quebec's Deputy Minister of Federal-Provincial Affairs: 'Formerly Quebec went to Ottawa, waving some article of the Constitution, and said, "This article forbids you to do what you are about to carry out." To which Ottawa retorted, "You are quite right, but would you mind if, for the time being, we went ahead anyway?" And Quebec submitted . . . Now that's all over. Quebec's motto is: We're through fooling around! It seems ridiculous to me to invoke the Constitution. It is like invoking St. Thomas.' Cited in Smiley, *The Canadian Political Nationality*, p. 80. See also Alan C. Cairns, 'The Living Canadian Constitution,' in Meekison, ed., *op. cit.*

system capable of containing strong governments at both levels, of facilitating effective administration by each level where possible, and effective joint policies where unavoidable, is open to question. The provinces in Canadian federalism, especially those which combine wealth and resources with impressive jurisdictional capacity, are more powerful than the states or provinces of any existing federal system. They are more powerful than most of the member states of the United Nations. Hence we cannot look elsewhere for successful models. There is no way of reducing the provinces to the position of comparative impotence they previously experienced. We have reached an impasse. We are left with an overloaded political system which has gotten out of control, a system of competitive big governments which, increasingly incapable of effective governing, burdens the societies it is supposed to serve.

In 1964 a Canadian economist praised the authors of the Rowell-Sirois Report for their intellectual achievement in providing a history appropriate for their times, a history which gave 'their contemporaries a coherent picture of themselves – of where they had been and how they had got where they were; of where they stood in relation to each other and to the rest of the world; and where they seemed to be going.'⁴⁵ But more than that they provided a blueprint for the future and a modest optimism that our fate was to be more than a plaything of circumstances.

From the vantage point of the late seventies the depression generation of social scientists had an easy task. It is much more difficult in the 1970s to define an equivalent set of compelling public purposes for this generation. For those Québécois intellectuals and government elites attracted by the vision of independence the problem does not exist. The presence of visionary possibilities for those who believe in the independence of Quebec, however, destroys the possibility of an equally strongly held vision for those who believe in Canada. The future for the latter is a long twilight struggle of coping, compromising, revising and adapting. Success in the endeavour is likely to be fragile. A new, enduring harmony will probably elude us, and English Canada will be fortunate to achieve the more limited goal of keeping the frustrations of Québécois down to a level where the short-run future, but not more, partakes of a shaky security.

This is the optimistic scenario. Even less attractive, if somewhat less likely, is that Canadians outside Quebec will find themselves against their wills in the remnant of a ruptured political system they did not seek and whose coming they tried to forestall. This scenario provides even less

45 W.A. Mackintosh, *The Economic Background of Dominion-Provincial Relations*, ed. J.H. Dales (Toronto, 1964), 'Introduction,' p. 2.

building blocks for a vision, for it will represent a future the believers in Canada tried, and failed, to avoid.

Even if we leave the Québécois nationalist pressures aside, as this paper has largely done, the grounds for optimism are slim. If the other crisis of Canadian federalism is as I have portrayed it, the agency to which we customarily turn for a solution, government, in some federal form, is so much the cause of our problems that one can only half-heartedly visualize it as the instrumentality for alleviating the strains to which it has so markedly contributed. It is the very effort to maximize public control over our fate by the device of big government at two levels which has undermined the federal system and produced a situation in which we are in imminent danger of being victimized by our own creations.

At such a conjuncture there is a clear danger of privatization, of a retreat to cultivating one's garden, or succumbing to despair over the apparent passing of a hitherto durable, beneficent and competent political order which has buoyed up our spirits for more than a century. Neither gardening nor despair will help. We have no alternative but to give up our illusions and go back to the study to grapple with the present reality of that no longer mythical assertion that Canada is a difficult country to govern.