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IN THE AFTERMATH OF MEECH LAKE: LOOKING AHEAD ...

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EDITORIAL NOTE

This special number of Constitutional Forum Constitutionnel represents the proceedings of an interdisciplinary conference entitled "In the Aftermath of Meech Lake: Looking Ahead..." held at the University of Alberta on October 18, 1990. The idea for the conference was initiated by E.J.(Ted) Chambers of the Western Centre for Economic Research, who also acted as Chairman of the Ad Hoc Steering Committee. Together with him on the committee were Paul Dubé (Romance Languages), Les Kennedy (Associate Dean, Faculty of Arts), Doug Owram (History), Mike Percy (Economics), David Schneiderman (Centre for Constitutional Studies), Linda Trimble (Political Science) and Allan Tupper (Chair, Department of Political Science).

We would like to thank all of the Conference panellists who kindly took the time to make their presentations, and then acceded quickly to our request for written versions for publication. Unfortunately, we were not able to reproduce the presentations of Michael Asch, Don Braid, and Pierre Fournier. We were fortunate, however, to be able to publish an edited version of Lise Bissonnette's remarks before the Alberta Constitutional Reform Task Force, Roundtable III on November 23, 1990. We are grateful to the Task Force for their permission to publish that presentation. Andrew Bear Robe also appeared before the Task Force and has granted us permission to reproduce an excerpt from his upcoming book *Rebuilding The Siksika Nation*. Greg Craven kindly agreed to contribute his essay in the aftermath of the conference on very short notice. We are grateful to them as well.

We are also grateful for the financial assistance of the Vice-President (Academic), Deans of the Faculty of Arts and the Faculty of Business, the Departments of Economics, History, Political Science, and Romance Languages, Canadian Studies Program, Centre for Constitutional Studies, Western Centre for Economic Research, and the University Conference Fund, all of the University of Alberta. We would also like to gratefully acknowledge the contribution of the Alberta Law Foundation to both the Conference and this publication.

The catalyst for publication was Bruce P. Elman, Chair, Management Board of the Centre for Constitutional Studies, who also acts as guest editor for this issue of Constitutional **FORUM** Constitutionnel.

DAVID SCHNEIDERMAN

I
MEECH LAKE: THE DEBACLE REVISITED

THE HISTORICAL CONTEXT OF MEECH LAKE
Doug Owram

I would like to begin with two quotes, both about the constitution and by Queen's professors. The first is from George Munro Grant, one of nineteenth century Canada's best known intellectuals. A constitution, he wrote in 1891, "is not like a coat to be thrown aside...but the very body which the inner life has gathered round it from the past and the present. The outward form can only be changed gradually by development to meet the changing environment and the growth of ideas, but it cannot be changed for another by revolution without grievous – perhaps irreparable – hurt to the nation's life."[1] The second is from a 1987 presentation of Richard Simeon, currently professor of Political Science at Queen's. "We must see it [constitution-making] as a continuous matter of unfinished business and not require that constitution-making...address all the possible issues".[2] Here are two very different concepts. Grant provides us with an almost classic Burkean statement about the national evolution as a slow, organic process. While Simeon is talking about normal entrenchment processes on an almost annual basis, Grant is talking about the slow evolution of the popular will. If I have a thesis for this paper, it is that George Grant understood constitutions better than Richard Simeon.

Underlying this view of constitution-building are the following premises. First, a workable constitution can only emerge when it contains the basic (and only the basic) values of a wide range of the populace. Fundamental law should not be employed to resolve issues that belong in the political arena. Second, the constitution, and the process of constitutional discussion, should be a stabilizing force. The fundamental law is the basis around which all other law, regulation and social policy revolve. If it is not reasonably stable, then nothing else can be.

What then has happened to constitution-making in Canada? For it should be understood that Meech is not an isolated incident but the culmination of an accelerating process. Increasingly, we have ignored George Grant's advice and have looked to constitutional reform as a quick fix. In historical terms, after 100 years of a relatively fixed formal constitution (and a minimalist one), Canada embarked on a series of ventures to find some sort of solution to national problems by rewriting the fundamental law – but this has made matters worse rather than better for two reasons. First, the reformism has destabilized the system. Second, this destabilization has occurred in part because we don't know what we want. In a sense, constitution-building in Canada has become another form of brokerage politics. In Grant's terms, we have been trying to change our coats on an almost yearly basis, alter them, or maybe pile coats one upon the other. The failure of Meech Lake and the legacy of bitterness and confusion it leaves, demonstrates just how critical the historical process has become.

This confusion and instability is of recent origin. Throughout much of its history the Canadian constitutional scene was surprisingly placid. In 1867, of course, the basic Canadian law was created via an act of the British Parliament and – if I might use a slight paradox – that constitution was very much in the tradition of a nation that did not believe in constitutions. It was concerned with government and governmental relations. In the British tradition, the protection of people was seen to be in the process of election and representation – not in a bill of rights. Over the next half century there was evolution but this was not by formal amendment but by judicial process. The courts set a series of precedents in place which adjusted (or maladjusted) the *Constitution* to new circumstances.

Until the 1920s, the 'Dominion status' of Canada made a British-based constitution appropriate. By 1926, however, the Dominions had achieved recognition of their equality within, and independence from, the Commonwealth. The natural step, it would seem, was to make Canada's *Constitution* a fully Canadian document. As is well known, this is not what happened. In 1931, Britain retained control of the *B.N.A. Act* at Canada's request. Thereafter, there were desultory attempts to do something about 'repatriation' and there were amendments made on occasion, but through all of this period Canadians continued to live within the more or less fixed framework of the 1867 act.

That began to change in 1960. The impetus here was undoubtedly the Quiet Revolution in Québec. That province, which until then had always argued that the 'true' interpretation of the *B.N.A. Act* would give Québec sufficient power, now began to take a more experimental, aggressive, but still nationalistic view, of the federal arrangement. In response, the federal government came forward with a series of proposals. In 1960, Justice Minister Davie Fulton of the Diefenbaker government proposed an

amending formula. It reappeared under the subsequent Pearson administration as the Fulton-Favreau formula. In both instances, the proposal died when Québec failed to support it.[3] Even at this point, constitutional reform was very limited in scope. The Fulton-Favreau formula involved a process of amendment and patriation. It did not, in itself, involve a restructuring of the *British North America Act*.

"Canada embarked on a series of ventures to find some sort of solution to national problems by rewriting the fundamental law – but this has made matters worse rather than better."

Overall then, for the first century of Canadian existence, constitutional reform was limited. The *British North America Act* remained substantially untouched between 1867 and 1967 though, as mentioned, judicial interpretation had an impact. It was also limited in that the *Constitution* was still seen primarily as an issue of relationships between governments. It defined our federal relationship and even the amendments that had taken place, such as that involving unemployment insurance (1940), dealt with jurisdictional questions. Also, the absence of an amending formula gave both frustration to lawmakers and protection to those concerned about their position in Confederation. In effect, every province had a veto and Québec, most sensitive about its provincial rights, possessed a shield against excessive destabilization of the status quo. That was why Québec, which sought reform, also proved the most obstinate when it came to accepting reform.

Only after the centennial did Canada enter a new and much more unstable constitutional era. Various elements in English Canada and the federal government feared that Québec was moving rapidly toward separation. This fear was reinforced by the rise of terrorist activity by the F.L.Q., the creation of the Parti Québécois, and, after 1968, a national government under Pierre Trudeau that saw itself locked in an elemental battle with provincial forces for control of the soul of Québec.

The Trudeau administration challenged several basic assumptions about both French-English relations and the constitutional process. First, and most famous, the federal government contested Québec's long-standing role as the special protector of the French fact in Canada. Instead it sought a pan-Canadian solution to French-English relations that focused on redefinition of Canada rather than a federal-provincial balance of power. The centrepiece of all this was, of course, the *Official Languages Act* of 1968 but many other initiatives were also undertaken. Second, the Trudeau administration began to develop a series of relationships with the Canadian public which raised constitutional issues in areas other than that of federal-provincial relations. In two potentially contradictory moves, it saw people in their capacity as members of groups, initially linguistic but later ethnic as well, and, on the other hand, the administration became increasingly receptive to a formal statement of rights along the American or French models. This was revolutionary enough. What made it more so, however, was that Trudeau and his rationalist coterie of advisors had little sympathy for the 'go slow' approach to constitution-making. From the late sixties on, the idea of 'renewed federalism' became a catchword in the battle for the hearts of Québec Francophones.

By the 1970s, therefore, a new set of political forces were in place. For once the federal government challenged Québec's position as the exclusive voice of French Canada, and once new concepts of the relationship between the state, the people, and the constitution began to develop, a Québec veto became too costly. After all, should one province hold up important constitutional reforms that affected the basic relationship not just between governments but between the people and their government? This emerging partnership between government and populace thus downplayed provinces, and put provinces on the defensive during the often vicious battles over the 1982 *Constitution*. Ultimately, of course, other provinces made trade-offs obtaining, among other things, the notwithstanding clause in return for their signature. Québec, however, did not.

The refusal of Québec to sign the 1982 *Constitution* has often been dismissed by saying that Premier Levesque, as leader of a separatist government, could never have agreed. That is a red herring, however. Lesage refused to sign Fulton-Favreau and Bourassa refused to go along with the so-called Victoria Charter. It is unlikely either would have signed in 1982. For the point is that the 1982 constitution was revolutionary in two ways. First, an undertaking that began as part of 'Non' campaign in the 1980 referendum had, in the end, practically nothing to do with Québec and everything to do with a new concept of rights in Canada. Québec really did lose something along the way. It lost its veto over the constitutional process. Before, at the very least, the *BNA Act* had been a rock, however imperfect . Now there was much less certainty as group and individual rights clashed within the same constitutional framework – and as

the 'deux nations' concept gave way to pan-Canadian bilingualism.

The second problem – to return to Grant's analogy – is that Canada hadn't changed coats. Rather it seemed to be piling new coats upon old. For, by the early 1980s, there were three competing constitutional concepts. The first was the traditional view of the constitution as primarily a vehicle for resolving division of powers between governments. The second was a more modern version of power sharing. Under this definition, the groups involved had spread outward, from governments to various special linguistic and minority interests, all implying positive government action.[4] Finally, there was a long-standing view, but one new to Canada, that involved elevating individual rights from the common law to the entrenched *Constitution*. The result was a constitution with a good many contradictions, from forces within the *Charter* itself, from the tension between linguistic and individual rights, from the tension between group and individual rights, and from the notwithstanding clause which was a safety valve for the whole experiment.

For all of the contradictions inherent in the 1982 *Constitution*, there is a strong argument made by observers that English Canadians adopted quickly the principles of the *Charter* as a social contract in two senses: between the state and the individual, and as an affirmation of the bilingual-bicultural nature of Canada.[5] Québec, in contrast, had not signed the *Constitution* and never took the *Charter* to heart. It seemed, instead, a dangerous instrument for the weakening of the sense of group identity and the identification of that group with the province.

It is against this background that the Meech Lake talks were held in 1987. They were held, in theory, to 'complete' the process begun in 1982 by making Québec a signatory to the *Constitution*. And they were a continuation of the 1982 process in their assumption that constitutionalism was the path to peace, and in the radical notion that constitutions could be endlessly refashioned without disrupting the political and social equilibrium. At the same time, the Meech deal returned to an older conception in two ways. First, it concentrated on federal-provincial relations and did not deal with *Charter* issues, except by accident. That focus on governments was also reflected in the process. It was, as the phrase went, eleven politicians (add adjectives depending on which group feels shut out) behind closed doors. Second, the distinct society clause was, in essence, a recreation of the 'deux nations' concept of the 1960s.

Initially, neither of these points were sufficient to alienate the public. Indeed, the primary public reaction was confusion. The press generally saw the reconciliation of Québec as a good thing and portrayed Meech Lake as being in the train of national unity policies adopted by Pearson and Trudeau. People of good will should support it. In fact it is possible that the attachment to the *Charter* stressed by Cairns and others should not be overstated. The public seemed willing to set aside *Charter* issues, at least for a while, in order to bring Québec into the constitution.

However, problems began to arise and public confusion turned to distaste. Important to this hardening of attitudes was the absence of a strong pro-Québec constituency in English Canada for the first time since 1960. There were several reasons for this, but two stand out. Québec's passage of Bill 178 using the 'notwithstanding clause', seemed a violation of the informal understanding which had arisen in English Canada about the nature of renewed federalism. On a practical level, it betrayed the efforts of all those middle-class Canadians who had been sending their children off to immersion. Also important was that the left wing nationalists in Canada felt betrayed by Québec. Over the years this group had been among the strongest supporters of minority rights for Francophones. They saw it both as a matter of justice and as a part of the definition of Canadianism. Then, in 1988, Québec supported free trade and seemed to sell Canada out. The disenchantment could be profound.[6]

> *"Constitutional reform itself probably should move more slowly than it has in the past. We have to absorb the massive implications of 1982 and sort out in our own minds all sorts of priorities of rights, identities, and federal-provincial balances required to make Canada governable again".*

Exacerbating all this was the reaction of the governments involved. Once concerns surfaced, they refused to treat them seriously. Even when the hold-out provinces forced the Charest Commission into being, the hearings were so obviously biased and, ultimately, so inconsequential that they only made the public more cynical. By the time the crisis arose in the spring of 1990, the politicians had lost their constituencies. This is crucial, even though the public had no immediate access to the discussions. For throughout the final

weeks, politicians asked how it was that a couple of small provinces, representing between them less than ten percent of Canadians, could resist. The answer was, of course, that Clyde Wells and Gary Filmon probably could not have withstood the pressure had they not realized their sentiments reflected widespread English Canadian opinion.

Now that Meech is dead, Canadian constitution-making is in a shambles. Even so, Meech did clarify two things. First, until Meech the strongest card a politician could play was to portray national unity as threatened. That card was played to the hilt in Meech and English Canada did not respond. It is equally unlikely to respond to deals it finds unacceptable in the future. Special status is unlikely to succeed in any form and Canada without Québec is now openly contemplated. Second (and here I must admit to a twinge of doubt), the old process is dead. I cannot imagine any politician undertaking constitutional reform in a manner as closed as the Meech Lake one. The doubt arises, though, from a fear that panic ensuing from a threatened referendum in Québec could lead to anything. Finally, constitutional reform itself probably should move more slowly than it has in the past. We have to absorb the massive implications of 1982 and sort out in our own minds all sorts of priorities of rights, identities, and federal-provincial balances required to make Canada governable again – for at the moment it seems frighteningly ungovernable and ungoverned.

Doug Owram, Department of History, University of Alberta.

1. G.M. Grant, "Review of Goldwin Smith, 'Canada and the Canadian Question'" *The Week* (April 1891).
2. Richard Simeon, "Political Pragmatism Precedes Democratic Process" in M. Behiels, ed., *The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord* (Ottawa: Ottawa University Press, 1989) 125-35 at 135.
3. For a quick summary of post-1945 constitution making see Robert Bothwell, Ian Drummond, and John English, *Canada Since 1945*, Rev'd. Ed. (Toronto: University of Toronto Press, 1989) c. 28, 29, 32.
4. Of course there were elements of this in the minority religious clauses of the *British North America Act*. Those clauses, however, were not phrased in universal terms but related to specific provincial jurisdictions such as Manitoba and Québec. In effect, they were caveats to the norms of federal-provincial power sharing.
5. Alan Cairns, "Citizens and Their Charter: Democratizing the Process of Constitutional Reform," in Behiels, *supra*, note 2, 109-124.
6. See as an example Philip Resnick, *Letters to a Québécois Friend* (Montreal: McGill Queen's Press, 1990).

MEECH LAKE AND DEMOCRATIC POLITICS: SOME OBSERVATIONS

Allan Tupper

Canadian elites have long been concerned with constitutional reform. But only recently has debate about the democratic quality of constitutional change become prominent. Indeed, a noteworthy aspect of the Meech Lake round of constitutional negotiations was its explicit focus on such broad questions as how the Canadian constitution should be amended, the relative roles of governments, interest groups and citizens and the desirable extent of public participation in constitutional negotiations. As Reg Whitaker argues, our relatively late discussion of such basic issues reflects deeper weaknesses in the Canadian democratic tradition, notably a powerful elitism, and an anti-democratic strain in our political culture.[1]

My goals in this brief paper are threefold. First, I outline and try to explain briefly the various criticisms, during and after the Meech Lake negotiations, of "executive federalism" as the basic process of constitutional change. Second, I outline and assess some of the possible alternative methods for securing constitutional amendments. Finally, I speculate about some of the lessons the debate about the Meech Lake process might hold for the broader conduct of Canadian politics. Does the Meech Lake experience raise questions that are somehow unique to constitutional negotiations or does it reflect broader concerns about the quality of contemporary Canadian democracy?

Before probing these issues, a number of qualifications and assertions merit some attention and explanation. First, while I am a member of the large chorus of critics of Meech Lake's democratic qualities, I offer neither a panacea nor a powerful, overarching explanation of our recent constitutional experiences. Second, it is important to avoid falling into the trap of arguing that a reformed, more

democratic process of constitutional renewal, however defined, will magically lessen deep and abiding conflicts of interest. Such sentiments were widely and strongly expressed immediately after the collapse of Meech Lake and to a degree they underpin the rationale of Keith Spicer's task force. Reformed processes will make some issues more prominent in future debates, will raise the influence of some groups and lessen that of others and, to the degree that a desire for public input is satisfied, will enhance the democratic legitimacy of resultant constitutional reforms. But more than this should be neither expected nor promised. Indeed, we must be cautious in predicting necessarily benign results from new processes of constitutional renewal. In this vein, some of the underpinning assumptions of the Spicer task force require serious debate. For example, an implicit argument is the fuzzy notion that Canadians will somehow become more tolerant of each other if only they can engage in a dialogue unmediated by governments, interest groups and political parties. A related, and very questionable, assumption is that the "real problem" is that Canadians, through poor communications, do not really understand each other's aspirations. But who is to say that a better informed citizenry will necessarily be more tolerant? More importantly, is it not possible that Canadians, armed with greater understanding of each other's demands, will become more stubborn and less willing to compromise? Third, we certainly do not enjoy perfect knowledge about public attitudes toward the Meech Lake process. For example, how many Canadians supported the goals and substance of Meech Lake but were appalled by the process and hence unable to give their full support? Similarly, how many constitutional actors are best labelled as "strategic democrats"? That is, did a large number of Meech Lake's opponents wrap their opposition in the robes of democratic propriety when, in fact, their opposition was rooted in the substance and symbolism of the proposed Accord? Another concern flows from this point and it is a reminder that an obsession with process can become conservative if it deflects attention from spirited discussion of the content of proposed constitutional reforms. Here reformers should remember that the democratic quality of proposed reforms is as important as the democratic quality of the process. Another remarkable feature of the Meech Lake debate is the relative silence of philosophers about both substantive and procedural questions. Those most informed and skilled in the debate about democratic politics continue to yield the constitutional reform field to such traditional observers as constitutional lawyers and students of federalism. We are not well served by the curious abstinence of our philosophers. Finally, the following discussion assumes that future constitutional negotiations will involve the eleven existing governments (and possibly the territories) and that some form of federal system of government will be maintained. If such assumptions are not met and if we consider seriously a sovereign Québec and other fundamental political realignments, the requirements for democratic processes become much more complex. Their discussion is beyond the scope of this short essay.

EXECUTIVE FEDERALISM UNDER ATTACK

A fundamental characteristic of the Meech Lake debate was a powerful consensus among interest groups, journalists, and academic observers that the process of change employed was flawed, ineffective, and unjust. Indeed, even a cursory examination of the public statements of many Canadian interest groups reflects a deep anger about their exclusion from a round of constitution-making that directly affected their political interests and goals.

At the heart of the critique were several intertwined concerns. Among the most important was the idea that Meech Lake, unlike the reforms of the early 1980s, was not preceded by a focussed public debate about a relatively widely understood and accepted constitutional agenda. A fundamental constitutional change was negotiated in secret and unveiled to a surprised and, in some cases, uninformed public whose role was to accept the handiwork of constitutional elites.

The second core concern was that the Meech Lake process was too dominated and orchestrated by the First Ministers and their closest bureaucratic advisors. This process of intergovernmental negotiation, normally described as "executive federalism", has often been assailed as detrimental to the quality of Canadian democracy. For example, more than a decade ago the late Donald Smiley denounced executive federalism as too secretive, too dominated by the political and bureaucratic drives of governments as complex organizations, and too oriented toward the aggrandizement of executive power at the expense of legislative input and public accountability.[2] But during the Meech Lake debate a new and powerful indictment was levelled at executive federalism when a range of interests challenged the capacity and willingness of the First Ministers to represent their constitutional demands. Women, aboriginal peoples, the disabled, and the representatives of various ethnic groups unanimously asserted that governments, as presently constituted, could not articulate their constitutional visions. The image of "eleven

able-bodied white males" negotiating secretly our constitutional future became an ingrained aspect of the Canadian constitutional landscape.

Such complex problems were exacerbated by the federal government's firmly held, albeit deeply elitist, notion that the Meech Lake Accord was unamendable given the complexities of the negotiations involved and the intricacies of constitution-making in a complex federal state like modern Canada. Moreover, an already confused undertaking was made more incomprehensible by a lack of detailed discussion papers and by an acute absence of clear, publicly stated rationales for Meech Lake's component parts. The federal government was content to advocate acceptance of Meech Lake as a necessary component of a broad strategy of national reconciliation. Detailed explanation of Meech's parts was apparently unnecessary given the lofty goals involved.

Two other factors merit attention when probing the malaise surrounding the Meech Lake negotiations. First, the range of debate was necessarily limited when the two major federal opposition parties — the Liberals and the New Democrats — quickly, and controversially, supported the proposed accord as negotiated by the federal Conservative government of Mr. Mulroney. Such interparty consensus robbed the process of a compelling and probing Parliamentary debate into the rationale and substance of the proposed reforms. Second, several observers have argued compellingly that national media coverage of Meech Lake failed to offset the glaring inadequacies of the political debate. Media coverage was obsessed with the personalities involved, the regional implications of proposed changes and the short term partisan implications.[3] Detailed analysis of the content and possible consequences of the proposals was conspicuous in its absence.

It is now well known how the process of executive federalism staggered toward the bizarre meetings in Ottawa in June 1990 where Canadians witnessed the spectacle of weary, often angry, men arguing about options, which, because of the secrecy involved, were neither known to, nor understood by, Canadians. During this troubling period, various conspiracy theories were advanced by the audiences as they predicted "worst case" scenarios for their constitutional quests. Widespread public cynicism was undoubtedly heightened by Mr. Mulroney's intemperate bragging about how he tried to manipulate the Ottawa meetings and how, far from bothering him, the process was congruent with a model of elite accommodation that had been historically employed.

Spirited defences of the Meech Lake process were few in number. Some observers pointed to the new requirement for legislative approval of constitutional reforms as a step toward greater democracy. Others argued that it was incorrect to assert that Meech Lake was "sprung" on an unsuspecting public given that Québec's demands for further constitutional reform had been widely known and debated for some time both within and without Québec. Yet another argument ultimately acknowledged the defects of the process but maintained that the political goals of Meech Lake were so important that they must override concerns about the quality of the democratic process. Once Meech Lake was ratified and Québec entered the constitutional family, it was argued, the deck would be cleared for important and necessary discussions about how to conduct future constitutional negotiations. Democracy was important but national unity was a deeper, overriding concern. In all of this, it is curious that governments never attempted to declare that the passage of Meech Lake was an undertaking of such importance that normal processes of democratic politics must be sacrificed and that a strong dose of unfettered elite negotiations was essential if national unity was to be maintained. It is, of course, difficult to gauge public reaction to such a declaration, but it is at least arguable that a forthright articulation of such a proposition might have garnered substantial public support.

"Despite the myriad inadequacies of the Meech Lake process, democratic politics ultimately prevailed over the ambitions of governments."

What accounts for the deep and widespread concern about the process of constitutional change in this country? A preliminary answer lies in the significant expansion of Canada's constitutional agenda in the 1980s. As Alan C. Cairns has persuasively argued in a number of essays, our constitutional plate is no longer filled exclusively by the governments' agenda with its heavy focus on federal-provincial questions, institutional concerns and the status of Québec within Canada.[4] The constitutional agenda is now also burdened by complex questions about individual and collective rights, the relationship between citizens and state and the rights and privileges accorded and denied to particular interests by constitutional provisions. As induced by the advent of the *Charter of Rights and Freedoms*, many

Canadians and their interest groups see themselves as significant stakeholders in constitutional negotiations. They no longer believe that governments should control the agenda and they are deeply frustrated and angered by processes like executive federalism which limit their participation in constitutional reforms that materially affect their interests. To employ Cairns' apt terminology, the "people's constitution" and the governmental agenda are increasingly competitive rather than complementary. A major upshot of these complex developments is that a cornerstone of executive federalism – widespread public deference to the wisdom and authority of political leaders – can no longer be assumed. Many Canadians are now confident in their ability to advance and define their constitutional interests independent of political leadership.

Before moving ahead, a perhaps self-evident point requires some attention. Despite the myriad inadequacies of the Meech Lake process, democratic politics ultimately prevailed over the ambitions of governments. To a degree, the Accord's passage was derailed by changed political circumstances in Manitoba, Newfoundland and New Brunswick. But also important were the relentless, indeed tenacious, critiques of such diverse Meech Lake opponents as women's organizations, Triple E Senate advocates, and the representatives of aboriginal peoples and Canadians resident north of 60. After all was said and done, politics did matter and various groups can claim a role in the victory. They will undoubtedly approach future negotiations armed with the knowledge that their stubborn resistance was effective in the final analysis. Viewed in this way, future constitutional negotiations, which promise to be more wideranging than those surrounding Meech Lake, will be bitterly contested if stakeholders feel excluded from the process.

WHAT MIGHT BE DONE?

Implicit in my argument thus far, is the proposition that a process like that surrounding the Meech Lake experience is totally discredited and that reforms are required for future constitutional negotiations. Put simply, too many interests are now demanding a major say in constitution-making. The construction of the Canadian constitution is no longer seen as the exclusive preserve of governments. Moreover, any repetition of the 1987-90 experience is highly undesirable given the widespread cynicism generated by recent events.

One obvious avenue for reform is to assume that future constitution-making will be conducted in the main under governmental leadership and ultimately through intergovernmental negotiations. But future negotiations will have to be preceded and followed by *genuine* public participation through serious, well-equipped and properly financed legislative committees. Moreover, government positions will have to be clearly articulated through widely circulated position papers which outline the underpinning logic of their constitutional visions and proposals. Implicit in this argument, which does not take us far from the status quo, is the idea that governments will approach constitution-making tolerantly and with a willingness to make substantial changes if necessary. The hard line, "it is not amendable" approach of Meech Lake talks, cannot be repeated in the future.

In this vein, the Alberta government has decided to adopt a different approach to the construction of its future constitutional positions. As recently outlined, the government plans a task force comprising ministers and government members of the Legislative Assembly whose role it is to gather publicly expert opinion and then to draft a position paper. In turn, the position paper will be turned over to a multi-party legislative committee whose task will be to hold public hearings on the proposals. The committee will then report to the government which will mull over the various inputs before presenting a comprehensive resolution to the legislature.

A number of issues arise when assessing such recent initiatives as the Spicer task force, the Belanger-Campeau commission, the federal Parliamentary committee on the amending formula, the Alberta proposals and developments in other provinces. First, a more participatory approach will probably be slower than the more focussed executive federalism model. And, as already noted, the provision of opportunities to be heard does not guarantee a reduction in levels of conflict or disagreement. Second, while some interjurisdictional variation in the participatory techniques employed is inevitable, a consensus must develop on a process whose core elements will apply federally, provincially, and in the territories. Put differently, the situation must be avoided where citizens in one jurisdiction enjoy substantially greater opportunities for the public discussion of constitutional change than their fellow citizens residing elsewhere. The need for common standards, a "level playing field" to employ the contemporary cliche, is an important, albeit neglected, element of the debate about reformed democratic processes. Finally, and most importantly, have governments learned from the Meech Lake

process? Is their recent desire to promote greater public input into constitution-making rooted in a genuine commitment to listen and to respond to non-governmental actors? Are governments really willing to experiment with such devices as referenda or do they ultimately remain wedded to executive federalism? Is there now a clear grasp of our changing constitutional agenda and a recognition that the older set of federalism issues must share centre stage with the newer agenda of rights and state-citizen relations? No clear answers have yet emerged to these questions but suffice it to say that many stakeholders, after a decade of hard fought struggles to impress on governments their constitutional viewpoints, are skeptical of governments' real commitment to change.

"It is no longer possible to dismiss proposals for more direct democracy as radical, utopian or unnecessary."

Beyond reforms to the government-dominated status quo are proposals which stress popular sovereignty through the widespread use of referenda and/or citizens' constitutional forums. Referenda, probably based on regional majorities, would grant citizens the capacity to accept or reject major constitutional reforms. Constitutional assemblies, which can assume many forms, are based on the notion that democratically elected citizens, not governments, are best placed to debate and negotiate constitutional changes. No blueprint for such a forum has yet garnered widespread support and philosophical, political, and legal issues abound. But the serious discussion of such proposals reflects the widespread disenchantment with Meech Lake's executive federalism approach. Put simply, it is no longer possible to dismiss proposals for more direct democracy as radical, utopian or unnecessary alternatives to a smoothly functioning status quo. In this context, one of Meech Lake's most important legacies is to highlight the weaknesses of executive federalism as a process for major constitutional renewals and to demonstrate that change is both necessary and feasible.

Agreement about new processes for constitutional reform will not be arrived at easily. For one thing, through their indirect capacity to shape outcomes, alterations to the process of constitution-making will necessarily remain deeply political undertakings. To argue otherwise is naive. This having been said, we must interject greater dispassion into the debates about process and strive to disentangle them from the substance of current proposals. We must somehow avoid linking reformed processes with the achievement or blockage of particular undertakings. For here is where the "strategic democrats" thrive. Indeed, much recent discussion of referenda and other changes is linked simply with a desire to achieve short term political ends. Major reforms must, however, be rooted in clearly articulated democratic grounds, must be subject to clear criteria for evaluation and must show themselves to be feasible and desirable long term alterations. Otherwise we may well burden ourselves for the long haul with changes designed to solve today's problems. The logic of many interests – that we want referenda when we think we will win but oppose them if we might lose – is utterly deficient as a guide to serious reform.

The recently formed Parliamentary committee on the amending formula has indicated a willingness to discuss the role of referenda and citizens' forums.[5] Its deliberations may, thus, provide a venue for assessing the degree of public and governmental support for new processes of constitutional amendment. It may also be a site for a relatively objective assessment of procedural alternatives *independent* of discussions of substantive constitutional changes.

CONCLUDING THOUGHTS

Is the debate about democracy and Meech Lake exclusively about the processes of constitutional amendment or does it reflect deeper anxieties about the effectiveness of contemporary Canadian democracy? Do concerns about the Meech Lake process reflect a growing alienation from, and disenchantment with large, often remote, public and private institutions? Put positively, does the Meech Lake experience reveal a broadening of Canadians' interest in democratic participation and a desire to engage in meaningful debate about our political future?

No definitive answers emerge to these complex questions. But the Meech Lake experience can be put in context with several other recent developments, all of which point to growing concern about Canadian democratic practices. First, as most observers note, the rapid rise of the Reform Party reflects a concern with the political practices of Canada's extant party system. In this vein, much attention has been paid to the party's avowed anti-statism and to its roots in the traditions of Prairie protest against the allegedly overwhelming political power of Ontario and Québec. But another clear Reform message is the need for a restructuring of Canadian democratic practices with a view to weakening the power of the political executive, enhancing the role of

individual legislators, strengthening popular accountability over elected officials and experimenting with referenda as important mechanisms of public participation. It is, of course, impossible to isolate the precise appeal of Reform's various claims but a strong critique of indirect democracy as now practised in Canada lies at the heart of the party's ideology. As well, the ardent, and related, advocacy of a "Triple E" (equal, elected and effective) Senate reflects a perennial regional concern about the effectiveness of national institutions. In a very different context, the 1990 provincial election in Ontario gives further evidence of an electorate weary of established political practices and willing to engage a hitherto untried option. Finally, the media has recently been swamped with survey data and more anecdotal evidence revealing a cynical electorate which believes the political system as presently constituted seldom responds to public opinion. To be sure, the factors mentioned above can be interpreted very differently. But these developments, and the Meech Lake debate, are linked by a common concern about the responsiveness of our political institutions, political processes and party system.

If the preceding argument has some merit, the Meech Lake debate, to be understood, should be seen as a symptom of a broader concern about indirect democracy in contemporary Canada and not merely as an exclusively "constitutional" concern. But, far from seeing these developments as unnerving "threats" to the status quo, governments, their political opponents, interest groups, and citizens should view such reformist tendencies as desirable developments. For, after all, they reflect a desire of citizens to participate meaningfully in politics. In turn, such desires to enter into democratic dialogue reflect the emergence of a more mature, ultimately richer, democratic tradition. However disruptive such pressures might seem, they must be compared with the alternative of an increasingly cynical, apathetic and alienated citizenry.

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2. Donald V. Smiley, "An Outsider's Observations of Federal-Provincial Relations Among Consenting Adults" in Richard Simeon, ed., *Confrontation and Collaboration: Intergovernmental Relations in Canada Today* (Toronto: The Institute of Public Administration of Canada, 1979) 105-113.
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4. See, for example, Alan C. Cairns, "Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake" (1988) 14 *Canadian Public Policy*, S120-S145.
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II
MEECH LAKE AND ECONOMIC REVIVAL

THE MEECH LAKE ACCORD AND THE FUTURE OF THE WELFARE STATE

Linda Trimble

During the three year ratification process there was a great deal of discussion about how the opting out provision of the Meech Lake Accord (section 106A) would affect the welfare state. For many critics of the Accord, such as the Canadian Council on Development, the National Anti-Poverty League and the Canadian Day Care Advocacy Association, the opting-out clause was worrisome. These groups feared the opting-out provision would impede the federal government's ability to pursue important social goals, such as the implementation of a national day care policy. Should they, and others concerned with the future of the welfare state, be breathing a collective sigh of relief now that the Accord is dead? Absolutely not. In fact, both those who were concerned about the impact of the Accord on the development of the welfare state, and those who supported the opting-out provision in the name of economic efficiency, were barking up the wrong tree. As usual, they were barking up the tree of federalism.

This paper presents the following rather controversial position: with respect to the welfare-state issue, many observers, especially political scientists, have not been able to see the forest for the federalism tree. I will discuss the spending power provision of the Accord, briefly outlining the two opposing positions. I will then argue that while these arguments represent important debates about the nature of federalism in Canada, they are largely irrelevant to the future of the welfare state. In this case, what matters when talking about the future of the welfare state is not the Meech Lake Accord or its demise, or any formal constitutional change which reflects current federal-provincial arrangements, but what governments *actually do*.

Federalism is not a negligible factor in the design and delivery of social welfare policies in Canada. This is so because the provinces have jurisdiction over welfare-state issues such as health care and social assistance but do not have the taxation powers which would allow them to pay for the programs. This problem has been addressed in two ways. First, responsibility for two welfare state issues (old age pensions and unemployment insurance) has been transferred to the federal government via constitutional amendment. Secondly, the federal government has helped the provinces out by using its "spending power"; the federal government has transferred funds and tax room to the provinces to pay for health and welfare policies.

The federal government has exercised varying degrees of control over shared-cost programs by setting conditions on the transfer of funds. The *Canada Health Act* provides for reductions in transfers to provinces which permit extra billing. On the other hand, the *Canada Assistance Plan* (CAP) is usually viewed as a shared-cost program which sets only a few conditions,[1] but it depends on your perspective. For instance, battered women's shelters couldn't get CAP funding until the plan was altered to include a category called "homes for special care". In other words, even though shared-cost programs may not impose conditions on provincial governments, they may contain provisions which shape program delivery.

Of course provincial governments do not mind getting the money from the federal government, but are irked by the conditions. The government of Québec has been a vocal opponent of federal incursions, via the spending power, into areas of provincial jurisdiction, and persuaded the federal government in 1964 to allow the provinces to "opt out" of a large number of shared cost programs. The opting-out provision of the Meech Lake Accord simply "constitutionalized" what was already political convention. It explicitly recognized the use of the spending power in areas of exclusive provincial jurisdiction, and it provided "reasonable compensation" to any province which chose not to participate in a national shared cost program established by the central government, so long as the province carried on a "program or initiative that is compatible with the national objectives" (the proposed *Constitution Act, 1987*, s. 106A).

Supporters of the Accord argued that it reflected the political and economic realities of the day while opponents asserted that the *Constitution* should enshrine ideals rather than stark realities. Let us examine both positions; first, the pro side. Commentators like Tom Courchene[2] argued that it would protect the federal spending power from legal challenge and allow the federal government to set national standards, thus acting as a centralizing force. Also,

Courchene argued that the opting-out clause would encourage the design and implementation of new, efficient and innovative shared cost social programs. In other words, it would provide security, by recognizing the spending power, but would allow for flexibility. Courchene asserted that this flexibility was critical because, in future, the state of the economy (not the *Constitution*) would determine the future of the welfare state. Economic factors, especially globalization of the economy and the fiscal crisis of the state, are pushing governments towards interdependence and towards developing more efficient ways of delivering existing programs. For Courchene, section 106A provided the perfect balance; it would allow for national leadership while providing flexibility in program delivery.

"The 'opting-out' provision is not necessary for the federal government to opt out of new welfare state initiatives and to deny responsibility for filling in gaps in existing programs."

Critics of the opting-out provision did not share his optimism. Opponents of the Accord felt that the provision would spell an end to new federal initiatives in social policy. The Canadian Advisory Council on the Status of Women (CACSW), for instance, argued that the clause would virtually eliminate the possibility of a comprehensive, universal child care program with national standards.[3] Even if new programs were initiated, said the CACSW and others, opting out would allow for considerable regional variation in standards and delivery.

I share the critics' concern about the likelihood of new shared-cost programs, but agree with Courchene that the *Constitution* is not, and will not be, the determining factor. The spirit of Meech Lake was quite evident in federal government policy-making even when the Accord was but a glimmer in Brian Mulroney's eye. The Conservative government has not introduced new spending power initiatives (and few social policy initiatives) and has taken an approach to social policy which encourages decentralization and regional variations in approach. There are two stark examples of this: day care policy and the abortion law.

The 1988 federal child care policy carefully avoided treading on provincial turf.[4] Even if the spending elements of the policy had been implemented (and they were not), they would not have addressed the fact that there is incredible variation in child care policy and services across the country. Alberta claims to have more day care spaces than are required[5] while families in the Atlantic provinces rely heavily on unlicensed, unregulated "family home" care. Alberta provides subsidies for profit centres while other provinces (such as Ontario) only subsidize non-profit facilities. Each province sets its own regulations and standards for licensing and staffing. The Mulroney government's *Canada Child Care Act* clearly reflected an unwillingness to impose national standards or objectives.

Similarly, the federal government's abortion strategy is notable for what it will not do; the difference is that this piece of legislation is likely to be passed into law. In 1988, the abortion legislation was ruled in contravention of section 7 of the *Charter* largely because access to therapeutic abortion committees was not provided equally across the country. The new legislation (Bill C-43) simply puts abortion back in the *Criminal Code* and does not address the access problem. Bill C-43 states that a woman may obtain an abortion if one doctor concludes that continuation of the pregnancy would harm her psychological, mental or physical health. The bill does not undercut the provinces' substantial power to regulate abortion by regulating the provision of health care services (by refusing to insure this service or by refusing to pay for abortions done in clinics). It is interesting to note that the government of Canada chose not to use the *Canada Health Act* to ensure access to this medical service.

To sum up this argument, opponents of the opting-out provision cannot rest easily now that the Accord has failed. Clearly, the approach to social welfare policy which so disturbs the critics of the provision is being taken regardless of its inclusion in the Constitution. The "opting-out" provision is not necessary for the federal government to opt out of new welfare state initiatives and to deny responsibility for filling in gaps in existing programs.

Other opponents undertook a wider analysis, arguing that the Meech Lake Accord would entrench the traditional political agenda (the politics of region, language and culture) and would prevent a new political agenda (social reform, human rights and equality issues) from taking root. I don't think we need a constitutional amendment to solidify the territorial nature of Canadian federal-provincial relations. Alan Cairns and Donald Smiley have both argued that the nature and processes of Canadian federalism have promoted political debate of territorial issues at the expense of issues which cross-cut territory, such as class issues (poverty), aboriginal self-government,and gender equality.

Does the failure of the Accord mean that those who want to see a shift in policy emphasis (from traditional to non-traditional issues) should be happy? Again, absolutely not, for two reasons. First of all, the Accord simply reflected the reality in Canada: territorial and jurisdictional issues dominate the political agenda. Secondly, what all of

the observers, critics or supporters, have overlooked is the fact that the welfare state in Canada is a mess. Supporters of the Accord spoke of delivering existing policies more efficiently (cutting costs). Opponents spoke of the need to extend the welfare state. An underlying assumption among both camps is the assumption that the welfare state actually works. There is ample evidence that the programs for which Canadians pat themselves on the back cost a great deal but do not solve the problems we expect them to solve. That the social safety net doesn't catch a lot of people is illustrated by the dramatic increase in the use of food banks. Another increasingly obvious fact is that existing social welfare programs do not address the feminization of poverty. Recently, the National Council on Welfare reported that women without partners, be they single, widowed, divorced or separated, are not likely to be economically independent.[6]

"The future of the welfare state depends on the development of social policies with forward-looking goals, and on their proper implementation, not on the Meech Lake Accord or any future constitutional negotiations."

The future of the welfare state will not be determined by constitional amendments which tinker at the margins of jurisdictional issues. The future of the welfare state will be determined by public policy. There is an urgent need for a re-thinking of existing policies. Policies currently on the books don't provide a social safety net and in fact are more like a box of band-aids used to patch up the unfortunate millions who aren't caught. Many existing policies seem to be aimed at perpetuating problems rather than solving them. For example, providing minimal assistance (below the poverty line) to single mothers simply perpetuates the cycle of poverty and adds to the food bank line-ups.

Our obsession with the nuances of federal-provincial relations leads us to ignore equally important political variables. A great deal more attention must be paid to public policy itself, as the future of the welfare state depends on the development of social policies with forward-looking goals, and on their proper implementation, not on the Meech Lake Accord or any future constitutional negotiations.

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3. Canadian Advisory Council on the Status of Women, *Brief to the Special Joint Committee of the Senate and of the House of Commons on the 1987 Constitutional Accord* (Ottawa, 20 August 1987) at 15.
4. See Susan D. Phillips, "Rock-A-Bye, Brian: The National Strategy on Child Care" in Katherine A. Graham, ed., *How Ottawa Spends, 1989-90* (Ottawa: Carleton University Press, 1989).
5. However, 75% of these spaces are in "for profit" centres.
6. National Council of Welfare, *Women and Poverty Revisited* (Ottawa, 1990).

THE AFTERMATH OF MEECH LAKE: IMPLICATIONS FOR THE WESTERN CANADIAN ECONOMY

Mike Percy

INTRODUCTION

Economic life as we know it in Western Canada did not end with the demise of the Meech Lake Accord. Interest rates remained too high and, perversely, the value of the Canadian dollar actually rose following the failure to ratify Meech Lake, much to the chagrin of doomsayers who had predicted it would plummet as the international investment community lost confidence in the Canadian economy. Nor did Meech have much effect on the forecasting ability of federal and provincial governments; deficits at all levels of government continue to be higher than anticipated and this problem will be further exacerbated as the North American economy heads into recession.

From the perspective of Western Canada and the nation, the collapse of Meech Lake was an economic non-event. The purpose of my brief discussion is to suggest why that was so and to predict what we might expect in the short term as we digest the political response to our constitutional impasse. In the short term, I believe that federal-provincial relations, especially those relating to tax and transfer programs, will be characterized by even more extreme rhetoric and ill-feeling than has been evident in the past. The economic ties which bind federal and provincial governments (and link individual Canadians regardless of location) are going to be strained, possibly to the breaking point, as all levels of government cope with deficits which are not sustainable at current levels. This short-term fiscal crunch will certainly colour discussions regarding the nature of economic ties which should underpin our constitutional linkages.

What the longer term holds is difficult to predict, especially in light of the ever increasing number of provincial constitutional committees and federal initiatives all seeking public input. We can, however, be reasonably confident of two outcomes. The first is that at some point the Canadian public will tire of endless discussion and seek action on constitutional issues even if proposed initiatives are ill-advised. Second, an even greater degree of decentralization and a reduced role for a federal government in tax-transfer programs will emerge regardless of whatever is the constitutional configuration that ultimately arises from the Meech debacle. The logic of the Meech Lake Accord itself and the economic context in which constitutional discussions will take place all point in this direction.

Let me hasten to add before going on to discuss the implications for the West of the rejection of the Meech Lake Accord that my brief is narrow. It is simply to address some of the *economic implications* of this constitutional impasse for the West. By necessity of time and space it cannot focus on likely reforms nor can it integrate the interface between economic and political change as much as I would like.

WHY WAS THERE SO LITTLE ECONOMIC IMPACT TO THE FAILURE OF MEECH?

The overall indifference of financial markets to the Meech debacle clearly brought home the message that, at least in the short to medium term, the Canadian constitutional crisis was perceived to have relatively few spill-overs to the economic arena. This reaction of financial markets to the aftermath of Meech Lake is instructive and highlights three key points that are important in assessing the implications of the Meech Lake failure for the Western Canadian economy. The first is that, regardless of the outcome of the Meech Lake failure, it is likely that the economic consequences will occur only incrementally. That is, if Québec or some other region of the country opts for sovereignty-association it will not come about overnight. Negotiations regarding the economic and political links will be time consuming and provide plenty of lead time for firms and investors to adjust to whatever new political configuration arises. Perhaps, more importantly, the political realignments which emerge will be constrained by economic reality. This latter issue brings me to the second point.

Canada, and certainly Western Canada, are relatively small players in international markets. In large part prices for our exports and imports are set in world markets where Canadian industries are small in relation to the volume of world trade. Living standards in all regions of Canada depend on our ability to compete in international markets. All regions of Canada rely extensively on access to foreign capital to help finance both private and government borrowing. I am an economic pragmatist and believe that the discipline of the market, especially the potential big stick wielded by bond rating agencies who evaluate both private and federal and provincial government debt offerings, will serve to minimize the economic consequences of constitutional redesign. Poorly designed constitutional reform which inhibits our international economic competitiveness would result in an immediate downgrading of credit ratings and increase the cost of borrowing. The fact that financial markets reacted so little to the failure of Meech suggests

that, at least currently, financial analysts perceive that all players in the game are aware that this constraint limits the potential adverse economic spill-overs of constitutional reform. Our economic ties to the rest of the world will continue regardless of the outcome of the constitutional debate in Canada.

Third, the extent of integration of Canadian regions with the international economy in terms of exports, imports and capital has reduced the relative importance of the rest-of-Canadian market to the economic well-being of any one region. The alternative to strong east-west economic links is strong rest of world links. The Free Trade Agreement (FTA) is an example of this process but it should be noted that it was simply a logical continuation of a process of trade liberalization that had long been under way. At the time of the FTA over 75 percent of Canada-U.S. trade was already duty free. Moreover, trade links of Western Canada, especially those of British Columbia and Alberta, with the Pacific Rim countries are expanding significantly. Thus, the potential disruption to regional economies of Canada as a result of any significant constitutional realignment could be quite modest.

"If the alternative to Confederation is free trade by each of the provinces with all trading partners it is likely that the gains from the economic union would be modest."

HOW DOES THE CANADIAN ECONOMIC UNION CONTRIBUTE TO LIVING STANDARDS IN WESTERN CANADA?

This question can be answered by assessing the implications for economic well-being of the West as a result of being a member of an economic union with a relatively decentralized federal structure – Confederation. Maxwell and Pestieau (1980:13-20) provide a thorough discussion of the possible economic gains which arise from an economic union such as Confederation. They suggest four basic gains from the integration of markets for labour, capital and commodities and the harmonization of policy instruments which underpin economic unions. The first and most important of these are the gains from greater economic specialization and the capture of economies of scale which accompany the elimination of regional barriers to flows of people, capital and commodities. The second source of economic gain is the pooling of risks at the national level to ameliorate the consequences of regional instability. This pooling includes interregional insurance and transfer programs, labour and capital migration across regions in response to varying economic opportunities, and macroeconomic stabilization policies aimed at specific regions. The ability to pool risks nationally is a useful feature of an economic union. It permits regions to specialize in those areas of production in which they are most efficient while at the same time insulating themselves from the major cost of specialization – greater variability of income and employment.

The sharing of overhead expenditures on joint projects such as defence, and large-scale transportation projects with economic spill-overs across regions is the third source of economic gain in the Maxwell-Pestieau framework. This attribute lies at the heart of allocating economic responsibilities among political jurisdictions. The allocation of economic responsibilities to a particular level of government should be consistent with the spatial distribution of benefits and costs from that economic function. The final source of economic benefit is the possible market power possessed by an economic union but not by an individual region. The use of this market power to increase export prices or to reduce import prices would enhance the economic benefits of trade to members of an economic union by reducing the amount of exports required to pay for a given amount of imports.

When seen in this perspective, Confederation does seem to offer the potential for increasing the real incomes of provinces and their residents because of the benefits derived from regional integration. The real issue, however, is whether benefits of similar or even greater magnitude are available to the participating regions through alternate trade arrangements. If each of the provinces were to pursue a policy of autarky in the absence of Confederation, the economic union would yield very large economic gains. Yet if the alternative to Confederation is free trade by each of the provinces with all trading partners it is likely that the gains from the economic union would be modest. All of the gains arising from greater regional specialization and the capture of scale economies are available from multilateral free-trade.

As was noted earlier, the post-war period for Canada and the world has been characterized by significant trade liberalization. This trend and its most recent manifestation, the Free Trade Agreement, thus suggests many of the gains in trade from the economic union are available through trade with the rest of the world. However, this perspective must be placed in context. It is highly likely that in 1867 Confederation did produce a positive economic gain especially through the incentives for specialization and scale. The two largest external markets open to the British North American colonies had become increasingly difficult to gain access to. The United Kingdom's move to free trade and the elimination of colonial preferences meant that Canada's distance and high costs hindered access to this traditional market. In the case of the U.S., lingering disputes from the Civil War manifested themselves both in high tariff barriers

and overt hostility. Yet, in the current environment, multi-lateral trade initiatives through the General Agreement on Tariffs and Trade (GATT) and bilateral initiatives such as the FTA provide alternative means of capturing the gains from trade for a region such as Western Canada.

What of the gains from risk pooling? Here, the evidence suggests that the Western Canadian economies remain remarkably volatile. A recent study by Mansell and Percy (1990) found that economic instability in Western Canada, but especially in the case of Alberta, was far above national levels. Furthermore the evidence suggested that an array of federal policy initiatives, again mainly in the case of Alberta, exacerbated the underlying instability arising from specialization in volatile resource markets. A forthcoming study by Chambers and Percy (1991) finds that macroeconomic policies, especially exchange rate strategies, have tended to exacerbate swings in economic activity brought about by movements in natural resource prices.

On one level the existence of stabilization programs at the sectoral level funded by large federal expenditures – agriculture and, those which are general in nature, unemployment insurance – do ameliorate some of the shocks arising from reliance on volatile natural resource markets. In this regard they certainly do improve economic well-being in Western Canada.

"The fight among the provinces and the federal government over how to distribute shares of a declining economic pie is going to obscure entirely the debate regarding a more efficient set of political and economic relationships suitable for promoting long-term growth."

On the other hand, there is evidence that the weight of federal policies has not always contributed to higher levels of economic well-being in the West. John Whalley and Irene Trela (1986) in a study undertaken for the Royal Commission on the Economic Union and Development Prospects for Canada found that on the basis of data for 1981, Confederation did not lead to positive net gains. They note that "..if anything, rather than accounting for a surplus to be distributed between regions, Confederation seems to account for a deficit, and this seems to be due in large part to the distorting policies pursued by the federal government" (Whalley and Trela: 199). Government policies have changed since 1981, especially those related to the energy sector. However, the one estimate that does exist regarding the effect of Confederation on national income clearly indicates that it has lowered rather than increased income on average with the resource-rich and higher-income provinces bearing a disproportionate share of the costs. These results thus indicate constitutional reform accompanied by a better designed set of federal policies could increase incomes in Western Canada.

WHITHER FEDERAL-PROVINCIAL FISCAL RELATIONS?

The next two years or more in federal-provincial fiscal relations promise to be among the worst in recent memory. The federal government is committed to reducing the deficit to $28.5 billion in the fiscal year 1990-91 and in the subsequent three year period reducing it to $14 billion. Deficit reduction and prudent fiscal management are the apparent planks of the Tory government's efforts to improve their popularity. The fiscal plan designed to achieve these goals included a ceiling on Canada Assistance Plan payments to "have" provinces – B.C., Alberta, and Ontario – and further reduced the extent of various shared cost programs. While there were legal challenges to the federal government's arbitrary revisions to signed agreements between itself and the provinces, the point was moot. Negotiations for a new five year agreement on funding these welfare, medical, and post-secondary programs are now under way as the current agreement expires in 1991. Since these statutory programs represent a major expenditure commitment by the federal government there is every incentive for them to reduce their contribution. Moreover, since these expenditures are to provinces there is not the political visibility associated with them that the federal government obtains from direct transfers to individuals.

Unfortunately, the coming North American recession will make economic hash out of the optimistic budget scenarios provided in the February 20, 1990 budget of Michael Wilson. The recession will lead to a decline in tax revenues and an increase in expenditures as automatic economic stabilizers such as unemployment insurance come into play in response to rising unemployment. Thus the imperative to pare expenditures is going to increase, and this does not even include the costs to Canada of the Persian Gulf crisis and our participation there.

Many provinces are facing exactly the same constraints of the necessity for deficit reduction in an economic environment where all the pressures are leading to increased deficits. The provinces face an added constraint. They, unlike the federal government, cannot finance their debt through increasing the money supply. Provinces must enter the money markets and subject themselves to the scrutiny of bond rating agencies. Several provinces face downgrading of their current high ratings unless deficits are brought under control. Thus they have neither the fiscal capacity nor the inclination to absorb a larger component of shared-cost programs.

Moreover, the balkanization of fiscal relations implicit in the Meech Lake Accord will continue unabated. The Western Canadian provinces are talking about collecting their own taxes and funding directly programs presently cost-shared with the federal government. Accompanying this dispute over fiscal relations will be efforts by the remaining provinces to duplicate any success Québec achieves in negotiating separate agreements with the federal government.

The fight among the provinces and the federal government over how to distribute shares of a declining economic pie is going to obscure entirely the debate regarding a more efficient set of political and economic relationships suitable for promoting long-term growth.

To conclude, I was not surprised that the failure to ratify Meech Lake had so little effect on the Western Canadian economy. Yet I am not that sanguine about the future. I believe there are legitimate issues regarding aspects of current federal-provincial fiscal relationships that should be discussed and open for debate. Unfortunately, I think the debate which will emerge will be driven by short-term considerations motivated by current fiscal problems and efforts by all provinces to keep pace with Québec's attempts to obtain separate agreements with the federal government.

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CONSTITUTIONAL REFORM: DOES ECONOMIC EFFICIENCY FIT IN?

Roger S. Smith

The quick and simple answer is that economic efficiency does fit in with constitutional reform, but that it fits in with lots of other things. Political, social, and cultural matters may all have a more important bearing on the nature of constitutional reform than do economic matters. And where "economics" comes on to the scene, the concern may be more with equity than with efficiency.

What is necessary in federal fiscal relations to achieve economic efficiency? The requirement is that provincial tax and spending activities do not cause factors of production, labour, and capital to move from one province where they are more productive to another where they are less productive. This requires, except for cases where there is a clear desire to affect location decisions, either

a) equal tax bills with equal expenditure benefits for individuals in similar circumstances regardless of where they live, or it requires,

b) tax differentials matched by differences in expenditure benefits – i.e., equal fiscal residuals (net fiscal benefits).

Achieving this requires either tax and expenditure harmonization across the country which is equivalent to complete centralization of power, or it requires a system of equalization payments, which allow for provincial policy differences, but equal fiscal residuals.

In the limited space I have, I want to look at Canada with respect to these efficiency criteria, and to look briefly at what the failure of the Meech Lake Accord may mean with respect to the question of "efficiency".

1. TAX HARMONIZATION

Tax harmonization in its most extreme form refers to the fact that a taxable entity, person or corporation, will face the same tax regardless of provincial location. Harmonization exists in another form if taxes are lower, but this is offset by the fact that some services are privately purchased rather than provided by the public sector. You don't pay as much, but you don't get as much.

Provincial taxes vary substantially in Canada. Nevertheless, Canada has a relatively high degree of harmonization compared to some federations – the United States and Switzerland. It has a low level of harmonization compared to Germany and Australia, and diversity is much greater than in unitary states such as the United Kingdom.

TABLE 1

INDICES OF TAX EFFORT (a), AND PROVINCIAL-LOCAL FISCAL CAPACITY FOR ALL OWN-RESOURCE REVENUE (b), *PLUS* THE FEDERAL EQUALIZATION TRANSFER (c), *PLUS* ALL FEDERAL TRANSFERS (d)

	Tax Effort Index (1988)	Fiscal Capacity Indices (1988/89)		
PROVINCE	(a)	(b)	(c)	(d)
Newfoundland	102	61.8	92.8	95.1
Prince Edward Island	95	65.0	92.8	95.0
Nova Scotia	92	76.6	92.8	94.4
New Brunwick	95	72.2	92.8	96.2
Quebec	120	86.8	92.8	93.5
Ontario	98	108.7	101.9	100.3
Manitoba	113	81.7	92.8	94.7
Saskatchewan	103	90.2	92.8	95.3
Alberta	77	137.0	128.4	125.9
British Columbia	95	104.5	98.0	99.9

Source: Tax effort indices have been calculated by David Perry of the Canadian Tax Foundation, based on data provided by the Department of Finance in April 1989. Fiscal Capacity Indices are from "Historical Summary of Provincial Indices of Fiscal Capacity, 1972-73 to 1988-89" (Ottawa: Department of Finance, March 31, 1989), mimeo.

The *British North America Act* (now the *Constitution Act, 1867)* specified revenue sources available to the federal and provincial governments. Constitutional reform could, by limiting provincial authority in the area of taxation, contribute to harmonization. This won't happen, nor do I think it would add to economic efficiency. In an economic union such as Canada, provinces have no control over monetary policy or customs duties and international trade. They retain some control over their tax system. This may permit taxes to reflect differences in economic and social structures (family size), different views of appropriate taxes (no sales taxes in Alberta), differences in preferences concerning the size of the public sector (Manitoba vs. British Columbia, or Ontario vs. Québec). Recognizing differing tastes may contribute to, rather than detract from, efficiency.

In sum, more tax harmony may not add to efficiency in Canada. Surely there is a case for harmonization of CIT and PIT bases, and we have this. With the GST at the door, potential benefits exist for harmonization of sales tax bases across provinces. But it is not clear that the costs of existing diversity outweigh the benefits. As Richard Bird (1990) has said, "it will always be more difficult, more costly, and more apparently wasteful to do things in a federal than in a unitary state." This does not mean that greater harmonization is more "efficient" for Canada. A high level of tax harmonization may be great for Germany, a low level for Switzerland, and an in-between level for Canada. One result of the Meech failure may be more diversity as Québec strikes out on its own. But this need not detract from efficiency.

2. WHAT ABOUT EQUALIZATION?

Equalization was enshrined in the 1982 *Constitution* to ensure that "reasonably comparable levels of services" could be provided at "reasonably comparable levels of taxation". Equalization payments have been important in reducing fiscal residuals (or the extent to which the benefits received minus taxes paid vary according to where you live), and thus in reducing inefficient movements of labour and capital within Canada. (In 1988/89, equalization payments were about $7 billion.) Equalization helps ensure that labour or capital receive a reasonable level of public service in a province at a reasonable cost, rather than cause it to move to another province where it may be less productive, but would get more in public expenditure benefits for the same tax, or the same for less tax.

Table 1 reflects the extent to which equalization enabled

a certain level of expenditure to be achieved at an "average" tax level in 1988/89. Alberta, we see, could still spend 38 percent more per capita, with average tax rates, than many of the other provinces even after equalization, although prior to equalization it would have been able to spend more than double that in Newfoundland and PEI at identical tax rates. In other words, fiscal residuals remain large. Equalization has an important contribution to make to efficiency by reducing fiscal residuals, and it is doing so. *Substantial additional equalization payments would be required if we were to eliminate all fiscal residuals.* On efficiency grounds, there is room for an expended role for equalization payments.

"It is debatable, but I think that the Meech Lake Accord would have contributed to economic efficiency."

3. EXPENDITURE POWERS

Equalization payments are *unconditional* transfers. Provinces can spend the funds as they wish, or they can use the revenue to lower provincial taxes. Efficiency in a federal system requires these unconditional grants. It also requires *conditional* grants. In other words, the federal government gives money to provinces if they do certain things.

Such were the grants under the Established Program Financing system for post-secondary education, hospitals, health care, and welfare prior to 1977, and so Canada Assistance Plan welfare payments have remained after 1977. ($16 billion in grants were provided in 1988/89.) When dealing with mobile people, part of the benefits of education, health and welfare expenditures are realized outside of the province. Hence, if spending is determined solely by the benefits to the spending province, too little is spent. By reducing the cost to the province, matching grants from the federal government ensure that a higher level of expenditure occurs, one that recognizes the benefits that "spillover" as people move about.

Spillovers must be recognized if economic efficiency is to be achieved. Federal government matching grants in the areas of health, education, and welfare, are a means to do this. Yet these are areas of exclusive provincial jurisdiction, areas in which Québec, in particular, has fought to limit activity by the national government, often with the support of other provinces. It may be worth reflecting on the extent to which spillovers are less important for Québec because of less mobility in and out of that province. However, where spillovers are important, constitutional reform which guarantees the federal government spending power for shared cost programs in these areas may contribute to efficiency.

4. OBSERVATIONS ON THE MEECH LAKE ACCORD AND ECONOMIC EFFICIENCY

Much of the controversy surrounding Meech Lake had to do with the possible increase or decrease in centralization of power within the Canadian federal system. I agree with those who felt that the Meech Accord would have little affect on the centralization or decentralization of economic power in Canadian federalism. Its failure may have greater effects, but other factors are likely to be more important. First, the federal deficit severely limits the ability of the federal government to take initiatives. This inevitably causes provincial governments to assert their authority. Examples include Premier McKenna's promotion of a Maritime economic union, Alberta's challenge to the GST, Québec's moves toward sovereignty, Saskatchewan's pursuit of the Rafferty – Alemeda dam, and the general distancing of Conservative premiers from Ottawa and its policies.

Second, forces of global competition, and the integration of markets, with the United States, Mexico, and others will influence both federal and provincial initiatives. As parts of Canada become more closely linked with external markets, conditions in these markets will influence Canadian fiscal systems. Québec's link with New York, and British Columbia's with California or Japan may require differing regional responses.

But greater or lesser centralization may have little effect on efficiency, so determining Meech's effect on centralization does not tell us its effect on economic efficiency. More relevant, I think, is the question of whether Meech Lake would have increased the flexibility of federal arrangements in Canada in a way that would have better allowed government responses to reflect regional and local preferences, and to adjust for spillovers. Does its failure have either a positive or negative effect on economic efficiency? It is debatable, *but I think that the Meech Lake Accord would have contributed to economic efficiency for four reasons.*

First, Meech enshrined in the constitution federal government spending power in areas previously considered the exclusive preserve of the provinces, areas with large spillovers. Meech may have reduced Québec's continual pressure to see the federal government draw back from these areas. One area close to home is that of post-secondary education. Prior to 1977, federal contributions to financing higher education were based on actual expenditures with 50-50 sharing of the cost with the provinces. In the view of the provinces, this permitted the federal government to be too directive and

manipulative in an area of provincial responsibility. Whereas 50-50 sharing may not be the right figure, some sharing, in recognizing spillovers in areas such as health and higher education, would rightly encourage more spending in these areas. The Meech Accord would have contributed to the legitimacy of federal initiatives and participation in shared cost programs. This could increase economic efficiency.

Second, Meech Lake would likely have increased the diversity that could be accommodated within "national" programs. The Meech Accord gave the provinces the constitutional right to opt out of national programs and receive "reasonable compensation". I subscribe to the idea (Courchene, 1988) that this would result in the Federal government designing national programs with sufficient flexibility in them to minimize opting out. Such flexibility would make national programs more responsive to regional and cultural differences. Increased consultation and collaboration would likely occur in the development of new programs. As noted earlier, federal systems are costly, but again it can be efficient if the diversity is responding to real differences in tastes and preferences. The NEP, success of the Reform Party, the separatist forces in Québec, the failure of Meech, all reflect the need to recognize different values and tastes within the Canadian federation.

Third, the Meech Lake Accord, by contributing to a sense of "unity in diversity" or a greater sense of "shared nationhood" (Bird, 1990) *may have further strengthened a commitment to equalization as a concept.* Although equalization is in the constitution, sizable fiscal residuals remain and contribute to economic inefficiencies. Meech, if successful, may have contributed to a stronger equalization concept and hence to greater economic efficiency.

Fourth, Meech may have moved us closer to Senate reform. (Although the recent Senate activities may have moved us much faster in this direction than Meech ever could have.) How does this relate to economic efficiency? The existing strong form of parliamentary government may not adequately ensure sensitivity to the differing tastes, values, and cultures across Canada. The result may be policies which do not sufficiently reflect these differences. Constitutional reform that enables the federal government to more adequately reflect the diversity of the country, that permits a more collaborative model of legislative change rather than the parliamentary confrontational model, should help government policy to be more responsive to the people of diverse regions.

In sum, the constitution at most can facilitate the process of adjustment to other major economic forces. In particular, the Meech Accord may have contributed to enhanced efficiency

1. by more clearly establishing the role of the federal government in shared cost programs where sizable spillovers exist,

2. by ensuring the right of provinces to opt out when values, culture, and tastes dictate,

3. by further strengthening commitments to equalization,

4. by increasing the likelihood of Senate reform.

To the extent that these differences, and there is uncertainty surrounding each and every one of them, could have enhanced economic efficiency, the failure of Meech and any similar reforms makes the country less productive.

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III
RIGHTS AND FREEDOMS AFTER MEECH

SOME DRAWBACKS OF THE POLITICS OF CONSTITUTIONAL RIGHTS

T.C. Pocklington

In my view, Meech Lake showed that the politics of constitutional rights has some serious drawbacks, drawbacks that we would be well advised to keep in mind from now on. In saying that the politics of constitutional rights have some serious drawbacks, I am acknowledging implicitly that such politics have some important merits as well. And I believe that quite strongly. However, in this brief commentary, I choose to err on the side of incaution, intemperance, and one-sidedness.

As Alan Cairns has pointed out so perceptively, the events culminating in the passage of the *Constitution Act, 1982*, involved a major (albeit incomplete) transformation of Canadian constitutional politics.[1] Prior to those events, constitutional politics was politics among governments, focused almost exclusively on the distribution of powers between provincial governments and the federal government. In Cairns's phrase, the constitution was "the governments' constitution." But in 1982, partly because of the intense political activity of numerous groups – especially but not exclusively women's groups, aboriginal groups, and groups of so-called "third force" Canadians – the governments' constitution was supplemented by a "citizens' constitution." Instead of seeing the populace simply as residents of various political jurisdictions, the *Charter of Rights and Freedoms* not only entrenched a number of traditional individual rights but also recognized a number of collectivities, defined by – for example – gender, ethnicity, and language. As Cairns remarks, "the *Charter* redefined the citizenry as bearers of rights."

Of course the *Constitution Act, 1982* did not involve the *supplanting* of the governments' constitution by the citizens' constitution. The move towards populism involved in recognizing citizens' rights was counterbalanced by a thoroughly elitist amending formula, which was to be a major factor in the Meech Lake hostilities.

Almost the whole of the Meech Lake process and, of course, the Accord itself, turned its back on the citizens' constitution. Few objected to the stated central objective of the Accord – "to bring Québec back into the Canadian family" – but many objected to the return to the governments' constitution. The deal was cut by governments; it was conducted in a highly secretive manner; and, to add insult to insult, it was presented in a take it or leave it fashion; no significant changes would be entertained. Moreover, the substance of the Accord reflected a return to the agenda of pre-1982 constitutional politics: the distribution of powers between the federal and provincial governments.

> *"Constitutionally stated rights are the be-all and end-all in the politics of constitutional rights. The inscription of one's rights – the more often the better – in the constitutional document is the indispensable sign that one is taken seriously."*

Not surprisingly, plenty of citizens – especially those who had achieved major substantive and/or symbolic gains in 1982 – were more than a little ticked off by the whole business. They were ticked off for one reason above all others – that they did not get in the Meech Lake Accord what they got in 1982: a recognition of their status, signified in particular by a reaffirmation of their rights. Why did they want their rights re-affirmed? Because constitutionally stated rights are the be-all and end-all in the politics of constitutional rights. The inscription of one's rights – the more often the better – in the constitutional document is the indispensable sign that one is taken seriously. Even if one's rights are not *violated*, it is still an unacceptable affront to one's dignity if they are not *publically re-acknowledged* at every reasonable opportunity.

What's wrong with the politics of constitutional rights? I concentrate here on three drawbacks of such politics. Earlier I quoted Cairns as remarking that "the *Charter* redefined the citizenry as bearers of rights." There is, of course, nothing wrong with being recognized, or even defined *in part*, as a rights-bearer. But there is plenty wrong with being defined *exclusively* as a rights-bearer. This narrow, legalistic understanding may be good enough for General Motors, but it isn't good enough for real people. Real people are not concerned merely with the protections afforded by legal rights. They seek goals – they strive to achieve

aspirations and struggle to achieve ideals. So one drawback of the politics of constitutional rights is that it encourages us to accept an emaciated, juridical conception of ourselves.

A second drawback of the politics of constitutional rights is that such politics are inimical to important political practices such as negotiation, persuasion, bargaining and compromise. Rights are "things" which, like a sports car or pneumonia, people either have or lack. They are not things, "like speed afoot or sensitivity to the feelings of others", that people possess in greater or lesser degree. As a result, disputes about rights tend to become very intransigent, and inhospitable to reasoned argument. I claim that homosexuals should have constitutionally-entrenched equality rights; you deny it. Where do we go from here? Into a shouting match? From a rights perspective, crucial questions tend not to get asked, let alone answered, much less answered in a way that appeals to rational argument and pertinent evidence rather than sheer assertion.

Finally, the politics of constitutional rights exacts a price which is, except in rare cases, not worth the gain. Political actors have only so much time, skill, effort, and money to spend. Every expenditure of resources on securing recognition of rights leaves fewer resources for the pursuit of substantive objectives in the rough-and-tumble forum of democratic politics. Important objectives like day care programs, Native self-government, and a guaranteed annual income, are not going to be achieved through the politics of constitutional rights. They will be achieved, if at all, only by sustained, intelligent political participation.

Our polity is often described as a liberal democracy. If I were to summarize my view of the politics of constitutional rights, exhibited at its worst in the Meech Lake process, I would say that it is preoccupied with the liberalism and largely unconcerned with the democracy. And that is precisely the central drawback of the politics of constitutional rights.

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1. (1988) 14 *Canadian Public Policy* 121.

WOMEN IN THE AFTERMATH OF MEECH LAKE

Susan Jackel

As we look ahead to the future of Canada in the wake of the Meech Lake Accord's collapse, my concern grows as we witness the accelerating disintegration of longstanding institutions and accommodations. I was one of the Accord's early critics, yet I am a lifelong Canadian nationalist; this country's survival in one form or another matters a great deal to me. I did not want to see the Accord die, since its basic purpose was so manifestly right and necessary. Yet along with many others active in women's organizations in Anglophone Canada, I was deeply disturbed by the manner of its introduction to the Canadian people: a deal done behind closed doors by the self-styled modern day Fathers of Confederation — eleven able-bodied white men who had apparently learned nothing from the constitutional debates of 1980-82. For Canada's excluded majority — women, native people, the disabled, visible minorities, the poor — this deal exposed with humiliating clarity our marginality and irrelevance in the Canadian political system. The Accord's defeat at the hands of this popular resistance was not, in the short term at least, a victory for Canada. Far better that our political leaders had recognized early on what was behind this widespread restiveness, and found mechanisms that would have at one and the same time addressed the critics' substantive concerns, and also confirmed that the people have a vital stake in our constitutional arrangements. Sheer boneheaded arrogance prevented this, and so supporters and critics alike have to hope that despite the acrimony of the debate, the seeds for the regeneration, if not the transformation, of our national political community lie in the new voices that united with Elijah Harper to say "no" to Meech.

During the 1980-82 exercise, virtually every branch of Canada's multifaceted women's movement underwent a crash course in constitutional law and the intricacies of federal politics. Led by groups such as the Ad Hoc Committee on the Constitution, the National Action Committee on the Status of Women, the Canadian Advisory Council on the Status of Women, and the National Association of Women and the Law, women entered

decisively into the formulation and defense of two key sections in the *Charter* that would entrench constitutional guarantees of equality between men and women. Keep in mind that this was happening as the Equal Rights Amendment in the United States was in its death throes. The short-term effect of this experience on women activists was total exhaustion: all that organizing and struggle just to insert and maintain a principle that should have passed without question. The longer term effect was energizing and empowering. Women discovered that they could play this constitutional game as well as anyone, especially now that the game was to be dispersed more widely into the courts as well as the provincial and federal legislatures. To a handful of idealists, it seemed as though the promise of the democratic franchise was finally on the verge of realization; or, at the very least, it had been worthwhile getting all those women through law school, after all.

If there was such a utopian view of the *Charter*'s promise for women, it was quickly tempered by the evasions of provincial governments during the three-year waiting period before section 15 of the *Charter* came into force; and it was further dampened by a string of less than enlightened lower court judgments on equality issues between April 1985 and May 1987. No less alarming was the Supreme Court decision in June 1987 insulating Ontario separate school boards from equality rights obligations. Hence, the suspicion, soon hardening into anger, with which the organized women's movement in English Canada greeted the Accord in June and early July 1987.

I am acutely aware that the discrete arguments and events related to women's groups' involvement in the Meech debates are largely unknown at best, and grossly misunderstood at worst, by all but a handful of devoted Meech-watchers. This is, indeed, a large part of women's perennial experience and frustration: that despite more than a century of articulation, women's voices are systematically unheard or misheard in our traditional political discourse, dominated as it is by federalism and parliamentary conventions. The native people have exactly the same complaint, with even more justice behind them: white women at least have had access, of sorts, to education, the professions, the press and other avenues of public participation for the last half century or more. Still, when I look at how the press reported women's submissions to the parliamentary hearings in late August 1987, I wonder whether total disregard might not have been better. Here was a large and, therefore, significant constituency voicing concerns about certain phrases in the Accord, and also voicing, in no uncertain terms, their distress at the rushed pace and undemocratic structure of the process. Soon, however, the "story" of women's criticisms of the Accord became, as far as the media were concerned, the titillating spectacle of Francophone and Anglophone women diverging in public on the impact that the distinct society clause might have on equality rights, and the remedies required to head off any hypothetical dangers. Wrongly and irresponsibly, the press overlooked the explicit endorsation in the majority of Anglophone women's briefs of Québec's five basic demands, including the recognition of Québec as a "distinct society". And so one observed an all-too-familiar scenario wherein, as soon as women's concerns could be viewed through a convenient and dismissive lens – women can never agree on anything – their substantive objections, as well as their substantial agreement on many points, were lost to sight.

A related causality at this early stage in the proceedings – although dramatically confirmed towards Meech's closing months and weeks – was women's insistence that the entire process was illegitimate; that it should never have happened this way, and must never happen this way again. In the measured but pointed phrases of the Federation des femmes du Québec, at the conclusion of their brief to the Parliamentary hearings: "We hope future consultations on the Constitution will give us an opportunity to intervene in time to influence the direction of government policy. We also hope we will be given reasonable notice. We have found it extremely stressful to have to prepare our presentation in such a rush on an issue as fundamental as the Meech Lake Accord."

Throughout the intensive summer and fall of 1987, and indeed throughout the entire three years of the debate, women's groups from Québec and the rest of Canada struggled to understand one another's situations and points of view about the real meaning of the distinct society clause for women. Many national organizations that had formed in the 1960s and 1970s, and were wholly or substantially Anglophone in membership, had spent much of the late '70s and early '80s trying to expand their membership into Québec or, at the very least, establishing formal links with corresponding Québécoise groups. A start had been made in restructuring executives and communications to ensure meaningful Francophone participation, or constructing alliances and opportunities for dialogue where parallel organizations made more sense. Many friendships were formed during this period that were severely strained by the Meech debates. Major organizations like NAC and CRIAW went through agonizing struggles to arrive at a position on Meech that would recognize the legitimacy of Québec's position, and yet take account of the concerns of Anglophone women. Never was the specificity of feminist

politics more clearly illustrated. What prevented total rupture were the foundations of mutual respect and common political purpose that had been laid, however incompletely, during the decade leading up to Meech. In the end, compromises of sorts were arrived at, and, in the process, Anglophone women, in particular, gained a vision of a distinct society where the equality of women and men is widely and irrevocably accepted as a fundamental characteristic of that society. This, needless to say was and is a revolutionary discovery for women in the provinces and territories outside Québec as women and as Canadians – a beacon of hope for our future.

"The effect of women's opposition to the Accord, however diffuse and in many instances ill-informed it was, was far more profound than has so far been recognized by our mainstream political scientists and pundits."

I have spoken of the impact of Meech on women's groups, and now I will speak briefly about the role of Anglophone women's groups' resistance on the overall outcome of Meech, before moving on to a consideration of where we go from here. From my reading of the commentary that has arisen around Meech in English Canada, I think that the effect of women's opposition to the Accord, however diffuse and in many instances ill-informed it was, was far more profound than has so far been recognized by our mainstream political scientists and pundits – Alan Cairns always excepted. As is now widely recognized, there was a fatal miscalculation in the ratification process laid out by the Fathers of Meech. They had apparently assumed that ratification by provincial legislatures would be immediate and automatic – in which case, the provision for such ratification seems in retrospect either hypocritical or silly. (To a few of us, discounted and disregarded at the time, that aspect of the process was suspect from the very beginning.) But a funny thing happened on the way to final approval of the Accord: the New Brunswick election, followed by the Manitoba election, in which opposition to the Accord by provincial status-of-women organizations was explicit and extremely influential. Neither of these elections, of course, should be interpreted as a referendum on Meech. On the other hand, it should not be overlooked that at the provincial level, and especially in those two provinces, Manitoba and New Brunswick, women's groups are pervasive and highly active. And women do, after all, constitute at least half the eligible voters in elections, thanks to the daring move of an earlier generation of male parliamentarians toward genuine democracy in Canada through the enfranchisement of women.

Similarly, I think two other factors have not been sufficiently remarked on. One was Frank McKenna's genuine and principled reservations about the Accord on the grounds that women and native people had been excluded from its construction, reservations that led him to adopt a strategy of delay in order to allow time for remedies to be evolved, remedies such as the "parallel resolution" or the insertion of a "Canada clause" or *Charter* protections. McKenna, too, made a fatal miscalculation in radically underestimating the intransigence of Mulroney, Murray and company. But, in the meantime, his delay, reinforced by Filmon's dilemma and then turnaround in Manitoba, gave time for all citizens' groups critical of the Accord to develop and promulgate their case. In the end it was native peoples, personified by Elijah Harper, who were the effective executioners of the Accord; but here, too, I think the support of Manitoba women's groups for the native cause during the Accord's final days, while possibly not decisive, was not insignificant either. Nor will that alliance between Manitoba women's and native groups, born of common cause and developed over nearly three years, easily dissipate, unless some Machiavellian type finds a way to divide and conquer, through resurrecting section 12(1)(b) or its equivalent. Moreover, I make this prediction with reference not only to Manitoba and New Brunswick politics, but to emerging political coalitions throughout English Canada. Québec after Oka and James Bay II may be a different story.

Where do women fit into the aftermath of Meech? Having alluded to the revolutionary model that Québec society holds out for us all, in according such a remarkable degree of sexual equality to our Québécoise sisters, I will make a few more wildly hopeful projections for our common future. I think we do have to be hopeful. The strains on Canada on other scores – economic, environmental, geopolitical – are so severe that we have no margin for despair about our ability to recover from the damage done by the Meech debates. But I think also we have to be daring in our thinking; to project in terms of transformation, not just a little tinkering at the margins. In saying this, I do not suggest for a moment that as true Canadians we would be anything but prudent and cautious, in Robert Bourassa's oft-repeated formulation, in the methods we use to bring this transformation about. Thus, we can look forward, in anticipation or horror as the case may be, to much more talk: more hearings, more colloquia and conferences and forums, more think pieces for the journals and the popular

media. The chattering classes of Canada will not lack for employment for as long as Canada may chance to endure.

If we have learned anything from the Meech debacle, it is that an aroused Canadian citizenry will no longer stand for backroom deals and high-pressure labour-style negotiations in re-making our constitution. Nor do we any longer have the luxury of a staged-in agenda, in which there is a Québec round followed by a native peoples round followed by a multicultural round followed by a round for disabled people, with women and the poor being told to wait their turn while the more severely disadvantaged take priority.

What I particularly want to urge on you is the further lesson that we can learn from many people, of whom the most authoritative, in traditional political-punditry terms, is Alan Cairns. I agree with Professor Cairns that the consciousness of Canadians vis-à-vis their relations to the state has radically changed during the past decade, straining our existing structures and political dynamics not merely to, but past, the breaking point. Thanks largely to the women's movement, and to feminist theorizing, the personal has become political and the political very personal. And yet where in the musings of our professional academic pundits, except for a handful of feminist political theorists – Catharine MacKinnon, Carole Patemen, Lynda Lange, Jill Vickers — and a few mavericks like Alan Cairns, is there an awareness of the huge gap between old-style understandings and new-style definitions of citizenship, the state, and the exercise of political participation and responsibility? In the multiplicity of think-tanks and colloquia and special journal issues that will no doubt proliferate through the next several years, it seems to me that it must be the so-called minorities – women, who of course are not a minority, and those other excluded groups who are minorities – whose voices must be present, and listened to, and heard. For increasingly it is precisely these groups who are developing a vision of a possible future together in which objectives, values and processes, other than those that poisoned our relations during Meech, are available as foundations for a transformed Canadian political community.

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FIRST NATIONS AND ABORIGINAL RIGHTS

Andrew Bear Robe

ABORIGINAL LAND CLAIMS

Any discussion today regarding land claims in Canada must begin with the proprietary concept of *Indian title*, which essentially means the full and complete aboriginal ownership, occupation and dominion over the North American continent. Aboriginal title essentially means the same as Indian title; both bespeak of an independent legal interest in land which must be satisfied by the Crown before it can claim unencumbered title to any piece of land in North America. Under the Canadian *Constitution* of 1982, aboriginal title can be asserted not only by Indians, but the Inuit and Metis as well, In any case, the Indian title is recognized and protected both by the British Imperial and Canadian Crowns through such Executive acts as the *Royal Proclamation of 1763*, s.109 of the *Constitution Act, 1867*, i.e Indian Trusts and Interests, the *Rupert's Land and North-Western Territory Order of 1870*, the pre- and post-Confederation land cession and peace treaties, the Natural Resources Transfer Agreements of the 1930s respecting the prairie provinces[1] and the more recent comprehensive land claims settlements for the northern regions. All of the foregoing executive undertakings must be read together in order to arrive at the common law and statutory pronouncements regarding Indian title and the associate aboriginal and treaty rights arising therefrom.

As a direct result of the dangerous and volatile situation created at Oka, Québec this past summer, between the Mohawks and the citizens of Québec, everyone in Canada that has expressed an opinion on the subject agrees that the federal land claims policy must be substantially revamped. That policy must now show fresh approaches, new attitudes and more flexible logic if Canadians are to enjoy calmer and lasting peaceful relations with aboriginal peoples. Firstly, the federal government and its huge bureaucracy can begin to appreciate the rich historical perspective of Indian land claims instead of attempting to fit those issues into narrow

property law concepts or restrictive federal land claims criteria. Aboriginal land ownership rights have a far more spiritual and democratic depth than the feudal land tenure system of England, France or Spain. Indian First Nations held communal ownership title and interests to their ancestral lands long before John Cabot or Captain Cook first set foot upon Indian territories. In some cases, as in British Columbia, the Chiefs held direct hereditary title based upon communal interests. Aboriginal land ownership title is no less politically and legally significant than the more individualistic fee simple ownership title of Europeans. Both systems of land tenure served their respective international communities equally well within their own times and continents.

Secondly, even though the Crown may presently claim the underlying title to the Canadian soil, nonetheless the Indian title must be dealt with before the Crown obtains a clear and unencumbered title. The Crown's title is derivative from the Indian title. In other words, before Indian lands become public lands and subsequently private lands, the Indian interests to the land must be purchased via treaty negotiations. This is clear in the land cession and peace treaty process in Canada as late as 1923, and also in the more recent comprehensive land claim settlements with the James Bay Cree and Inuit in 1975 and with the Naskapi of Northern Québec in 1978. Either method of Indian land purchase (i.e. treaty or comprehensive claim settlement) is used to satisfy the legal requirement for addressing the Indian title separately from the Crown's underlying interest. However, huge equity gaps remain to be fulfilled for the Indian side. As late as 1990, large blocs of Canadian soil remain which have never surmounted that legal requirement, hence, these regions are in constant land claim disputes as is the case now in British Columbia, Québec, Maritimes, Yukon, and the Northwest Territories.[2]

Thirdly, the federal government must abandon its dogged insistence that all aboriginal and treaty rights must first be extinguished in any land claim settlement. That line of argument and logic is not only contrary to s.35 of the Canadian *Constitution*, but it is also contrary to the permanent nature of those rights as guaranteed by the Sovereign and international law conventions.

Fourthly, there is an urgent need to create a judicial body outside of federal government structures that can effectively and equitably adjudicate Canada's long outstanding aboriginal land claims; it should be international in its origin, scope and composition. Such an independent body could speed up the land claims settlement process and thereby reduce the huge backlog that has built up over the years, plus diffuse the deep and bitter frustration levels of all aboriginal claimant groups. The federal departments of Justice and Indian Affairs must be removed from their respective central controlling roles in aboriginal land claims, simply because they are in a conflict of interest position. These departments are mandated to protect solely the federal interest and not the Indian interest; they are the judge and jury of all claims; they decide which claims should be negotiated and those to be rejected, irrespective of merit; they decide how much funds should be spend both for compensation and independent legal research. That "take it or leave it" policy must be terminated and a just and more reasonable negotiations process be established for the first time. Lastly, a Canadian Aboriginal Commission needs to be established soon to look into all aboriginal issues, including land claims, and propose some realistic long-term solutions, notwithstanding any other existing federal or provincial commission.

Indian nations prefer to seek redress through the negotiations process rather than through the courts. Let us hope that the next decade will garner a more positive atmosphere for aboriginal relations in Canada. We all have a stake in that goal, both Indian and white alike. Most importantly, the government of Canada must show proper and effective leadership towards resolving this thorny and long overdue national issue.

"There is an urgent need to create a judicial body outside of federal government structures that can effectively and equitably adjudicate Canada's long outstanding aboriginal land claims."

ABORIGINAL SELF-GOVERNMENT

The federal government's efforts in the recent past to integrate us into the mainstream of Canadian society have all failed. Those efforts have failed mainly for two reason: firstly, our societal and cultural values, customs, traditions and beliefs differ greatly from Euro-Canadian society; secondly, the Canadian government has always insisted that we, as Indian people, forget and relinquish all of our sovereign aboriginal and treaty rights as a price for entering mainstream Canadian society. For the above reasons, the federal government's proposal for integration or assimilation have never been acceptable to Canada's Indian First Nations.

There should be no price tag attached to our Canadian citizenship. We have already paid enough.

When Canada's constitution was repatriated in 1982, there was a great hope among the Indian First Nations that substantial changes would be made to our relations with Canada. It was hoped that our sovereign and inherent aboriginal rights would receive full recognition and affirmation; secondly that all outstanding land claims would be settled and; thirdly, that our treaty rights would be elaborated, defined and fulfilled. This great hope was engendered by the *Canadian Charter of Rights and Freedoms*, s. 25 and the *Constitution Act, 1982*, s. 35 and 35.1.

Section 35.1 commits the government of Canada and the provincial governments to the principle of aboriginal participation in a constitutional conference on the amendment of s.91(24) of the *Constitution Act, 1867* and s.25 of the *Charter*. As a moral issue under section 35.1, Indian First Nations should have an equal voice and voting power at such conferences. The Prime Minister should call for a constitutional amendment on that fundamental point.

Both the federal and provincial governments continue to insist that our aboriginal and treaty rights are essentially "empty" rights under the Canadian *Constitution* and that they must be defined through political negotiations. That line of argument ignores the historical development of Indian law and policy since the 15th century which always had shown deference for our sovereign rights to the land and our inherent right to self-determination.

The four First Ministers' Conferences dealing with our aboriginal and treaty rights, held during the 1980s, were failures. Indian First Nations did not fail in those negotiations. We stated our positions firmly and clearly. The main obstacles were the ten provincial Premiers who never took the F.M.C. process seriously. They feared that their own limited sovereignty and jurisdiction would be jeopardized if the aboriginal right to self-government ever became entrenched as constitutional law. Therefore, they simply refused to agree to a constitutional affirmation of our "existing" sovereign and inherent right to self-government.

Another obstacle was the unwillingness of Prime Ministers Trudeau and Mulroney to negotiate directly with Canada's Indian First Nations on the central issue of the aboriginal right to self-government. Both prime ministers were not willing to settle outstanding aboriginal and treaty issues, and they ignored the powerful leverage of the exclusive s.91(24) federal power. In contrast, John A. Macdonald's Conservative government dealt directly with Indian First Nations when the treaties were negotiated during the latter part of the 1800s. That constitutional convention and principle has not changed and there is nothing standing in the way of Parliament dealing directly with sections 91(24), 25, and 35 issues as presently found in the Canadian *Constitution* notwithstanding cooperative or executive federalism.

Since 1870, Indian First Nations in Canada have been governed by federal legislation called the *Indian Act*. The *Indian Act* was not of our making and we of the Siksika Nation were not notified of the application of this Act upon our lands and people at the time of Treaty 7 negotiations in 1877. This *Act* was simply foisted upon us without our discussion, input, and consent. The *Indian Act* gives too much power to the Minister of Indian Affairs and leaves very limited powers for the Siksika Nation to excercise either through referendum of the people or through their Chief and Council. It governs our adulthood, and even past death regarding the management of our estates. The *Act* controls and directs every facet of our lives, our communities, our education, our economic and social development, and it even tells us which individuals are entitled to become members of our nation.

The *Indian Act* is based upon the goal of essential disintegration and assimilation of our people into mainstream Canadian society. Its rules and regulations do not respect nor protect our aboriginal and treaty rights. In fact, the *Indian Act* allows the provincial governments to erode those rights. Indian First Nations had no input into the original design of the *Act* and, through the years, we have had very little impact upon its amendments and changes that affect our lives profoundly.

One of the major problems with the *Indian Act* is the limitations it places upon our ability to make decisions for ourselves or to take action for the benefit of our people. The *Act* simply assumes that the federal government can act unilaterally regarding our affairs and that the decisions of the Chief and Council can be overruled by the Minister of Indian Affairs at any time. The Minister does not even have to give reasons why he would overturn the Council's decisions. That is not democracy, it is *internal colonial dictatorship*.

Most glaringly, the *Indian Act* is based upon the belief that Indians do not have the legal capacity to be responsible for themselves. Legally, we possess rights very similar to minor children and the Minister of Indian Affairs is the

guardian. He is vested with the power to determine who is and who is not an Indian, how to dispose of Indian lands, minerals, tribal funds, and who may and who may not receive services such as education, social assistance, health services, and housing. In particular, we are restricted in the areas of land management, financial management, contract relations with third parties, economic development, and control over our natural and water resources.

Not so long ago, Dr. Lloyd Barber, the former Commissioner on Indian Claims, made the following observations at Yellowknife, N.W.T. in October 1974, which still ring true today. He said:

> I cannot emphasize too strongly that we are in a new ball game. The old approaches are out. We've been allowed to delude ourselves about the situation for a long time because of a basic lack of political power in native communities. This is no longer the case and there is no way that the newly emerging political and legal power of native people is likely to diminish. We must face the situation squarely as a political fact of life, but more importantly, as a fundamental point of honour and fairness. We do, indeed, have a significant piece of unfinished business that lives at the foundation of this country.

Andrew Bear Robe, Division Manager for Indian Government, Land Claims and Membership, Siksika Tribal Administration.

[This essay is an excerpt from Mr. Bear Robe's forthcoming book, *Rebuilding the Siksika Nation – Treaty, Aboriginal and Constitutional Rights* (Gleichen: Siksika Nation, 1991).

1. Alberta's Memorandum of Agreement, dated Jan. 9, 1926, ss. 8, 9 and *The Alberta Natural Resources Act*, S.A. 1930, c.21, ss.10, 12.

2. For a more thorough elaboration see: Bruce A. Clark, *Indian Title in Canada* (Toronto: Carswell, 1987).

THE CONSTITUTIONAL POLITICS OF LANGUAGE

A. Anne McLellan

INTRODUCTION: CULTURE AND LANGUAGE

At the heart of Québec's demands for constitutional reform is a concern for the continuation of Québec's cultural uniqueness. The Meech Lake Accord was viewed as a small, albeit important, step in guaranteeing and protecting Québec's uniqueness and "specificity." As the Minister of Intergovernmental Affairs, Gil Remillard, noted:[1]

> [Québec's] identity must not in any way be jeopardized. We must therefore be assured that the Canadian constitution will explicitly recognize the unique character of Québec society and guarantee us the means necessary to ensure its full development within the framework of Canadian federalism.
>
> Recognition of the unique nature of Québec gives rise to the need for obtaining *real guarantees for our cultural safety*. (emphasis added)

As the comments of Remillard suggest, culture is the principal factor which makes Québec unique and "language is the natural vehicle for a host of other elements of culture".[2] Claude Romand Sheppard, in a working paper prepared for the Royal Commission on Bilingualism and Biculturalism, describes the causal connection between language and the maintenance of cultural distinctiveness in the following terms:[3]

> To say that language is a mere means of communication is to state less than half the truth. It is also, and foremost, the foundation of a particular culture, the prerequisite of its survival and the vehicle of its propagation. In this perspective, language can no longer be treated as an incidental: it becomes the *essential element* of ethnic identity and cultural continuity. (emphasis added)

The Commission, in the General Introduction to its Report, acknowledges the vital link between language and culture:[4]

> We said that language is in the first place an essential expression of a culture in the full sense of the word; from the intellectual standpoint language is certainly the most typical expression of culture.
>
> . . .
>
> The life of the two cultures implies in principle the life of the two languages. Later, when we deal with the idea of equality, we shall see that, at the practical level, an attempt to make every possible provision for cultural equality is primarily an attempt to make every possible provision for linguistic equality.
>
> . . .
>
> Whenever a bilingual state preserves the integrity of its language groups, the tensions that might arise are neutralized to the extent that each of the groups within the state has a sense of cultural security. When a country fails to provide this sense of cultural security, the minority, seeing its language threatened, often tends to harbour feelings of hostility toward the majority and to look for other solutions, including various forms of "national" self-determination outside the framework of the bilingual state.

Because of the centrality of language in relation to the existence, preservation and promotion of cultural identity, the subject of language rights is one of singular importance to a number of constitutional players: for example, the Province of Québec and its Francophone majority, Anglophones within Québec, Francophones outside Québec, other ethnic groups, those whom Professor Cairns has referred to as "third force peoples"[5], and aboriginal peoples. In the past, these diverse groups have been in conflict with one another over the definition and, nature of, language rights and the allocation of resources to further language claims. Due to the centrality of the issue of language in Canadian political and constitutional life, one of the most difficult challenges in any future constitutional negotiations will be the accommodation and reconciliation of these diverse claims. However, before I look to the future in relation to language rights, let me go back and provide a brief overview of where we are, constitutionally and politically, in relation to language rights.

THE DEVELOPMENT OF LINGUISTIC RIGHTS[6]

Historically, ours is a constitutional regime which has always recognized some degree of linguistic duality. This fact was recognized in s.133 of the *Constitution Act, 1867*.[7] In essence, this section provides for the use of either French or English in the business of the federal Parliament and the Québec legislature, and the use of either French or English before those courts established under the authority of Parliament or the Québec Assembly. A similar constitutional provision is found in the *Manitoba Act* (s.23), recognizing the demographic fact that when Manitoba entered Confederation in 1870, the Anglophone and Francophone populations were roughly equal in size. Attempts to ignore s.23 and establish a unilingual English regime in Manitoba were addressed in 1985 by the Supreme Court of Canada, at which time the Court confirmed the binding and mandatory nature of s.23.[8]

When Alberta and Saskatchewan joined Confederation in 1905, s.110 of the *North-West Territories Act*, became part of the constitutions of those provinces. Section 110 provided limited protection to the Francophone minorities in Alberta and Saskatchewan,[9] although, the continued existence of this protection was not made clear until the recent case of *Mercure* v. *The Queen*.[10] The legislative response to this judicial recognition has been largely to remove the protection accorded the Francophone minority by virtue of s.110.[11]

I now move quickly forward to the period 1963-71 during which the Royal Commission on Bilingualism and Biculturalism was created and carried out its work. This Commission was "to inquire into and report upon the existing state of bilingualism and biculturalism in Canada and to recommend what steps should be taken to develop the Canadian Confederation on the basis of an equal partnership between the two founding races."[12] Almost as an aside, reference was made to taking into account the contribution made by other ethnic groups to the cultural enrichment of Canada.

In 1969, in response to recommendations made by the Bilingualism and Biculturalism Commission, the federal Parliament passed the *Official Languages Act*, the main section of which stated:[13]

> The English and French languages are the *official languages* of Canada for all purposes of the Parliament and government of Canada and possess and enjoy *equality of status and equal rights and privileges as to their use in all the institutions of the Parliament and government of Canada*. (emphasis added)

In the same year, New Brunswick enacted an *Official Languages Act* which accorded the English and French languages equal status.[14]

The last event of major significance before the constitu-

tional amendments of 1982 was the passage of the *Charter of the French Language* (Bill 101) in the Province of Québec.[15] The Act made French the official language of the province, and it became the language of the legislature, of legislation and of the courts. Further, the public administration of the province, as well as aspects of private commerce, were to be conducted in French. Access to English schools was restricted to children whose father or mother had attended a school in Québec, the primary language of which was English. This legislation, while recognizing in its preamble a desire to deal fairly and openly with ethnic minorities and the aboriginal peoples, was seen as a major violation of the rights of non-French-speaking peoples.[16]

This brief history, leading up to the constitutional amendments of 1982, clearly indicates that while official bilingualism or an "official languages" policy is of relatively recent origin in Canada, there has been, for a long time, recognition of the concept of bilingualism.[17]

THE *CONSTITUTION ACT, 1982*

In 1982, significant constitutional reform took place in relation to language rights. Linguistic *duality* became an important constitutional norm. Sections 16 to 22 of the *Charter* entrenched in the *Constitution* recognition of English and French as the official languages of Canada and New Brunswick.[18]

Further, s.23 provided minority language education rights to the Francophone and Anglophone minorities. It is this section which is viewed as being fundamental to the continued existence of Francophones outside Québec. It recognizes the importance of language in maintaining cultural identity and the importance of education in maintaining both. In the recent case of *Mahé* v. *The A.G. of Alberta*,[19] the Supreme Court of Canada determined that s.23 parents had the right to at least some degree of management and control over minority language education. The Court recognized that some degree of management and control was vital to ensure that the minority's language and culture would continue to flourish.

Little is said in the *Constitution Act, 1982* about the language claims of those who speak languages other than French and English. Sections 15, 27 and 35 may provide the basis for arguments by aboriginal peoples and "third force" people to some protection of their languages. However, these claims can be described as tenuous at best.[20]

One of the effects of the *Charter* has been to hand Québec a number of defeats in relation to its attempts to control its language and cultural policies. Section 23 (which cannot be opted out of) was used by the Supreme Court of Canada to strike down parts of Bill 101 which limited the rights of Anglophone parents to educate their children in English[21], and the provincial equivalent of s.2(b) was invoked to strike down s.58 of Bill 101, which required French only commercial signs.[22] The Québec government, to the dismay of Anglophones outside of Québec, opted out of this decision. Furthermore, it is doubtful that the Québec government was enthused by the Supreme Court of Canada's articulation of the purpose of s.23 in *Mahé*:[23]

> The purpose is to preserve and *promote* the two official languages of Canada and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population. (emphasis added)

Certainly, the demands of Québec, which later formed the basis of the Meech Lake Accord, were motivated in large part by a perceived need for recognition of its cultural distinctiveness and, in addition, to provide it with the means to protect and promote that cultural distinctiveness.

> *"Canada" would consist of provinces with Anglophone majorities, most of which would probably see little reason to single out tiny Francophone minorities for legislative recognition or promotion."*

THE MEECH LAKE ACCORD

I now turn briefly to the provisions of the Meech Lake Accord. Section 2 of the Accord reinforced the norm of linguistic *duality* when it recognized, as a fundamental characteristic of Canada, the existence of French-speaking Canadians, largely centered in Québec but also present elsewhere, and English-speaking Canadians, concentrated outside Québec but also present in Québec.

This interpretive section provided further recognition for the English and French linguistic minorities and, indeed, recognized their existence as forming part of a fundamental characteristic of Canada. While debate continues as to the meaning and effect of this section, it is reasonable to suggest that this interpretative section could be used to assist in the interpretation of sections such as 23 and 16 to 22 of the *Charter*.

Interestingly, the Accord spoke only of the Parliament of Canada and the provincial legislatures, other than

Québec, acting to *preserve* this fundamental characteristic.

There was no reference to its *promotion*. We can speculate as to what promotion might mean; for example, legislation to ensure provision of a broad range of public services in French at the provincial level. However, the role of the legislature and government of Québec was both to preserve *and promote* the distinct identity of Québec. Of course, what promotion may mean for the Anglophone minority in Québec would hinge upon the definition of "distinct society". Is Québec a distinct society because of its linguistic duality or because of the pervasiveness of the French language in an otherwise predominantly English nation?

There was no recognition in the Accord of the language claims of any other groups.

LOOKING AHEAD

Meech Lake has failed. There is no constitutional recognition of Québec as a "distinct society," and no additional means by which it can protect and promote its cultural distinctiveness. What is likely to occur in another round of constitutional negotiations? The answers depend a great deal upon the position of Québec. For example, if Québec were to seek some form of sovereignty, then the scene is bleak for Francophones outside Québec, while it probably gets brighter for other groups with linguistic claims. "Canada" would consist of provinces with Anglophone majorities, most of which would probably see little reason to single out tiny Francophone minorities for legislative recognition or promotion. The trend would probably be toward recognition of English as the only official language and lumping the Francophone minority in with other ethnic groups in a general multicultural policy. Indeed, the tendency in some provinces might be to recognize minorities, other than the Francophone minority, as enjoying some special status.

The official languages policy, as recognized in sections 16 to 22 of the *Charter*, at least as it applies to federal institutions, would probably cease to exist. Clearly, the main impetus for the policy was the presence of a significant Francophone population within Canada, the vast majority of whom are found in Québec. If Québec were to separate, I should think it would be very difficult for a federal government, even if so inclined, to continue the policy in the face of expected widespread provincial opposition. Greater emphasis might be placed upon multicultural linguistic rights and aboriginal linguistic claims.

If Québec chooses to negotiate with the rest of Canada in an effort to develop some form of reconstituted federalism, what then?

It is likely that Québec will want greater, if not exclusive, jurisdiction over all matters touching upon language and culture. Of course, the recognition of Québec as a "distinct society" will be a given. In addition, Québec will probably want the repeal of s.133 of the *Constitution Act, 1867* and s.23 of the *Charter*, as those sections apply to it. This is not to say that upon the repeal of those sections, the Anglophone minority in Québec will see their language rights disappear. It is simply to suggest that Québec views the issue of language, and its use within Québec, as an exclusively provincial matter. Indeed, the Québec government has stated that language protection for the Anglophone minority would be provided for in their own provincial laws, be it in Québec's *Charter of Rights* or in the *Charter of the French Language*, or perhaps such protection might be found in a future Québec constitution.

While arguing that language and its use, as it relates to Québec, is a matter properly within the exclusive jurisdiction of the province, Québec will also demand *constitutional* guarantees for the protection of the Francophone minority outside Québec. Indeed, Gil Remillard has stated that one of the three reasons the Québec government had for making its Meech Lake demands, and thus agreeing to the constitutional amendments of 1982, was to improve the situation of Francophones living outside Québec. He described the situation of Francophones outside Québec as being one of Québec's major concerns, and spoke particularly of the necessity to clarify important parts of s.23 of the *Charter*. Phrases like "minority language education facilities" and "where numbers warrant" could be defined within the *Constitution* itself to provide greater protection to the Francophone minority outside Québec.[24]

On a more cynical note, it is possible that Québec may sacrifice the Francophone community outside Québec, if that is the price at which exclusive control over language and culture, within Québec, can be bought. The Francophone minority would then be left to the mercy of Anglophone provincial governments, in which political sentiment is often antithetical to the *promotion*, if not the continued existence, of the Francophone minority. If the status quo is maintained in relation to the Francophone minority, statistics indicate that assimilation is unavoidable.

I have said little about the language claims of other groups within Canada; for example, the aboriginal peoples and "third force" peoples. Presently, there appears to be no constitutional recognition, or protection, of these groups' language claims. Some have attempted to create a constitutional language claim for aboriginal peoples on the basis of s.35 of the *Constitution Act, 1982*, in which existing aboriginal

rights are "recognized and affirmed"[25]. However, the success of this argument is uncertain, at best.

The constitutional claims for other ethnic groups are even more tenuous. Difficult legal gymnastics are required to create a claim through the use of sections 15 and 27. The *Official Languages Act* refers in its preamble to the importance of preserving and enhancing the use of languages other than English and French, but the economic reality of language rights is such that after Canada's two official languages are fostered, there are few resources left to provide meaningful support for other language claims.

CONCLUSION

In conclusion, we might note the following:

1. Our history in relation to language has been one of linguistic duality, with little, or no, official recognition of other language claims;

2. The likelihood of this situation continuing depends upon the actions of Québec in the next months. If Québec opts for sovereignty, then the present raison d'être of official language policies largely disappears. The Francophone minority outside Québec will probably be viewed as just another ethnic group and treated accordingly. Indeed, in some provinces, policies might be adopted to enhance other ethnic language claims;

3. If Québec determines that its future is best served within a reconstituted federal state, then it is likely that our present official languages policy will continue, with even greater emphasis placed upon the *promotion* of the Francophone community outside Québec. In addition, Québec will demand exclusive legislative jurisdiction over language and will wish to be exempt from provisions of the *Charter,* such as s.23.

4. However, the language claims of other groups within Canadian society cannot be ignored and, indeed, the level of tension in relation to such claims will rise dramatically as those left out of the Meech Lake process, in particular, aboriginal peoples and "third force" peoples, assert their claims for constitutional recognition and protection.

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1. Taken from a speech by Gil Remillard, Minister of Intergovernmental Affairs for Québec at a conference entitled "Rebuilding the Relationship: Québec and its Confederation Partners", May 9, 1986, reproduced in Anne F. Bayefsky, *Canada's Constitution Act 1982 and Amendments*, Vol. II (Toronto: McGraw-Hill Ryerson Limited, 1989) at 946.
2. Report of the Royal Commission on Bilingualism and Biculturalism, Vol. 1, (Ottawa: Crown's Printer, 1967) General Introduction, at xxxix.
3. *The Law of Languages in Canada*, 10 Studies of the Royal Commission on Bilingualism and Biculturalism (Ottawa, 1971).
4. Royal Commission, *supra*, n. 2 at xxiv, xxxviii and para. 40, p. 14.
5. This is an expression used by Alan Cairns to describe those people of "ethnic backgrounds and cultures outside of the founding peoples." "Citizens (Outsiders) and Governments (Insiders) in Constitution-making: The Case of Meech Lake" (1988) 14 Canadian Public Policy, 120 at 129.
6. Most people agree that linguistic rights are of relatively recent origin and should be kept conceptually distinct from classical human rights. Unlike classical human rights which belong to, and can be exercised by, each person by virtue of their being human, language rights often are described as being collective in nature, requiring a critical mass for their exercise. In addition, linguistic rights are thought to require positive public policy initiatives for their implementation while classical human rights usually flourish with government inaction. Indeed, the implementation of linguistic rights may require that limitations be placed upon individual rights. There is a growing literature on the nature of linguistic rights. For example, see generally D. Schneiderman, ed., *Language and the State: The Law and Politics of Identity* (forthcoming from Les Éditions Yvon Blais, 1991).
7. However, no one could suggest that the limited scope of s.133 provided recognition of offical bilingualism, as a constitutional norm.
8. [1985] 1 S.C.R. 721.
9. s. 110. "Either the English or the French language may be used by any person in the debates of the Legislative Assembly of the Territories and in the proceedings before the courts; and both those languages shall be used in the records and journals of such Assembly; and all ordinances made under this Act shall be printed in both those languages."
10. [1988] 1 S.C.R. 234.
11. For example, *An Act Respecting the Use of the English and French Languages in Saskatchewan* S.S. Vol 5, c.L-6.1 makes English only acceptable for all acts and regulations. However, in s.11(1) any person may use English or French in proceedings before the courts and s.12(1) permits any person to use English or French in the debates of the Assembly.
12. P.C. 1963 - 1106.
13. R.S.C. 1970, c.O-2.
14. R.S.N.B. 1973, c.O-1.
15. R.S.Q. 1977, c.C-11.
16. There have been numerous challenges to this legislation, the earliest being *P.G. Québec* v. *Blaikie (No. 1)*, [1979] 2 S.C.R. 1016 in which it was decided that Québec could not unilaterally amend s.133, as it applied to Québec. Thus, the Court declared ss. 7-13 of Bill 101 unconstitutional.
17. See for a discussion of the legal history of bilingualism in Canada, Sheppard, *supra*, n. 3 at 5 - 92.
18. To date only one case has considered the scope of these provisions: *Société des Acadiens du Noveau Brunswick Inc.*, [1986] 1 S.C.R. 549. This case considered sections 16 and 19(2) of the *Charter* and concluded that s. 19 gave the speaker or issuer of court processes the right to speak and write in her official language but provided no right to be heard or understood in the language of her choice.
19. [1990] 1 S.C.R. 342.
20. *Contra:* see *Language and the State, supra*, note 6, Pt. 9.
21. *The Attorney General of Québec* v. *Québec Protestant School Boards*, [1984] 2 S.C.R. 66.
22. *Ford* v. *A.G. Québec*, [1988] 2 S.C.R. 712; *Devine* v. *A.G. Québec*, [1988] 2 S.C.R. 790.
23. *Supra*, n. 18 at 362.
24. Remillard, *supra*, n. 1.
25. *Language and the State*, *supra*, note 6, Pt. 9

IV
WILL CANADA SURVIVE?

ROADBLOCKS IN THE WAY OF CONSTITUTIONAL CHANGE

Alan C. Cairns

My question is where do we go from here, and how do we get there? I am going to talk about three fundamental impediments which stand in the way of the two major outcomes which I suppose confront us; one, the outcome of a significantly renewed and modified federalism and, the other outcome, a two-nations solution of some kind.

Of the three issues on which I wish to focus, the first two relate to change within federalism, an outcome that leaves us with a recognizable federal system after the next constitutional round of negotiations. If that is the case, we have to come to grips with the role of the *Charter* as a symbol of constitutional identity in English-speaking Canada and therefore as a constraint in responding to Québec. Second, we have to question the principle of equality of the provinces. Can the *Charter* have a significantly differential, i.e. lesser, application in Québec, and can Québec have jurisdictional powers that other provinces don't? If we are to go that route, then English-speaking Canada has to shed its allegiance to the principle of the equality of the provinces that certainly a number of provincial leaders are deeply committed to, and also to the *Charter* as having a uniform coast-to-coast application, a strongly-held belief of many of the groups that contributed to the demise of Meech Lake.

My third issue is the impediment to achieving a two-nations solution outside of federalism inherent in the fact that English-speaking Canada does not have a constitutional existence. It is unavailable as a bargaining partner to negotiate its own passage to independence and the terms of its coexistence with an independent Québec. And it doesn't help us very much for Québécois spokespersons, secure in the fact that they have one provincial government that can speak for the Québec Francophone majority, to tell the rest of us to get our house in order. We are scattered across nine other provinces and two territories and identify with a central government which can't speak for "rest-of-Canada" because it has got to speak for the pan-Canadian dimension of our existence, which includes the Québécois, as long as there is a faint hope that we can continue to live together within one country. It is a fundamental structural dilemma, for which a solution cannot easily be found.

Let's return to the first two issues that we must confront if the attempt is made to accommodate Québec within Canada. That requires us to think again about the *Charter*, to remember that it had broad nation-building political purposes. It was a political document. The federal government supporters of the *Charter* did not believe that Canadians lived in a country where they were unusually likely to be subjected to abuse of power by state authorities. They were not driven by a cringing fear of the Canadian state, federal or provincial. Further, the *Charter* emerged in a country that had been deeply wedded to the British parliamentary tradition with its premise that political elites can be trusted. If they encroached on rights they would only do so after they had weighed the balance of necessities and made a prudential moral judgment. Although the *Charter* project drew sustenance from the global rights revolution, the impetus for its sponsors came from the high political purposes it was intended to serve.

Essentially, the *Charter* was viewed as an instrument to restrain centrifugal provincialism by establishing a base point of Canadian rights which provincial governments had to respect. Second, by its language provisions, especially in the field of education, it was an attempt to keep alive a conception of French Canada that extended beyond Québec. Prime Minister Trudeau, always a keen student of Lord Acton, feared that the coincidence of linguistic and territorial boundaries would lead to the break-up of Canada. So this aspect of the *Charter* was to keep alive Francophone communities in the midst of unsympathetic provincial majorities outside of Québec by requiring provincial governments to provide official minority language education services that they could not be trusted to provide without constitutional compulsion. Now if we sum both of these up, we could say that the purpose of the *Charter* was to transform the psyche of Canadians. The *Charter* was an instrument to get at our very identities, to get at our very souls, to change the way we thought of ourselves. In essence, its purpose was to get Canadians living in provinces to stop thinking of themselves as provincial residents but rather as Canadian citizens who happen to live in a particular province. They were to view the conduct of their provincial governments through the lens

of Canadian rights and were to bring to bear a Canada-wide evaluation of the conduct of all governments in terms of the citizen-state norms singled out by the *Charter*.

Now, in these political terms, the *Charter* has both succeeded and failed. I do not think anyone can read the presentations before the various Meech Lake hearings without concluding that at least among the elites of those organizations that made presentations – various women's groups, ethnic groups, linguistic minorities, and the various equality-seekers of section 15 of the *Charter* – the *Charter* has taken root. It has been a profoundly successful experiment in political engineering in English-speaking Canada if you agree that its purpose was to change the way people viewed their relationship to the constitutional order, by inducing them to think of themselves as belonging to a community of rights bearers conditioned to be deeply offended when they see provincial variations in rights which conflict with the *Charter* premises of uniform treatment. That is a fairly accurate reading of where we now are, supported by the New Brunswick select committee report on Meech Lake. Their report stated that, for Canadians (they should have said English-speaking Canadians) the *Charter* was unquestionably the constitutional instrument with the broadest appeal and the most pervasive psychological impact. It was the focus of their identifications with the constitutional order. The Manitoba Task Force reported that many interveners expressed apprehension that the *Charter* might be deleteriously affected by the 'distinct society clause'. Women's groups had particular concerns about section 28; and ethnic groups linked to section 27 feared they were losing status to the distinct society. To immerse oneself in the various Meech Lake proceedings in order to find out what's going on in the elite stratum of the constitutional culture of English-speaking Canada, is to conclude that the *Charter* has taken root.

"The Charter was an instrument to get at our very identities, to get at our very souls, to change the way we thought of ourselves."

There are a number of groups that are specifically attached to particular clauses. Women talk of section 28 as 'their' clause and they write about the 'taking' of 28; while ethnocultural groups think they took section 27 and some others claim responsibility for particular categories in the section 15 equality rights clause; many of these groups have their own mini-histories of how they overcame the resistance of those recalcitrant first ministers who didn't want to give them their rights and constitutional recognitions. Accordingly, they have a very proprietorial attitude to 'their clause' in the *Constitution* and they keenly watch its status versus other clauses when constitutional reform is underway. Is it perhaps being encroached on or weakened because some other clause is being elevated?

The consequences of Anglophone "*Charterism*" on constitutional reform are profound. The hostility to the Meech Lake distinct society clause and the opposition to Québec's use of the notwithstanding clause on the language of signs, I think, were unquestionably based on a *Charter*-influenced conception of citizenship. Another way of making the same point is that the 'notwithstanding clause' is on the defensive outside of Québec, although one can find all kinds of principled defenders of it in Québec. There are still some defenders in English-speaking Canada, but they're rather more hesitant than Québec supporters, and their numbers have diminished since 1980-82. The *Charter* has had a profound constitutional effect in English-speaking Canada. It greatly restricts the flexibility of political elites negotiating with a Québec still thought of as part of Canada. If Québécois are to remain as fellow citizens, there are limits to how much we can weaken the applicability of the *Charter* in Québec. Outside of Québec, the *Charter* is symbolically and tightly linked to conceptions of Canadian citizenship. That restraint on elite bargaining flexibility is strengthened by the fact that the *Charter* also generates participant orientations in its supporters. This contributes to a distrust of executive federalism in constitutional matters, as Meech Lake made clear. The traditional elites of executive federalism assumed that they could get together and transform the Canadian constitutional regime even if the result was to weaken the *Charter*, however marginally. They were wrong.

On the other hand, of course, the *Charter* has not 'taken' to the same extent amongst the Francophone majority in Québec. A very important piece of research needs to be done on the differential reception that the *Charter* has come to have. Some of it, of course, is due to the deliberate stratagems of the Québec government post-1982. Initially, the Parti Québécois did everything possible to make sure that the image of the *Charter* was stigmatized. Levesque categorically said he was going to do everything legitimately possible to see that "that bloody *Charter*" had as little impact in Québec as he could, and he did, including the across-the-board application of the 'notwithstanding clause'.

In any event, we are faced now with the reality that the *Charter* has become a source of division between

Francophone Québecers and the rest of Canada. Since Canadians outside of Québec don't think that the *Charter* should apply to the rest of Canada but not to Québec if Québec is an ordinary part of Canada, the solution has to be some attribution of a special constitutional status to Québec that takes its residents out of the category of normal Canadian citizenship. It doesn't bother us to know that the *Charter* doesn't apply to people who don't belong to our country. Presumably, if Québécois could be thought of as being in a special category, what we might call *Charter* exceptionalism would be less objectionable.

Is it necessary for the rest of Canada to be persuaded that the future status of Québec is to be sufficiently unique or special that the non- or much weaker applicability of the *Charter* appears constitutionally reasonable? I think the answer is "yes". Unless we come to think of Québécois as not being standard Canadians, the rest of Canada will insist that the *Charter* apply in Québec as it does elsewhere. If we think that way, a constitutional compromise will probably elude us.

The preceding analysis has an interesting consequence, that a large change in the status of Québec is easier to digest than a small one. A large change takes Québécois out of the category of being citizens like everybody else and this justifies a differential *Charter* regime in the way a smaller change, to which the normal rules apply, would not. In other words, we need to devise terminology and constitutional definitions that will make the fact that the *Charter* is not part of a common constitutional culture appear logical and defensible.

The second issue is the need to challenge the principle of the equality of the provinces in the next round of constitutional negotiations. In Meech Lake, we have seen the principle in action, by which a Québec round became a provincial round.

The principle of equality of the provinces, that whatever Québec receives has to be granted to everybody else, has two negative consequences. From Québec's perspective, it is constraining because Québécois realize that at some stage a positive response to their demands is resisted because British Columbians may not wish to strengthen their provincial government. So it makes it harder for Québec to press claims appropriate to its unique situation. From the rest of Canada's perspective, the problem with the equality of the provinces principle, particularly as it applies to jurisdictional concerns, is that the extent and nature of provincialism in rest-of-Canada is driven by Québécois nationalism. And that's simply not acceptable to all kinds of Anglophones. It was unacceptable for many even in its mild Meech Lake version. It will be even more unacceptable next time when the demands will be greater. If we adhere to the principle of equality of the provinces we get into the situation that the cost of accommodating Québec is paid by those English- speaking Canadians who have no desire to strengthen their provincial against their Canadian or central government identity or allegiance.

So we have to ask ourselves, are we prepared to move in the direction of asymmetrical federalism? We have to question the equality of the provinces from two perspectives. Recently the principle of equality of the provinces has come to be thought of essentially as a norm of equality amongst the provinces as provinces. It is seen to be unfair in some sense for Albertans not to have a provincial government wielding the same bundle of jurisdictional responsibilities as Québécois have for their provincial government.

On the other hand, I think we have to resurrect Mr. Trudeau's concern that one of the key reasons for observing the principle of equality of the provinces in terms of jurisdiction was so that one could maintain the equality of status and responsibilities of members of the federal House of Commons. Now this is a crucial constitutional point. It seems to me one cannot have a constitutional system in equilibrium if one province with 75 seats in the House of Commons has M.P.s with voting rights no different from other M.P.s across the whole range of issues that the House addresses, if at the same time many of the issues are provincial issues in Québec because Québec has a superior jurisdiction in five to ten areas.

Constitutional orders can stand a lot of untidiness, a lot of fuzziness, a lot of anomalies, but they cannot stand an anomaly that profound with such a large number of M.P.s if Québec has many jurisdictional powers the rest of the provinces do not have. Such a situation may be viable in small doses, but if we're talking of a big dose, it's not. If, therefore, Québec is to have significantly greater jurisdiction than the other provinces, Québec M.P.s cannot play the same role as other M.P.s. And I'm therefore not sure that we can work our arrangements to have them as members of the same House of Commons. I'm not sure it would be workable. This is particularly so because we're talking of a lot of M.P.s and we're also talking, of course, of a situation which would be fraught with extraordinary symbolism because of the historical context from which it emerged.

The preceding are fundamental issues of principle and constitutional theory which we can't put under the rug.

Unless we grapple with them successfully, we cannot reach an accommodation that is in some sense "federal". It may be that an asymmetrical Québec in terms of jurisdiction will generate such a serious challenge to the equal status of M.P.s that we will be unable to maintain the House of Commons as a common legislative body. Now we might then put another tier of a legislature on top, but then we run into a different set of problems – a certain distaste in English-speaking Canada for legislative complexity.

The third issue relates more to what happens if accommodation within federalism is not possible. Serious practical problems flow from the inescapable reality that in the present structure of the Canadian constitutional order English-speaking Canada has no constitutional existence, no institutional existence, no spokesperson to speak to it or for it, to define it, to debate its future, to bargain with the Québec side. I am always amazed that people don't seem to understand how terribly, terribly threatening this is for a future civilized breakup of Canada that would require negotiators with power to deliver the goods for both Québec and rest-of-Canada as they work out the terms of their disentanglement and subsequent coexistence.

" English-speaking Canada has no constitutional existence, no institutional existence, no spokesperson to speak to it or for it, to define it, to debate its future, to bargain with the Québec side."

It is self-evident that the federal government of all of Canada cannot negotiate on behalf of the rest of Canada with Québec if the goal is two countries, however tightly they might be linked by various treaties and common arrangements. Not only would such a role be objected to in English-speaking Canada, but the federal government would be impossibly cross-pressured, particularly if it had a very strong base of support in Québec. It would be tempted to try to find an accommodation within federalism, even at a very high price, in order to preserve its electoral base of support in Québec. So the federal government can't speak for rest-of-Canada, and it's obvious that provincial governments can't fill the gap no matter how many provincial constitutional commissions they establish. They can't speak for rest-of-Canada – that's not their mandate. It's not the 'jurisdiction' for which they are responsible. So if the long-run resolution of our constitutional problems is to be an amicable parting of the ways, we confront a very serious structural dilemma that English-speaking Canada is headless and voiceless. We are often told by our Québec colleagues that we are lucky to control nine provinces and to exercise majority control in the federal parliament. However this constitutional Midas touch has disabling effects. English-speaking Canada lacks the singular advantage that Québec has, now that it has shed its former feeling of responsibility for and affinity with Francophones outside Québec: a single spokesperson for its position. We're scattered all over the map.

If, therefore, we are forced into the situation where we have to reconstruct the relations between Québec and English-speaking Canada as two nations, English-speaking Canada has to be given time to develop a separate constitutional existence. I am floundering as I try to think my way through the difficulties we have ahead, but it seems to me, though I hesitate to speak so categorically, that this can only happen after Québec separated and elections are held in Canada without Québec, to constitute a new government which can then come to the table. And then they can negotiate at the top whatever degree of linkage seems appropriate.

Now, what worries me in this process is that Canada outside of Québec may reconstruct itself on the basis of a more provincial vision than is appropriate because of the circumstances of the break-up. When Mr. Bourassa, or Jacques Parizeau or Lucien Bouchard or whoever defiantly walks out after negotiations have broken down and says "we're going to go our own way", the rest of Canada is left with the rump of a country whose central government has been destroyed, along with the pan-Canadian dimension of its existence. What remains strong and virile? – the provincial governments. They're going to be there and we have already seen their avaricious conduct in constitutional affairs. And so we can anticipate what we will come up with if the reconstruction of Canada without Québec is led by provincial forces. We will end up with a much more provincial vision of Canada than I think would emerge if we were given time to put our act together after Québec has gone. So I think that we have to try to devise some kind of way, if this is the scenario that unfolds, to develop an understanding in Canada outside of Québec that for some transition period the existing constitution minus Québec should be respected, that we would carry on with what we've got without Québec and then, of course, we'd have a new set of elections and one of the issues in that election would obviously be relations with Québec and the constitutional remaking of rest-of-Canada. Thus I would like to put a damper on the process of constitution-making in a situation of maximum demoralization and insecurity in English-speaking Canada. If

we don't have this slowdown, this transition period, the future national existence of English-speaking Canada will be gravely weakened because its reconstruction will have occurred in the context of a demoralized central government and very strong provincial governments.

So to recapitulate, if we're talking of continuing within federalism we've got to make this big intellectual and normative judgement of the extent to which the *Charter* can be differentially applied in Québec. Second, we have to decide how great a departure from the principle of equality of the provinces is acceptable, making very clear that the real issue is the status of M.P.s in the House of Commons, not the lesser question of variations in the status of the several provincial governments. Third, if a future within federalism is not to be our fate, we have to think very seriously about ways and procedures for English-speaking Canada to get its act together, which is not possible in the existing constitutional structure.

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[A more elaborate presentation of the argument will be published in a volume of research papers commissioned by the Business Council on National Issues, to be edited by Professor Ronald Watts of Queen's University.]

QUÉBEC AFTER MEECH: ON THE THRESHOLD

Lise Bissonnette

I will not dwell too long on the Meech failure. I do not think it is worth it anymore except to say that I am not one to pursue a witch hunt against some individuals for its failure, be they Mrs. Carstairs, Mr. Wells, or Mr. Harper. I think that much of the press indulged too much in that. In the end, why do political deals fail? It is not because of individuals, but because they have to fail. Conflicting visions of Canada were clashing over the Meech Lake Accord and they were, in my view, impossible to reconcile while they were both absolutely legitimate.

In all of my editorials I have written that I understood perfectly why people opposed the Meech Lake Accord and why people in Québec wanted it. In both cases, one was not more of a culprit than the other. It is possible that legitimate views conflict, and so if you cannot reconcile them, you just don't. You just stop trying, at least for this kind of accord. Should Meech have been signed, I am totally convinced that the clash would have manifested itself nevertheless in the future. We would have had a period of calm, no doubt, but ten years from now the same problems would have come up again. Meech failed, then, and that is it.

I wish to address here a few of the clichés that some of my friends and colleagues, very often from the English-speaking press in Canada, are still challenging. First, and I am totally convinced of this, Québec will not go back to the negotiating table, at least the negotiating table as we know it. Québec will not abide by the present constitutional rules whereby one or two smaller provinces can challenge a majority's consensus. That is quite clear. We can have discussions about it, of course, but I do not see any kind of Meech II if that means we go by the same rules.

Second, the post-Meech mood of renewed nationalism is a resilient one in Québec. I recall this summer, when the Mohawk crisis erupted in mid-July, when I read many an editorial in English Canada that triumphantly stated that the national question would go on the back-burner and that Québecers would soon forget about their mood of the 24th of June. Well, if you look at the opinion polls today, you will see that they are consistent with where they were just at the time of the failure of the Meech Lake Accord. So this is not something that is going to just go away when the public mood changes. And that is quite remarkable because if you watch public opinion today on any other question, it is usually very volatile. But in Québec, this stand in favour of larger sovereignty or political autonomy is there, and it seems there to stay.

Third, if Canada has any chance to remain a country, it will have to accept many greater changes than most people outside of Québec are presently prepared to accept. This is in contrast to those who argue that, if Canada is to remain

a country, it must not accept radical change except for a Triple E Senate.

I was asked to deal specifically with the work of the Commission on the Political and Constitutional Future of Québec — the official name of the Belanger-Campeau Commission. The Commission was created, admittedly with some difficulty, over the summer but is now in full speed. The commission has such a large mandate that it can operate almost without a framework. The Commission's enabling legislation says only that the Commission must look at the future of Québec and make recommendations. That's about all.

"If Canada has any chance to remain a country, it will have to accept many greater changes than most people outside of Québec are presently prepared to accept."

It is an enlarged parliamentary commission, and it is supposed to report to the government in March and may make any recommendations it wants on Québec's future. So it might come up with not only constitutional recommendations, but other kinds of recommendations as well.

I am among the pundits who sharply criticized the Commission from the beginning, basically because of its membership. It is overloaded with businessmen, and has no representation to speak of from the intellectual and cultural communities that are still, in my view, Québec's most dynamic forces when it comes to reflecting on the future, whatever the new entrepreneurial class might say in Québec right now. It is also threatened by the fact that most members have arrived there with an agenda that is dictated by their own party or by their own interest group. Their mandates are pre-defined. They are not sitting there as individuals but, rather, as formal representatives of unions, for example, or corporate associations or federal or provincial parties, et cetera, so I don't think that they are as free as they should be to think, without prejudice, about the future of Québec.

The Commission is also hindered by the fact that it is co-chaired because Mr. Bourassa and Mr. Parizeau were unable to agree on the chairperson. One, Mr. Belanger, is categorized by us in the press as being a federalist and, the other, Mr. Campeau, as wearing an independantiste label. They both deny that this is so, and say that they are nonpartisan and all that. Of course, they are not people who have been in active politics, but they have been unable to escape that kind of categorization and description.

By and large, however, whatever we might have said at the very beginning, the Commission is able to function quite well. The hearings have now been completed both in Montreal and Québec City, and the Commission is beginning to travel to other regions in the province. The hearings are televised, widely reported on, and attract a lot of attention.

Many more people than I would have thought cared to participate in the hearings, despite their being given very short notice to make a presentation, and a lot of them have made written submissions to the Commission. In fact, we at *Le Devoir* are deluged with memoirs from all sorts of people who want to get in our pages because they can't go to the hearings or because there is not enough time to hear all of them. So it is a massive review, but it's really a very lively discussion. The estimated total of presentations will be around five hundred, and they come from all political horizons. Despite some ugly scenes, when strong differences were voiced in strong language — but they were less ugly than what we have seen recently in the Senate — most of the hearings have been quite calm.

When the Commission put an end to its hearings in Montreal, there was some talk of an already emerging consensus, the main elements of which were the following. First, I think it is quite clear that almost every member of this Commission, and it has got members of all political stripes, will agree that the status quo is unthinkable.

Second, they will agree, admittedly a very large and sketchy agreement, that Québec needs much more political autonomy, notably in the fields of immigration, communications, culture, industrial policy, research and development, and agriculture. I would add the topic of manpower training and development which is fastly rising to the top of the agenda in Québec. But, as Mr. Parizeau says, if you add all of the fields that people have been invoking before this Commission, you end up with quite a sovereign country. Although it is not the same people who are asking for the same powers, nevertheless, the real trend is towards much more power to be exercised by the provincial government.

Third, the preferred solution, and that, again, is just an emerging consensus, would be either a very decentralized federation or something like sovereignty association. There is more and more talk about this, even in the governing

Liberal Party of Québec. You hear continuously people matter-of-factly saying: "Well, you know, we're looking at sovereignty association." This was absolutely unthinkable ten years ago at the time of the May 1980 Referendum. The same people that were on the "no" side at that time are now talking about sovereignty association, which they voted and fought against in 1980 as if it were the most natural thing on earth. This is true especially among the young members of the Liberal Party, a very active wing of the Québec Liberal Party. Mind you, a consensus is not unanimity, and I am certainly not saying that the Equality Party, which is the Anglophone-protest provincial party, is party to such a consensus. But, by and large, the Pequistes and the Liberals would agree in this general sense, though the Pequistes and the Liberals are fighting like mad over questions of strategy and over details of the final design of a new status for Québec. The kind of sophisticated questions that they are asking, for example, is: do you need a supernational structure like the European Community or another kind of structure, and do you need to still send people to Ottawa or not?

Most public opinion polls are supporting the general consensus developing within the Commission, with, perhaps, two-thirds of the Québec population supporting the idea of some kind of sovereign Québec formally associated with the rest of Canada. To put it in a more sophisticated way, I think that most members of the Commission today would gladly settle for a kind of "confederal solution". That means a very decentralized federation such as the one that Europe is talking about. If you want to hear a lot about Europe, come to Québec right now for people have taken a great interest in Europe. They are discussing Europe almost as much as they do in Great Britain these days.

Premier Bourassa's own obsession with the European model has often led him to overstate the case and, in my view, to forget conveniently that Europe is still basically a collection of very sovereign states. These states are still far from political union, and they are still battling a lot over trade liberalization. Most Québecers would nevertheless agree that the Canadian solution, such as the one the Europeans seem to be contemplating, would be good for Québec and for Canada.

There is, then, a basic consensus in Québec on the overall objective. The burning question, and the one that is rapidly emerging as the most important issue, is about strategy. How do you achieve a sort of economic Canadian community just like the EEC on this side of the Atlantic? In Europe, and I think this is the basic difference that we must not forget in Québec, people are sort of enthralled by the building process that they are engaging in. Countries are working together to find common ground and they have a distinct sense of purpose about building Europe. In Canada, if we really wish to get where Europe wants to go, we would have to start from totally another point. We would have to deconstruct the present Confederation, break it into several parts, and only then would we be able to find some new common ground. This is a process unheard of and, I think, almost impossible to see, at least at first sight.

Speaking to the Belanger-Campeau Commission, three representatives of the Québec Association of Economists, all from very different political backgrounds, agreed on one thing: unless the rest of Canada is ready to re-think Confederation on its own, we are in for troubled times. People are beginning to face that fact in Québec also.

"There is no stopping Québec's movement towards more political autonomy."

There is no stopping Québec's movement towards more political autonomy. But if there were to be an angry reaction in other provinces, it could create certain economic turmoil and paralysis for years. That is not blackmail, by the way. It is just stating the facts. If you can't stop the movement in Québec, and if cooperation is not forthcoming from the rest of Canada, we're in for trouble. So we might as well face that, and that is very much a part of the discussion in Québec also.

I would buy the hypothesis of my colleague Don Braid in his just-published brilliant book, *Break Up*.[1] I would expect more tensions and resistance from Ontario than from the West because I feel that a true Confederation is also sometimes hoped for in this part of the country, whatever the specific hostility to some of Québec's demands or policies. I won't dwell further on what the West could do. I am only warning that your answer to these questions will have to come sooner rather than later.

More and more, the Belanger-Campeau Commission and the many groups involved in the present debate are coming to the realization that a referendum will have to be held in Québec in order to give other Canadians a clear sign that one-on-one negotiations are needed. We don't know what the question would be in that referendum, but no Québec Government, be it the Parti Québécois Government or the Liberals, could afford to just get elected or re-elected next

time around and say: "Well, this is the Québec consensus and here we go." I think that other provinces, quite legitimately, will ask that the Québec population say something clearly, and not only in an election. So there is more and more talk of an early referendum once the work of the Belanger-Campeau Commission is completed.

Ontario's throne speech in November 1990 stated in a very bland way — I was quite surprised that they didn't seem to have one idea about constitutional issues — that the next five years will be crucial for the settling of Canada's constitutional problems. I think that they've got the numbers wrong (and you might say that that happens from time to time). By next summer, one moment of truth might be upon us.

For my part, I am still of the view that a meeting of minds is possible if there is, in places such as this one, a deep desire for change, and not only for a Triple E Senate.

Lise Bissonnette, Publisher, *Le Devoir.*

[This essay is an edited version of a presentation before Alberta's Constitutional Reform Task Force, Roundtable III, November 23, 1990 "Restructuring Federalism"].

1. Don Braid and Sydney Sharpe, *Break Up: Why The West Feels Left Out of Canada* (Toronto: Key Porter Books, 1990).

CANADA AND QUÉBEC PLAYING CONSTITUTIONAL CHICKEN: THE VIEW FROM AN AUSTRALIAN PEDESTRIAN

Greg Craven

Over the past five months, I have toured Canada talking on the general subject of secession, with specific application to the present Québec-Canada scenario. My slender qualifications for this pilgrimage to Montreal via Vancouver, Calgary, Edmonton, Halifax, Victoria, Kingston, Toronto and Saskatchewan is that I have written a book on the subject of secession in Australia, which naturally also seeks to place secession in a rather more general context. Thus, any perceptions which I may bring to the present vexed topic of Québec's secession from Canada are confessedly not those of a Canadian constitutional expert: rather, they are the views of one who knows something about secession from federal states, but who does not profess to know a great deal about secession from Canada. I will attempt to make a few succinct points which seem to me be worth setting down.

The first is that judging the situation not by reference to timeworn truisms of Canadian constitutional debate ('Québec has whined for two hundred years, she'll whine for another two hundred, there's no problem'), but rather from the perspective of the common course of secession movements in federal states, the situation is very serious indeed. What Canada faces in Québec is a separatist movement of long-standing, fuelled by ancient feelings of ethnic difference and intensified by a perception of recent and continuing ill-treatment. Such movements are of extraordinary potency and danger to their parent states, as multiple historical instances attest.

Moreover, there can be little doubt that the emotional engagement between Québec and English-speaking Canada has been dissipating on both sides over a long period of time — a process accelerated by the recent contretemps over Meech Lake — and is now rapidly approaching the point at which even the minimal degree of involvement represented by mutual dislike has been replaced by the indifference of an irritated weariness. The truth is that, like some battle-scarred couple, Québec and Canada appear no longer to care very much, and it is precisely this feeling of disengagement that has caused other federations to reel and some to totter in the face of secession movements. To anyone who has been a student of secession movements in other federal states, whether in America, Australia or elsewhere, Canada shows every sign of being a federation on the very edge of disintegration.

Of course, to many Canadians, this will be anathema. I have already branded myself as, at best,a doom-sayer (and an ignorant foreign doom-sayer at that), and probably as something worse: a 'Meechie', or even (yes, I have heard the term used) a 'collaborator'. To such Canadians I will add insult to injury by suggesting that they themselves in fact fit

precisely into the pattern of a federal state facing a grave secession crisis. For one of the most common reactions of partisans of a parent state in such a crisis is to deny the existence of any problem. Such behaviour was profoundly apparent in the United States prior to the American Civil War, and was equally evident in my own country at the time of Western Australia's concerted attempt to secede during the 1930s. No-one wants to face the disintegration of their country, with all the implicit and explicit statements of rejection that this will involve, and certainly no-one will want to accept the awful necessity of facing the crisis and seeking to resolve it. Far better in all the circumstances to resolutely deny its existence, and peremptorily to execute any messengers of disaster that might stray across one's path. A recognition of this strategy of 'desperate denial' helps explain why its proponents treat prophets of Québec's separation not as the poor fools that they profess to believe them, but more like rabid dogs.

"The truth is that, like some battle-scarred couple, Quebec and Canada appear no longer to care very much, and it is precisely this feeling of disengagement that has caused other federations to reel and some to totter in the face of secession movements."

Of course, even some profoundly confident Canadian constitutional pundits have been forced to recognize in the light of the failure of Meech Lake, the increasing belligerence of Québec and the proliferation of constitutional road-shows, that there is currently some problem in Canada's constitutional arrangements, and that the relationship between Québec and Canada lies at the heart of this problem. But even here, denial has its role to play. The cry becomes not 'There is no problem!' but 'Yes, there is a problem, but it will be easy to solve.' From this phenomenon sprouts countless confident prophecies that the Canadian genius for compromise will carry the day, that only minor adjustments to the federal structure are needed, that Canada can easily and painlessly transform itself into some North American Switzerland, *et cetera*. At no point are the quite terrible dangers recognized and realistically considered, or any detailed blueprint for the future set out.

What seems to remain hidden from large sections of the Canadian people, both within but particularly without Québec, is that the secession of that Province will carry with it consequences potentially far more serious than the recalling of existing political maps of Canada. There exists a common attitude in English-speaking Canada to the effect of 'Let them go!'. But there is a critical failure to appreciate the fact that the removal of Québec from the Canadian federal equation will almost certainly destabilize the entire federation. At the very least, this will necessitate a wholesale recasting of political relationships, and possibly the disintegration of the national structure. Why, for example, would Western Canada remain in the long-term within a truncated national union with the much-hated Ontario? Why would Ontario, once the heat of the moment had passed, prefer Western Canada to Québec? To anyone hopeful of Canadian unity, these are important and not readily answerable questions.

Even grimmer issues arise. Most Canadians assert that whatever else is true, violence is not a possibility in connection with the secession of Québec. It is difficult even to be polite about this pious platitude. Secessions are inherently unstable political events of the utmost unpredictability: no-one can rule out the possibility of violence. To take one scenario only: Québec secedes; it nervously awaits the reaction of English-speaking Canada; the native population of Québec rejects secession; barricades are erected; Québec determines on a swift, surgical removal of the problem; tension in the rest of Canada mounts; pressure builds on the Canadian government to intervene; Québec's operation is mishandled, with consequent loss of life; outrage erupts across Canada. Anyone who is prepared to dismiss such a scenario and its escalation into broader violence as simply implausible is either not thinking straight or not thinking at all. Nor is this by any means the only 'fact pattern' which could be put forward as a genesis for the outbreak of violence.

One thing that all this strongly suggests is that those from either side who are prepared to contemplate secession should think long and hard as to the price that they are prepared to pay, and as to the risks that they are prepared to run. In English-speaking Canada there is a tendency to think that the underlying equation in the whole impasse concerns what the rest of the nation is prepared to concede to Québec out of the goodness of its heart. This is quite wrong, and Canada should simultaneously cultivate the constitutional virtues of realism and self-interest. The real issue is quite simple for the rest of Canada: what is the continued presence of Québec worth to them? It is here that visions of wider disintegration and the outbreak of violence are highly relevant. To both paraphrase and contradict Kennedy, Canadians should be asking themselves not what they can do for Québec, but what Québec can do for them. Paradoxically, the answer to this latter question

will be far more productive of intelligent concessions to Québec.

"There is a critical failure to appreciate the fact that the removal of Quebec from the Canadian federal equation will almost certainly destabilize the entire federation."

Unfortunately, Canadians are not asking themselves this question. Tragically, the very horrors that may well flow from the secession of Québec are seen not as reasons for negotiating, but are rather triumphantly put forward as facts demonstrating that this eventuality could never come to pass. It is all rather like the argument that there is no need for nuclear arms control, because a nuclear war would be so horrible that no-one would ever start one.

So what does this particular presumptuous foreigner believe that Canada should be doing? The answer is, critically, that it should be doing something, anything, rather than simply waiting for the blow to fall while denying that any arm is raised against it. On my assessment, Canada faces probably its gravest constitutional crisis. Big problems require big responses. Time has passed by solutions of the type offered by Meech Lake, and was never even on the same road as the risible Spicer Commission. When a nation faces disintegration, the only option is reintegration, and this is a work of constitutional creation, not tinkering. Eighteen sixty-seven comes around again next year and, the sooner Canada realizes it, the better.

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[Professor Craven's views are more fully set out in "Of Federalism, Secession, Canada and Québec" forthcoming in the *Dalhousie Law Journal*. His book on succession in Australia is *Sucession: The Ultimate States Right* (Carlton, Victoria: University of Melbourne Press, 1986)].

CANADA AFTER MEECH

Bruce P. Elman
and
A. Anne McLellan

INTRODUCTION

This comment is divided into two parts. First, we will review the events surrounding the formulation and subsequent demise of the Meech Lake Accord. Second, we will try to identify, and comment upon, some of the effects of the failure to reach agreement on the principles contained in the Accord.

THE PROCESS

April 17, 1982, was an extraordinarily important date in Canadian history. On that day, Canada's quest for sovereignty from Great Britain was realized. By affixing her signature to the *Canada Act, 1982*, Queen Elizabeth patriated the Canadian *Constitution*, making Canadians solely responsible for any future changes in their constitutional regime. At the same time, the very nature of Canada was changed from a country ruled by the principle of parliamentary sovereignty to one governed by the rule of constitutional supremacy.

Long sought-after constitutional reform had been achieved. In spite of the blustery weather conditions, there were smiles all around. Only one factor cast a damper on this moment. Québec was not a signatory to the constitutional agreement. Québec had, through its referendum on sovereignty provided the impetus for reform. And yet, while celebrations were going on in Ottawa, Québec was preparing to exercise its legal right to opt-out of significant parts of the Constitution.

A constitutional impasse ensued. Eventually new governments came to power in both Québec City and Ottawa. These governments, headed by Robert Bourassa and Brian Mulroney, wanted a deal that would end Québec's

constitutional isolation. The beginning of the process to achieve such a deal began in May of 1986 when Gil Remillard, Québec's Intergovernmental Affairs Minister, spelled out the five conditions for Québec's acceptance of the 1982 Constitution:

1. Recognition of Québec as a distinct society.
2. A greater provincial role in matters of immigration.
3. A provincial role in appointments to the Supreme Court of Canada.
4. Limitation on the federal spending power.
5. A veto for Québec on constitutional amendments.

On the 30th of April, 1987, the eleven first ministers — gathered in a cabin by the shore of Meech Lake and, hidden from the prying eyes of aboriginal groups, women's groups, and special interests groups of all sorts, they struck a deal on the future of Canada. Québec's five demands were incorporated in what became known as the Meech Lake Accord.

It became clear that the other nine provinces wanted many of the same things that Québec wanted and, consequently, all the provinces were willing to carve up the Canadian pie. The Prime Minister wasn't going to stop them — he was, quite simply, desperate for a deal. A month later the first ministers met again in the Langevin Block in Ottawa and sealed the deal. On June 3rd, 1987 the Constitutional Accord was signed and the process of selling it to the country began.

This should have been easy. After all, they had the unanimous agreement of all the provincial premiers. Now all the premiers had to do was pass resolutions in their provincial assemblies ratifying the deal. The first ratification came from Québec on June 23rd, 1987. There were 3 more years to obtain the ratification of the other nine provinces and the federal government. The process of ratification went smoothly at first. The federal government and seven more provinces joined Québec in ratifying the accord. Only New Brunswick and Manitoba remained and there seemed to be plenty of time to obtain those ratifications. Then the process hit some unforseen snags. New governments took office in Manitoba — Gary Filmon's minority government replaced the government of Howard Pawley — and in New Brunswick — Frank McKenna replaced Richard Hatfield. From the outset McKenna was an opponent of the Accord while Filmon was coping with the problems of a minority government. In Newfoundland, Clyde Wells' Liberals replaced Brian Peckford's Conservatives. Ultimately, Wells revoked Newfoundland's ratification of the agreement.

As of June, 1990 — the last month for ratification — three provinces were holding out. A meeting of first ministers was held in Ottawa in an attempt to salvage the Accord. Finally, on June 9th, an agreement was concluded which provided that the Accord would be put before the legislatures in New Brunswick, Newfoundland and Manitoba. New Brunswick ratified the agreement but the legislatures in Manitoba and Newfoundland did not. In large measure the Accord was rejected because of the defiance of Elijah Harper, an aboriginal Canadian, who refused to give the unanimous consent necessary for Manitoba to debate the measure.

"The fact that one native person was able to that which Clyde Wells, Gary Filmon and others were unable to do was an act which has emboldened and strengthened the resolve of native peoples to demand that their constitutional aspirations and concerns now be moved to the top of the constitutional reform agenda."

After the frenetic activity of the spring, a summer to "cool down" was needed. Canada needed time to heal the emotional scars which accompanied the Meech Lake fiasco. But it was not to be. A number of important events have transpired since the failure of Meech Lake? These include:

(1) The establishment by Premier Bourassa of the Bélanger-Campeau Commission to receive submissions and make recommendations in relation to Québec's constitutional future. Commissions have been created in Alberta, New Brunswick and Manitoba as well.
(2) At this summer's Western Premiers' conference, the Premiers attempted to develop a unified strategy for future negotiations with the federal government.
(3) At the annual Premiers' Conference in Winnipeg, the Premiers made it clear that they would not accept separate constitutional negotiations between the federal and Québec governments. Premier Bourassa was not in attendance.
(4) The Oka crisis and the claims of aboriginal peoples for some form of sovereign recognition. Indeed, this one event — the Oka crisis and related aboriginal protests, particularly, the one at Kahnisetawke — heightened tensions and increased the level of anxiety of all Canadians regarding the future of their country.

(5) The dramatic defeat of the Peterson government in Ontario. We must keep in mind that David Peterson had been hailed as a "modern father of Confederation" just weeks before.
(6) The decision of Premier Frank McKenna of New Brunswick to ask the Maritime Premiers to consider some form of economic union.
(7) The reelection of the Filmon government in Manitoba.
(8) The setting up by the Federal Government of the twelve member Citizen's Forum on Canada's Future.

THE RESULTS

What has been the effect of the failure to reach agreement on the Meech Lake Accord? A number of consequences can be identified:

1. THE EMPOWERMENT OF CANADA'S ABORIGINAL PEOPLES

The stand-off at Oka, and other related native protests, may be seen as a logical outcome of the failure to reach an agreement on the Meech Lake Accord. Aboriginal Canadians had requested for years that their claims to sovereignty be put on the constitutional table for resolution. However, at least since 1984, the obsession of the federal government has been to bring Québec into the "constitutional family." While clearly an important moral, if not legal, objective, this objective sounded a sour note with Canada's native community. The exclusion of their concerns from the Meech Lake Accord, and their dismissal with the refrain "wait till the next round", has produced to a volatile political situation.

The empowerment which native peoples felt at the failure of the Meech Lake Accord cannot be underestimated. The fact that one native person was able to that which Clyde Wells, Gary Filmon and others were unable to do was an act which has emboldened and strengthened the resolve of native peoples to demand that their constitutional aspirations and concerns now be moved to the top of the constitutional reform agenda. Recent polls may strengthen the native position. In an October 30, 1990 G&M/CBC Poll, 55% of Canadians think that the government is not doing enough to settle native land claims.

Over the summer months, the issue of sovereignty did consume the Québec government and people of Québec but the sovereign claims being considered were those of the native peoples in Québec. The irony of this situation cannot be lost on Premier Bourassa and the Québec people. To further their sense of discomfort is the fact that, as some reports suggest, approximately 95% of the territory of the province of Québec is subject to land claims by native peoples. This might indeed lead to a collective sense of insecurity on the part of Francophone Québecers.

2. INCREASING DEMANDS FROM THE PROVINCE OF QUÉBEC

While aboriginal claims may have the effect of pushing Québec's sovereign aspirations to one side for the moment, the reality is that this issue remains the central challenge to Canada's future as a federal state. The Bélanger-Campeau Commission will be reporting in the spring of 1991 with proposals for reform. The rejection of the Meech Lake Accord by English Canada has served to heighten feelings of Québec nationalism. It is predictable that the proposals which come forth from this Commission will be more "sovereignty oriented" than many English Canadians would like. In the same G&M/CBC Poll, 63% of Québecers saw separation from Canada as either very likely or somewhat likely. Only 37% of Québecers thought things should remain as they are today.

> *"Greater decentralization is inevitable; the real question is how much decentralization we can tolerate and still have, in more than name only, a federal state."*

One thing that seems to have slipped the attention of many people is that Québec's five demands prior to Meech Lake were seen by the people and government of Québec as an "opening gambit". Québec saw the Meech Lake Accord as the beginning of serious constitutional negotiations, not the culmination of them. Their 1985 discussion paper stated:

> Constitutional discussions should be reopened with the clear understanding that a comprehensive review of the *Constitution* must eventually be proceeded with. The process that is beginning will only be truly meaningful if it includes key elements which evidence a new spirit of dialogue.

Now that Meech Lake has failed, we can only presume that the demands of Québec will be considerably more far reaching than they were prior to June of 1990. The areas in which Québec will seek greater jurisdiction can be readily identified: (1) communications; (2) interprovincial and

international trade; (3) taxation; (4) external affairs; (5) limitations on the federal spending power; (6) a veto over all proposed constitutional amendments; (7) retention of the opting-out provision in the *Charter*, if the *Charter* is to apply at all; (8) jurisdiction over the appointment of all superior court judges; (9) consent to any Supreme Court of Canada appointments from the province of Québec; (10) greater control over language policies and greater protection for linguistic minorities outside Québec; (11) a Senate to which members are appointed by the provincial government. We might add here parenthetically that Québec has never been interested in an elected Senate; (12) immigration; and (13) recognition of Québec as a distinct society. We must recognize that a number of these areas are ones over which all provincial governments would be happy to have greater jurisdiction.

Furthermore, it is clear that Québec is not interested in "re-building the traditional relationship at either the economic or political level". Premier Bourassa continues to be attracted to the European Community model as a workable one for a reconstituted federal state. While the outline of this model has not been constructed, his vision of Québec as a "nation-state within Canada" provides us with some insight as to what a future Québec proposal might look like. Greater decentralization is inevitable; the real question is how much decentralization we can tolerate and still have, in more than name only, a federal state.

"Our leaders simply cannot conceive of what they can do next on the national level to move constitutional negotiations forward and, hence, they have retreated to regional strategies designed to ensure they get their share of the pie."

The reality is that strong feelings of nationalism exist in Québec. They are not going to disappear. The difficult issue for constitutional reformers is how to accommodate creatively these feelings of nationalism while retaining the basic structure of a federal state.

The price Québec will demand to remain within the federal system will be high. As columnist William Johnson of the Montreal Gazette noted last June: "The price will never be lower than Meech." Whether the rest of Canada is interested in paying the price is difficult to predict, although we sense a hardening of resolve on the part of many Canadians. The use of the notwithstanding clause by Québec to exempt Bill 178 from the *Charter* and the awarding of the CF-18 contract to a Québec firm have had a profound impact on many westerners. Many may simply be prepared to say "let Québec go."

3. THE REGIONALIZATION OF CANADA

We have seen since the failure of Meech Lake, in more pronounced fashion than ever before, the "regionalization of Canada". This regionalism has taken two forms. First, the politics of regionalism have become the main focus of established political parties and leaders. We have seen some recent examples. The Western Premiers met in July 1990 and the main focus of their discussions concerned strategies for ensuring that the Western provinces got their "share of the pie" when it came to further negotiations with the federal government. Saskatchewan Premier Devine was quoted as saying: "It's time Western Canada spoke up with a united voice. We are increasingly frustrated at seeing deals with central Canadian provinces and Ottawa." Premier McKenna of New Brunswick has recently called for a Maritime economic union to increase the bargaining power of that region. It seems that since Meech, the predominant strategy of the provinces is a limited, and we would say selfish, one focusing on the enhancement of regional interests at the expense of a national vision. This, we believe, demonstrates the paucity of creative solutions to our current crisis. Our leaders simply cannot conceive of what they can do next on the national level to move constitutional negotiations forward and, hence, they have retreated to regional strategies designed to ensure they get their share of the pie.

Secondly, we have seen the growth of regional protest parties in the federal political arena. These parties — the Reform Party and the Bloc Québécois —have sprung up and, indeed, flourished by responding to the deep dissatisfaction expressed by many in relation to the current state of politics in Canada. The Reform Party existed prior to the Meech Lake crisis but its popularity and attractiveness has grown since the failure of Meech. In addition, we see the creation of a second new party, the Bloc Québécois. This party was born directly out of the failure of Meech Lake and appears to capture the sense of frustration many Québecers feel. These parties, at present, attract support by espousing what we would describe as regional interests: western alienation, suspicion of the East and the federal government, a desire for a larger "say" in the economic decisions that affect westerners lives and, in Québec, a desire to create a new deal for Francophones. They exploit negative feelings and emotions. This results in greater

tension, and further fragmentation of the Canadian polity. While the politics of regionalism has its place, there is an attendant danger that the larger, collective interests of the country — the interests of Canada, if you like — are not articulated and are forgotten in the rush to pursue the politics of regional self-interest.

Further, suppose in the next federal election the Bloc Québécois wins 35 seats in Québec and the Reform Party 30 seats in the West. It is very likely that a minority government would result in Ottawa with a highly factionalized Parliament. Effective government would become more difficult if not impossible. This does not auger well for constitutional reform which generally requires a strong federal government to initiate discussions and bring the provinces to the table. At a time when a strong voice is required to articulate a national vision, such a voice would be muted or, more likely, would speak in a number of tongues.

4. HEIGHTENED PUBLIC CYNICISM ABOUT POLITICS AND POLITICIANS

We are undoubtedly witnessing a heightened level of public dissatisfaction and cynicism about politicians and the political process. One senses a national collective response: "we're fed up with the lot of you and we're not going to take it any more." This response is obviously not exclusively generated by the Meech experience, but Meech was the "last straw". The image of the Prime Minister gambling with the future of the country in such an apparently cynical manner alienated Canadians even further from the political process and the process of Meech Lake. The most visible victim of this growing alienation, to date, has been David Peterson, but there will be others.

Recent Polls confirm this. Eighty-four percent of those polled think the county needs a leader with vision. One of the few things that many Canadians — 75% — agree on is that the present political leadership cannot get us out of the dilemma in which we find ourselves.

This alienation was in part generated by the public's exclusion from the Meech debate, at least at a meaningful stage. After the deal was reached, Canadians were confronted with a *fait accompli*. They were told that the deal could not be changed. Politicians probably misjudged the degree of outrage felt by Canadians over this approach to constitutional reform.

One can contrast the dearth of public involvement in the Meech Lake process with the period leading up to the adoption of the 1982 *Constitution*. Prior to 1982, there was extensive public input, particularly during the Joint Senate/House Committee hearings, from hundreds of individuals and groups. It was not only the opportunity to present one's views that was important but the time at which these views were sought and the context in which they were sought. They were solicited at a time in the process of negotiation when it was clear that the opportunity existed to have some impact on the substance of the proposed reforms. Furthermore, it had been made clear that the federal government sought out public input in an attempt to ensure the *Charter* was a document that commended itself to the largest number of Canadians possible. In addition, the lobbying efforts of aboriginal groups, women's groups, and ethnic groups "paid-off", in the sense that changes were made to accommodate their concerns.

It is our belief that, in 1982, we forever altered the process required to bring about constitutional change in this country. That was a fact that the Prime Minister and premiers simply failed to appreciate. Executive federalism has its limits even in this country, and those limits were exceeded in the Meech Lake negotiations.

The creation of the Citizen's Forum can be seen as a belated attempt, on the part of the federal government, to involve the public in the process of constitutional reform. The Prime Minister in setting up the Forum stated that it was time for "soul searching" and that the Forum would cross the country to find out how Canadians felt about their constitution.

Where Canada goes after Meech depends upon political will and creativity. The exercise of this will, in a spirit compromise, may produce a reformulated constitution which will provide the basis for Canada's constitutional and political development into the next century. At this juncture in our history, however, political will and creativity seem to be in short supply.

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[Versions of this paper have been presented at Super Saturday, University of Alberta, October 1990 and to the Education Society of Edmonton, November 19, 1990.]

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of the University of Alberta
invites you to attend
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231/237 Law Centre
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Reception to follow

THE CENTRE FOR CONSTITUTIONAL STUDIES

The Centre for Constitutional Studies was established in the fall of 1987 as a result of the collaborative efforts of the Departments of History and Political Science and the Faculty of Law at the University of Alberta. Financial support for the Centre is provided by the Alberta Law Foundation. The Centre was founded to encourage and facilitate the interdisciplinary study of constitutional matters.

The Centre's research activities are complemented by an education programme consisting of public lectures, conferences and publications. The Centre also serves as a clearing house for information and materials relevant to constitutional studies.

The Centre for Constitutional Studies is located at the Faculty of Law at the University of Alberta in Edmonton. The John A Weir Memorial Law Library possesses an extensive collection of constitutional, comparative constitutional, civil liberties and human rights materials.

Due to the generous support of Dr. Samuel Belzberg and family, the Faculty of Law has created the Belzberg Chair in Constitutional Studies. This chair is offered to outstanding constitutional scholars. The holder is invited to write and teach at the University as well as to participate in the ongoing projects at the Centre. During the first year of their appointment, each holder is expected to deliver a major inaugural lecture on some aspect of Constitutional studies.

The Centre has hosted conferences on constitutional topics of national importance. The first such conference addressed the issue of reform of the Canadian Senate and the second dealt with linguistic rights in Canada. The Centre's third conference was held in April of 1989 and the topic was Freedom of Expression and Democratic Institutions. These conferences involved scholars from a variety of disciplines, government officials, members of the practising bar and the general public.

CENTRE D'ÉTUDES CONSTITUTIONNELLES

Le Centre d'études constitutionnelles a été institué en automne 1987 grâce aux efforts conjugués des départements d'Histoire et des Sciences politiques, et de la Faculté de Droit de l'Université de l'Alberta. Il reçoit l'appui financier de l'Alberta Law Foundation. Fondé surtout dans le but d'encourager et de promouvoir l'étude interdisciplinaire des questions constitutionnelles, le Centre offre, en plus de ses activités de recherche, un programme éducatif de conférences et de publications. C'est également un centre de documentation qui recueille les données et le matériel relatifs aux études constitutionnelles.

Le Centre d'études constitutionnelles est situé à la Faculté de Droit de l'Université de l'Alberta à Edmonton. Les collections de la bibliothèque de droit John A. Weir comptent parmi les plus riches du Canada. La vaste collection portant sur le domaine constitutionnel, le droit constitutionnel comparé, les libertés civiles et les droits de la personne est particulièrement précieuse pour le Centre.

Grâce au soutien généreux du Dr Samuel Belzberg et de sa famille, le Faculté de Droit a créé la Chaire Belzberg en études constitutionnelles, proposée aux spécialistes de renom. En plus de se consacrer à la recherche et à l'enseignement, le titulaire de la Chaire est invité à participer aux projets du Centre et, au cours de la première année, il donne une grande conférence inaugurale sur un aspect particulier du droit constitutionnel.

Le Centre à organisé plusieurs conférences consacrées à des sujets constitutionnels d'importance nationale. La première de ces manifestations portait sur la réforme du Sénat canadien et la seconde, sur les droits linguistiques au Canada. La troisième conférence s'est tenue en avril 1989 et avait pour subjet la Liberté d'expression et les institutions démocratiques. Ces conférences sont destinées à engager la participation des spécialistes oeuvrant dans diverses disciplines, ainsi que celles des fonctionnaires de l'État, des membres actifs du Barreau et du grand public.