An historical interpretation of the Constitution

In the first instance, asserts eminent McGill historian Desmond Morton, Confederation was primarily a response to the ravages of the US Civil War and the threat of annexation by the United States. “With admirable rationality,” he tells a national conference of law students in Quebec City, “the British organized British North America to manage its own affairs.” This included the division of powers between Ottawa and the provinces in the British North America Act of 1867, not to be confused with the Charter of Rights and Freedoms of 1982.

À l’origine, rappelle Desmond Morton, éminent historien de l’Université McGill, la Confédération se voulait essentiellement une réplique aux dévastations de la guerre de Sécession et aux menaces d’annexion des États-Unis. « Et c’est avec une admirable rationalité que les Britanniques, soucieux de gérer leurs propres affaires, ont alors créé l’Amérique du Nord britannique », explique-t-il ici à des étudiants en droit réunis à Québec à l’occasion d’une conférence nationale. Ces « affaires » englobaient la division des pouvoirs entre Ottawa et les provinces inscrite à l’Acte de l’Amérique du Nord britannique de 1867, qu’on évitera de confondre avec la Charte des droits et libertés de 1982.

There are many historians in our universities who could discuss the historical evolution of constitutions in Canada. Shaping my thought at a vulnerable age was one of Canada’s leading exponents of the famous or notorious Compact Theory beloved of Québécois nationalists since the days of Honoré Mercier and Judge Thomas Loranger. Why did their views capture the complete sympathy of Colonel George Francis Gilman Stanley, a High Church Anglican from pre-war Calgary? You might as well ask why George Stanley was an equally fervid partisan of Louis “David” Riel, whose legitimacy he dragged from obscurity into the daylight in two influential books. I always wondered whether Sir John A. Macdonald lost Stanley to the Grits after the Old Chieftain insisted that treason was treason and the law must take its course. On a cold November 16th, 1885, Riel mounted a scaffold in Regina and fell to his sudden death.

I was not a partisan of Riel nor of Colonel Stanley’s constitutional views. Though this exposure occurred at the Royal Military College of Canada, uniformity of thought was not imposed on cadets or their professors. After we had been exposed to Stanley in the morning, our brains were properly scrubbed by RMC’s chief political scientist at the time, Murray Beck, a Nova Scotian of comparable passion and eloquence.

This, I regret to say, was almost the sum of my exposure to constitutional historicity until Trudeau and Mulroney decided to use constitution- alism as their claim to a place in history. Isn’t this conference, in and of itself, a reminder of how irresistible constitutional discussion seems to be for clever lawyers? Had the Fathers of Confederation created a federation of equal provinces? How could anyone who read the Confederation Debates believe it? Was the Senate an irrelevant failure? An obvious mistake? Why, then, did the Fathers of Confederation spend so much time exploring every detail of its creation and functioning? Why is every reform fraught with complexity and injustice? Were Quebec’s interests respected in 1866 or in 1982? The answer, a rare agreement between Beck and Stanley, was yes, at least in the enumeration of provincial powers and responsibilities. Was there provision for the departure of any of the newly created provinces? How could there be in the shadow of the cataclysmic war in our all-powerful neighbour to the south? There obviously were Canadians who sympathized with the Confederate States but they were not a noisy or prominent force in the Canada of the 1860s.

That war, with over a million federal soldiers armed, disciplined and dispatched by Lincoln to their bloody work, was the biggest single influence in shaping Confederation. It told our British governors that no War of 1812 could ever again be possible. Canada was not only indefensible; it would be a fatal trap for any country who believed that an American invasion could be resisted. With admirable rationality, the British organized British North America to manage its own affairs, instructed us all to fight to the death, wrapped up their military obligations as neatly as they could and, on November 11th, 1871, marched their garrison at the Citadelle quietly down to the docks, boarded a ship and
departed, never to return. November 11th was, let me suggest, Canada's Independence Day, and not a single Canadian politician of the era or historian of the subsequent past, French or English, has ever wanted to know about it. Canadians remained, as we all know, endowed with the illusion that somehow we owed the empire a blood tax whenever the British got into a war, whether in Egypt, where Quebec's Major Philippe-Omer-Joseph Hébert died in 1880, or in France and Flanders, where 65,000 of us perished between 1914 and 1918. November 11th is a day for Canadians to remember.

This session of this conference asks how judges interpret history in constitutional decisions. As a “professional historian,” supposedly engaged in teaching others how to assess history, I admit that I cannot answer the question and perhaps I don’t even think it is necessary. My experience in the trade is that we interpret history to suit our own ends, barring only our temptation to create fiction. The study of history derives sufficiently from the practice of law in that allegations should be evidence-based. Or so I have been assured, though I find some judicial reasoning more creative than I would allow myself to be. How could Willie Picton, of recent memory, have committed six similar murders — (or is it 26?) without having premeditated them? Even the prosecution has hustled into appeal before the defence tries to get Picton out of jail. If judges are Canadians, the Dominion Institute reminds us that even young Canadians, fresh from school, don’t know our history. “We haven’t a clue” cases when majorities in Canada have deserved that suspicion, perhaps most commonly when Canada goes to war and we unleash the paranoia that lurks too conveniently at the heart of most nationalisms. The appeal of such a compact did not persuade me nor my mentors of its reality when I had my dose of Canadian constitutional history so many years ago. Nor, for some reason, did my mentors inspire much enthusiasm for giving judges the power to regulate vital features of my life. The bulk of Colonel Stanley’s course, as of most such courses in my adolescence, was an expose to the vagaries of the grandly named Judicial Committee of the Privy Council, working its will on the Macdonald-Cartier blueprint for a centralized federal Canada with arguments that obviously owed nothing to detailed knowledge of Canada’s realities and a good deal to the “states’ rights” views of a former attorney general of the Confederate States, a New Orleans lawyer named Judah P. Benjamin, a political refugee in London, sometimes hired by Oliver Mowat’s Ontario for constitutional challenges.

British privy councillors felt free, it seemed, to redesign Canada from the other side of the Atlantic with, on occasion, quite a tenuous grasp of what was happening here. When Prime Minister Trudeau displayed a passionate impatience to leave a made-in-Canada Constitution as the memorial to his years of power, the rapturous excitement in Canada’s higher courts and in faculties of law should have started alarm bells. I remember thinking for a moment that Trudeau might have himself to replace Chief Justice Dickson. Instead of retiring to the obscurity of a corner office at Heenan Blaikie, he would have presided over the affairs of Canada until he was a full seventy-five years of age. So what if John Turner or Brian Mulroney moved into Sussex Drive, Chief Justice Trudeau and his
appointees would be signing the decisions that governed their choices.

If I am a democrat, as I hope I am, this thought did not really please me very much. Perhaps I was and remain an admirer of old things, be they my much-lamented computer or the British North America Act of 1867 and the system of government we have enjoyed ever since. We enjoyed an organic law that saw Canada through its first century and assisted our historic climb from the primitive bigotry, sexism and racism of our binational adolescence. It was sufficient to transform us from the Third World poverty our country knew until the Second World War; it needed no Clarity Act nor a Supreme Court declaration that, as in India or the late Soviet Union, our constituent parts may negotiate secession, provided they allow their people to answer a clear question with a clear majority.

Nothing tells me that our judges will interpret our history any more validly than the imaginative and combative lawyers who appear before them. If I had been trained in the 24-7 law factories that will presently, I hope, give the members of this conference access to a generous living, I might well have stayed up all last night and been able to provide detailed evidence for the misgivings I have inherited from my academic mentors. Instead, I went to sleep to the soothing tones of Peter Mansbridge, confident that if Canada and Canadians could enjoy their future as I have spent a lifetime enjoying their past, we would remain one of the happier countries on the face of the globe and that most constitutional processes could remain, as they have been since 1990, a phenomenon we can usually ignore.

Outside, a journalist asked me my thoughts about the passion of young law students for throwing themselves into the seeming abyss of constitutional innovation. I responded by reminding him that my specialty is the study of war. Wars are fought by young people, willing to throw their lives into an abyss of death. I am far from enthusiastic about this sacrifice because history seldom tells me that it did much lasting good. I came here with Philip Shelton’s criticism of your chosen profession, and wondered whether this brutal assault on your professional ethics might not have provided a more significant theme for your national meeting. Instead, to the delight of some of your elders, you are preparing for the next edition of a war those elders lost. Soyons prudents!

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*Stern Review: The Economics of Climate Change, October 2006*

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