Centre for Constitutional Studies

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Number 3

Referendum Round-Table: Perspectives on the Charlottetown Accord

KATE SUTHERLAND

POINTS DE VUE

Numéro 3

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REFERENDUM ROUND-TABLE: PERSPECTIVES ON THE CHARLOTTETOWN ACCORD

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INTRODUCTION

This collection of papers emerged primarily from a panel discussion sponsored by the Centre for Constitutional Studies on "Canada's Constitutional Predicament" which took place on September 19, 1992. Most of the papers reproduced here formed the basis for presentations delivered by participants during that panel discussion. The two articles that were not part of those discussions were either prepared for it, as in the case of Regena Crowchild's paper, or for oral delivery elsewhere, as in the case of Beverley Baines' piece. What we have, then, is a collection of very current views of a diverse group of people, formulated on the eve of the National Referendum on the *Charlottetown Accord*.

These are the perspectives of insiders and of those who consider themselves outsiders, regardless of whether or not they had formal political representation in the negotiations which led to the *Charlottetown Accord*. The Right Honourable Joe Clark, as Minister Responsible for Constitutional Affairs, has been, as he notes in his speech, "at the heart of this question for the last seventeen months." Ron George was party to the negotiations as the President of the Native Council of Canada. Howard Leeson, Professor of Political Science at the University of Regina, acted as a constitutional advisor to the Saskatchewan Government.

On the other side, Regena Crowchild, President of the Indian Association of Alberta, puts forward a treaty perspective she fears has been overlooked. Beverley Baines, Professor of Law at Queen's University, addresses her remarks to lawyers, who certainly have not

been excluded as a group. But she directs her attention to those lawyers who practice on behalf of disadvantaged groups. She offers her analysis in the service of groups who have publicly decried their exclusion from the constitutional table — groups such as the National Action Committee on the Status of Women and the Native Women's Association of Canada. Jacques Frémont, Professor of Law at the Université de Montréal, offers a more detached view, presenting us with the positive as well as the negative aspects of the Accord, as seen from a Quebec perspective.

Some of our contributors view the Accord as a solution to Canada's most pressing problems. The Right Honourable Joe Clark speaks of the amelioration of poverty and powerlessness among Aboriginal peoples, of the staving off of the threat of Quebec separatism, and of an end to Western alienation. Howard Leeson argues that rather than endangering social programmes, the *Charlottetown Accord* constitutionally guarantees them. Ron George applauds the recognition of all Aboriginal peoples in the Canadian Constitution, particularly those who have fallen outside the Federal Government's definition of "Indian" under the *Indian Act*. Others among our contributors see no progressive potential in the *Charlottetown Accord*. They fear that rather than moving us ahead, the Accord threatens gains we have already made. Beverley Baines characterizes the Accord as an all-out attack on the *Charter*. Regena Crowchild expresses concern that the Accord would erode the rights of Treaty Indians.

These six perspectives represent perhaps only a fraction of the views that have been expressed across Canada since the content of the Accord was made public. However, in their range and diversity, they warrant a broad consideration in the final weeks leading up to the National Referendum, as Canadians decide which way to cast their votes.

Kate Sutherland
Edmonton
October 1992

THE HEART OF THE QUESTION

THE RIGHT HONOURABLE
JOE CLARK, P.C., M.P.

I remember in a previous job an observation that was made by George Shultz, the American Secretary of State. The Cold War was still on. But George Shultz saw the possibility of a thaw. There were people then, though, who did not want the Cold War to end. They did not see the need for change. They were comfortable with conflict.

Mr. Shultz noted that for decades, the West had proposed arms control agreements with Moscow. Moscow had always said "No." George Shultz said that the real question now, was that when Moscow finally said "Yes," would we in the West be willing to take "yes" for an answer.

That is Canada's challenge today. To discover if we have the will and the vision to take "yes" for an answer, to say "yes" to each other. This is Canada's opportunity to bring the end to our own Cold War.

We have never faced a challenge or an opportunity like that before. On October 26, Canada will decide whether or not it will come together or begin to come apart.

Some people would have Canadians believe that decision will have no impact, no consequence for this country. That we will survive the outcome, no matter what it is. That we would succeed in staying together simply because we have succeeded in the past.

I could not disagree more strongly. I believe that, if we accept this agreement, the Constitution will fade into the background, where it belongs. But if we reject this agreement, I believe this country would begin to crumble. The only issue would be whether that would happen slowly with a whimper, or more quickly, with a bang.

Now, that is only my opinion. But I have been at the heart of this question for the last seventeen months. I have seen what was achieved, and how much good will it took; and I know how close we came to failure, and how bitter that would have been, how divisive, how permanent.

People who say there would be no consequences for the rejection of this Accord are, I believe, either fooling themselves, or trying to fool others.

You have to judge for yourselves. But, in addition to describing this Agreement, I think I also have the duty to express my view that to reject this would be very dangerous for Canada, probably fatal.

The *Charlottetown Accord* deserves support on its substantial merits.

It is an extraordinary achievement. It comes after two decades of fighting and failure. For the first time in our history, at the most inclusive Canadian table ever, seventeen Canadian leaders came together, to support each other, to support our country, to build our future.

They agreed on a new vision of how this country can work better. And they did that with unanimity.

The *Charlottetown Accord* does not reflect an Ottawa vision of Canada, or a provincial vision, or a partisan vision.

This is a Canadian vision, never broader, never more inclusive. The very strength, the very value of this Accord is that it is not the work of one set of hands or one level of government, or one vision of Canada. Its strength is in its shared authorship, the many hands, the diverse views that are reflected and respected by this Canada Accord for the whole country.

This agreement deals with every major constitutional issue of the past ten years.

For the first time ever, we have agreed on fundamental reform of our Canadian Parliament. The House of Commons would reflect the voice of the people better. The Senate would reflect the voices of the provinces better, effectively, democratically, for the first time. And both houses of Parliament would respect what Premier Wells calls "the third equality," that between the English and French-speaking cultures.

For the first time ever, we have agreed on a new partnership between Aboriginal and non-Aboriginal Canadians, one that can move us from confrontation to co-operation.

For the first time ever, we have agreed together, without dissent, to say "yes" to Quebec, to give it the instruments it needs to feel at home here, as a minority, in a large country, on a large continent that speaks mostly English. And we have done that by treating every province equally, without special status.

For the first time ever, we have agreed that provinces, like Alberta, like Quebec, are better able than Ottawa to provide leadership in particular fields — from training to tourism to mining and municipal affairs.

For the first time ever, we have agreed on an inclusive statement of shared Canadian values and characteristics — of

The most relevant comparison is not between this agreement and past proposals, or some wish list, or a theory or thesis on some library shelf. The only comparison is between this Accord and any other we have been able to agree to in the past.

In 1982, Quebec was left out of constitutional agreement. This Accord brings Quebec in. In 1990, Aboriginal Canadians felt left out, as did others. This Accord brings them in. We have agreed on issues that have never been dealt with before — the economic union, the social charter, reform of our institutions, the inherent right to self-government, a new division of powers, the limits on the use of the federal spending power.

This Accord keeps promises that were made before and broken. It achieves reforms that were started before and failed. It brings people in who were left outside.

I defend the detail of each element of this reform. But I also defend the vision that underlies it, a new vision of how this federation can function better for Canadians.

The Constitution we have comes from another time, literally another century. It reflects a Canada concentrated on the East coast, facing the old Europe. It reflects a country that saw itself as European, and white. A country that regarded its Aboriginal citizens as either children or savages.

We are not that country anymore. It is time for the Canadian Constitution to catch up with Canada. The *Charlottetown Accord* does that.

For decades in Canada, the central government took upon itself a monopoly in defining the national interest. The roots of that lie in the Constitution itself, which gave Ottawa the power

to spend money wherever and whenever it wanted. The roots lie in war and depression, when national emergency required a truly national effort. And the roots lie in a time when only Ottawa had the resources and the vision and the expertise to act for the whole country.

Only Ottawa could establish a national broadcasting system, and a national medicare system, and a national wheat board. Many of those initiatives defined a community coming of age, a country the world came to admire.

But many Canadians were never comfortable with that practice, that presumption. Many of the tensions in this country have their origins in the conflict between the monopoly exercised by Ottawa and the reality that other partners could do some things better than the Central government.

We look at those tensions in isolation. But they share a common thread.

The National Energy Program reflected the arrogance of an approach that defined the national interest in a way that deliberately harmed a whole region.

The controversy over powers, in Quebec and other provinces, was rooted in the use of federal spending, to intrude on the interests and priorities and powers of the provinces.

The rates of disease and despair in the Native communities are chilling testimony to the failure of a centrally controlled, colonial system.

The *Charlottetown Accord* changes that approach, across the board. It builds a new partnership, between governments, among Canadians. It puts aside the notion that strong parts mean a weak country. It ends a view that federalism should

work by fiat, as a monopoly manipulated by Ottawa. It reflects the reality, and the vision, that strong parts can make a strong whole.

It does that by bringing the views of the regions and provinces into the process of parliamentary decision in Ottawa. It does that by establishing the only alternative to the colonialism of the *Indian Act*, treating Aboriginal Canadians with the respect that comes with responsibility. It does that by respecting and restoring areas of responsibility to the provinces, and by new provisions, in training, in culture, that allow provinces to reflect their needs and requirements more effectively. It does that by putting predictability into federal-provincial agreements, ending unilateral change.

And it does that by reforming profoundly the way the federal government would exercise its spending power under the Constitution.

Until World War II, there was a rough balance in Canada between the responsibilities governments held and the revenues they collected from citizens. That changed profoundly in 1942. Because of war, all provinces surrendered to Ottawa their rights to collect personal and corporate income tax to Ottawa. They did so on the understanding that that arrangement would end one year after that war. But Ottawa did not end it. The Dominion Provincial Conference of 1946 collapsed with Nova Scotia, Quebec and Ontario opposed to Ottawa's efforts to institutionalize its dominance. And ever since, the unrestricted right of Ottawa to spend, and the unrestricted right of Ottawa to collect taxes, has been a fundamental source of tension in this country. It let Ottawa impose priorities in fields of provincial jurisdiction, not because Ottawa was right, but because Ottawa was rich. It has brought imbalance to our federation.

The *Charlottetown Accord* addresses that fault head on. It restores the balance of power, of perspectives, of partnership in Confederation. On the spending power, it puts co-operative federalism into practice for all of Canada. And entrenches it for the future. It does so in three ways.

First, in six fields where the federal government spends in areas of exclusive provincial jurisdiction, Ottawa would be obliged to withdraw, and compensate, if provinces wanted that — in mining, forestry, tourism, housing, recreation and municipal and urban affairs. That would apply as well to labour market development and training.

Second, for new national shared-cost programmes in areas of exclusive provincial jurisdiction, provinces could withdraw, if they chose to, with compensation, if they put in place programmes compatible with national objectives.

Third, the Accord commits governments to develop a framework that would cover all other federal spending in areas of exclusive provincial jurisdiction.

That framework would flesh out four criteria agreed to in Charlottetown. One, the federal spending power should be used to contribute to truly national objectives. Two, the federal spending power should reduce overlap and duplication, not create it. Three, use of the federal spending power should reflect equal treatment of the provinces, while recognizing their diverse needs and circumstances. Finally, the federal spending power should not be used to distort provincial priorities, but rather to respect and reinforce them.

Let me be clear. The capacity of the federal government to act in the national interest for national objectives is intact in this Accord. That is true in economic policy, monetary policy, trade policy, foreign policy, defense policy. The federal

government explicitly retains authority over key social programmes such as old-age pensions and unemployment insurance and, for the first time, has an explicit role in setting occupational standards.

The *Charlottetown Accord* does not threaten existing national programmes. Indeed, for the first time, in the social union and elsewhere, it commits all Canadian governments explicitly to medicare, to equalization, to infrastructure, to education, to social services. No future government — federal or provincial — would be able to disregard those declared objectives.

The *Charlottetown Accord* confirms those Canadian objectives, celebrates them. Canada-wide programmes are protected more than ever.

In addition, new national shared-cost programmes would be possible. As Audrey McLaughlin said in Parliament the other day, a given government may not have the political will to launch a new social programme, but it clearly retains the constitutional capacity. What has changed is the monopoly by which the centre imposed its stamp on the parts. That approach does not work any more. It does not fit the modern and diverse country we have become. It is precisely the wrong instrument in a maturing community where diversity is not simply a cultural value, but an economic value as well.

Obviously, this country needs national programmes. Obviously those programmes must have common standards. But equally obvious is the reality that we must take into account real diversity and different needs.

The needs of Newfoundland in job training are very different from the needs of Alberta. The educational requirements of British Columbia may differ from the requirements in

Quebec or Nova Scotia. The purpose is to ensure that national programmes are more effective by making them more sensitive to local needs. They should be developed in partnership, among Canadian governments, and not imposed, by dictate, by Ottawa. The levels of government should trust and respect each other.

The new framework for the federal spending power will be developed carefully, co-operatively, through consensus.

The proper use of the federal spending power is a central issue of modern Canadian federalism. It is the direct cause of most of the fights about jurisdiction. It has also been the instrument of accomplishing some of the programs which are most important to Canadians. As usual, in Canada, the challenge is to find the balance — between proper use and abuse — that is right for this country, today and to-morrow.

So what does the *Charlottetown Accord* do?

It maintains the federal spending power.

It returns jurisdiction, in important named fields, without penalty, to provinces that want that jurisdiction.

It respects provincial jurisdiction in any new field, and will pay for new programmes that meet national objectives.

It protects provinces who want Ottawa to maintain national programmes.

And, for the first time ever, it establishes a clear process to agree on the principles that would guide the use of the spending power.

That may sound technical to some, but it goes to the heart of the constitutional problems that have plagued Canada, and that gave Quebec sovereignists a rationale to fight Canada.

It restores the principle that these important questions will be decided together, in a spirit of confederation.

That is a major change in the way our federation works, a profound improvement. It would build on the balance between national needs and local realities. It would reinforce that practice of partnership, of interdependence that is Canada's modern reality as it is everywhere else. It returns Canadian common sense to our Constitution.

I believe the *Charlottetown Accord*, on this question and every other, can improve this country materially, for all governments, for all Canadians. But that is my view. What matters now is the view of millions of Canadians who will vote on October 26, to either accept the Accord or reject it, to either build this country, or risk that it will come apart.

We need each other in Canada, more than ever, and on much more than the Constitution. We need each other tomorrow, on everything else.

If we can not agree on Canada, on what else would we possibly be able to agree on again? And if we can not agree on Canada, would anything else matter after that? But if we can agree, if we do agree, what does that say for the future? What does that say to the world?

This is not a national choice. It is a personal choice, for each and every Canadian.

I made my choice long ago. I am proud of my roots, here in the foothills of Alberta. But I know I am fortunate to be part

of a large and lucky land. I am proud of my province of Alberta. But I believe it is better off as part of a bigger community. I am proud of Quebec, and I believe Quebec helps make Alberta strong, just as I believe Quebec is stronger by having Alberta at its side. I am proud of Canada. I was not surprised when the United Nations found that this country is the best place in the world to live.

The Canadian community is a family, a large one, a diverse one — with differences, like any other. We are not identical twins. No one wants that. But we are brothers and sisters, inheritors of the best community that I know on this earth. And we have a legacy to leave, or to lose.

In 1865, after another agreement at Charlottetown, George Brown said the following: "We are endeavouring to adjust harmoniously greater difficulties than have plunged other countries into all the horrors of civil war ... Have we not then great cause of thankfulness that we have found a better way for the solution of our troubles...?"

Canada still is the better way. Our ancestors knew that. The world knows that. Our opportunity today is to build on that Canadian way — better still, better always. That opportunity is ours alone and I pray that we will seize it, that the generations to come, and the world that is waiting, will respect and not regret what we do to ourselves this year.

THE RIGHT HONOURABLE JOE CLARK, P.C., M.P., President of the Privy Council and Minister Responsible for Constitutional Affairs. Notes for a speech on the occasion of the anniversary of the University of Alberta Law Centre.

WHY CANADIANS SHOULD VOTE "YES"

HOWARD LEESON

By now most Canadians have been caught up in the referendum campaign. What started off as the simple ratification of an historic agreement has turned into a real debate.

Should you vote yes or no. I would argue strongly that you should vote yes.

Let me begin my effort to pursuade you by telling you what this agreement is not about. Only by clearing away some of the more prevalent misconceptions can the positive features of the agreement be more clearly appreciated.

First, this agreement is not utopian. It will not solve all constitutional problems for all time. Those who are looking for the perfect Senate, the perform form of aboriginal government, or the perfect Social Charter, will not find it here. Rather, this agreement is a pragmatic compilation of changes which are possible now, considering all of the conflicting pressures in Canada. Given the art of the possible, it is a good document.

Second, this document is not Brian Mulroney's vision of Canada. Far from it. It is a document which in many respects is completely at odds with what he proposed. Rather it is a document which fairly and accurately reflects the views of all of the leaders of Canada today.

Third, it is not a document in which there are big winners, and big losers. If someone tells you that Quebec got too much, or women lose out, they are just wrong. The proof of this statement is best found in the strident cries from those on

the NO side, that their particular province, region, or group, has gotten too little, while the others got too much.

Finally, what of the argument that this agreement seriously weakens the federal government, and that national social programmes are in danger? I believe these arguments are misleading and false. They are false because programmes like unemployment insurance, the Wheat Board, PFRA, Medicare, and regional economic agreements are *constitutionally guaranteed* by this agreement, not the reverse. I believe that arguments that conclude that there will *never* be another shared cost programme are simply misleading. Programmes like medicare, CAP, and others were instituted not because the federal government had the constitutional power to do so, but in the face of the fact that these were in areas of exclusive provincial jurisdiction. They were instituted because a government had the *political will* to do so, not because there was constitutional permission. For the first time, in this agreement, there is a mandate for national programmes and national standards. Indeed, even if a province opts out, it must meet national goals and standards, or it does not get the money. Those who forecast that national social programmes are doomed are just scare-mongering.

The *Charlottetown Accord* does not fit any of the extreme characterizations attributed to it by Jacques Parizeau, Preston Manning, Judy Rebick, or Pierre Trudeau. It is a balanced and reasonable compromise.

But simply being a good compromise, or an inoffensive document, is surely not a good enough reason for people to vote for the Accord. Indeed, there are many positive elements which stand on their own and deserve your attention.

The first reason for voting yes is found in the very inclusiveness of the Accord. For the first time since 1867 all major

elements of our society have been represented at the table, and come to an agreement. Despite what you might think of any individual leader, the fact that they could all agree ought to signal to us that the agreement deserves our careful study.

Second, this document meets all of the major tests of our time. It speaks eloquently and in detail to the problems which threaten our society. The problem of Quebec's place in Canada is dealt with in a manner which keeps Canada intact and strong. The Aboriginal people of Canada will be allowed to negotiate and develop instruments of self-government for the first time in hundreds of years. There is a new Senate which will replace the present appointed, patronage-ridden body. For those concerned about our social rights and programmes there is a Social Charter and guarantees on transfer payments like Equalization and Canada Assistance Plan payments. These, and many other changes have been demanded by various groups in Canadian society. The results of this agreement allow us to say yes to solutions to each of our problems. Do those opposed to the agreement offer such a positive package of proposed changes? No! They offer only the status quo, which we know is unacceptable to large numbers of Canadians. They offer only further uncertainty and turmoil, something which we can ill-afford. This package provides the opportunity for Canadians to vote yes to solutions to their problems.

Third, there are some positive changes in this package for the people of Saskatchewan. There are guarantees on transfer payments for social programmes which are not in today's Constitution. There is a floor on our representation in the House of Commons. Our present 14 seats are guaranteed for at least ten years, and like Quebec we have a guaranteed floor on the number of MP's in the House of Commons in the future. As well, we have equal representation in the new Senate with Ontario and Quebec. This is a flexible institutional arrangement

which does not violate our sense of democracy and representation. There are new arrangements for Aboriginal people in Saskatchewan, control of our telephone company is maintained, there is a Social Charter with a monitoring mechanism to help mount pressure in favour of social programmes, and we have maintained a good balance on national and provincial responsibilities.

This agreement is a sound, pragmatic, and very Canadian agreement. It represents the best efforts and best principles of many, many Canadians. When you vote on October 26, think about which side offers you positive alternatives. When you vote on October 26, think about the fact that the other side has not presented a package of alternatives. When you vote on October 26, ask yourself one important question. Will this provide a better, more stable, and humane Canada? If you ask yourself that question, I believe that you will answer yes, and vote yes on October 26.

HOWARD LEESON, Professor, Department of Political Science, University of Regina.

WHY LAWYERS SHOULD VOTE "NO"

BEVERLEY BAINES

None of the historically disadvantaged groups speaks with one voice about the current constitutional deal. Since these groups include the Aboriginal peoples, Quebec francophones, visible minorities, westerners, francophones outside of Quebec, maritimers, women, lesbians and gays, and the disabled, this observation is scarcely surprising. Without question some of this intra-group diversity results from the overwhelming sense of powerlessness that many of these groups experience much of the time. However the sheer pervasiveness of this diversity also would suggest that another factor might be at work. In effect, it would appear that divide and conquer tactics have not lost their appeal among the political elites.

Moreover such intra-group diversity augurs much worse for those who intend to vote NO in the constitutional referendum than for those who prefer YES. Dissenters confront a political universe that is composed almost entirely of opponents. This is because most politicians outside Quebec support a YES vote; and it seems that most of their academic counterparts, the political scientists, are similarly inclined.[1] Indeed the extent of this academic commitment to YES might seem somewhat curious, but for the fact that the more senior and vocal of these political scientists also are men who would deny affiliation with any, or at least solely with any one, of the traditionally disadvantaged groups. Under these circumstances, the naysayers have very little choice. If they require advice and/or support for their dissenting positions, they must look to the legal profession. But what of the lawyers, have they any reason to vote NO?

The members of the legal profession have been unusually quiescent. Could it be that they have no professional opinion about the constitutional deal, unlike the politicos?[2] Of course, this is precisely what is expected from some members of the legal profession, namely those who have become judges. Obviously the judiciary are constrained from expressing their opinions about constitutional texts, except when required to do so in formally constituted adjudicative processes. Nor is there any reason for judges to intervene in the constitutional debate since their job security is not threatened by these constitutional proposals. The courts will still be required to adjudicate constitutional matters, irrespective of whether the proposed changes favour the forces of federalism or, alternatively, the so-called Charter Canadians.

Similarly the outcome of the vote is unlikely to have any effect on the occupational preoccupations of most legal academics. Nor have law professors been completely silent about the constitutional proposals. However those who have spoken up have shown a remarkable tendency to cancel each other out. For instance, immediately after the constitutional deal was struck, three anglophone law professors whose careers span Quebec, Ontario and Manitoba, argued that the new Senate proposals would give the Quebec government a veto over federal language and culture legislation.[3] Almost simultaneously, seven Quebec law professors representing all four francophone universities in that province joined with a colleague from the University of Ottawa to denounce the distinct society clause as being "of virtually no value for Quebec."[4] A hapless bystander might well wonder whether Quebec has gained or lost power and/or face in this deal.

Another example, drawn from a very different context, involves feminist legal academics, some of whom have formally signed on to the YES side,[5] while others have provided reasons for voting NO.[6] Or again, newspaper reports have revealed

some law professors working for the governmental or Aboriginal deal-makers,[7] just as some prominent former law professors are working for the NO side.[8] And then there is the idiosyncratic legal academic who persists in tilting at the judiciary while his colleagues get on with the task of explaining the substance of the deal and how it could change our lives.[9] In sum, while legal scholars appear more responsive to the NO side than their politically scientific brethren, this is by no means true of the entirety.

But what of the practising bar and the law students who plan to join them? Since it is conceivable that there are no longer any practitioners whose practices have not been touched by the *Charter*, arguably there now are just two categories of practitioners: those who have invoked and/or expect to invoke the *Charter* on behalf of non-governmental litigants (whether parties or intervenors), and those who rely on the *Charter* to defend their governmental clients. It is the former who would be well advised to vote NO in the upcoming constitutional referendum. Unfortunately the *Charter* has become the real, if ill-concealed, target of the constitutional deal-makers in this, the most conservative of times. Accordingly, the very practitioners who might otherwise complain about the shortfall in the *Charter*'s reach, must nevertheless rally to its defence lest they lose much of what was wrought in 1982.

The *Charter*, which is a liberal document (coming from me that is not high praise), has on occasion been available to ameliorate the situation of some of the historically disadvantaged groups in Canada. This is true, for example, of the outcomes in the *NWAC*, *Bulter*, *Andrews*, *Daigle*, *Morgentaler*, *Jane Doe*, *Blainey*, and perhaps even *Schachter*, cases.[10] Needless to say, the *Charter* has also produced some less palatable decisions such as occurred with the *Seaboyer*, *Phillips*, *Hess*, and *Canadian Council of Churches* cases.[11] As

well, there have been far too many cases, usually in the criminal law context, in which men have used the *Charter* to attack women's equality rights.[12] Thus the *Charter* is neither a win, win nor a lose, lose instrument.

When the *Charter* came into existence in 1982, one of its most immediate consequences was to relax the hold that federalism had exercised over Canadian constitutionalism for the previous 115 years. While federalism lost its monopoly in the courts, it did not disappear from any of our conventional constitutional arenas. Nevertheless, after experiencing five years of a constitutional regime that was trying to balance its new-found fascination with the *Charter* and the old familiar demands of federalism, suddenly our politicians decided to intervene with the Meech Lake Accord. While that Accord threatened those of us who had begun to turn to the *Charter* to protect our constitutional personhoods, unlike the current proposals, it was not an all-out assault on the *Charter*.

In fact, it did not become clear until the summer of '92 that the real intent of the constitutional deal-makers is to put the *Charter* in its place, that place being one that is subordinated to the forces of federalism.[13] The evidence is in the text, such as it is, of the Consensus Report on the Constitution that became available on August 28th, 1992, after the Charlottetown meetings of the eleven first ministers and two territorial leaders with the representatives of four Aboriginal groups. This text refers almost exclusively throughout its sixty provisions to governmental actions and division of powers' matters, in contrast with the *Charter*'s focus on people and their concerns. As well, the August 28th text is as explicit as any constitutional document could be about trumping the *Charter*.

Mainly the *Charter* gets trumped in the Canada Clause. This happens explicitly in the text of the Charlottetown agreement which instructs that, "The Canada Clause would

guide the courts in their future interpretation of the entire Constitution, including the *Charter of Rights and Freedoms*." It happens again in the draft text that will be entrenched in s. 2 of the *Constitution Act, 1867*, which provides:

> 2.(1) The Constitution of Canada, including the *Canadian Charter of Rights and Freedoms*, shall be interpreted in a manner consistent with the following fundamental characteristics.

Both of these texts use "including," which is not an ambiguous word. To the contrary, it means to treat as subsumed, as subordinated. At the present time, Charter values are not subordinated to any other values. However, if the Charlottetown agreement is adopted, they will be subordinated to the contents of the Canada Clause.

More specifically, Charter values will be measured against the first three fundamental characteristics that are itemized in the Canada Clause. These three are flat-out assertions of governmental and federalism characteristics. They provide, first, that Canada is a democracy, committed to a parliamentary and federal system of government and the rule of the law; second, that Aboriginal governments constitute one of the three orders of government in Canada; and third, that Quebec constitutes a distinct society. "Is" and "constitutes," those are the operative words in these three assertions - constitutive assertions I call them for want of a better term. Both their wording and their positioning will be interpreted as indicative of the strength of the call for deference to governmental actors.

It is significant that when non-governmental (or Charter-oriented) references occur thereafter in the Canada Clause, they are expressed not as constitutive assertions like the three initial provisions, but rather as "commitments," at least in the

english text. Additionally, these four ensuing commitments refer to "soft" or non-governmental entities - that is, to "communities" (official language minorities), to "citizens" (racial and ethnic equality and diversity), to "people" (individual and collective rights), and to "persons" (male and female). And if that were not enough, the discourse also allocates responsibility for some values (those of official language minorities) to Canadians and their governments, while only Canadians and not their governments are responsible for others (those of racial, ethnic, and gender equality-seekers). It seems, in sum, that the distinction between what comes first in the Canada Clause (governmental assertions) and what comes second (non-governmental commitments) is both deliberate and significant. If not, why did the constitutional deal-makers change the ordering that was set out in the September 1991 federal proposals where, for example, "the equality of women and men" was the second of fourteen values, rather than seventh out of eight as it is now in the Charlottetown agreement?

A second piece of evidence that it is the *Charter* that is the real target of the most recent constitutional deal appears in the context of the clauses referring to Aboriginal rights. Although clause 43 specifies that the *Charter* should apply immediately to the governments of Aboriginal peoples, it also provides that these same governments will have recourse to the s. 33 override clause. There is no more reason to deny Aboriginal governments access to s. 33 to override Charter rights than to the other two levels of government. However, what is significant is that the constitutional deal-makers thought this was important. They had the *Charter* in mind, and not benignly.

All of which brings me to my final question: what is so threatening about the *Charter* that it must be broken, shot down, brought to heel? At first, it seemed that the *Charter* might have become a pariah because it was perceived as supporting women and minorities in their claims against

governments. At least we would count. Women did not count in November 1981 when the override clause was invented and adopted; in fact, the first ministers did not even know whether they had intended the override to apply to s. 28 of the *Charter*. Nor did women count in Meech when the Aboriginal and multicultural peoples, but not women (or again the perpetually invisible s. 28), were exempted from the reach of the distinct society clause.

Unfortunately we still do not count, unless it matters to have a weak reference to us in the Canada Clause, even though we went from being second out of fourteen in the list of fundamental values to being seventh out of eight. Moreover, if that weak reference does matter, then how should we assess the effect of the changes in the positioning of the distinct society clause vis-a-vis s. 28? Consider the fact that last September's federal proposals located the distinct society in a new s. 25.1 of the *Charter*, making it subject to s. 28; whereas the recent proposals entrench it not once, but twice, in the Canada Clause, neither version of which will be subject to s. 28. If that is not enough, what about the failure to entrench a requirement for gender equality in the composition of the Senate? Also, there is the small but revealing issue of terminology that arises when the constitutional drafters refer to the s. 33 override provision as "the notwithstanding clause."[14] Since s. 28 is also a *bona fide* "notwithstanding" clause, referring to s. 33 as "the" notwithstanding clause renders s. 28 invisible. This is no trivial matter given that s. 28 also disappeared historically when the override was born. All in all, the evidence that women still do not count for the constitutional deal-makers is not meagre. Indeed, it seems we will not count until we have 52% political representation, but that is another story.

So why do the deal-makers dump on the *Charter*, if it is not because of uppity women? Put simply, it is because of uppity lawyers. The *Charter* has created a constitutional regime in

which lawyers can actually influence law-making as they write their factums in *Charter* appeals. Ask LEAF about their factum in *Andrews* (do not ask them about *Butler* - I am not talking about win, win; I am only talking about having a voice). The LEAF factum made the law in *Andrews*; yet LEAF is an NGO that acts for non-governmental entities. Contrast what obtains under federalism: the arguments are made by government lawyers on both sides. It is no discredit to those government lawyers that they make the arguments that their political masters demand; but the politicians pull the strings. The politicians do not pull the strings when LEAF and other lawyers draft factums for parties and intervenors who are not governmental entities in *Charter* cases. The government lawyers are still there in *Charter* cases; it is just that they are not all there is. Thus it seems that in the summer of '92 the constitutional deal-makers - who are after all politicians first and, where relevant, lawyers second (with the possible exception of Clyde Wells who has difficulty with that ordering) - were out to make sure that lawyers whose factum-writing they cannot otherwise control would nevertheless suffer a loss of credibility with the courts because the courts would understand that the real message of the Canada Clause, indeed of the whole deal, is: Put the *Charter* down.

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1. For example, Peter H. Russell, "Exhausted, we must bit this bitter bullet" *The Toronto Star* (17 September 1992) A29 typifies the latter.

2. It is worth noting that the Canadian Bar Association recently published a report entitled "Rebuilding A Canadian Concensus" in response to the September 1991 federal constitutional proposals, *Shaping Canada's Future Together* (Ottawa: Minister of Supply and Services Canada, 1991).

3. The law professors are Bryan Schwartz, Lorraine Weinrib, and Julius Grey; see, Joan Bryden, "Quebec senators may run Canada: Veto on 'culture' a broad power" *The [Kingston] Whig-Standard* (31 August 1992).

4. Professors Henri Brun, Ghislain Otis, Jacques-Yvan Morin, Daniel Turp, José Woehrling, William Schabas, Pierre Patenaude and Daniel Proulx, "Distinct society clause no use to Quebec" *The [Toronto] Globe and Mail* (7 September 1992) A11.

5. Law professors Jamie Cameron and Kathleen Mahoney are listed as members of the National Canada Committee in Susan Delacourt, "Yes and No fighting over 'us'" *The [Toronto] Globe and Mail* (23 September 1992) A7; and law dean Maureen Maloney is described as "one of the founding members of the Yes committee in British Columbia" by Robert Matas, "McLaughlin defends accord as protecting women's rights" *The [Toronto] Globe and Mail* (26 September 1992) A13.

6. Anne Bayefsky, "This power game beats up on human rights" *The Toronto Star* (21 September 1992) A21; and Beverley Baines, "The Harms That Men Do Live After Them" *Canada Watch* (Toronto: York University Centre for Public Law and Public Policy, September 1992) 21, reprinted as "Ten good reasons for voting no" *The [Kingston] Whig-Standard* (21 September 1992) 7.

7. Julia McKinnell, "Unity deal won't Sell - or will it?" *The [Kingston] Whig-Standard* (24 September 1992) 1, referring to John Whyte as working for the federal government although he was actually working for the Yukon government (see: *The [Kingston] Whig-Standard* (5 October 1992) 7); and Craig McInnes, "Views on accord's meaning differ wildly without text" *The [Toronto] Globe and Mail* (25 September 1992) A5, referring to Mary Ellen Turpel working for the Assembly of First Nations.

8. Deborah Coyne, "Roll of the dice: Final act" *The Toronto Star* (18 September 1992) A27; and Tracey Tyler, "Lawyer working for No campaign forced on leave" *The Toronto Star* (24 September 1992) A3, referring to Mary Eberts.

9. For example, Allan C. Hutchinson, "Legal text is a launching pad, not a final destination" *The [Toronto] Globe and Mail* (2 October 1992) A27.

10. *Native Women's Association of Canada* v. *Canada*, [1992] F.C.J. No. 715 (Fed.C.A.); *R.* v. *Butler*, [1992] S.C.J. No. 15; *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Tremblay* v. *Daigle*, [1989] 2 S.C.R. 530; *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30; *Jane Doe* v. *Metropolitan Toronto (Municipality) Commissioners of Police* (1991), 1 O.R.(3d) 416 (C.A.); *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513; *Schachter* v. *Canada*, [1992] S.C.J. No. 58.

11. *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577; *Attorney-General of Nova Scotia* v. *Phillips* (1986), 34 D.L.R. (4th) 633; *R.* v. *Hess*, [1990] 2 S.C.R. 906; and *Canadian Council of Churches* v. *Canada*, [1992] S.C.J. No. 5.

12. See Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights For Women: One Step Forward Or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989).

13. The forces of federalism are governments, whether federal, provincial, Aboriginal, or Quebec. Although federalism comes in various models (viz. pluralist, two-nation, etc.), they all focus on inter-governmental relations and not on the citizenry per se. Federalism is, in short, that which the *Charter* is not.

14. See clause 43 of the Consensus Report.

EQUITY OF ACCESS FOR ABORIGINAL PEOPLES

RON GEORGE

History was made in Toronto at the end of May.

As a gruelling week of negotiations neared its end, the Native Council of Canada secured a last-minute agreement on the final component of its "Triple E" agenda for constitutional reform.

Unlike Don Getty's "Triple E" however, this one does not deal with the Senate. Rather, it deals with the "equity of access," something which the Native Council of Canada has been working to achieve since it was formed in 1971.

"Equity of access" simply means that the rights of all Aboriginal peoples will finally be recognized in Canada's Constitution. In theory this has been the case since 1982, when Canada's Constitution declared that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." It specified that "aboriginal peoples" includes the Indian, Inuit and Metis peoples of Canada" (See ss. 35.1 and 35.2).

While this clause would seem to make it clear that Aboriginal rights belong to all Aboriginal peoples, Ottawa has continued to act as if this is not the case. Instead, it has continued to rely on its outdated *Indian Act* system to exclude a large proportion of the Aboriginal population from any exercise of their rights. It is this archaic and colonial system which has caused so much grief to so many of our peoples for the last century.

When Canada was founded in 1867, Ottawa was given the responsibility for dealing with Aboriginal peoples under s. 91[24] of the *British North America Act*. At the time it was seen as only a temporary burden, since it was assumed that our peoples would eventually become "civilized" and assimilate into white European society.

But Ottawa was not content to leave this process to chance. To ensure assimilation, generations of our children were removed from their families and put through residential schools where every possible attempt was made to drum their culture out of them. Many of our traditional religious ceremonies were made illegal, which forced us to surrender — or hide — our most valued cultural and religious belongings. We were forced through a foreign educational system - one which denigrated our history, our values, our customs, our religions, our languages. Finally Ottawa took away our land and our resources, and thereby undermined our ability to look after our own needs, as we had done for untold centuries. And for a time, at least, it was illegal for us to challenge Ottawa's actions through its own legal system!

Just as Ottawa worked to ensure our cultures would not survive, so too did it work to ensure that its own constitutional responsibilities would eventually fade away. This is where the *Indian Act* comes in. It has been the principle legal tool that Ottawa has used over the last century to reduce its obligations under s. 1(24). It is through the *Indian Act* that Ottawa has found ways to exclude Aboriginal peoples from their rightful heritage. It has done this by denying people recognition of their aboriginal identity, either by refusing to recognize it in the first place, or by inventing a litany of artificial reasons for taking it away.

The reasons that were invented would be laughable, had they not had such tragic consequences for the peoples

involved. Tens of thousands of our people were forced to give up their official identity as a condition for exercising the most basic rights of Canadian citizenship, for example, voting, pursuing higher education, and owning property. Some of our veterans even returned home from wars (from the Boer to the Korean) only to be told that they had been stricken from official Band lists for being away from their reserves too long! And as we all know, tens of thousands of women lost their status because they married non-status or non-native men - the consequences of which have only partially been rectified with the passage of *Bill C-31* in 1985.

For over a century, these arbitrary laws have had the effect of separating tens of thousands of Aboriginal peoples from their families, their communities, their lands, their treaties, their birthright. As a result, today there are hundreds of thousands of Aboriginal people in Canada who fall outside Ottawa's definition of "Indian," because they either do not have "status," or they do not live on a reserve. And Ottawa has used this legal chicanery to ignore their rights, and to escape its fiduciary obligations towards them as Aboriginal peoples.

But the "Triple E" promises to change that.

The Native Council of Canada had three main goals in the constitutional talks.

First, we wanted any new constitution to make it clear that all Aboriginal peoples would have equal access to the rights recognized in s. 35 of the Constitution. We got that. This will mean that status and non-status Indians living on or off-reserve will be able to exercise their Aboriginal right to hunt, fish and trap.

Second, we wanted to ensure that all Aboriginal peoples who possess treaty rights, no matter where they live, will be

able to take part in the treaty renovation process promised in these proposed constitutional amendments. This means that when treaties are being reviewed in the future, all people who are descendants of the treaty signatories will be able to participate and benefit (not just status Indians living on reserves). We got that.

Third, we wanted to ensure that all Aboriginal people would be able to exercise the right to enter into self-government negotiations. We got that. This will mean that those of us living off-reserve, or in major urban centres, will be able to sit down with the government and negotiate self-government agreements which will suit our particular needs. And governments will be obliged to deal with us. And we got that.

It should be noted, we also helped to secure agreement that Metis will now be included under the federal government's responsibilities as listed in s. 91(24).

If these agreements are ratified in the months ahead, they will mark an historic shift in our relationship with the government and in our relations with each other. They will put the great many of us who have been outside the government's system, at the dawn of a new era. The future is ours.

RON GEORGE, President, Native Council of Canada. This paper first appeared as a guest editorial in *The First Perspective* (24 July 1992).

A TREATY PERSPECTIVE

REGENA CROWCHILD

The first idea that I would like you to consider arises from the most immediate thought that came to mind as I attempted to focus on the topic of the Canadian Constitutional Predicament. I wondered how I could comment fairly on the Canadian Constitution, a charter, if you will, of another Nation. That "other" Nation being Canada.

For the Indigenous Treaty Peoples, Canada is precisely that — a Nation separate and apart from our own.

We note, however, that Canada does not yet, and is not yet prepared to, recognize us in a like manner or fashion. This present day lack of recognition of the Nation status of the Indigenous peoples is a large departure from the historical roots of the Crown, and Canada, in its relations with the Indigenous peoples.

Perhaps many of you here do not realize the overwhelming body of evidence that can be laid before you to attest to the overtures made to the Indigenous Treaty peoples by past leaders and governments of Canada.

For us these overtures served in a real way to reinforce what we already knew. That we, as a people, governed this entire land.

What we did come to learn, however, over the course of history, is that these overtures on the part of the Crown were designed to realize a singular objective that was unbeknownst to us and, for all intents and purposes, foreign and antagonis-

tic to the Indigenous Treaty peoples' living relationship to the land. The results of this legacy persist today.

Between January 18-21, 1983 a conference on Aboriginal Rights took place at the University of Lethbridge. The conference was sponsored by the Alberta Law Foundation and the Department of Native American Studies of the University of Lethbridge. James Youngblood Henderson, then a Professor of Law at the University of California, Santa Clara Campus, delivered a paper entitled "The Doctrine of Aboriginal Title."

In his paper Professor Henderson informs us that from the earliest contact of the Colonial powers of Europe with the Indigenous peoples of the Americas, the "aboriginal rights" of the Indigenous peoples were a part of a vision of universal rights and freedom in a world order. In this vision our rights as the First Peoples of this land were to be maintained and protected from involuntary loss. This vision persisted in much the same form to the time of both the British and French colonizing activities on this continent. It was included within the law of Nations and elements of it were contained in the Royal Proclamation of 1763.

In January of 1982, a number of questions were put before the English Court of Appeal. The Indian Association of Alberta was a party in this case and, although we did not receive the decision we were seeking from the Court, recognition of the customary and enforceable nature of the Indigenous peoples' laws was contained in the decision. The decision states that beyond doubt the customs and laws of the Aboriginal people (as he referred to us) are well-established and have the force of law within the community. Lord Denning further states: "In England we still have laws which are derived from customs from time immemorial."

His decision continues:

> As a matter of public policy, it was of the first importance to pay great respect to their laws and customs: and never interfere with them except when necessary in the interests of peace and good order. It was the responsibility of the Crown of England — and those representing the Crown — to see that the rights of the indigenous people were secured to them, and that they were not imposed upon by the selfish or the thoughtless or the ruthless.

From this we can begin to understand the nature of the Crown-Indigenous peoples relationship. In considering the effect of the Royal Proclamation of 1763 Lord Denning states:

> To my mind the Royal Proclamation of 1763 was equivalent to an entrenched provision in the Constitution. It should not be abrogated or derogated from by any of the legislatures in Canada. It was binding on the Crown "so long as the sun rises and the river flows."

The Royal Proclamation contained detailed assurances binding the Crown to reserve for the use of "the said Indians" lands and territories described in it.

From this brief description we can see that the First Nations were recognized by the Crown as First Nations in the fullest international sense. They are not colonies or plantations of Canada. The Royal Proclamation further prescribes the manner in which the Crown must conduct itself when it seeks to alter or affect or change in any way the original Treaty relationship. Strict adherence to the process that Canada inherited from the Crown in right of Great Britain has not been achieved in the Multi-lateral process. We protest this abrogation and inform the Minister that the consent of the First Nations must be obtained

at an open meeting of each First Nation properly convened for that purpose. In the absence of the consent of the Indigenous Treaty peoples, a change in our relationship to Canada can neither be established nor implied.

The ordinary citizens of Canada are faced with a very difficult decision on October 26, 1992. The decision has been made more difficult because of the very short period of time allowed to consider the full ramifications of the proposed changes that the governments have made available to you. This same timeline is to apply to the Treaty peoples as well.

The Constitution of Canada and the enforcement of the principles contained within it are extremely complex. The Canadian government and the governments of the provinces and territories along with all of the consultative and legal forces at their command have been debating, in this latest round, for close to two years now.

And yet the Canadian public, the large majority of whom are not trained in the law and have not been party to the decisions of the politicians, are expected to cast an "informed" vote almost TWO months to the day after an "agreement" was reached in Charlottetown.

Is this fair or equitable?

The relationship between the First Nations peoples and the governments and the departments of the governments of Canada and its provinces has been marked by and determined almost exclusively on the basis of existing Federal and Provincial statutes. Lawyers and bureaucrats engaged or employed by the Crown have, in the past, determined for us the rightness or wrongness of what we did. And today they judge what we propose to do on much the same grounds. These judgements are based, not on the necessity of maintaining peace and good

order between us, as stipulated in the Royal Proclamation of 1763, but on other oftentimes purely selfish and harmful reasons. The individuals making these decisions are not judges but policy-makers.

There have been many situations where the efforts of these policy-makers have proved not only detrimental to but prejudicial to the Treaty peoples.

For the Indigenous Treaty peoples the most striking example of a law whose development, history, and present day application is almost exclusively policy-based is the *Indian Act*.

Given that such a large part of the Treaty peoples present day relationship to the non-indigenous governments is a direct result of the laws that presently exist, how can we as Treaty peoples be expected to decide whether the deal struck in Charlottetown is in our best interests? It does not have the force of law.

Besides we do not know what the deal is! We have not yet seen the complete legal text that will amend the Constitution of Canada. It is the legal text in the body of the Constitution that the courts will base their judgements on, not the *Charlottetown Accord*.

It is the precise amendment to the Constitution that we should be addressing, not some "agreement" that is apparently still subject to change. Rather than wasting time debating the "agreement," changeable as it appears, the Canadian people as well as the Indigenous peoples should be given the opportunity to fully understand the implications of the legal text.

We have to deal with the law itself. To do otherwise at this juncture of our history is mere political chicanery. I do not believe that the Canadian public or the Indian people are being

given a fair opportunity to cast a "free and informed vote" on the Constitution.

I say this because, for me, the Indigenous Treaty peoples relationship to Canada is as one Nation to another. In our eyes, this is a fact in international law. If Canada wants to alter this relationship, the Treaty First Nations must be approached by the Crown in the manner prescribed in Canada's own Constitutional instruments, and established through the conventions that exist between our Nations. Only the parties to the Treaty have any authority to enter into bilateral discussions.

REGENA CROWCHILD, President, Indian Association of Alberta.

THE CHARLOTTETOWN ACCORD: SQUARING THE CIRCLES IN CONSTITUTION-MAKING

Jacques Frémont

In many respects, it can be asserted that the *Charlottetown Accord* is an exercise in the art of the impossible, an attempt to square the circles. The perilous negotiations which led to the conclusion of the Agreement are a testimony to the difficulty faced by negotiators attempting to reconcile within a political accord what constitute some very opposite conceptions of how tomorrow's Canada should function. Seen from a Québec perspective, the Accord is a skilful but probably insufficient effort in constitution-making; it has the characteristics of a potentially good deal for Canada since most actors can pretend that their negotiation agenda has been fulfilled. It remains to be seen, however, if Québécois and Canadians can buy into such an evasive vision of Canada.

Québec's track record in this round of negotiations can be said to be remarkable on the defensive, but rather poor on the attack.

The Rest of Canada's Agenda

The reform of the Senate was clearly a priority of the western provinces in the current round; for Québec, the Senate has always been perceived as a non-issue, and an institution which should be abolished. The essence of the *Charlottetown Accord* on this point, seen from Québec, is to exchange a number of senators in an institution which has no raison d'être for an enlarged representation in the House of Commons (18 seats) as well as a guarantee of a minimum of 25% of the

seats in any future House of Commons. In this respect, the loss of weight in the future Senate is amply compensated by the gains in the Lower House.

As far as the Aboriginal package is concerned, it did not receive much popular support in Québec where it is not understood. Here again Québec's negotiation agenda can be said to have been fulfilled since the Accord does not directly include any territorial gains for Aboriginal peoples, which was seen as the main difficulty, especially in light of the James Bay development. As far as the rest of the Accord on the First peoples of Canada is concerned, the deal is mainly perceived in Québec as a blank cheque; the essence of the consequences of the deal will only be felt in a few years' time.

Québec's Agenda

Basically, Québec's agenda was undoubtedly to maintain Meech's gains while provoking a substantial revision of the distribution of powers within the federation.

Québec's objectives were achieved as far as Québec's veto is concerned, since a veto with regard to the reform of federal institutions would be conferred. The *Charlottetown Accord* is, however, weaker as far as the creations of new provinces is concerned; in that case, Québec would have no veto but could oppose any revision of the representation of the former territories within the House of Commons, the Senate and in the amending procedure.

The distinct society has always had, as one could imagine, a highly symbolic importance in Québec. This time around, the *Charlottetown Accord* proposes a different clause which probably represents a symbolic defeat for Québec, but at the same time represents a legal achievement superior to Meech's.

The symbolic defeat is that, from now on, Québec's distinct society would only represent one of eight Canadian characteristics, a characteristic which in itself is bound to clash with others. The fact remains that, legally, the distinct society clause in the *Charlottetown Accord* is stronger in may respects than its Meech counterpart, especially with the presence of s.2(2) which confers upon the Government and the Legislature of Québec a special role with regard to the protection and promotion of that distinct society.

On the issue of the distribution of powers, the *Charlottetown Accord* is both satisfying and profoundly unsatisfactory. The sectors of Manpower and labour training as well as that of immigration are part of the agreement and correspond essentially to Québec's specific requests; the other sectors which would be, under the *Charlottetown Accord*, recognized as falling under exclusive provincial jurisdiction are sectors which, in Québec, have effectively always been considered as falling under provincial jurisdiction and jurisdictions.

These gains are especially weak when examined in light of the recognition of the constitutional foundations of the federal spending power within spheres of provincial jurisdictions. In the end, it will mean that, except for a few fields (the six-sisters and Labour Market Development and Training), all provincial jurisdictions will be susceptible to invasion by a new level of federal normativity linked with the federal spending power. The "framing" of the federal spending power, as proposed by clause 25 of the Accord, will probably be useless to protect provincial exclusive powers against such invasion.

Conclusion

Seen from Québec, the *Charlottetown Accord* does not meet Québec traditional requests for more provincial autonomy; however, it probably constitutes a step in a direction of meeting some of its traditional requests. The people of Québec will have to decide if it is sufficient. If it is not, as is possible, it will mean that such an exercise in squaring the circles and attempting to satisfy everybody is not the right approach to adopt in constitution-making. Short of full independence for Québec, some form of "special status" will then have to be accepted by the rest of Canada.

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