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The Politics and Ethics of John George Bourinot

Paul Benoit

John George Bourinot was Clerk of the House of Commons from 1880 until his death in 1902. Although best known for his book on parliamentary procedure, Bourinot devoted his leisure time to the study of the principles of government. He wrote voluminously on the subject and many of his books became standard works in Great Britain and the colonies. Bourinot frequently lectured at universities in the United States and has some claim to being considered the first political scientist in Canada.¹

In Bourinot's eyes, Confederation established a Dominion of which one could truly be proud but its complexity required of its citizens considerable knowledge and understanding. He was fond of saying that with Confederation Canada became "heir of all the ages" inheriting both the fruits of British experience with parliamentary government and American experience with federal government. Directly or indirectly, all his writings turn on Confederation which he saw as that union of the best of two worlds.

Considering how much has been written about Confederation in the past twenty years, it is strange that scarcely any attention has been paid to Bourinot.² His views merit consideration not only because he was one of Canada's first political scientist but he was also an important official of the Canadian Parliament during its formative years and finally because he was a Maritimer. If one has difficulty discerning a specifically Maritime point of view in recent constitutional debate, a voice from the past would seem better than none.

The Nature of Confederation

Describing the first century and a half of European settlement in North America, Bourinot emphasized its past politics: "In the days of the French régime... a system of centralization was established by Louis Quatorze, who so pitilessly during his reign enforced 'that dependence which', as Saint Simon tells us, 'reduced all to subjection', everything like local freedom was stifled, and the most insignificant matters of local concern were kept under the direct control of the council and especially of the intendant at Quebec."³ He called the history of Canada as a French colony, a record of autocratic government giving no opportunity to the expansion of energy and intellect.

Bourinot then contrasted the highly centralized government of New France with the highly decentralized government of New England: "it is easy to understand that there could be no such things as free government or representative institutions in Canada, like those enjoyed from the very commencement of their history by the old English colonies which were founded almost contemporaneously with the settlement of Acadia and Canada."⁴ Clearly the meetings of a Boston town hall were more attractive to Bourinot than the intrigues of a Bourbon court. The English speaking colonies, by providing scope for local civil liberty, represented for Bourinot a more advanced stage of constitutional development.

But subsequently, and rather paradoxically, those colonies which remained faithful to the Crown came to acquire a more progressive form of government than those which had rebelled. Bourinot explained how:

In the United States when the constitution was formed parliamentary government, as it is now understood in England and her self-governing dependencies, was not understood in its complete significance. The framers of the American constitution saw only two prominent powers, the king and parliament, and their object was to impose a system of checks and balances which would restrain the authority of each and prevent any one dominating in the nation.⁵

In England a way was found to eliminate friction between the two branches of government by making the ministers of the Crown responsible to Parliament. When England moved from a state of opposition between the executive and the legislative to one of co-operation, a more sophisticated form of government emerged one that the remaining British colonies in North America acquired beginning in 1848.

The 1850s and early 1860s are very important in Bourinot's mind because they testify to the successful operation in the New World of "a constitution similar in principle to that of the United Kingdom." They illustrate the ability of the separate colonies to govern themselves along the lines of the most progressive form of government evolved by man.

Given the emphasis on local self-government which we have already detected in his writings, it should not surprise us that Bourinot viewed Confederation as essentially a compact. To him, the provinces' authority to govern was not dependent on the fate of the new Dominion: "If the dominion should cease tomorrow to exercise its constitutional powers, the province would still remain — for it existed before the union — and its local organization could very soon be extended to embrace those powers which now belong to the central authority."⁶ Bourinot then outlined his account of Confederation.

The weight of authority now clearly rests with those who have always contended that in entering into the federal compact the provinces never intended to renounce their distinct and separate existence as provinces, when they became part of the Confederation. This separate existence was expressly reserved for all that concerns their internal government; and in forming themselves into a federal association under political and legislative aspects they formed a central government for interprovincial objects only. Far from the federal authority having created the provincial powers, it is from these provincial powers that there has arisen the federal government to which the provinces ceded a portion of their rights, property and revenues.⁷

Paul Benoit works for the federal government in Ottawa. He is the author of several articles on Canadian history and politics.

Bourinot's account of Confederation as a compact naturally led him to criticize some features of the *British North America Act*. Three in particular he singled out: the constitution of the upper house; the existence of the power of disallowance; and the financial dependence of the provinces to a large extent on the Dominion exchequer.

Bourinot's proposal that the Senate be reformed so as "to make it more representative of provincial interests" has become commonplace in nearly all assessments of the Canadian constitution. The federal cabinet's power to nominate the chief magistrates of the provinces is, for Bourinot, another example of "a tendency to give the ministry too superior a control."⁸

The federal power of disallowance, though exercised only rarely, was objectionable for two reasons. First, it called on politicians to assume the role of judges: "An executive power which can be thus questioned in the political arena seems obviously fraught with perilous consequences. If all questions of the constitutionality of a provincial act could be decided only in the courts, parliament would be saved the discussion of matters which, once mixed up with political and religious issues, must necessarily be replete with danger in a country like Canada."⁹ The second objection was that "the central power might in a moment of passion or arrogance use its authority to check or thwart the government made subordinate to it in this particular."¹⁰ As long as the federal government had the right to disallow provincial legislation there was no area that the provinces could consider safe from jurisdictional encroachment.

With regard to the financial dependence of the provinces, Bourinot explained that:

As a large portion of their provincial revenues — in certain cases the largest portion — is not derived from local sources, there has not been always, it is believed, that effort for economical expenditure that would probably have been made if all the funds were raised from local sources, and from direct taxation as in the United States... Each province should be, as far as possible, in a position of local independence, and free from suspicion of political pressure on the central government at critical times.¹¹

Bourinot's remarks have since been elaborated into the argument against conditional and unconditional grants (and other forms of co-operative or administrative federalism) which tend to blur the lines of accountability and make it difficult to hold any particular minister or official responsible.

The Legislative versus the Judicial

The compact theory of Confederation as articulated by Bourinot has been out of fashion among English Canadian politicians and publicists since the 1930s. Yet in being one of the first to make a strong case for the provinces, Bourinot emerges as the godfather of a host of current constitutional proposals. For example his account of Confederation anticipated recent constitutional changes which have enhanced the role of the judiciary.

In theory, the Canadian constitution is an even mixture of British experience with an unwritten constitution and American

experience with a written one. But in practice, the exigencies of public affairs lead one to have recourse to the wisdom stored in one or the other. In the crunch of a constitutional conflict to whom does one turn as the final arbiter? To a group of politicians acting as a team of ministers responsible to Parliament or to a group of lawyers acting as a body of individual judges not responsible to anyone? Bourinot explained how federalism by its very nature tipped the balance in the judges' favour:

Any federal system like that of Canada must, in a great measure, gather its real strength from the decisions of the courts which are called upon, from time to time, to adjudicate on the many questions that arise with respect to the rights and powers of the several provinces which have entered into what may be considered a solemn treaty, to which the Imperial Parliament, as the supreme legislative authority of the Empire, has given its authoritative legal sanction. Accordingly, the security of the federal union largely rests on the legal acumen and independence of the courts.¹²

Furthermore, it is clear that Bourinot approved of the supremacy of the judiciary:

Not only the life and prosperity of the people, but the satisfactory working of the whole system of federal government rests more or less on the discretion and integrity of the judges. Canadians are satisfied that the peace and security of the whole Dominion do not more depend on the ability and patriotism of statesmen in the legislative halls than on that principle of the constitution which places the judiciary in an exalted position among all the other departments of government and makes law as far as possible the arbiter of their constitutional conflicts.¹³

But in positing a court of law above and independent of the political life of a country, is one not making it very difficult for any central executive authority to respond or to adjust to any collective purpose that may gradually be evolving in the country? It is no accident that the new *Canada Act* which has made the Supreme Court the guardian of a new constitution and an entrenched bill of rights has coincided with demands by certain provincial governments for greater power, and with a general desire on the part of many Canadians to see the power of the federal government reduced.

Self-Determination of Provinces

Bourinot's account of Confederation also anticipated the provinces' claims to self-determination. He believed the provinces never intended to renounce their separate existence; that the federal government was the creature of the provinces, not *vice versa*. Thus if Canada should come to an end, the provinces, having pre-existed would remain to take over its powers. Strengthening a Canadian province's claim to self-determination are two compelling notions: the notion of local civil liberty and the notion of popular sovereignty.

In North America, the European settlement of distinct and separate colonies provided to a large extent the basis for the local communities of today. It also provided our model of civil liberty: the sight of a small group of citizens assembling, deliberating, passing resolutions, and carrying them into effect. It seems appropriate that his most widely consulted work, the one for which he is most remembered is his *Rules of Order*. Furthermore for Bourinot the government's authority — i.e., its right to command and be obeyed — stems not from the person of the Monarch, but from the collective will of the people. It is the latter which renders legitimate all enactments of public policy. In Bourinot's eyes, it was not Queen Victoria's assent (or that of her representative) which lent authority to the constitutional arrangements being worked out in the North America colonies; it was rather the consent of the people inhabiting them. Thus, for example, Bourinot interprets the governor-general's right to dissolve Parliament — the royal prerogative *par excellence* — as essentially a means for the people to assert their sovereignty: "A Governor, acting always under the advice of responsible ministers, may, at any time, generally speaking, grant an appeal to the people to test their opinion on vital public questions and bring the Legislature into accord with the public mind. In short, the fundamental principle of popular sovereignty lies at the very basis of the Canadian system."¹⁴

In theory, there is no reason why the notion of popular sovereignty cannot be invoked to support the expansion of an empire, but in practice it has usually been employed to reinforce the claims of a community wishing to break free. Today, for example, there is hardly a politician in Canada who would maintain that the Quebec referendum was devoid of any moral authority, that its verdict stands for nothing more than a crude measurement of public opinion. A belief that authority flows upward, out of a community's consent, leads inevitably to a desire and a willingness on the part of that community to assert its identity. When a belief in popular sovereignty is coupled with a belief in local civil liberty, they produce, in the Canadian context, the right of the provinces to self-determination, a powerful dissolvent of national unity.

Politics and Ethics

Bourinot's account of Confederation is not, however, perfectly clear-cut. There are ambiguities in his thought which will become apparent if we examine an article he wrote on whether municipal officials should be appointed or elected.¹⁵

Bourinot begins by explaining to his readers how "the people legislate and govern through their representative assemblies".¹⁶ For Bourinot, not only does the authority to make laws come from the people; it is even exercised by the people — representatives being but the people's efficient agents. Now while it is doubtful that such a view is, as Bourinot claims, "in accordance with the wise principles of English government", it is in accordance with Bourinot's belief in popular sovereignty. Having claimed so much for the people, Bourinot goes on to object to the election of officials. Any experimenting with the elective system, he says, "would be literally the thin edge of a wedge which would gradually and surely split up the durable foundation on which government rests."¹⁷

Elsewhere, and in accordance with his belief in the primacy of local self-government, he describes municipal government as "those local institutions on which must always rest, in a great measure, the whole fabric of popular liberty"¹⁸ and as "the very basis of Canada's parliamentary institutions".¹⁹ Still he goes on to question the wisdom of electing aldermen: "It is the elective principle that is now in question, when applied to men whose duties are those of managers of a corporation. Indeed there are many influential and thinking men in Canadian cities — in Toronto especially — who express the opinion that a small permanent commission appointed by the government would best manage civic affairs."²⁰ We are left to wonder: are Canada's cities to be viewed as meeting grounds where people can learn to govern themselves and prepare themselves to take part in the larger councils of the world? Or, are they simply corporations, the management of which should be left to a small permanent commission appointed by the provincial cabinet?

The same ambiguity is to be found in Bourinot's estimation of referendums and plebiscites. He has sympathy for Swiss-style referendums but contempt for French-style plebiscites. It is difficult to see how the two can be held so very far apart. The ambiguity is due to the fact that while his intellectual convictions led him in one direction, his moral concerns led him in another. For Bourinot laxity of morals in society must tend to lower the political conditions of a country. It was on the basis of a substantive moral consideration that Bourinot objected to the extension of the principle of election: "Can anyone argue that the body of the voting public who elect can be made responsible for the result? The legislature in the first place, and the people at a final stage, can censure a government, or turn it out of office, since ministers are directly responsible for every act of administration. But who will check the people?"²¹ It was impossible to hold the voter morally responsible for his action, and therein lay the danger of extending the principle of election. The experience of the United States, where the principle of election was widely extended, showed:

that the party machine, as managed by the boss, is destructive of public morality; that it is the elective and the "spoils" system by which a horde of public officials obtain office that gives vitality to the machine and its creatures, and is weakening the foundations of republican or democratic institutions; that rings and bosses will exist and thrive as long as the great majority of public officers, including judges, are elected or appointed on political lines.²²

Writing in 1897, Bourinot cited the case of the American election just past: "In the remarkable presidential election of November last in the United States we saw the perilous tendencies of demagoguism in a country of universal franchise, elective officials and pure democracy. The spirit of the Demos is dangerous in the extreme when it is not surrounded by the checks and guards which restrain its power and lead it in the direction of sound, stable and strong government."²³ Clearly the practices which developed as a result of "universal franchise, elective officials and pure democracy" were morally objectionable to Bourinot. But the substantive concern he evinced is in conflict with his formal conviction that people should govern themselves. How else can the members of a local community determine their own political destiny if not by

going frequently to the polls, casting their vote in one direction or another, and abiding by the opinion of the majority?

There are a number of other instances of moral concern to be found throughout his writings. The levelling tendency, the laxity of marriage ties, the sensationalism of newspapers: these and other U.S. mores repelled Bourinot, who was anxious that such should not become the case in Canada. Indeed, Bourinot's concern with the moral dimension of human behaviour led him to view certain social practices as "public wrongs" rather than "civil rights".

The correcting of public wrongs is a task incumbent solely upon the central government. While it is difficult to see how far Bourinot would want to extend the concept of public wrong, and thereby the scope for federal intervention, it is clear that we have, in this concept, a lever capable of drastically altering the balance of federal-provincial power. What would the consequences be today of viewing practices such as pollution, energy-waste, certain forms of advertising and pornography as public wrongs.

Bourinot once defined federalism as "a system which rests on the basis of local self-government and a central authority".²⁴ We sense in this definition the same ambiguity: the two terms "local self-government" and "central authority" do not quite hang together. Where in the final analysis, does the authority to govern come from? Is it an expression of the collective will of the people as manifest, for example, in the results of a provincial referendum held to decide whether or not that province should join (or separate

from) a federal union; or is authority an expression of the individual judgement of the government as manifest, for example, in the Crown's decision that the exercise of a particular civil right has gone beyond the bounds of reason and has become a public wrong? Once one has granted the principle of popular sovereignty, once one allows that the task of the legislature is to bring public questions into accord with the public mind, then what central authority is there left "to restrain the spirit of Demos and lead it in the direction of sound, stable and strong government"?

Conclusion

Bourinot showed considerable respect for the mosaic of distinct communities that settled North America. He developed his liberal convictions into a strong argument for viewing Confederation as a compact between the representative of some of those communities, but ethically, Bourinot proved to be a conservative who clung to the belief that morals were still the legitimate concern of politicians; and that consequently there was a need for a strong central authority capable of assuring the peace, order and good government of the country as a whole. His writings reveal the difficulty of keeping aligned one's intellectual convictions about the best form of government, and one's moral concerns about man's behaviour in society. The difficulty is part of the predicament of human nature and it is really in this sense (never intended by Sir John) that Canada is "the heir of all the ages".

Notes

¹As an example of the pioneering work Bourinot did in this field, see his "The Study of Political Science in Canadian Universities", *Transactions of the Royal Society of Canada*, Vol. VII (1889), sec. ii, pp. 3-16.

²The only scholarly article on Bourinot, Carl Berger's "Race and Liberty: The Historical Ideas of Sir John George Bourinot", *C.H.A. Annual Report* (1965), pp. 87-104 — deals mainly with his imperialism and his racism. But these two aspects of his thoughts are, in my opinion, peripheral and reflect but common assumptions of his age, though perhaps they account for the neglect he has been subject to in ours.

³Bourinot, *Federal Government*, p. 149.

⁴*Ibid.*, p. 10.

⁵J.G. Bourinot, "Canada and the United States: A Study in Comparative Politics", *Annals of the American Academy of Political and Social Science* (July 1890), p. 13.

⁶Bourinot, *Federal Government*, *op. cit.* p. 76.

⁷*Ibid.*, p. 124.

⁸John G. Bourinot, "Canadian Studies in Comparative Politics", *Transactions of the Royal Society of Canada*, Vol. XI (1893), sec. ii, p. 92ff.

⁹Bourinot, *Federal Government*, *op. cit.* p. 64.

¹⁰*Ibid.*, p. 62.

¹¹*Ibid.*, pp. 74-75.

¹²J. G. Bourinot, "English Principles of Canadian Government", *Canadian Magazine*, Vol. IX (June 1897), p. 96.

¹³Bourinot, *Canada Under British Rule*, p. 281.

¹⁴Bourinot, "English Principles", *op. cit.* p. 98.

¹⁵J. G. Bourinot, "Elected or Appointed Officials? A Canadian Question", *Annals of the American Academy of Political and Social Science* (March 1895).

¹⁶*Ibid.*, p. 8.

¹⁷*Ibid.*, p. 30.

¹⁸J. G. Bourinot "Local Government in Canada", *Transactions of the Royal Society of Canada*, Vol. IV (1886), sec. ii, p. 43.

¹⁹J. G. Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada*, Shannon, 1971, p. 32.

²⁰Bourinot, "Elected or Appointed Officials?", *op. cit.* p. 22.

²¹*Ibid.*, p. 23.

²²*Ibid.*, p. 24.

²³Bourinot, "English Principles", *op. cit.* p. 101.

²⁴Bourinot, "The Study of Political Science" (1889), *op. cit.* p. 10.