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AFTER ALLAIRE AND BÉLANGER-CAMPEAU

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Alberta Law Foundation

SYMPOSIUM REPORT

After Allaire and Bélanger-Campeau

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Springtime in Edmonton is short but delicious. The smell of emerging greenery wafts along the Saskatchewan river valley, by the University of Alberta. It was in the spring of 1991, after the Allaire and Bélanger-Campeau reports, that the Centre for Constitutional Studies gathered together twenty scholars from across Canada and a variety of disciplines to think about constitutional reform. The spring seemed well-suited for the endeavour; a window of opportunity to think afresh about matters that had become bogged down in entrenched and oft-stated positions.

The idea for the symposium, conceived originally by Alan Cairns, was to gather together scholars to think imaginatively about our future constitutional prospects in a closed session. In this way, rhetorical stances could be displaced with genuine dialogue. Participants were asked to come, not with prepared papers, but only with their thoughts on a number of questions circulated before the meeting. The following is a report of that discussion. Because of the closed nature of the symposium, the identity of speakers generally remain anonymous. Some of the particpants, however, have kindly offered their views arising out of the symposium, and they follow this report.

I. The Current Crisis

There appeared to be agreement that we were facing a constitutional crisis. There was no consensus, however, about its causes or what solutions to look for to resolve it. The crisis was characterized as: a conflict of nationalisms; clashing and irreconcilable cultural differences over such matters as the Charter and the Free Trade Ageement; an identity crisis which required finding a way to accomodate our colonizer and colonized past, and; a matter grounded in symbolic rejections.

The participants were despondent about the fact that we were still embroiled in these "macro-constitutional" disputes which wore at our very essence as national communities. Not only were many issues implicated in the current debate awkwardly being framed in constitutional terms (such as the jurisdictional claims over immigration) but many other important issues, such as the increasing numbers living in poverty, were being neglected in the face of the ongoing crisis. There was even expressed boredom with the current debate.

The participants acknowledged that it was useful to distinguish between long term and short term constitutional reform. Disagreement existed over which strategy to pursue. For some, it was important that we forget about Québec's deadline for renewed federalism, sometime in October 1992. Rather, Canada should take the time necessary to resolve its long term concerns, despite the October deadline. Others agreed that we would have to find a new covenant upon which to base constitutional reform expressed, perhaps, through a new preamble. That new covenant would expressly accept the principle of equality of peoples.

The short term solvers advocated a more pragmatic and less foundationalist approach. This might mean tackling a handful of issues dossier by dossier, in order to forge a consensus over a small number of issues: what Dale Gibson characterizes in his comments as "son of Meech".

Another short term solution identified was the "stick and carrot" approach. The stick is the threat of no economic association with Canada should Québec secede, and the carrot is the promise of sovereignty for Québec over cultural matters. It was suggested that this was not, however, a solution that could last beyond the short term.

To what extent would partisan party politics direct the short term agenda? One participant expressed concern that, with the short term approach, immediate electoral interests direct the agenda for change. It also over-emphasizes the necessity for change. To the extent that issues of Parliamentary reform are being driven by the Reform Party agenda, and clutter up an already heavy portfolio of constitutional reform, this observation was on target.

Regarding the solutions to the crisis, some projections saw two-way traffic on jurisdictional issues, together with some aspects of the Reform party agenda (i.e. loosening party discipline in the House of Commons) and a reformed senate. Another forecast was for symmetrical decentralization, essentially the agenda of groups such as the Business Council on National Issues. It was predicted that this decentralization would not be accompanied by the financial resources to the provinces to provide those public services. This could be sold, essentially, as a way of lessening government regulation, like the Free Trade Agreement and privatization intiatives.

While this decentralization would be welcomed in Québec as a way of responding to Québec's legitimate demands, it could lead to a massive backlash in the rest of the country. Indeed, others argued, there is simply no reason for Canada outside of Québec to decentralize. It is the fear of being drawn economically into the United States that animates Canadian nationalism and the championing of strong central institutions. As free trade expands economic links southwards, lessening the links with the rest of Canada, there will be even fewer economic constraints for Québec to remain in Canada. It is a reason to conceive of some other, new arrangement between Canada and Québec.

II. Issues of Self-Determination

Many of the symposium participants saw Canada as moving towards irreconcilable claims to self-determination. Québec, of course, makes the claim vis-à-vis the rest of Canada, and First Nations make the claim vis-à-vis both Canada and Québec. The debate concerned the question of who had the authority to define the boundaries of acceptable claims to self-determination. For example, as Stephen Scott maintains in his comments, if Canada is divisible, so must be Québec.

Scott's argument sits well with aboriginal communities in Québec, who themselves face serious threats to their language, way of life, and livelihoods. It may be that, as a result, aboriginal peoples in Québec and the Québec government are moving towards irreconcilable conflict. This is not so, claimed other voices from Québec. Québec has a well-grounded and recognized right to self-determination. Moreover, the Québec National Assembly has recognized aboriginal communities as distinct societies with a right to self-government, the first provincial government to ever do so.[1] While the concept

[1]See Québec, Assemblée nationale, *Journal des Debats* à la p.2570-71 (20 mars 1985)

of self-determination is admittedly a vague, even awkward concept, it is also a useful one in the current context.

III. Aboriginal Issues

An aspect of the identity crisis identified by the participants is the emerging realization that Canada's legal and constitutional arrangements are premised upon colonial and racist concepts. For First Nations, therefore, there is no difference between English and French Canada. They both have been colonizers of aborginial communities, exploiters of natural resources, and both have the same conception of time and economics, much of it alien to aboriginal ways of thinking.

The symposium participants explored the ways in which aboriginal issues have been traditionally perceived, and how they may be resolved in the future. Everyone agreed that aboriginal issues had now become of prime concern to all regions in the country. Aboriginal issues were reported to be a high priority item on some lists; the New Democratic Parties in British Columbia and Saskatchewan could be seen as powerful advocates for aboriginal self-government. With the great potential of the NDP coming to power in those provinces by the end of 1991, there could be a discernible swing at the provincial level in favour of self-government for First Nations. In some respects, aboriginal concerns were of greater prominence in those provincial NDPs than the threat of Québec sovereignty. Even the Reform Party, it was suggested, could be a powerful ally to First Nations. Preston Manning, prior to his entry into politics as Reform leader, had done a lot of consulting work on economic development issues with Indian bands and, therefore, had a lot of experience on aboriginal issues. While aborginal self-government may be acceptable to Manning, it was pointed out, this would not be accompanied by financial assistance to native bands. In other words, Manning is in favour of devolution of power to First Nations without financial solutions.

The time appears ripe for resolving, constitutionally, the self-government issue. The Royal Commission on Aboriginal Peoples, whose mandate at the time of the symposium was being drafted by former Chief Justice Brian Dickson, would deal with social and economic issues. This would leave the broader issue of constitutional reform to this round of constitutional negotiations. It was suggested that, by dealing with the aboriginal issues now, we could find a way out of our constitutional quagmire. By doing away with the racist premise of the present legal regime, we could welcome constitutionally the equality of all peoples. It would require a responsiveness to the identity of others, and a respect for their differences. If we fail to recognize those differences, it was argued, we would be incapable of recognizing the ethno-national background of any group in Canada.

IV. Process Issues

The discussion then turned to equitable processes that could be employed to make more meaningful public participation and input into constitutional change. The issue of a constitutional convention or constituent assembly, which had dominated the procedural debate until then, was one mechanism available. There appeared to be agreement amongst many in the group that a constituent assembly would be unnecessary if we only mildly reformed our ongoing constitutional arrangements. Rather, a constituent assembly would be useful if we were undertaking wholesale changes to the constitutional regime.

Two types of constituent assemblies were identified: (1) an assembly directly elected by popular vote, and (2) an assembly constituted by delegations from elected legislatures. The Dominion colony of Newfoundland had experience with the former type in 1946-48, and the provinces of Canada and the maritimes with the latter type in 1864-66.

The Bélanger-Campeau Commission was proferred as a hybrid of the two types; one-half of it constituted by representatives of the National Assembly, the other half chosen by the Premier of Québec from a list compiled by both main parties in the Assembly. Through this process, many groups, such as business, labour and the artistic community were over-represented while many other groups were not represented at all — aborginal peoples, the poor, women, and ethnic groups were given little or no representation on the Commission.

The north has also experimented with a constitutional assembly in the Western Constitutional Forum. The Forum was responsible for developing a constitutional formula for the groups living in the western region of the Northwest Territories. The Forum had three representatives from the legislature, each representing one of the distinct ethno-national groupings in the north, and representatives from each of the constitutionally-recognized aboriginal groups.

It was recognized that, in the end, an assembly alone would not guarantee success. First, it would be naive to think that no politicians would run for election in the first type of assembly, therefore, we would likely be confronted with many of the same types of individuals, and party pressures, as we do today. Second, with very little tradition of democratic consultation regarding constitutional matters, we would still need politics to

amend the constitution: negotiations likely would still take place in private. Finally, as long as we continued to exclude aboriginal groups from those negotiations, it would be no different than, as one participant described it, "moving funiture around a house".

With regard to the participation of Québec in the process of constitutional change, it was concluded that negotiations likely would not take place if there was something unacceptable to Québec on the table. The package of reform, therefore, will do little to insult Québec's constitutional sensibility. Much of the feedback obtained from the the Canadian public by the Spicer Commission, as well, would have to be ignored or dealt with in some other manner and at some later time.

If there was anything on the table for Québec, it is likely that Bourassa will, as promised, hold a referendum. The group then turned to the issue of referenda in the rest of Canada. On the one hand, it was felt that if Bourassa holds a referendum, the federal government will be forced to consult the public through a referendum as well. This scenario was characterized by one participant as "the mother of all dice rolls". There was proposed the novel idea of three referendums to ratify constitutional reform: one for Québec, one for the "rest-of-Canada", and one for aboriginal peoples. Lastly, there could be thirteen dice rolls — federal, provincial and territorial referenda.

V. Institutional Reform

The group indentified two matters of institutional reform which likely would arise in this round of negotiations. The first concerned Senate reform, which one participant described reluctantly as likely to be "dragged onto the agenda". The second concerned Parliamentary reform, which may have come to outstrip Senate reform on the agenda. Parliamentary reform has come to predominate perhaps largely because of the rise in popular opposition to the Goods and Services Tax and the rise in popularity of the Reform Party, whose call for looser party discipline and more free votes in Parliament has gained a fair measure of support. Parliamentary reform can be achieved, however, without constitutional amendment but, rather, by simple majority amendment of Parliamentary rules and modification of party practices. Senate reform likely would remain, therefore, a priority item as far as some provinces were concerned.

The value of an elected Senate, argued one participant, was the way in which it cut back on the influence of the provincial Premiers in national politics. Particularly if Québec were to secede, there would have to be some counter-balance to the new power of the premiers and the influence of the largest region in the country, Ontario. A reformed Senate, argued another, could take on a number of important functions that are of contemporary concern to Canadians. This Triple E Senate would be empowered to monitor the three E's of (1) Equalization, as provided for in s. 36 of the *Constitution Act, 1982*, (2) Economic union, reducing barriers to interprovincial trade, and (3) the Environment.

No consensus on Senate reform appeared easy to reach — Québec was in principle opposed to all three tiers of the Triple E Senate. Equality, as a consociational principle, could be accomodated in other ways than strictly through numbers. For example, a reformed Senate could guarantee that no majority could trump minority (francophone, anglophone or aborginal) interests. In the north, for example, double or concurrent majorities are needed to affect change regarding an aboriginal group. Most models of reform have built in concurrent majorities for legislation affecting Québec's areas of traditional concern: language and culture.

VI. Official Languages

It appeared, at the time of our gathering, that public and political sentiment desired the swift abandonment of Canada's Official Languages regime. In its stead would appear the Swiss model of regional accomodation — English outside of Québec, French inside Québec — otherwise, minority language rights would be accorded only where numbers warrant. But this may be less likely than some advocates realize. The official language regime has been constitutionalized in ss. 16-22 of the *Constitution Act, 1982*. Minority langauge education rights are also found in s. 23 of the *Charter.* Their provisions cannot be subject to legislative override, nor can they be amended without triggering the unanimity requirement. While some modifications to the official languages regime may be made administratively, it is unlikely that these constitutional guarantees will be modified unless complete unanimity is achieved — an unlikely strategic task for this round of reform.

It was suggested by one participant that no dissolution of language rights be permitted, even if this meant dissolving the federation. It was considered unlikely, by others, that language rights, for either Anglophones in Québec or Francophones outside of it, would be of sufficient importance so as to block constitutional accomodation with Québec.

VII. Constitutional Options

The symposium participants turned to a discussion of the constitutional options which lay down the road ahead. A preliminary list of six options was introduced. They included: (1) the status quo, (2) radical decentralization,

(3) assymetrical federalism with institutional reform, (4) confederal (Canada-Québec) union, (5) loose sovereignty-association between two nation states, and (6) re-balancing of the division of powers. To these were added: (7) a "market model" which removes jurisdiction from both levels of government, and (8) an expanded *Charter* with social and economic rights. The administrative option of re-aligning fiscal federalism, making more tax room available to the provinces, was also introduced.

To some participants, the first option (status quo) was unacceptable while others observed that the second option (radical decentralization) likely was unacceptable to the mass of the Canadian public outside of Québec. Others suggested that the *status quo* should not be ruled out if sufficient symbolic gains were made. Refining the status quo through (6) a re-balancing of the division of powers, seemed to be a likley scenario. This could be achieved with either (a) concurrency with provincial paramountcy or (b) a two-way transfer of powers between the two levels of government.

VIII. Federalism Under Fire

We have long presumed that constitutionalized federalism provides us with all the flexibility necessary to amend, even re-create, our constitutional arrangements. As far as Québec is concerned, the idea of federalism has been losing its relevance. Federalism appears particularly incapable of handling the bilateral nature of the demands ermeging from Québec. Federalism is also under fire from the environmental movement who see the destruction of the environment as a concern that calls for the dismantling of provincial, and even federal, borders.

The principle of federalism, explained one participant, embodies notions of self-rule and shared-rule. The economic reality of Canada means that self-rule alone is insufficient to guarantee national sovereignty. The principle of federalism permits both forms of rule to be accomodated. What was needed was a more flexible formula; a confederal rather than a federal arrangement. Federalism, argued another, creates a marketplace of political options. Where else, but under a federal regime, could Québecers simultaneously elect politicians with such diametrically opposed political visions as Prime Minister Trudeau and Premier Levesque? Federalism was, therefore, a concept alive and well, adaptable, flexible and amenable to change through administrative arrangements.

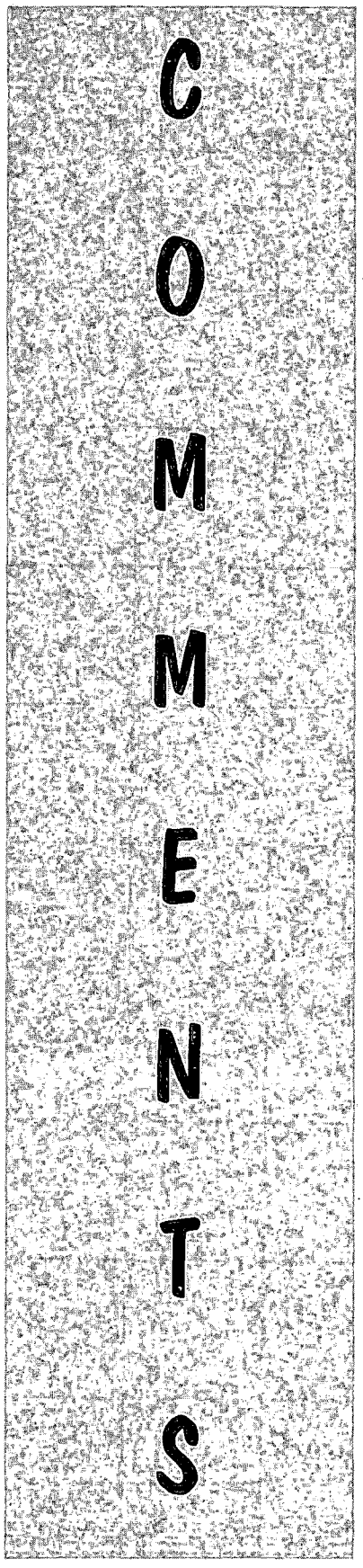
Could federalism accomodate sovereignty-association and, if so, would federalism be so global a concept so as to lose any real meaning? Moreover, argued participants from Québec, the reality of economic links with the rest of Canada alone need not justify a federal arrangement. Those economic links are not, and need not be, exclusively with Canada. With the free-trade agreement, and increasing resource trade with the United States, Québec is well on its way to transforming the flow of its trade southward, and therefore need not be economically dependant on the rest of Canada. This is an avoidance, argued others, of increasing economic integration and globalization. Globalization makes all states small states; we must choose between re-integration or disintegration.

Federalism, ultimately, is a flexible notion. It has permitted the establishment of special status for Québec financially, but not constitutionally, in such matters as pensions and immigration. Despite the *Alberta Government Telephones* case, Québec still excercises control over telephones and intra-provincial communications. The puzzling thing is that we cannot appear to to be able to recognize constitutionally what federalism has achieved administratively.

IX. Conclusion

It would have been too much to expect any great consensus to have been achieved amongst such a diverse group, many of whom had never met each other. If the one day and a half of wide-ranging discussion taught us anything, it is that much work needs yet to be done to bridge our differing perspectives.

Canada is a country constructed of multiple "communities of meaning". With no overarching theoretical construct to guide our deliberations, we must struggle to reconcile both our pasts and our futures together. We can only begin to do so by listening to each other. If the symposium achieved anything at all, it was an opportunity to engage in meaningful dialogue about the people, their government, and their constitution.



MICHAEL ASCH
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The aspect of the meeting I take away with me concerns mood and in particular my mood and its shifts. Our group consisted primarily of constitutional experts from law and political science who came from Québec, the Aboriginal community, and, with regard to the Rest of Canada, the various regions.

At the outset, we were asked to provide some brief opening remarks about our visions of constitutional renewal and change. I heard strongly stated remarks that, as a whole, did not convey to me a sense of reaching out to "others" to find consensus. It did not feel good and I found myself angry and upset. After the morning session, I did not want to come back.

The afternoon of the first day brought further remarks and some general discussion. Again it felt closed, but dialogue did begin. I went home that night discouraged.

Things changed on the morning of the second day, when the session was about to end. Only then I began to sense a feeling of a collective "we" and a sense that the members of the "we" could, at least, usefully challenge each other and our entrenched ideas. As this attitude began to come to the fore, the atmosphere became warmer. My feeling was that the meeting was coming closer to a place where we might risk the possibility of trying to "work things out" together. I felt disappointed that we ended that morning. I only hope at least some of us get the chance to meet again to continue to build dialogue.

I am left with a feeling that our meeting encapsulated what we are addressing as a country. We, at least in the non-Aboriginal community, are starting with entrenched views and only a clear vision of ourselves and what we want. This leads to monologue and a general mental turning away from other; a kind of "let each only take care of self" attitude. If it is like our meeting, such a path will lead to a coldness in attitude that will eventually destroy Canada regardless of the specific compromises that constitutional experts might arrange for the self-centred good of each in the interim. What we need, if our meeting serves as an example, is the opportunity to move beyond monologue to establish a dialogue where, secure in self, we are prepared to reach out to the others to find a home that respects all.

If I have a fear it is that such a possibility does exist in Canada, but that, like our conference, time will run out before we have the chance fully to explore it and build on what we find.

PAUL L.A.H. CHARTRAND
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I will address three general points. What are the circumstances of the Aboriginal people in Canada in relation to the present 'unity debate'? What is the issue to be resolved? How may it be resolved?

The Aboriginal peoples in Canada have been transformed, in time, from ancient societies in their homelands to strangers in a strange land. Having been colonized, marginalized, brutalized, repressed, depressed, and suppressed, they now suffer the fate of the dispossessed, the poor and the politically powerless. Being poor in a welfare state, they suffer, more than other Canadians, the treatment accorded by bureaucrats who despise them. This is not a happy lot. Like colonized people everywhere they have been denied a history, as part of the process of trying to eradicate their identity and sense of worth. There is a discernible start now in the rebuilding of the peoples' collective identity. Like nationalist movements everywhere, this process involves the contemporary crystallization of an idealized antiquity. Incidentally, in a recent expression of an individual Québécois' contribution to that process, I noted a curious overlap with the folk memory of the Métis. The Québécois included Louis Riel in a short laundry list of Canadian 'insults' to the Québécois! History shows that Québec sent some of its people to the West to try to recreate Métis society into its own image but the project failed for all sorts of reasons having to do with the power of Ontario. Having been marginalized by the society that developed in the West, the Métis now have firmly cast their identity with that of their Aboriginal brethren.

What is the issue to be resolved? The circumstances of the Aboriginal peoples have driven them to embark on the metaphorical constitutional train on its way to an unknown destiny. But the constitutional reform process is not the train to glory for Aboriginal peoples in Canada. A just resolution of their undesirable circumstances must determine a proper place for them in Canada. That does not mean they must be put in their place. For too long that has been happening. The present case requires more than an acceptance of a social responsibility on the part of Canadians "to do right by the Aboriginal peoples." What is required is acceptance by Canada of the legitimacy of the claims of the Aboriginal peoples to self-determination. Once that is done, the objects of the principle of self-determination can be tackled at every level. Some accommodations should involve constitutional reform. Others need not. Self-determination has a lot of meanings, including some rather personal connotations.

How may the issue be resolved? The concept and the intelligent application of the right to self-determination for Aboriginal peoples in Canada need not frighten anyone. It is my belief that the application of the principle is probably necessary in the long run if the illegitimacy of the present system is not to be raised again. If the present crisis is Québec-driven then it is the circumstances of the Aboriginal peoples and the way in which their place in Canada is tackled that will determine the extent to which principle is added to power in the resolution of the 'unity debate'. That is important, to the extent that principle is important in crafting a just and enduring vision of the sort of society Canadians want. There must be more in the process of constitutional reform than the parcelling out of political power. The right of the Québécois to self-determination is back by significant power. The right of Aboriginal peoples to self-determination is backed by little power. But the right is the same. Shared sovereignty has been expressed as 'sovereignty-association' in the case of the Québécois. Canada must give Aboriginal peoples the chance to develop *their* versions of shared sovereignty. That requires at least two things: first, the formal recognition of the 'right' (which is essentially agreement on a broad vision of Canada), and second, the provision of circumstances calculated to permit Aboriginal peoples to proffer their informed consent to feasible forms of shared sovereignty with Canada.

The first step, that of recognizing the right of self-determination, could take the form of a constitutional provision, but it need not. The present debate is highly symbolic and there is room for symbolism in our unique Constitution which has already absorbed sawdust and wood chips, among other strange and practical things. A primordial value of the recognition of the right of self-determination has to do with political psychology, that is, the effect on a colonized and marginalized people in their ancient homeland of being recognized as an equal partner in crafting a new vision of the Canada that has subjugated them.

Canada is not being helpful by denying that 'peoples' in section 35 of the *Constitution Act, 1982* means 'peoples' in the international law sense. It is naive or mean-minded to suggest, as some do, that an incomplete concept of Aboriginal sovereignty within Canada, or the giving of an important interpretive role to the courts, are good reasons to avoid the even-handed recognition of the

right to self-determination for all historically and culturally distinct peoples. This leads to the second point, the ways by which the recognition of the 'right' might lead to political and practical accommodations.

The practical application of an abstract right to existing circumstances necessitates the making of realistic choices. Perhaps much of the present constitutional hand-wringing has to do with the difficulty of effecting large scale, peaceful constitutional change. If that is so, as a general proposition, then it can be expected that Aboriginal peoples would opt for relatively small institutional changes, were they given the real opportunity to do so. Much desirable change can be effected without constitutional upheaval and much can be done at the political level of recognizing the rights of peoples as equals without changing the basic law of the land. Note that successive U.S. governments have recently affirmed their policy of dealing with American Indian tribes on a 'government-to-government' bias. The basic object should be to provide opportunities for Aboriginal peoples in Canada to give their *informed consent* to their preferred form of association with Canada. The realistic choices available can all be accommodated within a federation. It might be useful in this context to examine the extensive constitutional and legislative 'asymmetries' which now exist in respect of Aboriginal groups in Canada. The Aboriginal societies themselves must be provided the opportunity, in the broadest sense, to be the agents of choice. No time limit can be put on this internal Aboriginal process and any schedule to tie 'the resolution of the Aboriginal issue' to the Québec-driven constitutional agenda is likely to fail. It is instructive to recall that Québec's capacity to give informed consent to its association with Canada has followed a three decades-plus revolution which saw the creation of home-grown intellectual and economic élites. Because the courts are finding the existence of a general fiduciary obligation in the relations between the Crown and Aboriginal peoples, governments must have a facilitative role to play in permitting the making of a free choice. Section 35 of the *Constitution Act, 1982* heralds a new era wherein Aboriginal peoples are recognized as 'peoples' and the shackles of 'race'- oriented thinking and policy-making must be cast away. Perhaps if western Canadians appreciated that the recognition of Aboriginal self-determination did not mean that they would have to read Cree or Ojibway on their cornflakes boxes, they might agree that self-determination need not frighten anyone.

DALE GIBSON
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NOW WHAT?

I consider Québec's separation from the rest of Canada in the near future to be both a right of the Québec people and a strong possibility. By a combination of blunder and design, Canada's political leaders have generated a destructive momentum which, if not soon arrested or re-directed, will carry the country to the point of disintegration. I think disintegration would be unfortunate for both Québecers and non-Québecers, though not a total disaster for either group. It is still possible, in my opinion, to avoid separation, but not unless decisive steps are taken soon. The establishment of legislative committees, Royal Commissions, governmental task forces, or even "constituent assemblies", do not, in my view, constitute decisive steps in this direction; responsible politicians must meet behind closed doors and negotiate (more intelligently than they did at Meech Lake) until they reach an agreement they can take to their respective legislatures (and perhaps their voters) for approval. Agreement will be unlikely unless leaders outside Québec are willing to recognize a greater degree of constitutional distinctiveness for Québec than ever before. Although any attempt at this point to carry out more extensive constitutional reform than the immediate crisis dictates would generally be foolhardy, the inclusion of a provision concerning aboriginal self-government in the amendment package seems unavoidable, given the circumstances under which the Meech Lake Accord expired.

Technically speaking, Québec could not secede unilaterally from Confederation. The Constitution Act requires a formal constitutional amendment with the participation of other governments, federal and provincial. But such legalities mean little. Every population inhabiting a well-defined geographic area that is reasonably capable of independent political existence has the now well-recognized right of self-determination, provided that it exercises that right by democratic means. In my opinion, this principle applies to the people of Québec. It might also apply, of course, to certain regions within Québec, such as the island of Montreal, or areas in the north that are inhabited chiefly by aboriginal populations.

Why would Québec separation be unfortunate? Because it would hasten Canada's integration with the United States, economically, culturally and politically. The Free Trade Agreement already exerts a powerful assimilative force, which would be greatly magnified by separation. For Franco-Québec it is difficult to understand how even the current level of French in advertising, education, and so on, could be maintained for long without the protective buffer provided by the rest of the country. We would all survive somehow; we might even prosper economically. But the quiet, caring, culturally aware, environmentally sensitive nation we've tried to build since winning our autonomy from Britain is almost certain to disappear when we surrender that autonomy to the United States. So would the only viable French culture in North America.

There are some who believe that the easiest solution would be a clean break by Québec. The establishment of total sovereignty would be followed, they say, by a negotiated new association that might end up looking much like the negotiated special status within Confederation discussed above. I agree that this might occur, and that if it did occur it would probably be healthy from the point of view of healing wounded pride. I fear such a solution, however, because I think that negotiations are much more likely to succeed if conducted under the imperative of attempting to keep an existing country together than if carried out between separate entities which both have stronger reasons to be concerned about their relations with the United States than with each other. The Canadian Constitution stands in need of amendment in many respects other than those which affect Québec's distinctive concerns. There is a temptation, while politicians are dealing with amendments to meet the Québec crisis, to slip other amendment proposals onto the table as well. With one exception, I think that this would be madness; by unduly complicating and prolonging the bargaining process, it would ensure failure.

The exception concerns aboriginal self-government. Although not logically linked to the Québec situation (except in the important sense that the aboriginal people consider themselves, as "founding peoples" along with the English and French, to be entitled to as much priority in the constitutional recognition of their "distinct society" as either of the others), this question has received so much attention from both media and politicians, and was so closely linked to the failure of the Meech proposals, that it will inevitably be included in any "Son of Meech" amendment package. The slipperiness of the aboriginal self-government notion is such, however, that I doubt whether anything other than a vague statement of principle can be worked out before the final deadline in the Québec crisis arrives. Canada no longer has time for anger. Whatever other Canadians may think, Québecers have both the moral right and the practical ability to be independent.

Québec's sovereignty is not within the gift of the rest of Canada; if Québec opts democratically for independence it will have it. If the rest of Canada wishes to forestall that event, it can do so only through cool negotiation; neither rhetoric nor righteous indignation will help. Success in such negotiations will only be bought at significant cost to Canadians outside Québec. Failure, in my estimation, will involve even greater cost, both inside and outside Québec.

ANDRÉE LAJOIE
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Faculté de droit

Le séminaire convoqué par le *Centre d'études constitutionnelles* en mai dernier a été une excellente occasion de discussion avec des collègues anglophones du "reste du Canada", comme ils se désignaient eux-mêmes, sur nos perceptions respectives de la crise constitutionnelle.

Nos échanges m'ont permis de confirmer mes convictions sur l'impossibilité de réconcilier nos intérêts réciproques: si j'étais une canadienne du "R.O.C.", je ne verrais pas non plus l'utilité de décentraliser la fédération canadienne dans une mesure qui puisse satisfaire les exigences minimales du Québec. Mais comme québécoise, je ne pourrais accepter le minimum de normes nationales qu'exige le maintien à l'échelle canadienne, des programmes qui constituent, pour les citoyens des autres provinces, l'essence même du Canada.

J'ai par ailleurs apprécié la possibilité d'échanger pour la première fois sur ces questions avec un métis et un amérindien. Leur approche nous intéresse tous, quel que soit l'avenir du Canada et du Québec, et j'ai beaucoup appris d'eux aussi bien que de Michael Asch, dont la perspective anthropologique, nouvelle pour moi, me semble extrêmement féconde comme voie de réflexion.

HOWARD LEESON
University of Regina
Department of Political Science

I found the symposium to be valuable in several respects, but most importantly for two major reasons.

The first was the opportunity to engage in a free-flowing discussion with thoughtful people from Québec. I was struck by the degree to which the two solitudes in Canada still exist, and indeed, have been strengthened. It is too simplistic to blame the failure of Meech Lake completely for our impasse. Certainly the actions of our political leaders contributed to the present situation, especially their willingness to gamble everything on a positive outcome. In reality, Meech Lake crystallized what was already in existence; two largely disparate views of our mutual enterprise, and even more importantly, two contradictory estimates of its worth. The views of the Québec participants forcefully reminded me of how much work is needed if we are to find common views on the future of this country.

The second important outcome of the conference was the clarity with which it elaborated the clash between regional and ideological impulses in the Canadian body politic. The aspirations of the nationalists in Québec, which invite decentralization of power and control from Ottawa, are in opposition to those on the political left in the rest of Canada, who want to preserve a significant role for the national state. Questions surrounding these apparently irreconcilable goals were left unanswered, leading me to believe that the old alliances of social reformers in Canada and Québec may be at an end. In particular, those outside of Québec who believe that a strong national government is the only protection against absorption of Canada by the United States find themselves in a dilemma. Ironically, many of these same people were supporters of the Parti Québécois and its goals for Québec in the 1970s. Now they find themselves opposing the present nationalists. Such an ideological turn can only help harden views outside of Québec against proposals for decentralization of power. As well, it could facilitate the final achievement of the "business" agenda in Canada, as the left wing in Canada finds itself caught between the equally unpalatable options of promoting Québec sovereignty, or American hegemony.

JOSEPH ELIOT MAGNET
University of Ottawa
Faculty of Law

OBSERVATIONS ON THE CURRENT CONSTITUTIONAL IMPASSE

Canada's constitutional system has become dysfunctional. Québec will not participate in Canada's constitutional processes. Without that participation, Canada's constitutional mechanism is cumbersome to operate and lacks perceived legitimacy. Canada's constitutional structure works in a state of constant crisis. Constitutional breakup — with attendant drastic consequences — is continually threatened from important quarters.

Are there problems of governmental design that have ruptured the efficient functioning of Canada's constitutional system? I think not. Although I have many suggestions for reform of the way we are governed, and have studied many others more, none are critical to the survival of our institutional structure. Our institutions work. But for the shock of the Meech Lake debacle, our constitution could have endured centuries more — unchanged. In the history of politics, Canada serves as a powerful example of successful democracy in a bi-national state.

Our current constitutional predicament results from symbolic flaws, not defects in institutional design. In the Meech Lake process, Québec bargained for constitutional amendments to protect it against the possibility that the constitution could be operated or changed in ways unfavourable to its interests. This was the theme of Mr. Remillard's speech at Mont Gabriel, and it is why he called for more power for Québec over immigration, limits to the federal spending power, a right of veto for Québec and Québec participation in selecting Justices of the Supreme Court of Canada. Québec was seeking protection against demographic change, central institutional change, and indirect attacks on its powers by the federal authority. The accommodation of these reforms in the Meech Lake Accord was not without controversy, but the controversy was manageable. In depth and strength the controversy did not approach the same order of magnitude as the rage provoked by the symbolic aspect of the Meech Lake Accord, the recognition of Québec as a distinct society.

Mr. Remillard began his historic speech at Mont Gabriel with a quote from the Québec Liberal Party's Paper, *Mastering Our Future*: "Nothing less than Québec's dignity is at stake in future constitutional discussions." The Meech Lake process proved the truth of that observation. Québec's dignity became the central issue with the death of the Meech Lake Accord; Québeckers have been exhorted to feel offended, and many do — deeply. Our constitutional dysfunction results from that offence to dignity.

It would be wrong to try to break the current deadlock in the technical spirit. No exercise in technical crafting of efficient institutions will mend the hurt feelings on either side of the Ottawa River, no matter how brilliant the institutions proposed.

What is required is a symbolic manoeuvre. There are certain elements appropriate for most constitutional symbols: simplicity, ambiguity, low cost and beauty. Constitutional symbols should be simple. Otherwise they are not generally comprehensible, and cannot therefore command loyalty. They should be ambiguous. Different constituencies may therefore read different agendas into them. There are no immediate losers. Any lingering controversy is postponed to a day when, in a situation of actual confrontation, one group attempts to convert the symbol into a weapon of principle. Constitutional symbols should be low cost. They should not be attached to the power apparatus, and not alter the institutions of government. Constitutional symbols should be beautiful. Beauty produces feelings of transcendence, which are crucial to patriotism.

Section 2 of the Meech Lake Accord does not meet these conditions. Whatever else one may think of it, it is a bad symbol.

Beyond advocating symbol creation and deployment, I would suggest that there are some existing symbols with which we ought not to tamper. They are too explosive in feeling, too uncontrollable, the downside is too great. I am thinking, among other things, of bilingualism. Although controversial, official bilingualism is an essential element of what it means to be Canadian — of Canadian identity. So we should read with considerable caution the observation of the Spicer Commissioners that "our participants ... almost uniformly reject the treatment of our official languages." As readers of the Official Languages Commissioner's Reports know, support for bilingualism comes and goes. If the Spicer Commissioners are correct that support for bilingualism is at a low, I would interpret that as part of the general malaise in toleration that has overtaken us. This is not a reason to open up the seam of the federation further, by attempting to weaken the bilingualism machinery. Weakening bilingualism would send a bad symbol. It is unambiguous, high cost and may be ugly. In the present situation bad symbols are to be avoided at all costs.

We should also be careful about expanding the substantive agenda of constitutional reform. In the current charged climate, failure to reach consensus on issues will be regarded as yet another affront to dignity in some quarters: whether in Québec, the West, among Aboriginal Peoples or others. And Canadian history teaches that consensus on substantive constitutional reform will be notoriously hard to reach.

My prescription for getting out of the current constitutional impasse is to reach for consensus on a modest package of institutional reforms, to which are attached a bundle of low cost symbols, symbols which are not coupled to the power apparatus in a significant way. The negotiations should focus on trading off symbols. Particular symbols sought in different quarters are not mutually exclusive. A package of symbols could be proclaimed together in a low cost preamble, or in other parts of the Constitution not significantly entwined with the power apparatus.

Of course, it is always difficult to go backwards in negotiations. Québec achieved a high cost symbol in the Meech Lake process. The "distinct society" recognition was coupled to the power apparatus, as it occurred in a interpretative provision. At least, this is how the recognition of Québec as a distinct society was ultimately perceived, within and without Québec. It is difficult to think that Québec's dignity can now be assuaged in any lower cost way. That is a likely result of the past four years, and it is a reality certain constitutional actors would do well to understand.

PHILIP RESNICK
University of British Columbia
Department of Political Science

The forum brought together about 20 academics from across the country, including 4 francophones and 1 anglophone from Québec, 1 Métis, 1 aboriginal, and other participants representing the different regions/provinces of English-speaking Canada. The group included supporters and opponents of the Meech Lake Accord, those looking for modest changes in existing federal arrangements, others convinced that only a more radical rearrangement of our constitutional landscape based upon some variant of a 2+ nation formula would do the trick.

The discussions were informal, helped by the fact that there were no papers to be presented and no attempt on the part of the organizers to force consensus on any of the issues that we face.

The most useful part of the get-together, from my point of view, was the chance it gave us to collectively think through the moves likely to come out of the federal government in the coming months and the timetable for constitutional debates into 1992. The symposium also made it clear that our future thinking about Canada-Québec relations needs to be along two-track lines: 1) in the event that some new arrangement within an ongoing federal system can be worked out and sold to the Canadian people through referendum and the like; 2) in the event that we are heading toward a disentanglement in the Canada-Québec relationship. Each scenario has different implications for such questions as the use of constituent assemblies, Senate reform, or official language policy. In either case, scrupulous attention will have to be paid to aboriginal issues and to questions of minority language rights and the multicultural character of both Canada (outside Québec) and Québec. What must be avoided at all costs is the intolerance of ethnic nationalism of the sort we have been witnessing in the Soviet Union or Yugoslavia where multi-national federations are coming apart.

PETER H. RUSSELL
University of Toronto
Department of Political Science

When academics get together to talk about anything they tend to cheerfully disagree about everything. That is the politics of academic discussion. There is no constraint on the participants to agree. On the contrary, participants justify their existence by demonstrating their ability to put forward positions held by nobody else.

In this sense, it was a darn good conference — full of vigorous but never mean-spirited exchanges. However, by definition such a conference cannot be expected to produce a consensus. Not only was there no clear tendency to adopt any particular approach to constitutional change but there was not even agreement on the threshold question of whether the future of Canada was in jeopardy or, if it were, was it worth saving?

The discourse did reveal an intriguing pattern of cultural differences in approaching the constitutional issue. The French Canadians (all from Québec), if not exactly serene, were more "laid back" on the constitutional question than either the English Canadians or the Aboriginal participants. While I did not detect much enthusiasm for Québec independence, neither did I sense any anxiety that Québec's separation may occur. Their comments on restructuring alternatives indicated a strong commitment to asymetry, which in part seemed to depend on a determination to view English Canada as homogeneous and centralist.

The English Canadian participants did nothing to confirm this Québécois view of "The Rest of Canada". They agreed neither on the scale of constitutional reform (incremental or fundamental) nor on the process (traditional and elitest or novel and participatory). On constitutional models, opinion ranged from a somewhat centralizing English Canadian nationalist perspective to a deeply pluralist vision of the Canadian polity. While among this group there was a deep commitment to the constitutional game, there was considerable pessimism about the possibility of arriving at consensual solutions.

For the Aboriginal peoples, whose first choice of constitutional futures went by the board several centuries ago, "optimism" and "pessimism" are not relevant mental categories. This was reflected in the contributions of the Aboriginal participants. They made us more aware of the non-Aboriginals' hegemonic domination of the constitutional process. Indeed, the most significant question I took away from the conference is whether a constitutional settlement consented to by Canada's Aboriginal peoples can make any concessions to the Aboriginals' world view.

STEPHEN A. SCOTT
McGill University
Faculty of Law

I would like to set out my views about the proposed secession of Québec, many of which I presented at the symposium. In giving my views, I realize that I am breaking a taboo and articulating positions which are anathema to many in Québec. These principles, however, are crucial to the outcome of any future constitutional change.

1. **Canada: the sovereign state and its people.** Canada, as an integral whole, is a sovereign state, every part of which belongs to all of its people so far as political sovereignty is concerned.

2. **No double standard on indivisibility.** There can be no double standard on the issue of divisibility. Any principle which argues that Québec is indivisible makes Canada equally indivisible. And any principle which argues that Canada is divisible makes Québec equally divisible.

3. **The Constitution: the sole source of authority.** Canada's sovereign powers are exercised by its people through federal and provincial institutions, whose very existence and powers are established and defined by the Constitution, and by the Constitution alone.

4. **The Provinces: creatures of the Constitution.** Canadian provinces, as much as the Federation itself, therefore depend completely upon the Constitution for their rights and powers, and even their existence. Provinces can make no valid claim to any rights beyond, or outside, the Constitution. The provinces

are not — either legally or historically — "prior to" Canada, nor are they the "creators of" Canada: the law, rather, creates both.

5. **The Constitutional amendment processes: sole means of change.** There is no legal basis for any constitutional change — and therefore no right of secession by any province, territory, or other provincial subdivision of Canada — except through the means of change provided by the Constitution itself. (As Lincoln said, "The States have their status in the Union, and they have no other legal status. If they break from this they can only do so against law and by revolution": Complete Works, VI, p.315 (July 4, 1861).)

6. **Boundary lines mean nothing by themselves.** A line drawn as a boundary has no legal meaning — nor, indeed, any moral or other meaning — beyond its actual purpose. A line defining the boundaries of a province, municipality, or other political unit exists for no purpose other than the exercise of whatever powers (if any) are conferred upon it by law from time to time. A political boundary does not, merely because it exists, define a potential sovereign state.

7. **Rights of the people of a province: simply to govern a province.** In particular, the people of a province, and their political institutions, have no legal right — nor for that matter any plausible moral or other right — to govern its territory otherwise than as a province of Canada and within the Constitution of Canada. A province is what it is: no more no less.

8. **A boundary does not create a right to sovereignty.** The existence of a provincial, municipal or other boundary creates, in itself, no basis whatsoever for a claim of entitlement to sovereignty by the inhabitants of the territory. They cannot, so to speak, plausibly claim "to pull themselves up by their bootstraps" to a higher status. Any aspiration to greater powers or higher status depends on the will of the country as a whole.

9. **Dismemberment of the federation depends on the will of the whole Canadian people, as do boundaries of new state.** Since the dismemberment of the Federation depends on the will of the Canadian people as a whole, as exercised through their constitutional amendment procedures, there is no reason why the Canadian people are obliged to consent to the secession of any province; or, if they do consent, to allow it to secede with its existing boundaries or any other particular boundaries.

10. **An independent Québec has no valid historical or legal claim to the northern part of the present province.** The immense territories added to Québec by the Canadian Parliament in 1898 and 1912 were territories under English, and later British, sovereignty long before the cession of New France in 1763, having no connection with New France. These territories were added to Québec to be governed as part of a Canadian province.

It is sheer effrontery to demand that the 1898 and 1912 territories should form part of an independent Québec. Without these territories it is highly doubtful that Québec would be economically viable as a sovereign state, at any rate, viable at an economic level acceptable to its people.

11. **Duty of the Parliament and Government of Canada: Defence of the constitution, laws, and territorial integrity of Canada.** It is the duty of the Parliament and Government of Canada to enforce and defend the Constitution and laws — and therefore the territorial integrity — of Canada, against resistance by its enemies, whether foreign or domestic. This is obviously so in the everyday case of law enforcement against common criminals. The duty to defend the Constitution, laws, and territory against foreign invaders is also self-evident. It is equally so as regards rebels attempting the overthrow of the Canadian state in all, or part, of Canada's territory. A unilateral declaration of independence, by members of the legislature of a province or by anyone else, with or without a referendum, is an act of, or invitation to, treason, and the treason is complete, at the latest, when force is used to carry out the purpose of overthrowing the government. Under Canadian law, in sum, an attempt to overthrow the government is criminal as well as invalid.

12. **Use of force in defence of the Constitution: legitimate self-defence.** The use of force to defend the Constitution, laws, and territorial integrity of Canada is simply legitimate self-defence. The odium of resort to force properly lies on those who attack the Constitution, laws, and territory, of Canada, and not upon those who defend the status quo. The status quo represents the rights both of the Canadian people as a whole, and also of every individual who wishes to keep the country as one.

13. **Use of force in northern Québec.** Even if, in the face of a unilateral declaration of independence within Québec, the Canadian people, or their Parliament and Government, decided not to exercise their right to defend all of the territory of Québec by force, the use of the limited amount of force needed to retain the sparsely-inhabited territories of northern Québec would probably be effective to frustrate any attempt by Québec to secede, with or without the northern portion of the province. As an absolute minimum, it could be made perfectly clear that this will be done.

14. **Right of "self-determination".** It is difficult to discern any consensus at all as to the conditions of an internationally-recognized right of self-determination: who enjoys it; when and how it may be exercised; and what territory it applies to. It cannot plausibly be a right to assert repeated fresh claims, each of which would bring the state to an end at any time. It seems preposterous to assert that Canada can be brought to an end at any time at the demand of one of its provinces. So far as Québec is concerned, the population of Québec, through its elected representatives or its voters, opted for Canada in 1867 and again in 1980. I would argue that the issue of self-determination, if it existed, is closed; the people and province of Québec remaining free, like all others, to seek constitutional change within the Federation by constitutional processes. Assuming, however, that the French-Canadian people within Québec, as a group, have a moral or an international-law right of self-determination, so do others in the province: aboriginal peoples, for example, and other non-French-Canadians. And any right of French Canadians to self-determination can extend only over a limited portion of the present territory of Québec.

15. **Partition of Québec.** Demands for the independence of Québec thus compel consideration of partition of the province. In the event that Québec seeks, and Canada permits, the independence of Québec, new provinces of Canada could and should be established, or a rump province retained, both (1) in what is now northern Québec, and also (2) in those portions of southern Québec remaining loyal to Canada.

16. **Bargaining on reform.** Bargaining on constitutional reform must not take place on the basis that Québec can secede if it is dissatisfied with the progress or with the results. Rather it should be based on the principle that all legitimate concerns of Québecers, and of other Canadians, can be accommodated by balanced measures of reform.

JENNIFER SMITH
Dalhousie University
Department of Political Science

It is apparent to me that after 25 years of almost continual talk about constitutional change, the divisive issues remain, and new, divisive issues have materialized. Nothing has been resolved. Further, even academics are provincial (or regional) in their understanding of these matters. Québecers have little sense of prevailing currents of opinion outside their province; much of Western opinion is exotic to non-Westerners; nobody outside of Atlantic Canada is interested in opinion there; and few have anything to say at all in response to native political claims.

As well, I find it interesting that academics have retreated into generalities. What I mean is that they seem loathe to discuss particular proposals. This is quite a change from the latter part of the 1960s and the 1970s, when such proposals abounded and were almost all the products of university professors. The proposals contained in the studies of the Macdonald Commission seem to have been the last academic gasp. The Meech Lake proposals were the work of politicians and their advisors. Since then, the proposals circulating have been drafted by private citizens, members of think tanks and so on. There is nothing wrong with this, of course. But I do think that academics who are trained to understand the dynamics of political institutions have not contributed enough to public discussion on this score. For example, Senate reform should be a major issue to smaller provinces. In Atlantic Canada, there has been virtually no debate at all about the merit of competing proposals, just elementary statements for or against the idea of election. Perhaps that will change when the federal government presents its proposals to the Senate-Commons committee that it is planning to establish in the fall.

I am not overly optimistic that Canadians and their politicial leaders will resolve the constitutional impasse at which we seem to have arrived. I do think that if the recession continues, or worsens, the popular will for major change will dissipate, at least in the short term.

KATHERINE SWINTON
University of Toronto
Faculty of Law

There is a continuing problem in discussions like that at the Edmonton symposium because of the differing perspectives of participants on the "game" which we are in. For some, the project is the repair of the existing constitution; for others, it is a more ambitious rebuilding; for still others, it is a process of deconstruction and Québec separation, with or without a subsequent realignment. Without some consensus on the project, it is difficult to engage in profitable discussion about the process for change and the substance of new arrangements.

While it is worthwhile to consider the implications of separation by Québec, it is important to realize the direction in which constitutional debate is now turning in the country. We are now into a consideration of repairing or rebuilding the constitution. Whether it is the former or the latter will, to some extend, be determined by the tone set in the document on constitutional reform promised by the federal government by September of 1991 (although it will be hard to keep the agenda narrow once the public is invited to engage in the discussion).

Even though some provincial premiers and various individuals continue to call for a constituent assembly, the federal government has made at least a preliminary decision about the process to be followed by establishing a joint House of Commons-Senate committee that will hold public hearings and meetings with provincial legislators and legislative committees on the federal document. The decision has been made to use a parliamentary forum to consult with the public, rather than engage in a debate about the form and nature of a constituent assembly — a debate which I feel strongly would distract us from the important issues of substance which face us.

It is now time to concentrate more directly on those issues of substance, especially in the academic community in symposia and conferences to come, on questions about the structure and powers of national institutions, the recognition of the claims of Québec and aboriginal peoples, and the changes necessary to the distribution of powers and responsibilities between federal and provincial governments. The debate must be focussed to be productive. No longer can we talk somewhat abstractly about the need for more centralization or decentralization, for some degree of asymmetry, for reshaping national institutions to be more responsive to regional and other types of claims. It is time to discuss proposed changes to the constitution in a disciplined and focused manner.

"AS I SEE IT, RENÉ ..." SAID SIR JOHN

DALE GIBSON

Perhaps it was a case of intellectual indigestion. A day and a half's discussions about Canada's constitutional future with a score of sophisticated constitutionalists would be enough to upset anybody's mental metabolism. Whatever the cause, as I sat contemplating the highlights of the constitutional symposium in the warm amber light of a single-malt scotch, I was visited by an extraordinary vision.

Across the room from me sat René Lévêsque, in animated conversation with Sir John A. Macdonald. Both men seemed oblivious to my presence, though not to my bottle. They helped themselves liberally to the latter. It appeared that they'd been observing the same constitutional symposium from the vantage point of their present domicile (whether they'd been looking down or up on the proceedings was not clear), and they were now debating the topic of Canada's future themselves.

> "As I see it, my dear Lévêsque," said Sir John, "this alleged constitutional crisis is a tempest in a tea cup."
>
> "On an eternal scale, Sir John, you may be right. By that measure, of course, even your own grand accomplishment of Canadian Confederation seems minor. (Macdonald winced.) On a more immediate scale, though, (Lévêsque squinted to avoid a curl of smoke from the cigarette in the corner of his mouth) our former countrymen seem to have got themselves into a monumental fix."
>
> "Oh tush!" the older man replied, "Canada's constitution is working perfectly well right now. You heard delegates from Québec admit that. In terms of getting things done on a day-to-day basis, the government of Québec is not experiencing significant difficulty. Those many informal arrangements they've worked out with the federal government over the years ensure that Québec has effective *de facto* control over most of the governmental sectors it needs to ensure the preservation and enhancement of what it calls its 'distinct society'".

Lévêsque shook his head vigorously.

> "There are still many matters that Québec considers to be federal intrusions into its constitutional autonomy", he said. "The use of the federal spending power in areas of provincial jurisdiction, for example. And the fact that the Québec government and Québec laws are subject to the Canadian Charter of Rights and Freedoms."
>
> "Granted," Macdonald acknowledged, "but those things can be worked out over time. Meanwhile, both federal and provincial governments are able to function quite effectively. It's nothing like the situation I faced in the early 1860's, when continuous political impasses made it next to impossible to get anything done. And on top of that, I had to face the constant threat of invasion from the United States. Now that was a real crisis!"

René Lévêsque looked annoyed, but he took a deep draught of scotch and lit another cigarette before replying.

> "Now look, Sir John. You were a practical politician — and a very subtle one at that. You know very well that voters don't know much, or care much, about the day-to-day operations of the governmental apparatus. What counts with voters is appearance, symbolism, regional pride: things they can debate over a beer; things that stir their emotions."
>
> "I don't deny that."
>
> "Those things — symbolic things — are what the present Canadian crisis is all about. In 1982, Québecers were forced into constitutional changes they didn't agree with: the Charter of Rights, an amending formula that allows constitutional changes to be made without Québec's consent, and so on. These things were agreed upon in the middle of the night by representatives of every government except Québec. They were decided — literally, and deliberately — while I and my colleagues slept.

Macdonald smiled a little crookedly.

> "Yes", he remarked. "I recall watching that little double-cross by the Trudeau government, and wondering how Mr. Trudeau reconciled it with his vision of a 'Just Society'. But you cannot tell me with a straight face, my dear friend, that you would have agreed to the 1982 amendments even if you had been at

that all night meeting."

Lévêsque smiled a little sheepishly and shrugged: "Be that as it may, we were not even given an opportunity to participate, and Québecers are still very angry about that insult."

"As I understand it", Sir John observed, "the Meech Lake Accord was intended to make amends for the insult."

"Yeah, and look what happened to that: it was rejected by the rest of the country! My province was repudiated once again. Well that's it! Québecers can only take so much! They now know it's true what I and the Parti Québécois tried to tell them: if they want to be treated with dignity, they must first assert their sovereignty. This they are about to do, and this is what has led to the present crisis. (Lévêsque's face, always animated, twitched so vigorously that his cigarette waggled.) It's not a 'crisis' in Québec, by the way. Québecers are calm about what needs to be done — serene, in fact. It's the rest of Canada that is panicking."

Now it was Sir John's turn to pause. After refilling his glass from my diminishing supply, he watched the smoke spiral from his friend's cigarette for a moment or two, and then spoke reflectively.

"Yes. I suppose all those royal commissions and legislative inquiries and constitutional task forces that are chasing their respective tails all over the country are an indication of the panic. And academic symposia like this one we've been watching today."

He ran a hand through his grizzled hair.

"What do you think is going to happen, René?," he asked. "Separation?"

"I urgently hope so, Sir John. Not total separation, mind you — sovereignty association. After Québec's sovereignty has been recognized, I'm sure there will be bilateral negotiations, which I believe will result in some kind of future association — as the Allaire and Bélanger-Campeau reports contemplate."

"You know," Macdonald said with a frown, "I think you are under-estimating the ease with which those arrangements could be made. The high degree of informal devolution — *de facto* autonomy — that Québec has experienced in recent years has been the result, in part, at least, of a certain political imperative. Because there was no alternative, politicians at both levels had to find ways to make the *status quo* work. And they did. That political imperative will disappear if Québec becomes sovereign. There simply may not be sufficient political will left among federal politicians — or those from the other provinces — to forge a new relationship with an independent Québec. The possibility of northern North American unity having disappeared, Canadian politicians might see much greater advantage on concentrating their efforts on unifying the remaining parts, or (God forbid) on union with the United States, than on exploring new forms of association with Québec."

"That," said Lévêsque with another shrug, "is admittedly a danger. There is also a danger, I can't deny, that the voters of Québec might lose their nerve again, as they did in the 1980 referendum, and vote to remain as a part of Canada."

"You think that is possible?"

"I certainly hope it doesn't occur, but I've always been a realist, Sir John — like yourself — and I recognize that it would still be possible for the federalists, if they made the right moves, to persuade Québecers to stay. Fear of the unknown is a powerful force for stability, and skilful politicians could exploit the uncertainties about Québec's ability to survive, culturally and economically, on its own."

"But what about that sense of ruptured pride you spoke about a moment ago? Anger breeds courage."

"Quite so, Sir John. If there is to be a *rapprochement*, the federalists will have to remove or soften that anger. This they can do, I believe, with a new set of proposals, if they are generous enough."

"Along the lines of the Meech Lake Accord, but broader?"

"Much broader," Lévêsque agreed.

"What could be added to the Meech proposal that would overcome Québec's anger and yet be acceptable in the rest of the country?"

Lévêsque scratched his nose with the bottom of his glass.

> "There are many possibilities. What would be essential, whatever the other details might be, would be a willingness by the rest of Canada to accept a distinct constitutional status for Québec — to agree that Québec must have certain powers or rights that other provinces do not have. Unless the federalists are willing to agree openly to that approach I don't think they'll be able to stop sovereignty association, since many of the things that Québec needs or wants would not be suitable for other provinces."

> "There would be mountainous opposition to that approach in the rest of Canada," Macdonald objected. "As we heard at the constitutional symposium, the notion of 'asymmetrical federalism' is very unpopular."

> "Now really, Sir John," blurted Lévêsque, more than a little testily. "Canadian federalism has been asymmetrical from the beginning; you designed it that way! Look at the constitutional protections for separate denominational schools, for instance. They're different in almost every province. And the language protections ..."

It was now the old man's turn to be annoyed.

> "I didn't say that I would object to that solution. I've been a pragmatist much too long to worry about a mere lack of symmetry. My point, my dear fellow, was that the voters outside Québec, who don't know anything about the misshapen constitution that already exists, would consider any new special concessions to Québec as a sell-out, and resist them at all costs."

> "Perhaps they will — I hope they will," Lévêsque grinned. "If so, sovereignty association will be assured, since English Canada must accept either this kind of 'sell-out' or a pull-out of Québec from the country."

Sir John nodded.

> "That's really the point isn't it?" he asked, "Canadians outside Québec must understand — and soon — that there is a hard choice to be made. Either the seriousness of Québec's demands must be recognized and responded to in ways that will perhaps not be appropriate for other provinces, or Québec will cease to be a province altogether."

> "That may be true, Sir John", said a new voice, a rather scholarly one, from a dark corner of the room. "But it cannot be phrased in that way."

The other men turned in surprise, and were joined by a magisterial figure whom I recognized as former Chief Justice of Canada Bora Laskin. With a toss of his leonine mane, Laskin continued.

> "If Canadians are asked to choose between a sell-out and a pull-out they will unquestionably opt for the latter. What is needed, in my estimation, is a massive pedagogical exercise aimed at educating non-Québecers to accept that asymmetrical federalism is not evil, but that it could, on the contrary, be a positive boon, both directly and instrumentally."

Lévêsque smiled.

> "Do you really think that the ordinary anglophone voter — watching television with a beer-can in his hand — would be persuaded by that kind of message? You were a great judge, my friend, but with great respect (as you lawyers are always saying) you would have been an even better judge if you had used less ponderous language."

An irked frown passed across the face of the Chief Justice, swiftly followed by a generous smile.

> "Anyone who could persuade voters to take an expression like 'sovereignty association' seriously is clearly my master in that department. We do seem to agree, though, that Canada can't be kept whole much longer unless non-Québecers can be persuaded that a Canadian Québec will have to be a Québec which is more constitutionally distinctive, at least in the formal sense, than it now is. What are you fellows drinking, by the way?"

The remains of my scotch splashed into the newcomer's glass. He swirled it, inhaled appreciatively, sipped, smiled, and continued:

> "In the long run, you know, it is probably fortuitous that things have reached this impasse."

> "How so?" asked Sir John Macdonald.

"Well," said Laskin, "the impasse creates an occasion for Canadians to examine and to agree upon essentials — to reach some consensus on the values they collectively cherish ..."

"Values?" asked Lévêsque, somewhat dubiously.

"Basic values," the Chief Justice replied, "What the country is all about, what Canadians consider important: democracy, tolerance, the parliamentary system, the marriage of French and English traditions, the unique status of the aboriginal population, multiculturalism, and so on. Once agreement has been reached about those basics, they can be entrenched in the Constitution as a kind of foundation, and the rest of the document will grow logically from them."

"Rubbish!" lisped a new voice from the shadows, "You always were too much the academic, Bora!"

A smiling man wearing a bow-tie emerged from the corner of the room: unmistakably Lester Pearson. In his hand was what appeared to be my auxiliary bottle of extra-old Glen Morangie. He must have brought it from the kitchen. I'd been saving it for a special occasion; but I suppose this was one.

The Chief Justice made room on the sofa for the genial new arrival before addressing him in a tone of mock injury.

"What does my once having been an academic have to do with my views about Canada's future?"

"You professors," said Pearson with a twinkle, "think that constitutions should be built like cathedrals according to some grand over-arching design. Politicians know that they're much more like shanty-towns, thrown up in haste to meet pressing needs, and patched or added to as more immediate demands arise."

"Perhaps you're right about politicians," Laskin responded, "but any constituent assembly that's convened to formulate a new constitution for Canada will be bound to include many delegates who are not politicians. They're the ones most likely to demand a statement of fundamental values."

Lester Pearson smiled sadly. "Constituent assembly? You should know better than that, Bora old man. Surely you don't think that any government — federal or provincial — is going to relinquish control over the shape of Canada's future constitution to a yabber of amateurs. At most, they might call upon token representatives of various community groups to offer 'advice', or to rubber-stamp the final product. Frankly, though, I'm not even sure about that; I think a referendum is the most likely device for achieving democratic approval for that which will have been hammered out in what used to be smoky rooms until the clean-air folks took over. Fundamental values will find their way into the Constitution, if at all, as decorative flourishes in meaningless preambles and the like."

"Like the bright coloured paint on low-cost shanties," Lévêsque chuckled.

When Macdonald also nodded in agreement, Chief Justice Laskin threw up his hands in good-natured surrender.

"All right, all right" he said "let's take the pragmatic approach, then — the shanty-town approach. Let's see if we can at least agree about which shanties need to be renovated in order to prevent either a conflagration or a mass population exodus."

"That's the spirit," cried Sir John, recharging their glasses all round. His voice was beginning to thicken. "Let's see. One of the first essentials seems to be the matter we were discussing when you came along, Chief Justice: an open acknowledgement by the rest of Canada that Québec really is distinct, and requires certain new constitutional provisions that may be inappropriate for other provinces."

"Such as the right to veto future constitutional changes", suggested Lévêsque.

"Not every change, surely?" asked Pearson with a frown, "surely just those amendments having special significance for Québec: those which would affect the preservation or enhancement of the franco-Québec culture. Could these items not be listed, and subjected to a special amendment process? Or perhaps it would be better to entrench a general principle that Québec may veto amendments that would affect its cultural distinctiveness?"

René Lévêsque looked wary: "Maybe it would be possible to find words to limit Québec's veto power, but it would not be easy, since almost everything has cultural significance: certainly education, radio and television, but also such matters as family allowances, the federal spending power, and certainly the Charter. It would be much simpler just to let Québec go rather than try to concoct some complicated veto provision like that."

Pearson spoke up: "Perhaps not. Let's assume for the sake of discussion that the lawyers will be able to come up with suitable language if the politicians can agree on what they want. If we were still in charge of things I suspect that we'd be able to reach agreement."

"But we've been mellowed by our current situation, Pearson," said Sir John with a leer. "Just look at our friend Lévêsque here, for example. Can you picture him calmly discussing with his political opponents the ways in which sovereignty association might be avoided if he were still terrestrially rooted? (He had trouble articulating 'terrestrially'). Death brings a perspective rarely attained by those who are in the throes of active politics."

Pearson disagreed: "You were born mellow, Sir John — you and René. (The latter smiled innocently.) In any case, you were both very pragmatic politicians, as was I — and as the political leaders of today still are. You don't have to be dead to recognize the virtues of compromise. If we can find a *via media* among ourselves, I'm confident that terrestrial politicians could do so as well."

"But can we?" asked the Chief Justice.

Pearson nodded. "Perhaps so. We seem already to be agreed that avoiding Québec separation will require both a recognition of its distinctiveness and some form of at least partial constitutional veto for Québec. What other matters do we consider to be *sine qua non* to reconciliation?"

Lévêsque spoke up: "As I said before, the Charter is a serious problem. Many Québecers see the federal Charter as an invitation to the courts to destroy the French culture in the name of individual rights. For them that's unacceptable."

"It is not a federal Charter!" objected Chief Justice Laskin. "It's an all-Canadian Charter, applicable to the governments and laws of all provinces, as well as to federal laws and authorities."

"I understand that," said Lévêsque, "but the fact remains that some of Québec's language laws were struck down by the Courts because of the Canadian Charter, and many Québecers are angry about that. The Charter has to go!"

"Just a second," offered Lester Pearson, somewhat sibilantly. "I understand that governments can opt out of most Charter provisions, but not those related to language. So perhaps our problem could be solved by simply extending the opt-out feature of the Charter to apply to language rights in the same way that it now applies to other rights."

The Chief Justice looked troubled.

"I'd hate to see that," he said. "The Charter is so important a bastion of individual freedom."

"Bora," said Pearson, with a trace of impatience, "most parts of the Charter can already be opted out of. Besides, I thought you agreed a few minutes ago that we are not trying to erect grand edifices here; we're just trying to find short-term ways of staving off constitutional calamity."

Turning to the others, he asked: "What else would be needed?"

Lévêsque listed several: greater Québec control over electronic communications; formalization of Québec's jurisdiction over immigration and of the various other *de facto* forms of governmental devolution to Québec that now exist; a rejection of the federal spending power in certain areas of provincial jurisdiction; and perhaps the abolition of Québec's constitutional obligation to be bilingual.

"Is that all?" asked Laskin with more than a trace of sarcasm.

"Probably not," Lévêsque replied, ignoring the Chief Justice's tone, "There are many other things that might also be demanded. It all depends on how anxious the Québec and federal governments are to reach a deal, and how far their respective electorates will allow them to go. If I were still in charge of the

> Québec government I'd demand very much, since I'd personally prefer to see a clean break anyway. I fear, though, that the present Québec government is afraid of a clean break. So I think that a deal may be possible. I don't know how many concessions it will take, since I can't read the mind of Robert Bourassa. What I can predict is that there will not be a deal unless the rest of the country is willing to recognize some kind of special constitutional status for Québec. Without that, Parizeau and his Parti-Québécois friends — my friends — will win!"

Lester Pearson, looking more serious than he had until now, remarked that there was another reason why the separatist forces might be victorious:

> "The exasperation factor: everybody's wish to get on with other things. The economy is stumbling, health care is dilapidated, unemployment is scandalous, environmental problems cry out for attention, and politicians continue to fixate on constitutional questions. It seems to me that voters both inside and outside Québec may soon be in a mood to grasp at whatever constitutional solution is closest at hand in order to free their political leaders to move on to what they consider more pertinent questions. And the easiest constitutional solution in the short run would be outright separation for Québec. If that happened, I doubt that there would be much political will outside Québec to talk about some new form of association for many years to come."

Sir John A. Macdonald, who had been quietly attentive during most of the foregoing discussion, cleared his throat and asked:

> "Aren't we forgetting something else, too? (His diction was quite thick with whiskey by now, but his thoughts were clear enough.) Even if the politicians somehow overcome this exasperation factor and arrive at a consensus about constitutional revisions that would avoid separation, they might not be able to sell the proposal to the electorate. Don't forget that the politicians already agreed amongst themselves on a package of practical amendments like these in their Meech Lake Accord. But the Meech Accord died. And its death was attributable in part to its failure to deal with certain extraneous matters — aboriginal rights, for example. Is it not likely that any new agreement would again be derailed by some new Elijah Harper?"

> "Yes, indeed," Pearson agreed, "unless the package includes something that will satisfy those interests. Current public opinion seems to support the demand of native groups for explicit constitutional recognition of the right of aboriginal self-government, so I would expect that to be a part of any new agreement, even though it will probably be restricted to a some vague declaration, rather than a precise legal devolution of governmental authority."

> "And even though," added Laskin acidly, "there is no logical linkage between the Québec question and the aboriginal question!"

> "Now, now, Mr. Chief Justice," said Sir John, "life is not entirely a product of logic. Politics is not logical, but it can produce happy results. (He stood, somewhat unsteadily, and reached once more for the bottle.) Scotch whiskey is not logical, either, but it ... oops!"

He accidently knocked over the whiskey bottle, which disgorged its remaining contents into René Lévêsque's lap.

> "Son-of-a-Meech!" Lévêsque muttered, as the others collapsed in laughter.

And suddenly I was alone. On the table before me were two empty bottles, one on its side. From the carpet rose the reek of wasted malt nectar. "Could I have drunk all that myself?" I wondered. It wasn't altogether clear just how much "all that" was, since it was difficult to judge how much had been spilled. I certainly felt rather lightheaded, but constitutional reform is rather dizzying stuff, after all.

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