

# Revisiting the 1865 Canadian debates on Confederation: Rights and the Constitution

On February 3, 1865, the legislators of the Parliament of Canada began discussing the merits of the proposed union of the colonies of Canada, Nova Scotia, New Brunswick, Newfoundland, and Prince Edward Island.<sup>1</sup> These debates were both framed and informed by 72 resolutions adopted at a colonial conference held in Quebec City four months earlier. Combined, the resolutions provided the basis for the proposed colonial government and effectively laid the foundation of what was to become the new nation's first written constitution, the *British North America Act, 1867*.<sup>2</sup> The debates about the resolutions are important because they give us an insight into the nature and expectations of the proposed new government, as well as a sense of how some key colonial politicians understood the meaning of the words they were putting down on paper.

Despite Lord Sankey's famous dictum that the Constitution was like a living tree "capable of growth and expansion within its natural limits,"<sup>3</sup> those drafting it in 1865 were not thinking a great deal about its future evolution. Its proposed provisions were meant to address a number of contemporary problems and challenges, and designed to provide a fixed set of rules to govern the new nation. While many of the measures that were adopted proved to be enduring and "capable of growth" over the decades, others were less fecund and less able to rise to the historic occasion. This is particularly true with rights issues. Even the judiciary's liberal interpretations of the imperial statute have proven to be unable to address these deficiencies over time.

## THE RIGHTS DISCUSSION

The issue of protecting rights was a focal point of the Canadian Parliament's 1865 debates on Confederation. But the nature of these rights discussions was

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limited. Some rights issues were discussed explicitly, some were implicit, while others were outright ignored. The legislators assumed the existence of certain individual rights and civil liberties protected by the British constitution and the common law, such as the right to a jury trial in serious criminal matters, access to the writ of *habeas corpus* to test the validity of any imprisonment, and the right to hold and enjoy property. These rights had been elaborated on over the centuries, and while subject to some limitation by legislatures, had a relatively well-defined content. In the *British North America Act*, such rights were subsumed in the preamble's direc-

tion that the new dominion was to have "a Constitution similar in Principle to that of the United Kingdom."

Individual rights were thus not the primary focus of the debates. Rather, two collective or minority rights issues dominated the discussions—minority education rights and the rights of French Canadians to protect their language, religion, and institutions in Lower Canada. These issues were addressed extensively and passionately throughout the debates. With regard to minority education rights, for example, Aquila Walsh, member of the Legislative Assembly for Norfolk, reflected the views of many of his colleagues when he underscored that it was justice itself that necessitated the protection of denominational schools in the new nation.<sup>4</sup>

The rights of French Canadians in Lower Canada also were extensively addressed during the Confederation debates. To ensure that these rights were acknowledged and protected, several provisions were included in the resolutions to secure them—for example, article 46 guaranteed the right to use the French language in the courts and legislature of Lower Canada and in the federal courts and Parliament.

But specific provisions in the 72 resolutions were not the only features of the proposed new Confederation arrangements that were intended to address the interests of French Canadians in Lower Canada. Several features of the British system of government also were to be carried forward into the new order to support the protection of the rights of the French minority.

The British Crown, the parliamentary system, and the common law were to be retained. Legislators widely believed that the British system of government was preferable for the protection of French-speaking minorities. As the attorney general for Lower Canada,

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George-Étienne Cartier, explained to his colleagues in the Legislative Assembly, French Canada learned early on that “it was better for them to remain under the English and Protestant Crown of England, rather than to become republicans” like their neighbours to the south.<sup>5</sup> He emphasized that it was “precisely because of their adherence to the British Crown” that French Canadians had “their institutions, their language and their religion intact to-day.”<sup>6</sup>

## HOW NOT TO PROTECT RIGHTS: THE AMERICAN EXPERIENCE

In fact, the American experience supplied a powerful example of how *not* to protect rights. Careening between “the tyranny of a single despot”<sup>7</sup> on the one hand, and the tyranny of “mob rule”<sup>8</sup> on the other, the events leading to the Civil War had underscored, as Cartier described, the “hollowness” of American democracy.<sup>9</sup> The combination of the Crown, well-designed legislatures, and the common law provided a much better institutional recipe for protecting both individual and minority rights. The superiority of the British approach to what John A. Macdonald called “constitutional liberty” was so clear to most of the legislators that it required no elaborate defence.<sup>10</sup>

In addition to a British system of government, another feature of the proposed union that was designed to act as a guardian of the French Canadian community was federalism. As the premier of Canada, Sir Étienne-Paschal Taché, emphasized, a federal union “would be tantamount to a separation of the provinces, and Lower Canada would thereby preserve its autonomy together with all the institutions it held so dear, and over which they could exercise the watchfulness and surveillance necessary to preserve them unimpaired” (4). John A. Macdonald underscored that unlike a pure legislative union, a government formed upon federal principles “would give to the General Government the strength of a legislative and administra-

tive union, while at the same time it preserved that liberty of action for the different sections” (23).

In the 1865 Canadian debates on Confederation, the nature and scope of rights issues for the new nation were discussed extensively. Rights were to be addressed and protected in three ways: specific resolutions that eventually formed the basis of the country’s first written constitution, adoption of specific features of the British system (the Crown, parliamentary government, and common law), and a government founded upon federal principles. But make no mistake, the beneficiaries of these rights were limited and narrowly defined. Cartier emphasized that the 1865 Confederation scheme was designed to ensure that “there could be no danger to the rights of and privileges of either French Canadians, Scotchmen, Englishmen or Irishmen.”<sup>11</sup> George Brown underscored that “[o]ur scheme is to establish a government that will seek to turn the tide of European emigration into this northern half of the American continent ... and that will endeavor to maintain liberty, and justice, and Christianity throughout the land” (36). The new nation, in other words, was intended to safeguard the interests of French Canadians in Lower Canada, linguistic communities (the French and the English), and religious communities (Catholic and Protestants). But that was all.

Parliamentarians did not see this limited approach to rights as narrow or problematic. Indeed, they envisioned themselves as progressive liberals. Repeated references were made to the actions of Lower Canada in 1832 to accord legal rights to members of the Jewish community before most other governments had done so.<sup>12</sup> As Sir Narcisse F. Belleau, life member in the Legislative Council from Quebec City, explained, this measure underscored that, “far from wishing to oppress other nationalities, all that the French Canadians ask is to live at peace with the

world; they are quite willing that they should enjoy their rights, provided that all live peaceably together.”<sup>13</sup>

## OPEN-MINDED TOLERANCE ... TO EQUALS

Canadian parliamentarians, however, were open-minded and tolerant only to those they deemed to be equals. The rights rhetoric of the period, and it did indeed exist, was layered and nuanced, targeted only to a select few. Rights protection was not envisioned to apply to racial minorities or women. A racial slur delivered in the form of a “joke” by Christopher Dunkin, member of the Legislative Assembly for Brome, against Asians was met with “Laughter” in the Legislative Assembly.<sup>14</sup> Similarly, Joseph Dufresne, member of the Legislative Assembly for Montcalm, ridiculed one of his colleagues by making a negative comment about him in relation to black Americans. It, too, was met with “Laughter” in the chamber.<sup>15</sup> And throughout the debates, women were either portrayed as damsels in distress or viewed through the lens of demeaning stereotypes. In other words, only some groups and communities were viewed as equals and thus deserving of rights. Others were disregarded altogether.

Indigenous people were likewise given no status or recognition whatsoever in the debates on Confederation. They were virtually invisible. No one spoke on their behalf. No one advocated for their rights. Indeed, at least as many references were made to the state of Indiana as to the condition of British North American Indians. While John A. Macdonald repeatedly made reference to the Confederation agreement as a treaty among the British colonies,<sup>16</sup> he neglected to refer to any of the treaties between the British government and Indigenous people in North America. On the few occasions where Indigenous people were mentioned in the debates, there was nothing positive. Brown spoke about the importance of opening up the “Indian Territories” between Upper Can-

ada and British Columbia to “civilization” (37). He underscored the “vast importance that the [northwest] region should be brought within the limits of civilization, and vigorous measures had been taken to ascertain what could be done with that view.”<sup>17</sup>

In other words, the legislators of the Canadian Parliament in 1865 did believe in the importance of rights and the need to entrench them into the country’s new constitution. But they narrowly framed who would be the beneficiaries of those rights. Minority education rights were clearly spelled out in the 1864 resolutions and later in the *British North America Act*. Similarly, language rights were accorded to the French and the English in both the resolutions and the imperial legislation. Freedom of religion would be guaranteed, as long as one was Protestant or Catholic. Lower Canada was given the legislative authority to protect the interests of French Canadians via the federal structure of governance, and the continuing institutions of the Crown, Parliament, and the common law would be relied on to protect minorities more generally. But those outside the privileged Scottish, Irish, English, and French communities were not explicitly recognized as rights holders.

### THE RIGHTS CONSTITUTION: INCAPABLE OF GROWTH


Looking back from the perspective of a century and a half of Canadian political experience, it is apparent that the country’s living constitution was not capable of addressing these deficiencies particularly well. Whereas the federal constitution was able to adapt to facilitate changes to federal–provincial relations throughout the 20th century (even with the stresses and strains associated with the sovereignty movement in the latter half of the century), the same cannot be said with regard to Canada’s “rights constitution.”

Although the courts and constitutional scholars envision constitutions as being capable of growth and change, the achievement of a more inclusive understanding of rights proved to be relatively

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difficult. Federalism itself could occasionally be invoked to protect rights indirectly, as when the courts declared in 1899 that British Columbia could not pass a law prohibiting the employment of Chinese workers in mines because it dealt with the status of aliens, a topic of federal jurisdiction.<sup>18</sup> However, litigation was expensive, inaccessible to most, and not a reliable vehicle for expanding the circle of rights protection.<sup>19</sup> Federal and provincial legislatures remained virtually unchecked as they adopted a myriad of statutory and regulatory frameworks that discriminated against various groups or communities. Indigenous people, for example, were not entitled to vote in federal elections until 1960. It was not until the introduction of a number of human rights codes in the aftermath of the Second World War and the passage of the *Canada Act 1982*<sup>20</sup> that rights issues began to be recognized and addressed in a broader context in any meaningful way.

### A HISTORICAL EFFORT TO ACCOMMODATE

There is, however, one way in which Canada’s relatively narrow 19th-century rights approach may have laid the foundation for a critically important dimension of Canada’s contemporary identity. Our historical effort to live with, and constitutionally accommodate, the French–English, Catholic–Protestant divide may have equipped Canadians with the capacity to accept and in fact welcome the more extensive cultural and religious diversity that has been the product of postwar immigration—an emerging social reality that has proven so vexing and difficult for many other Western nations to digest. 

### NOTES

1. The debates are printed in English in their entirety in Canada, *Parliamentary Debates on the Subject of Confederation of the British North American Province*, 3rd Session, 8th Provincial Parliament of Canada (Quebec: Hunter, Rose, 1865). Quotations in this essay are cited either to the Waite edition or, where they are excluded from that edition, to the original record (herein referred to as *Debates*).
2. *British North America Act, 1867* (UK), 30 & 31 Vict., c. 3.
3. *Edwards v. Canada (Attorney General)*, [1930] AC 124 at 136-37.
4. *Debates*, 808.
5. Cartier, *Debates*, 57.
6. Cartier, *Debates*, 59.
7. Macdonald, *Debates*, 44.
8. Cartier, *Debates*, 59.
9. *Ibid.*
10. Macdonald, *Debates*, 44.
11. Cartier, *Debates*, 55.
12. Belleau, *Debates*, 183; Taché, *Debates*, 236; Alexander Mackenzie (member of the Legislative Assembly for Lambton), *Debates*, 432; Charles Alleyn (member of the Legislative Assembly for Quebec West), *Debates*, 672.
13. Belleau, *Debates*, 183.
14. Dunkin, *Debates*, 531.
15. Dufresne, *Debates*, 928.
16. Macdonald, *Debates*, 15, 16.
17. Brown, *Debates*, 18.
18. *Union Colliery v. Bryden*, [1899] AC 580 (JCPC).
19. For example, see *Cunningham v. Tomey Homma*, [1903] AC 151 (JCPC) and *Christie v. York Corporation*, [1940] SCR 139.
20. *Canada Act 1982* (UK), 1982, c. 11.