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The Education Power in Canada

by

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In an influential book entitled *Federal Government*, Professor K.C. Wheare observed that in countries satisfying in practice his understanding of the federal principle, namely the United States of America, Switzerland, Canada and Australia, education was a matter substantially in the hands of regional (state, canton, provincial) governments. The federal principle was defined (Wheare, 1967, p.10) as "the method of dividing powers so that the general and regional governments are each within a sphere co-ordinate and independent". After the federal bargain (Riker, 1964, P.11) has been negotiated, powers are sacrificed to the central organ but the contracting political entities are granted autonomy in certain spheres. For practical purposes each citizen living within the national territory is subject to two sets of law and has to deal with (at least) two independent levels of government. In such federal systems Wheare maintained (1967, p.156) that it is "wise" to keep education in the hands of regional governments, a maxim he attempted to uphold with several references to the controversies in Canada over the religious and linguistic aspects of the education power.

In Canada, where the residual powers were originally allocated to the centre (or federal) government, the provinces under section ninety three of the British North America (B.N.A.) Act were granted exclusive right to make laws in matters of education (see appendix 1). However, the exercise of such a provincial power, often administered by local school boards, was not to prejudicially affect any right or privilege with respect to denominational schools which had been established in the provinces at the time of federation in 1867. These Protestant and Roman Catholic minorities had the right of appeal to the Governor General in Council (the Federal Cabinet) against any Act by a provincial authority. The Governor General in Council was permitted to order remedial measures, and the Canadian parliament was empowered to enact appropriate legislation to execute the provisions of this section. Similar special sections designed to protect minority rights in education appeared in the Acts creating Manitoba (1870), Saskatchewan (1905) and Alberta (1905). The education clauses under which Newfoundland entered the federation in 1949 also gave protection to sectarian rights. But in the light of the history of the ineffectual provision permitting centre government remedial intervention, a modified procedure for the protection of minority education rights was outlined. The only guardian of such rights were to be the courts, as no provision was made for an appeal to the Governor General in Council or for the intervention of the Parliament of Canada.

A chronicle of important events surrounding section ninety three of the B.N.A. Act should illustrate how centrifugal forces, exacerbated by ethnic

cleavage, have often been operative in the Canadian federation. That education should be a matter solely for regional jurisdiction has been upheld with greater determination than in other federations, such as perhaps Australia. More familiar to Australians said to have a federation with a "similar skeleton" as Canada, (Birch, 1955, P.XIII), has been the increased exercise of responsibility (understood by some as remedial legislation), by their own federal government in the field of education. Yet upon close inspection the federal government in Canada has also been prepared to intrude into education matters by reference to its jurisdiction over agriculture and immigration, trade and commerce, radio (and television), Indian Affairs, the North-West Territories and defence, as well as assumed national cultural and research responsibilities. In Canada, education has proven to be a useful case study in constitutional flexibility often rendering it difficult in practice to apply Wheare's federal co-ordinate and independent division of powers model.

The Quebec Conference resolutions of 1864 which formed the basis of the eventual B.N.A. Act explicitly placed education within provincial jurisdiction (Lupal 1970, P.226) saving the rights and privileges which the Protestant or Catholic minority in both Canadas may possess for the time when "Union goes into operation". These qualifications were limited to the two Canadas (Upper and Lower Canada, or modern day Ontario and Quebec). But at the London Conference, the final pre-federation meeting of the constitutional founding fathers, the scope of the minority guarantees were extended to Nova Scotia and New Brunswick, the other member provinces. In addition the clauses specifying the right of appeal to the Governor General in Council and the capacity of the centre government to pass remedial legislation were inserted into this contentious section.

The compromises achieved for the purpose of federation represented a calm before further storms. As early as 1872 New Brunswick passed a Common Schools Act which the Roman Catholic minority (largely French) considered prejudicially affected their rights and privileges. This legislation was to herald the beginning of a series of court judgments on nearly every clause in the constitutional education provisions. Eventually the 1872 Common Schools Act was declared *intra vires*. Moreover, the centre government was reluctant to initiate remedial legislation on behalf of the Roman Catholic minority in New Brunswick. Still further, the federal government, although led by Sir John H. Macdonald a renowned 'centralist' who was prepared in the early days of Canadian federation to exercise the centre government's constitutional authority to disallow or even temporarily reserve provincial legislation, in this instance refused to pursue this course of action. Thus minorities were confronted with the realization of the possible ineffectiveness of the constitutional protection of their educational privileges.

In the provinces the education of minorities was to remain a simmering problem. However, it was the 1890 legislative programme in Manitoba which nationally inflamed tensions on the education question. The

Manitoba government abolished the official status of the French language and the dual church controlled Board of Education, transferring its financial and administrative authority to a Provincial Department of Education. Denominational schools which continued to exist did so privately, without the benefit of governmental financial support. The Catholic Church hierarchy immediately petitioned the federal government to have the legislation disallowed. As well, an attempt was made to placate the situation by taking the matter to the courts with the result that the Canadian Supreme Court, on appeal from a lower court, declared the legislation *ultra vires*. In 1892, however, the Judicial Committee of the Privy Council, which at that time was the final court of appeal for Canadian constitutional cases, reversed the decision "in a subtle and legalistic verdict" (Lupal, 1970, p.266) Their Lordships declared the 1890 Act infringed no law at the time of federation for none governing education existed in Manitoba in 1870. Nor was educational practice altered, for the practice in 1870 had been for Catholics (mostly French) to maintain their own schools at their own expense.

Subsequently appeals were made to the centre government (through the Governor General in Council) to enact remedial legislation to protect the educational interests of the Catholic-French minority. Meanwhile the Manitoba provincial government of the day had its position strengthened with an intervening electoral victory, whereas the incumbent centre government was to suffer electoral defeat partly for its inability to offer a solution in the Manitoba School debate. Finally, a political settlement was reached between the Premier of Manitoba and the newly elected federal Prime Minister. Governmental aid to private or separate schools was denied, thereby enforcing Catholics to pay the public school board taxation levy as well as financing the maintenance of their own local schools. Provision was made for religious instruction in public schools in the 'unholy' last half hour of the school day.

In this important test case the provinces' paramount right to legislate in matters of education was upheld at the expense of federal 'overlordship'. While the centre government's disallowance (and reservation) powers have recently been labelled as defunct in all legislative fields, events since the Manitoba School debate suggest the remedial power has fallen into the same category. In one notable instance the Ontario Department of Education in 1913 issued the notorious Regulation 17 which sharply limited the use of French, both as a subject of study and as a language of instruction. The Franco-Ontarians defied Regulation 17 but subsequently lost their case in the courts. The judgment on this occasion was that the educational guarantees of the B.N.A. Act applied to religion, not language. Again the present day (1977) Parliament of Canada's posture has been one of reluctance to officially interfere with the Quebec government's determination to enforce school instruction to be conducted in French, recently designated as the only official language of *la belle province*.

Quebec has traditionally resisted any federal government activity in education matters even when the latter has pursued its legitimate constitutional role in military and Indian education, and its responsibilities in immigration and agriculture. Expressions of Quebec disquiet accompanied the Agriculture Instruction Act of 1912 which instituted the first programme of federal grants. Such grants were for the purpose of "supplementing and extending agricultural education" (Smiley, 1963, p.1). The Act did not require the provinces to provide new services as a condition for federal assistance. However, the federal grants-in-aid provided under the Technical Education Act of 1919 were on a matching basis. In addition, the provinces could not devote more than quarter of the federal assistance to capital expenditure. These conditional grants to technical education had been recommended by a *Royal Commission on Industrial Training and Technical Education*. Ontario had originally approved the appointment of the Commission on the understanding that it "would be solely for the purpose of gathering information," whereas the Quebec Premier declared (Peitchinis, 1971, p.21):

We are of the opinion . . . that anything pertaining to public education — whether the subject be separate teaching or general teaching — belongs to the province exclusively . . . there be no misunderstanding on that point.

After nearly a decade the conditional grants in aid of technical education were phased out as they had been frequently criticized as an unnecessary trespass of provincial autonomy (Peitchinis, 1971, p.30). It was contended that the federal government had tempted the provinces to embark upon programmes which were sometimes beyond their fiscal capacity. Yet financial stringency during the depression did prompt demands, particularly from the 'have-not' Maritime and Prairie provinces, for federal government initiatives on education. However, the celebrated *Federal Provincial Relations Commission*, set up in the wake of the depression to review the whole federal structure, argued (1940, p.50):

. . . the instruction of the young during the formative years is a matter which the provinces must continue to control . . . A free hand in something so important to the social and cultural life of the people seems to us to be vital to any provincial autonomy worthy of name, and it is obvious that any attempts to alter the existing arrangements would meet with powerful opposition and would provide profound resentment.

Immediately after World War II the centre government by way of fee payments to institutions became engaged in an intensive programme for war veterans' education. This federal financing of the 'veterans' bulge' was generally considered to be a highly successful undertaking. This helped to establish a climate for further demands for federal assistance to higher education which eventually resulted in federal grant payments to universities. This scheme was, however, vehemently challenged by the

Quebec government which for a period successfully directed the Quebec universities not to accept the grants. Indeed Pierre Trudeau, as a French Canadian, before he entered elective politics, had assisted in portraying the breadth of opposition in Quebec to the federal university grants system. At that time Trudeau argued that the provinces should have sufficient tax resources to be answerable to their electorates for the education policies they pursue. Speaking of "rapacious centralization" (Trudeau 1958, p.101) he attempted to refute a series of arguments such as equalization (of provincial services), 'needs,' and co-ordination of economic and educational planning, which had been presented to justify the federal university grants.

The federal government in presenting its position was also to reply on the findings of the *Royal Commission on Arts, Letters and Sciences (1951)*. It was claimed that universities, as distinct from elementary and high schools, were national institutions contributing to national strength and unity, and thus in some sense, partially Ottawa's responsibility. The Commissioners use of the term 'national' gave the impression they were courting a theory of federalism incorporating the notion of *Gesamtstaat* or total state whereby there are actually three levels in any federation; the regions, the centre and the *Gesamtstaat*. As the *Gesamtstaat* does not appear in any federation to have organs of government directly corresponding with it, in the same manner as the centre and region levels, this product of a long tradition of German thinking about the principles of federalism (Sawer, 1976, p.99) may be readily refuted. Notably, however, this three-tier theory has been considered relevant to the education power in West Germany, labelled a federation since 1949. In the *Concordat Case (1957)* the West German Federal Constitutional Court did appear to actually recognize the *Gesamtstaat*. To escape the inference that the centre government was to remain bound to an agreement between the Pope and Nazi Germany concerning religious education it was argued the treaty was not binding on the federal government, nor on the region (or Lander) constitutionally holding exclusive control of primary and secondary schooling), but on the *Gesamtstaat*. Thus any duty to carry out the treaty was owed to the *Gesamtstaat* and not to the centre or region government.

The circumstances of the *Concordat Case* may have been unusual, but the notion of a responsibility to a *Gesamtstaat*, total state, or nation can not be easily dismissed with matters such as education in modern federal systems. In Canada this principle of federalism has been at least implicitly recognized to justify the federal government's commitment to tertiary education. This assistance was to take a different form in 1966 when a new shared cost programme was implemented. According to this agreement the centre government was to unconditionally meet half of the operating costs of higher education institutions. As the Premier of New Brunswick expressed (Federal-Provincial Conference, 1966, p.37): "We are gratified that the Government of Canada . . . is recommending a strategy of aid that recognizes the constitutional role of the Provinces in

the field of education." The escalation of higher education costs had prompted the so termed 'have not' provinces to seek more federal assistance. Ontario as the major 'have' province was needless to say reluctant to support the programme. Quebec's compliance was only secured by an 'opting out' formula permitting Quebec to finance its own higher education plans with an extra percentage, compared to the other provinces, of the federal government's tax receipts.

Another stand taken by Quebec authorities in their claim for autonomy in education was not to secure the support of Pierre Trudeau, when he became Prime Minister in 1968. During the 1960's there was a protracted debate as to whether the province was to participate independently of Ottawa in international conferences and agreements in spheres of provincial legislative jurisdiction. Quebec argued that in such matters it also had a concomitant right to representation abroad. Sensitivity in this regard had been instanced in 1947 when Canada abstained from a United Nation's vote recommending that member countries encouraged the teaching of U.N. objectives in the schools. The Canadian spokesmen agreed to transmit the resolution but in "scrupulous respect" (Lower and Scott, 1948, p.145) of provincial rights in education would not officially support the U.N. action. Matters, however, did come to a head in 1968 when Gabon (French speaking) sent an invitation for an international conference in education to Quebec City, rather than Ottawa. Subsequently the federal government broke off diplomatic relations with Gabon, Trudeau with annoyance stating (Beck, 1968, p.408): "When Canada's participation is sought for international conferences — there is only one address for the invitation — Ottawa."

In recent years radio and television education broadcasts have also been a source of dispute between the federal and provincial governments. Holding exclusive jurisdiction over radio communications, including both the transmission and reception of broadcasting, the central government under this power has allocated broadcasting licences, controlled the content of broadcasting and operated national radio and television networks. But with the realization of the potential of television as an instrument of formal instruction the provinces, particularly Quebec and Ontario, have increasingly claimed responsibility for the content of such programmes. As yet this issue remains unresolved, although there has been some evolution from exclusive federal control of the field of communications to acceptance by the federal government that provinces might share federal facilities in the area of educational broadcasting. In the absence of any authoritative definition by the courts about what education means there remains uncertainty as to what activities of an educational nature could be validly undertaken by the federal government. Indeed it has been the policy of Canadian centre governments, at least since 1916, to support research, a term with a meaning almost as elastic as education. This has been the rule whether the research has been in connection with specified federal responsibilities or otherwise. Of course many of the research programmes are implemented in an atmosphere of co-operative federalism

as a result of federal and provincial consultation. Expertise and assistance is invariably forthcoming from national professional bodies.

In Canada the federal government expending funds on education (see appendix 11) has also rested on the argument "that making a gift is not the same as making a law" (Smiley, 1976, p.32). This has enabled the national government to support education by making scholarships, or even loans, available to individuals, private groups, local government and provinces. Such monies are granted in accordance with guidelines determined by the federal government. In this context the 1944 Family Allowance Act continues to provide a form of federal oversight endeavouring to uphold the principle that education in Canada is a right of each citizen, irrespective of each citizen's place of residence. As there had been some tardiness in the adherence to compulsory school attendance laws the Act provided for parental or guardian forfeiture of the family allowance if provincial school statutes were not satisfied. So while the federal government lacks the power to make non-attendance a legal offence it can deny the family allowance 'gifts' if provincial compulsory schooling regulations are not obeyed.

Encroachment into the education field has also been a consequence of the lucrative provision of federal funds (since 1961) for occupational and vocational training. The centre government, which has engaged in large scale training programmes for its own employees (especially bilingual training), has justified this initiative by making a distinction between training directly related to the labour market and general education. Hence the federal government's role is deemed to be derived from its economic powers. There is significantly no federal education portfolio to administer the training but in 1967 the Provincial Ministers of Education constituted themselves as a permanent council to be equipped with a secretariat to consult with the federal government to help rationalize the Canadian education policy making process. This stupendous task has been made especially difficult as the federal bilingual programmes often come within the ambit of the council.

Whether the present federal government policy of encouraging bilingual education 'at all costs' will lead to increased centre government participation in education matters is a moot point. Since the 1968 *Royal Commission on Bilingualism and Biculturalism* there have been substantial federal expenditures on bilingual programmes. If implemented some of the recommendations of the Commission, especially those concerned with curricula, would represent unprecedented encroachment upon provincial education jurisdiction. In the words of the Commissioners (1968, Vol 11, p.299):

We recommend;

. . . that the study of the second official language should be obligatory for all students in Canadian schools,

. . . a federal grant to the interprovincial bureau of second language training centres to assist in the operating costs of the centres,
. . . the establishment by the federal government of a language research council concerned with research and development related to second language teaching in Canada.
. . . that the basic operating costs of second language training centres be paid by the respective provincial governments.

With the provinces already spending close to half of their budgets on education (Hockin, 1976, p.77) the last mentioned recommendation would certainly encounter determined provincial opposition. The learning of a second official language, that being English in Quebec and French in most other parts of Canada, is variously resisted and sometimes resented. Even if it is the federal government providing funds for this objective the provincial authorities, and especially their electorates, are frequently reluctant to encourage the development of this programme. Obviously bilingual and bicultural policies are so easily perceived as a threat to the often documented provincial identities (Careless, 1969) or sub-cultures (McRae 1974). It can even be asserted that the once dual cultural composition of Canada (Quebec, and the other provinces) is now tending to be redefined in terms of provincial sub-cultures. The result is that the provinces, despite financial strains, are determined to control as effectively as possible their respective education systems to facilitate the maintenance and development of their subcultural identity.

In justifying its manifold activities of an educational nature the centre government has even attempted to draw a distinction between education and culture. The formation in 1957 of the Canada Council for the encouragement of the arts, humanities and social sciences sprang from a belief that the centre government had a national responsibility to foster cultural studies. The previously mentioned *Royal Commission on Arts, Letters and Sciences*, (See Smiley, 1976, p.31) had asserted:

All civilized societies strive for a common good including not only material but intellectual and moral elements. If the federal government is to renounce its rights to associate itself with other social groups, public and private, in the general education of Canadian citizens, it denies its intellectual and moral purpose, the complete conception of the common good is lost . . .

An acceptance of this view would mean there would be virtually no limits to federal participation in the "general education of Canadian citizens." In this vein *The Tremblay Report* (1956) sponsored by the Quebec government chose to define education as a process of preserving the "national culture" (Kwovnick 1973, p.18) of French Canada. This report opposed any direct federal involvement in educational activities and was critical of such participation when it was justified by reference to centre government powers over trade and commerce, unemployment, broadcasting, agriculture, immigration, Indian Affairs, the North-West

Territories, foreign affairs and defence. Ottawa could exhibit a legitimate interest in education, but this was to be displayed by the provision of adequate financial arrangements for the provinces to attend their educational needs.

The Quebec stance illustrates how political entities regard the education institutions of a polity as an important socialising agency inculcating cultural traditions. Not only, however, is it deemed necessary to administer the schooling system and supervise the content of educational curricula, but the education power is also an important symbolic referent of competence. Education in this federal context provides a useful demonstration of Edelman's (1971, p.6) model of referential and condensation political symbols. The former refers to the objective constitutional wording of section ninety three of the B.N.A. Act, whereas the condensation symbol of education pertains to the emotion associated with the situation. It cannot be denied that the constitutional specifications are important in framing legislation in education. But practically every political action concerned with education in Canada evokes at least a quiescent response because it symbolizes a threat or reassurance to a provincial identity.

In Canada, even apart from Quebec (or in reaction to it), the provinces have considered it "wise" to limit direct centre government involvement in education. When the federal government has considered utilizing its remedial, or disallowance, powers with respect to education, the provinces have successfully resisted such drastic action. The two-level principle expounded in Wheare's definition of federation, that the method of dividing powers be co-ordinate and independent, is symbolically significant and relevant to the course of political events with respect to education. Nevertheless the centre government's fiscal capacity has been an obvious means of influencing provincial government educational priorities and resulted in encroachment upon the provincial education sphere. In fact, bearing in mind the federal government's ability to justify selected involvement in education through powers in other matters, education has been forwarded as a case study of constitutional flexibility in Canadian federalism. The elastic meaning of education, and the cost of its provision induce compromises which break down any clear co-ordinate and independent division of the education power. Indeed on occasions the education competence in Canada leads to a reference to a conception of federalism incorporating the notion of *Gesamtstaat*, or total state. Possibly this three-tier federalism is applicable, particularly when considering education in other federations with "similar skeletons" where the original "federal bargain" has also resulted in centre government financial overlordship.

APPENDIX I

THE BRITISH NORTH AMERICA ACT, 1867

Education

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:—

- (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:
 - (2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissident Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:
 - (3) Where in any Province a System of Separate or Dissident Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:
 - (4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.
- (43)

APPENDIX II

Federal Expenditures in Support of Education and University Research 1972 – 1973

<i>Department and/or Programmes</i>	<i>Total (\$'000)</i>
Fiscal Transfers for Post-Secondary Education	987,030.0
Department of Indian and Northern Affairs	105,235.0
Department of National Defence	62,779.0
Federal Prison Service	416.0
Occupational Training of Adults	310,611.3
Citizenship & Language Instruction Agreements	775.7
Textbook Agreement	120.6
Teaching of Official Languages	62,883.2
Department of Regional Economic Expansion	13,313.0
Research Grants and Fellowships	121,302.0
Contracts	7,504.7

Excise Tax Exemption	23,000.0
Canada Student Loans Plan	34,023.0
Allowances, Bursaries, Scholarships and Fellowships	28,390.3
Income Tax Reductions	84,000.0
Other Programmes	98,944.7
TOTAL	1,940,328.5

(Source: Meekison, 1977, p.418)

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