

IR. 6 180
Copy
INSTITUTE OF INTER-
GOVERNMENTAL RELATIONS,

STRUGGLE OVER THE CONSTITUTION:

FROM THE QUEBEC REFERENDUM TO THE SUPREME COURT

Ronald James Zukowsky

INTERGOVERNMENTAL RELATIONS IN CANADA:

THE YEAR IN REVIEW 1980

Volume 2

Institute of
Intergovernmental Relations
Queen's University
Kingston, Ontario

Copyright © 1981

ISSN-0226-9341
ISBN-0-88911-031-X

TABLE OF CONTENTS

| | page |
|--------------------------------------------------------------------------------------------------|------|
| VOLUME TWO: THE CONSTITUTION | |
| Foreword | v |
| List of Tables | vii |
| Introduction | 1 |
| PART ONE: THE QUEBEC REFERENDUM | |
| Chapter I: Contending Constitutional Options in Quebec | 7 |
| Chapter II: The Referendum Campaign | 22 |
| PART TWO: THE SUMMER MEETINGS AND THE SEPTEMBER CONFERENCE | |
| Chapter III: The Summer Meetings of the Continuing Committee of Ministers on the Constitution | 34 |
| Chapter IV: The September Talks: The First Ministers' Conference on the Constitution | 40 |
| PART THREE: THE FEDERAL GOVERNMENT ACTS | |
| Chapter V: The Federal Constitutional Resolution | 56 |
| Chapter VI: Parliament and the Resolution: The Debate Begins | 66 |
| Chapter VII: The Provinces Respond: The Court Challenges | 92 |
| Chapter VIII: Other Provincial Actions | 107 |
| Chapter IX: The Role of the British Parliament | 114 |

| | page |
|------------------------------------------------------------------------|------------|
| Chapter X: The Public Response | 124 |
| Chapter XI: Struggle over the Constitution: Some Observations | 136 |
| PART FOUR: OTHER DEVELOPMENTS | |
| Chapter XII: Political Development in the Northwest Territories | 139 |
| APPENDICES | 142 |

VOLUME ONE: POLITICS AND POLICY

Chapter I: An Overview of the Year

Chapter II: A Year at the Polls

Chapter III: Government Economic Policy and Fiscal Federalism

Chapter IV: Energy Policy

Chapter V: General Policy Areas

Chapter VI: Interprovincial Relations

Chapter VII: Judicial Review

Chapter VIII: Notes on the Intergovernmental Bureaucracy

Select Bibliography

FOREWORD

Intergovernmental Relations: The Year in Review is designed to provide its readers with an annual record of developments in the Canadian federal system. In past years, this was accomplished within the limits of a single volume. But few periods in Canadian history were as filled with major events as 1980. No single brief volume could have done justice to the complex issues facing Canadians and their governments.

The single most important issue was the constitution. It transcended all others in its fundamental significance for the future of the federal system. Moreover, the constitutional debate burst the conventional boundaries of the calendar year on which the Year in Review is based. In order to maintain the integrity of the flow of events on this issue, we decided to split our coverage of the constitutional debate off from our other concerns and issue the Year in Review in two volumes. Volume One examines developments in the politics and policy of the Canadian federation during 1980. This volume, Volume Two, is devoted to the constitution. Its coverage of events extends well into 1981 in order to provide our readers as comprehensive a perspective on recent developments as possible.

Volume Two was written by Ronald Zukowsky, Institute Research Assistant. Editorial and secretarial assistance were ably provided by Sheila Dunn, Anne Raizenne, Beverley McKiver and Patti Candido. More than most Institute projects, this has been a collective enterprise.

What follows is a history of a dramatic year and half. The following review is based primarily on the public record, supplemented by accounts from newspapers. It seeks to summarize the actions and views of the major actors as fully as possible within the confines of available information and subject always to the constraint that space does not permit as full an analysis of the views of each as one would wish. In developments so fraught with conflict as these, complete objectivity is probably an impossible goal: we have tried, however, to be as balanced as possible, and to avoid injecting our own views. The issues are vital; the conflicts disturbing. But, as all students of politics must agree, it has been a great show.

Richard Simeon
Institute Director

LIST OF TABLES

| Table | page |
|------------------------------------------------------------------|------|
| 2.1 Poll Results Compared to Significant Referendum Events | 30 |
| 6.1 Opinions Concerning the Proposed Resolution as a Whole | 74 |
| 6.2 General Principles | 74 |
| 7.1 The Resolution in the Courts | 106 |
| 10.1 Public Opinion on the Substance of Constitutional Reform | 125 |
| 10.2 Public Opinion on the Process of Constitutional Reform | 125 |
| 10.3 Western Political Attitudes on Separatism and Powerlessness | 133 |

ACKNOWLEDGEMENT

The author would like to thank Richard Simeon for his careful and judicious aid in the preparation of this volume and, of course, for the opportunity to research such an exciting period of Canada's constitutional development.

INTRODUCTION

In every generation Canadians have had to rework the miracle of their political existence. Canada has been created because there has existed within the hearts of its people a determination to build for themselves an enduring home. Canada is a supreme act of faith.

- A. R. M. Lower, *Colony to Nation*,
cited in Colombo's *Concise Canadian
Quotations*, p. 30.

It has not been easy to be a Canadian recently. We have been asked more and more by our political leaders to sort out our allegiances to our national and provincial communities across a wide range of issues. Many of these issues such as energy policy and economic development have already been described in Volume One of the *Year in Review 1980*. This volume, however, covers the issue which highlights, better than any other, the dilemmas faced by Canadians in balancing their allegiances to provincial and national communities. That issue is the constitution and its reform.

In covering this issue, this volume spans the 18 months from publication of the Quebec government's White Paper on Sovereignty-Association to the Supreme Court's hearing on the legality of the federal constitutional Resolution. Part One deals with the choice as it was posed to Quebecers in the Quebec referendum campaign. Three and a half years after being elected as the government of Quebec, the Parti Québécois held its referendum on sovereignty-association in May, 1980. It asked Quebecers to repudiate the constitutional status quo. Instead, the PQ wanted support for the development of a radically new relationship with Canada - sovereignty-association - involving political independence for the province in a framework of economic association with Canada. Federalist forces inside and outside Quebec united to oppose the Parti Québécois' proposals and to promote "renewed federalism" as the alternative. At the end of a vigorous campaign, Quebecers voted to reject sovereignty-association by a proportion of 3 to 2.

But their refusal was not without effect. Part Two of this volume describes how Prime Minister Trudeau seized on this rejection as an opportunity to initiate a new round of federal-provincial talks on constitutional reform. Despite the momentum provided by the Quebec referendum, the talks did not produce agreement on the renewed federalism promised to Quebecers if they voted no in the referendum. Rather, the talks provided a nationally televised forum for explicit debate between spokesmen for two competing visions of the country's future.

On the one hand, Prime Minister Trudeau and various of his ministers, supported by one or two provincial Premiers argued the case for what has come to be called the "nation-building" perspective. Viewed through this lens, Canada is more than a loosely knit collection of provincial communities. The ties that bind Canadians should be protected and strengthened. National institutions where Canadians can meet to learn about each other's problems and to decide a common future need to be developed further. There must be as few restrictions as possible on Canadians' participation in the national community. Underlying these concerns is the fear that Canada has become too decentralized politically, economically and culturally, and that the trend to further decentralization has to be arrested by decisive federal action.

On the other hand, many of the provincial Premiers argued a "province-building" perspective. According to this view, the province is the primary political community. Provincial governments are more responsive to local needs; they are the primary spokesmen for provincial interests. In a federal system, each order of government, federal and provincial, is sovereign within its own sphere of jurisdiction. They confront each other as equals, and not as superior and subordinate. Provincial interests are thus entitled to an equal hearing and may not be overridden by national majorities pursuing a national interest. Underlying this position is the fear that the federal government possesses too much power under the present constitution and that provincial independence and provincial powers need to be protected and strengthened.

A mutually agreeable set of constitutional proposals that reconciled these different visions did not emerge from the First Ministers' Conference. Again, the scene shifted dramatically. Part Three details the events that followed the failure of federal and provincial governments to agree on constitutional reform. Prime Minister Trudeau sought to impose his own solution. He presented a Resolution for approval by the Canadian Parliament. It requested the United Kingdom Parliament to pass a "Canada Act" providing for patriation of the constitution with an amending formula and a Charter of Rights and Freedoms. With a newly elected majority government and the referendum victory behind it, the federal government felt it had the self-confidence, the public support and the momentum to break the deadlock on constitutional change, to "cut the Gordian knot." It asserted that the federal Parliament could act alone; that neither the law nor the tradition of Canadian federalism required provincial consent to constitutional change. It argued that action now was imperative. The promise to Quebecers of a "renewed federalism" must be fulfilled. Canadians were fed up with constitutional wrangling and experience had shown that as long as the federal-provincial negotiations were governed by the "tyranny" of the unanimity principle they would never yield agreement.

The Prime Minister was supported only by the Premiers of Ontario and New Brunswick, who had been his chief supporters at the September conference. Provinces which had been his chief opponents at the September talks, such as Manitoba, Alberta, Newfoundland and Quebec, disagreed with the specifics of the proposals and rejected the idea that the federal government could act to amend the constitution without their consent. They launched court actions challenging the legality of the federal action.

The dissenting provinces saw the federal initiative as a repudiation of the federal character of Canada, an expression of central dominance which reduced provinces to a minor role. For them, the principle of the equality of two orders of government lies at the heart of federalism. It follows that any process for constitutional amendment which does not involve provincial consent is fundamentally illegitimate and in the deepest sense unconstitutional. To this was added disagreement on the content of the government's Resolution and anger at the omission of most provincial concerns which had been on the table since the 1960's. 2 vote

In Parliament many of the same issues were raised in debate in both Chambers and in a Joint Senate-House of Commons Committee. The Progressive Conservatives led the opposition and attempted to delay the passage of the government's Resolution by all possible means. They too rejected Ottawa's procedure as a violation of the essence of federalism - but they found themselves in general agreement with much of the content of the Resolution, a dilemma faced by many Canadians. The New Democratic Party accepted the basic legitimacy of federal action, but tried to strengthen the Charter, and to inject at least some elements which would address the concerns of the West, where much of the party's electoral base lies. All three parties experienced some internal tensions: among Liberals, there was disquiet among some members who felt minority language rights had not been sufficiently protected; among Conservatives, there was a sharp split between the national caucus and the Ontario provincial government; within the NDP, western hostility to the Resolution led several members from Saskatchewan to vote against the caucus majority.

The Canadian debate also spilled across the Atlantic to Britain, where the members of its Parliament would be asked to approve changes to the Canadian constitution. With much competing advice from Canadians, they anxiously considered where their duty to Canada and the BNA Act really lay, knowing that a false move might injure the traditionally close Canada-UK relationship. 2 vote

By May 1981, events reached a climax. The Newfoundland Supreme Court of Appeal had ruled the federal government's actions illegal. This ruling forced the government to strike a deal with the Official Opposition. The government agreed to wait until the Supreme Court of Canada ruled on the legality of its action before final passage of the Resolution. In return, the opposition Conservatives agreed to end their very effective delaying tactics and allow amendments to be made to the Resolution. If the Court later judged the federal action legal, they would allow a vote on the Resolution as a whole after only a limited debate. The government agreed that if its Resolution were judged illegal, it would be abandoned.

The Conservatives also extracted a promise from the Prime Minister that he would meet the dissenting Premiers. They, however, were busy developing their own "patriation package" based on an alternative amending formula for the constitution. By the time they were ready to meet the Prime Minister, he had deemed his original invitation to have expired and no meeting took place as an immediate response to the Premiers' proposals. *Probe*

Thus, the matter, has been placed in the hands of the nine justices of the Supreme Court of Canada. Their decision on the most politically contentious question in the Court's history may not appear until the fall of 1981. If the court decides the federal action is legal, that will mean parliamentary approval of changes to the constitution is a sufficient condition for amendments to occur. As a result, Canada will likely soon have a new constitution based on the federal government's Resolution. Concern about the desirability - rather than the legality - of the federal Resolution will remain, but it is difficult to see how the passage of the Resolution could be blocked.

If the Supreme Court judges the federal action illegal, then the role of the provinces in the amending process will have been legally recognized. Constitutional change must then await further federal-provincial negotiations. This would re-open the constitutional agenda to the whole range of items not dealt with in the Resolution, and constitutional reform would likely be delayed until some reconciliation of the nation-building and province-building perspectives can be accomplished.

The decision of the Supreme Court will thus be crucial in determining the road that Canadian federalism will take in the future. This is true not only of constitutional issues in the narrow legalistic sense, but also in the more basic sense of attitude, outlook and emotion.

Since the 1960's the constitutional debate has been characterized primarily by the pressure from the provinces to enhance their autonomy and

limit federal powers. First Quebec, then increasingly other provinces, sought basic changes in federal institutions and the division of powers. Ottawa had consistently advanced another agenda, focussing on patriation and a Charter of Rights, but it had been primarily on the defensive. Through a long period of discussions, first between 1968 and 1971, then again in 1975-76 and 1978-79, these two agendas confronted each other. But, since all participants assumed that any substantial change must be based on the consent of all eleven governments, each side was able to block agreement; neither could prevail. At the First Ministers' Conference of September 1980, these competing views were stated more sharply and clearly, and with less room for compromise, than ever before. However, within a few days of that failure, the federal government challenged the assumption that unanimous consent was required. The federal government asserted that it had the power to act alone, that provincial consent was not necessary after all and that Parliament was the ultimate voice of all Canadians. A year that began with a serious debate about whether Quebec would gain its independence ended with an expression of federal power unprecedented since World War II.

This action raised profound questions of political philosophy: what is the nature of the Canadian political community; what is the basis of Canadian federalism? What rights are held by Canadian citizens and how are they best protected? Where and by whom are the diverse interests of Canadians to be expressed, represented and accommodated? What roles do Canadians want their federal and provincial governments to play?

Those questions were also linked to a broader context of increasing intergovernmental and interregional conflict. The constitutional debate both reflected and contributed to increasing recrimination. It was inseparable from conflicts over energy and other issues which seemed to pit the interests of the West against Central Canada, the interests of provinces against Ottawa. As a result the constitutional debate became a complex, compelling kaleidoscope of activity, played out in numerous political arenas involving a multitude of actors from Premiers and Prime Ministers to individual citizens.

Never a people inclined to optimism, Canadians may foresee a bleak future for federal-provincial relations whatever the decision of the Supreme Court. Whether or not the Resolution is approved, there are still many other issues which will need to be resolved and other issues may emerge. Part Four examines one other development with constitutional implications: the constitutional status of the territories.

Such pessimism should be counterbalanced by the realization that this constitutional crisis has worked itself out in an orderly, almost

disciplined manner. The system has been severely tested but, in the last analysis, it succeeded in forcing the protagonists to legitimate their positions through established political and legal institutions. This is a considerable achievement in a world where violence seems to be the preferred way to settle political disputes. It offers hope for the future, whatever the verdict of the Supreme Court.

Canadians may also want to reflect upon the effects of this experience upon themselves. Previous generations of Canadians have had to debate their relationship to a variety of communities: to the different language communities comprising Canada, to communities based on religion or race, to the North American community dominated by our powerful southern neighbour and to communities based first on Empire and, later, on the Commonwealth. All of these debates involved the play of economic self-interest, political expediency, and personal sentiment and loyalty. The same mix shapes the present generation's debate over the primacy of national and provincial communities. And, as with these previous issues, the burden of debate may also carry with it a blessing: the further refinement of the developing Canadian identity.

It is hoped that this review will provide the reader with the background to understand this whirl of activity and the significance of the Supreme Court decision to which it has led. It will be the task of the next Year in Review to report on that decision and its consequences.

PART ONE

CHAPTER I

CONTENDING CONSTITUTIONAL OPTIONS IN QUEBEC

INTRODUCTION

On November 1, 1979, the Parti Québécois government published its White Paper on Sovereignty-Association (Government of Quebec, Executive Council, Quebec-Canada: A New Deal, Quebec, November, 1979). With its release, Quebecers realized that a referendum on Quebec's future was close at hand. It had been promised by the Parti Québécois in the election campaign that swept them to power on November 15, 1976. Now, three years later, Quebecers would have to make their choice: should Quebec stay a province of Canada or should it seek a radically different status under the arrangements described in the White Paper?

In the following months, Quebec society became absorbed in a process of collective self-examination. Prime Minister René Lévesque led the fight for sovereignty-association with one basic argument: if Quebec remained a province its needs would remain unfulfilled; its potential would never be reached. Claude Ryan, leader of the Quebec Liberal party, put the case for federalism. There could be a place for Quebec in Canada if only Quebecers would work for the renewal of the federation.

*Quote
Verbatim*

This process of self-examination took place at all levels of society, and even otherwise trivial events gained a heightened significance as a result of people's awareness and concern. Nevertheless, several events stood out. First, of course, was the publication of the White Paper. Although criticized on several grounds, it provided the basic terms of reference for the debate on sovereignty-association. The defeat of PQ candidates in three by-elections on November 14, 1979 marked the start of a period when the PQ, still smarting from criticisms of the White Paper, appeared to lose momentum to the federalist forces. This loss was further aggravated by criticism of the proposed wording of the referendum question announced on December 20, 1979.

The publication of the Liberal party's "Beige Paper" (Quebec Liberal Party, Constitutional Committee, A New Canadian Federation, Montreal, 1980) on January 10, 1980, gave the PQ something it could criticize and it took the offensive. When the debate in the National Assembly on the wording of the question ended on March 20, the PQ's seemed to have outclassed the

opposition and put itself clearly on top. This position was held well past the start of the official referendum campaign on April 15, 1980. However, by the mid-point of the campaign, the federalist forces had come from behind to make the referendum anybody's game. The forceful intervention in the campaign of the Prime Minister and his Justice Minister, Jean Chrétien, culminated with an outstanding display of eloquence by the Prime Minister in Montreal on May 14. The inspired federalist forces pressed on to victory on May 20.

THE WHITE PAPER ON SOVEREIGNTY-ASSOCIATION:

"QUEBEC-CANADA: A NEW DEAL", NOVEMBER 1, 1979.

In its foreword ("The Future of a People") the White Paper set itself the task of helping the Quebec people "to choose, freely and democratically, the path for our future" by explaining sovereignty-association as clearly as possible. Chapter 1 ("Lest We Forget") observed that, by 1760, francophones had already established a society with "a soul, a life style, a way of behaving, traditions, institutions that were its very own". However, the natural tendency of this society towards prosperity, self-expression and independence had, since the Royal Proclamation of 1763 (formalizing Quebec's status as a British possession), been continually hobbled by various political encumbrances imposed upon it by force or in negotiations. Not the least of these encumbrances has been the federal system. Chapter 2 ("Quebec's Experience of Federalism") detailed Quebec's difficulties in resisting the centralizing tendency of the federal system evidenced by the persistent invasion of provincial jurisdiction by federal policies.

The White Paper argued that the growing problems with federalism imply the need to choose between reforming Canadian federalism or replacing it with another system. However, Chapter 3 ("Federalism: An Impasse") pointed to fundamental differences between Quebec and the rest of Canada and argued that the failure of previous attempts at reform "proves how illusory it is to hope that federalism can ever be renewed in such a way as to satisfy both Quebec and the rest of Canada" (Quebec-Canada: A New Deal, p. 41).

After reviewing various systems of political association in the world today, the White Paper proposed in Chapter 4 ("A New Deal") sovereignty-association. Except for those powers subject to the terms of a treaty of association, Quebec would have all of the powers of a sovereign state: "the power to levy all taxes, to make all laws and to be present on the international scene" (Quebec-Canada: A New Deal, p. 54). The treaty of association between two equal partners, Canada and Quebec, would establish the free circulation of goods (no customs barriers between the two partners and

a common tariff policy towards other countries), the free circulation of people (subject to special agreements on the operation of the labour market), a common currency (the Canadian dollar) and free circulation of capital (subject to investment codes or "particular regulations applicable to certain financial institutions").

The treaty of association would also set up four major institutions: a community council to administer the tasks required by the treaty, a commission of experts to advise the council, a court of justice to decide disputes and, a monetary authority to oversee the working of a central bank. The court of justice would have an equal number of judges from both Quebec and Canada. Representation on the monetary authority would be proportional to the relative weight of each economy. The formula for representation on the community council was not specified but all representatives would be appointed by their respective governments. The paper rejected an elected parliamentary assembly for the association.

Chapter 5 ("The Referendum") described the stages which would lead to sovereignty-association. As promised in the last election, the PQ would hold a referendum seeking approval for its proposals. In the event of a OUI vote, negotiations would begin with Ottawa and the rest of Canada on sovereignty-association. Any subsequent agreements would be submitted to the National Assembly for approval before they became legally binding. Chapter 5 also tried to convince Quebecers that a OUI vote would force English Canadians to negotiate sovereignty-association despite their claims that they would not. At the same time, the paper argued that a NON vote would be interpreted as an approval of the status quo.

Chapter 6 ("Quebec, Land of the Future") described in optimistic terms the economic, social and cultural growth attendant upon Québécois control of their society. At the end of the White Paper is a message from Premier Lévesque ("Call to the Quebec People"). In his direct and personal style, the Premier recapped the arguments of the White Paper and concluded,

Indeed, the choice should be easy, for the heart as well as the mind... We will not hesitate, then, at the great crossroads of the referendum, to choose the only road that can open up the horizon and guarantee us a free, proud and adult national existence, the road that will be opened to us - Quebecers of today and tomorrow - by one positive and resounding answer: Yes (Quebec-Canada: A New Deal, p. 109).

In sum, the White Paper elaborated somewhat on the resolutions of the PQ convention in June 1979. A significant difference was its retreat from the principle of parity in all community institutions as shown by its provision for unequal representation on the monetary authority, by its failure to specify the formula for representation on the Community Council and by the restriction of veto powers over Council decisions to matters of "fundamental importance" only.

Reactions to the White Paper in Quebec

The reaction to the White Paper was generally critical. Opposition critics in the National Assembly were most scathing in their assessment. Gérald Lévesque, Liberal House Leader, called it propaganda (*Le Devoir*, November 2, 1979). Liberal leader Claude Ryan termed sovereignty-association "a house of cards" which would lead to the rupture of Canada (*Le Devoir*, November 3, 1979). Quebec federalists such as former premier Robert Bourassa, pointed to flaws in the institutional arrangements of sovereignty-association and argued that a common monetary and fiscal policy required a common parliament (*Le Devoir*, November 7, 1979).

Editorial reaction in the Quebec press was only slightly more moderate. Lise Bissonette wondered why eleven years after the founding of the party, the PQ could still not define for Québécois "what would be their real weight in the association and exactly how their sovereignty would be limited" (*Le Devoir*, November 5, 1979, p. 4). For her, the many strategic "silences" in the document left room for a retreat from equality in community institutions. Michel Roy observed that the PQ's proof of a failed federalism was not exhaustive but he reminded federalists it was up to them to prove the PQ wrong (*Le Devoir*, November 5, 1979, p. 4). The *Gazette* felt the PQ's optimism about the feasibility of negotiating association with the rest of Canada stretched credulity (*Montreal Gazette*, November 7, 1979).

Opinions and analyses of the White Paper continued to appear in succeeding months. Business groups, such as the Montreal Board of Trade and the Conseil du Patronat, generally saw sovereignty-association as economically unworkable; nationalist groups, such as the Société Saint-Jean-Baptiste de Montréal, generally approved of it. Although PQ losses in the November by-elections were interpreted by some as a mark of Quebec's rejection of sovereignty-association, it was still unclear at the time what effect the White Paper had had on the elections or would have upon the way people would vote in the referendum. It was more widely held that regardless of the contents of the White Paper, the decision to vote Oui or Non in the referendum would depend in large part upon what kind of question were asked.

Reaction from Outside Quebec

Ottawa

The Liberals and the NDP were quick to agree that the White Paper confirmed sovereignty-association as independence by another name. They criticized Prime Minister Clark's policy of limiting federal government participation in the referendum and to urge him to take a stand.

The Liberals attacked the White Paper most strongly. Jean Chrétien argued "it's a war and it must be won" (*Le Devoir*, November 2, 1979, p. 1). Trudeau complained that the paper was full of historical fallacies and that the PQ had been more cunning than lucid or honest. Trudeau agreed that in the event of a OUI vote, the procedure of negotiation proposed in the White Paper should be followed because the democratic expression of the will of the citizens must be respected. However, he criticized the White Paper for not saying what would happen if Canada refused the type of association suggested by the White Paper, or if the vote was NON.

Prime Minister Joe Clark argued that the treaty of association suggested in the White Paper was unacceptable and incompatible with the continuation of the federation. However, he did not want himself classed as a "status quo federalist" and said that one of the Conservative government's main objectives was to show by its actions that it was less rigid than the Trudeau government. Although unclear about the precise role his ministers and government would play in the referendum debate, Clark did promise to participate in the campaign "in order to show Quebecers that with a prime minister who doesn't come from their province, there is a respect for the aspirations of Quebecers" (*Le Devoir*, November 3, 1979, p. 6).

Prime Minister Clark, NDP leader Broadbent and Liberal spokesman Marc Lalonde said they believed that Quebecers would likely vote NON to the White Paper. Fabien Roy, Cr ditiste leader, argued that Canadian political structures should be revised and said that there was general agreement on the need for revision. A party commission was to study the specifics of the White Paper at a provincial council in December 1979.

The Provincial Governments

The response from the other provincial governments has been presented in some detail in *The Response to Quebec: The Other Provinces and the Constitutional Debate* (Institute of Intergovernmental Relations, Kingston, 1980). Accordingly, only a brief summary of their positions will be presented here.

Ontario's response came in two stages. On November 5, 1979, Premier Davis spoke to the members of the Legislature in tough, hard-hitting terms. He termed sovereignty-association "the most facile response...the ultimate 'cop-out' - a self imposed ghetto mentality" (The Response, *ibid*, p. 7). He said his Government remained totally opposed to sovereignty-association and would never negotiate it with Quebec. Opposition leaders supported his assessment with few qualifications. Three weeks later on November 26, 1979, Thomas Wells, the Minister of Intergovernmental Affairs issued a more detailed, reasoned analysis that argued Ontario could not negotiate such an emotionally explosive issue as the break-up of the country in a spirit of cooperation. Moreover, sovereignty-association was not in the political or economic interest of Ontario. He concluded that "new and fair arrangements" could be achieved within federalism and that this would be the only constructive course for Canada.

In contrast to Ontario, the initial response from the western provinces was more restrained. In a joint communiqué, dated November 7, 1979, the four western provinces stated simply that nothing in the White Paper had caused them to alter their previously expressed position that sovereignty-association is neither in their interests nor in the interests of Canadians as a whole. They also reaffirmed their opposition to the status quo and their commitment to a process of constitutional change in which they invited Quebec to participate. The response from the Atlantic Region was equally negative towards sovereignty-association.

The Response analysed the reaction of the provinces in the following manner:

In rejecting the option out of hand, the other nine provinces are delivering a message to Quebec - "you can't have your cake and eat it too". A sovereign Quebec cannot also enjoy the benefits of sharing the economic linkages of the federal state - the association arrangements are unacceptable as a political framework for the trade-offs, sharing and sacrifices inherent in a market as unchanged as the sovereigntists would like. Finally, the "no negotiation" response of the other nine is meant to go hand in hand with a commitment to renewed federalism - the positive side of their coin.

Other Reactions

Editorial reaction in the press outside Quebec generally supported the negative response of the provincial governments although the tone of reaction ranged from hard line to conciliatory (see *Ottawa Journal*, November 8,

1979; Winnipeg Tribune, November 10, 1979; Vancouver Sun, November 8, 1979; St. John's Evening Telegram, November 11, 1979). While it was felt that the White Paper clarified the issue of "what Quebec wants", it was also concluded that, in doing so, the White Paper made it easier to see that sovereignty-association meant the break-up of Canada. The White Paper was criticized as a biased account of Confederation. The assumption that the rest of Canada would negotiate sovereignty-association in the event of a OUI vote in the referendum was considered unwarranted. The failure to say what would happen if the vote were NON or if the rest of Canada refused to negotiate sovereignty-association in the event of a OUI vote was regarded as a crucial omission in the White Paper. The francophone press outside Quebec expressed concern that the fate of francophones outside Quebec was being ignored in the debate over the White Paper (see translation of editorial from L'Evangeline in St. John Telegraph Journal, November 6, 1979).

Independent commentators were also generally critical of the White Paper. John Robarts, former premier of Ontario and co-chairman of the Task Force on Canadian Unity, said in a speech in Quebec City that the Government of Quebec's proposals would destroy Canada (Le Devoir, November 3, 1979). Stephen Lewis, former Ontario NDP leader, assessed the White Paper as "seductive" and said English Canada would have to conduct a good campaign to convince Quebec to remain in Canada, but he doubted there was sufficient awareness of the difficulties of the task or of the power of M. Lévesque (Le Devoir, November 3, 1979).

THE QUESTION: DECEMBER 20, 1979

Premier Lévesque unveiled the referendum question in the National Assembly. The wording of the question as finally approved in English was:

The government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada based on the equality of nations;

This agreement would enable Quebec to acquire the exclusive power to make its laws, levy its taxes and establish relations abroad - in other words, sovereignty - and at the same time to maintain with Canada an economic association including a common currency;

No change in political status resulting from these negotiations will be effected without approval by the people through another referendum.

On these terms do you give the government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada?

YES

NO

Thus, the question did not directly ask voters to approve sovereignty-association. Rather, it asked for a mandate to negotiate sovereignty-association. The provision for a second referendum was a change from the White Paper which had committed the government only to submit the results of negotiation to the National Assembly.

It was clear to most observers that the government had opted for a 'soft' question designed, as James Stewart put it, "to make it easy to say yes" (Ottawa Journal, December 21, 1979). In doing so, the government may have been influenced by public opinion polls taken in June and in early December. These polls showed that whereas a majority of those answering the poll opposed sovereignty-association, a majority would approve a mandate to negotiate it. PQ spokesmen denied these speculations.

Quebec opinion seemed split on the question. The government was heavily criticized by Claude Ryan who termed the question a fraud (Le Devoir, December 21, 1979, p. 1). Jean Chrétien argued that the wording must be changed if the PQ government were "to be honest with the people" (Ottawa Journal, December 21, 1979). Michel Roy in Le Devoir argued the question was a "sidestep" that merely delayed the historic division on a referendum question with clear objectives. However, Roy felt the government would be dishonest only if it regarded a OUI vote as "a decisive step towards the undertaking of future change" rather than solely a mandate to discuss (Le Devoir, December 21, 1979). Pierre Bourgault, ex-leader of the Ralliement d'Indépendance Nationale said he was disappointed that the question did not ask for a clearer declaration of independence (Le Devoir, December 21, 1979, p. 2). However, Claude Rocher, president of the Mouvement national des québécois, called the question "clear". Jean-Marie Cossette, president of Société Saint-Jean-Baptiste de Montréal said he appreciated the question, even if the idea of holding a second referendum seemed to him "an excess of the democratic spirit" (Le Devoir, December 21, 1979, p. 2).

THE QUEBEC LIBERAL PARTY'S PAPER ON CONSTITUTIONAL REFORM:
"A NEW CANADIAN FEDERATION", JANUARY 10, 1980

In its paper on constitutional reform, the Quebec Liberal Party outlined its alternative to sovereignty-association by fleshing out its concept of "renewed federalism". Like many previous efforts at sowing the seeds of Quebec's political future, the so-called "Beige Paper" sought to root its efforts in the soil of Quebec political traditions. However, the Beige Paper tried to exploit the relatively unworked terrain of Quebec's federalist political past. Calling the PQ's attitudes towards Confederation pessimistic, the authors of the Beige Paper argued that federalism offered the province a major role in building Canada as a great country as well as the opportunity to develop Quebec's own distinctiveness. Nevertheless, the authors made it clear that their commitment to Canada could continue only in a radically restructured federal system.

The authors drew on a variety of works on constitutional reform in drawing up their proposals. These included the work of the Task Force on Canadian Unity (see especially, Volume 1 of the Task Force's Report, *A Future Together: Observations and Recommendations*, Ottawa, January, 1979), the Canadian Bar Association (Committee on the Constitution, *Towards a New Canada*, Montreal, 1978), and the Ontario Advisory Committee on Confederation, (Government of Ontario, *First Report*, Toronto, April, 1978; *Follow-up Report*, August, 1978). The result was a proposal which modified the principles of classical federalism (strict division of powers, juridical equality of the two orders of government) in light of Canada's special circumstances. The scope for independent provincial action in a number of fields would be enlarged. The potential for the abuse of federal powers under the present BNA Act would be reduced by abolishing some of these powers and by giving the provincial governments a greater voice in central decision-making.

The principal check to the possible abuse of provincial power would be the Constitution itself, principally the Charter of Rights, rather than the offsetting powers of the federal government. Cultural and linguistic dualism would be recognized and safeguarded in a number of areas. In other fields, the proposals tried to find a middle route between subjecting the rest of Canada to a Quebec veto and subjecting Quebec to the will of the national majority.

The Division of Powers

Federal powers to be abolished included:

- the powers of reservation and disallowance;
- the declaratory power;
- the competence to create federal courts other than administrative tribunals; and
- the power to tax real estate and to levy duties and royalties "arising from the exploitation of natural resources".

A number of powers now exercised by the federal government would be subject to ratification by a "Federal Council" composed of delegates from the provinces. The power of ratification extended to:

- the use of federal spending power in fields of provincial jurisdiction*;
- the use of the federal emergency power*;
- treaties concluded by the federal government in fields of provincial jurisdiction;
- any intergovernmental delegation of legislative powers;
- the appointment of Presidents and Chief Executive Officers of federal and Crown Corporations of major importance;
- the appointment of judges of the Supreme Court and its Chief Justice, and
- international and interprovincial marketing programs of agricultural products.

(*two thirds majority required)

In addition to the power of ratification, the Federal Council would also be entitled to give advice on economic policy, equalization arrangements and, generally, on federal policies with substantial regional or provincial impact. A special committee of the Council composed equally of francophones and anglophones would ratify federal proposals on linguistic matters, give advice on cultural matters and ensure that Canada's dualism was reflected in the federal public service.

Federal powers would also be reduced and provincial powers generally increased by a finer division of powers over immigration, the environment,

culture and education, natural resources, agriculture, health and social services and communications. The provinces would receive exclusive jurisdiction over manpower programs, family law, and penitentiary and parole systems. They would also gain any residual powers and could opt out of federal programs ratified by the Federal Council. To pay for these increased responsibilities, the provinces would be allowed to tax indirectly as well as directly. They would also be entitled to compensation equivalent to federal payments foregone by opting out of federal programs. But, key federal powers over the national economy and interprovincial trade (monetary policy, taxing powers) were left mostly intact. The new constitution, however, would commit the federal government to efforts at equalization and regional economic development.

Institutional Reform

The Beige Paper recommended that the Senate would be abolished and replaced by a Federal Council. Delegates to the Council would be sent by the provincial governments in numbers roughly proportional to a province's share of the national population. The Beige Paper suggested an 80 delegate Council distributed in the following manner:

| | |
|--------------------------------------|----------------------|
| Prince Edward Island - 2 | Alberta - 8 |
| Newfoundland - 3 | British Columbia - 9 |
| New Brunswick & Nova Scotia - 4 each | Ontario - 20 |
| Saskatchewan & Manitoba - 5 each | Quebec - 20 |

Delegates from the Northwest Territories and the Yukon Territory to the Federal Council would be admitted but their numbers were not specified. The federal government would have no representation on the Council but would have the right to make presentations.

Thus, on the Federal Council, the smaller provinces would be over-represented and Quebec's vote would not be sufficient to veto Council actions even in cases where a two-thirds majority of the Council was required. However, Quebec would be guaranteed a minimum of 25 per cent of the Council delegates. Moreover, the principle of dualism would be recognized for linguistic matters. A special committee of the council composed equally of anglophones and francophones (both from Quebec and outside of Quebec) would make decisions on these matters.

The only major change to the Supreme Court proposed in the Beige Paper would require the convening of a "dualist" bench (composed of an equal number of judges from Quebec and from the other provinces) at the request of any government to decide constitutional issues. The status of the House of Commons and the provincial legislatures as democratic assemblies in a parliamentary system would be guaranteed by the constitution. Proportional representation for the federal parliament would be the subject of study.

The Charter Of Rights and Liberties

The Beige Paper included a charter of fundamental rights and liberties which would protect basic human and legal rights, and affirm the right of each Canadian to settle anywhere in Canada and enjoy rights identical to other fellow provincial residents.

The provinces would be able to legislate with respect to languages subject to certain inviolate rights. The rights of any French or English speaking person would include:

- the right to request and receive primary and secondary level education for one's children in their mother tongue in the province of residence*;
- the right to be tried in one's mother tongue in trials which expose one to possible imprisonment*; and
- the right to communications, health and social services in one's mother tongue where numbers warrant.

(*extended to native peoples as well)

English and French would be the country's official languages. Quebec and Manitoba's legislatures and court system would continue to be officially bilingual and this provision would be extended to cover Ontario and New Brunswick.

The Amending Formula

The more important provisions of the constitution, concerning the division of powers, the Charter of Rights and Liberties and the Supreme Court, would require the formal consent of the federal House of Commons plus those provinces which form (or have formed in the past) 25 per cent of the Canadian population (thus protecting Quebec and Ontario), plus two of

the four Atlantic provinces, and two of the four western provinces including one of the two most heavily populated provinces in each of these regions. This formula was modelled on the earlier "Victoria" formula approved unanimously at a First Ministers' Conference on the Constitution in June, 1971 at Victoria, BC.

Reaction in Quebec to the Beige Paper

The Beige Paper was the most fully elaborated federalist constitutional proposal ever to have come from Quebec, and it had been eagerly awaited. To many, however, the Beige Paper proposals were a disappointment. Many federalists had hoped for some sort of special status for Quebec, a formula explicitly rejected in the paper. Sovereignists argued that it confirmed that a federal system could only institutionalize Quebec's minority status in Canada (see *Le Devoir*, January 21, 1980; *Le Soleil*, January 15, 1980).

Some Quebec analysts feared that the rest of Canada would regard the proposals only as a basis for negotiation. The systematic nature of the reform proposals, they asserted, meant it could not be adopted piecemeal and still retain its value. They also argued that Quebecers would not accept any less power or any weaker constitutional guarantees than were proposed in the Beige Paper. The paper thus represented Quebec's minimum requirements and not a bargaining position from which it might be expected to retreat.

The Reaction Outside Quebec

Outside Quebec, the Liberal proposals received lukewarm support. The federal government termed the Ryan proposals a valuable addition to the debate, but it could not have been too happy with Ryan's proposals for greater provincial powers. While it restrained its welcome, it avoided outright criticism for fear of strengthening Premier Lévesque's forces in the upcoming referendum.

The provincial governments' response to the Beige Paper has been detailed in *The Response* (op. cit.). In general, they found the provincialist tone of the Ryan report more to their liking than did the federal government. They emphasized their support for the general principles and objectives of the proposals as a firm basis for negotiation while downplaying their reservations. "Like the federal government, they wished to avoid strengthening the PQ side and, at the same time, to keep their options open." *Quote*

Editorialists showed a greater range of opinion. While most welcomed a federalist option from within Quebec as a basis for discussion, many found that the extent of decentralization proposed by Ryan threatened their vision of a united Canada.

The significance of these and other arguments about the Beige Paper both in and outside Quebec was at best marginal. Not until the next provincial election were the Liberal proposals likely to become a serious matter of debate. Of more immediate interest were the verbal jousts over issues such as the legality of the referendum question, the date of the referendum, and the right of Quebec to self-determination. The serious marshalling of arguments and counter arguments on these issues came with the debate on the referendum question in the National Assembly.

THE DEBATE ON THE REFERENDUM QUESTION, MARCH 4 - MARCH 20, 1980

The Quebec law on referenda requires a debate in the National Assembly on the wording of questions to be used in the particular referendum (see Appendix A for a summary of Quebec's Law on Referenda). An edited English version of the debate on the sovereignty-association question has been prepared by the Institute and should be consulted by those readers wishing more than the brief summary of the debate presented here (M.-H. Bergeron, D. Brown, R. Simeon, eds., *The Question: Debate on the Referendum Question*, Institute of Intergovernmental Relations, Kingston, 1980).

The PQ argued that the question was clear and honest. As to its message, PQ spokesman referred the opposition to the White Paper on sovereignty-association and argued that giving the government a mandate to negotiate its proposals would affirm the equality of the Québécois with the rest of Canada, gain bargaining power for the Quebec government and end the constitutional impasse between Ottawa and Quebec. These appeals, rather than the merits of sovereignty itself, came to dominate the PQ campaign.

The opposition called the question dishonest because it hid the real goal of the government - independence. It was dictated less by principle than by the need to win. They argued that with such a question, the referendum results could only be ambiguous and would complicate, not settle, the constitutional debate in Canada.

The PQ, however, succeeded in expanding the scope of the debate. They evoked a vision of a better, brighter future for Quebec unclouded by the sombre presence of the federal government. They ridiculed past efforts at constitutional reform and the current proposals of the Quebec Liberal party. They dissected federal policy on transportation, agriculture, industrial development and language and culture for evidence of bias against Quebec.

Caught offguard by the PQ's wide ranging sallies, the opposition struggled in their attempt to counter with a similarly appealing vision of Quebec's future in Canada. Provincial Liberals, not surprisingly, were also less equipped to research and to defend in detail PQ criticisms of federal policies and programs than their federal counterparts. Because the rules of the debate allocated time according to party strength, the PQ was able to develop their arguments at much greater length. In addition, the different opposition parties and independents in the Assembly found it difficult to organize and to complement each others' contributions to the debate.

Thus, by the end of the debate on March 20, 1980, it appeared that the government side had "won". The question itself was approved with only one minor change intended to commit the government more clearly to a second referendum to ratify any changes negotiated with the rest of Canada. However, this "victory" was not reflected by a marked increase in support for the OUI side as revealed in polls taken shortly after the debate (see Table 2.1, p. 30). If indeed the PQ believed that their performance in the televised debate had given them such momentum that the referendum should be held in May rather than June, they may have been mistaken.

CHAPTER II

THE REFERENDUM CAMPAIGN

Because the referendum became an issue of debate virtually from the election of the PQ in November, 1976, it is sometimes hard to remember that there was an "official" referendum campaign. In the strictly legal sense, the official campaign began April 15, 1980 with the issuing of the writs specifying the date of the referendum as May 20. At this time, spending limits in the campaign came into effect, restricting each side to total expenditures of \$2.1 million, or 50 cents per eligible voter (see Appendix A).

The 35 days between April 15 and May 20 was the shortest period for campaigning allowed under the referendum legislation. Cynics argued that the government chose a short campaign to preclude dissipating the momentum developed in the National Assembly debate on the question. Others welcomed a short campaign because it would limit the build-up of tensions between opposing camps. However, in practice, NON and OUI forces had been organizing for the referendum as early as December, 1979, and the campaign itself, considered as a period of intense activity leading up to the vote, began somewhat earlier than April 15. Thus, the advantages of a short campaign were offset to some degree.

THE FORMATION OF UMBRELLA COMMITTEES

After the approval of the referendum question on March 20, members of the National Assembly formed provisional committees in favour of their preferred option: government members joined the provisional "umbrella" committee for the OUI side, most opposition members joined the NON side. The general expectation was that the NON side would have great difficulty in mounting an effective campaign since it had to unite under one "umbrella" committee a number of groups and political parties previously divided on linguistic and political lines.

A particular problem for the NON umbrella committee was its relationship to federal Liberals in the upcoming campaign. Strong federal ties had both drawbacks and advantages. Too close a relationship might taint the NON committee's campaign as being under federal tutelage. Total exclusion would cut the committee off from the substantial political and financial clout of the federal government. Eventually, Claude Ryan became the leader of the NON committee but Jean Chrétien also emerged as a powerful figure. The NON side became quite successful at getting NON supporters to work together. As a result, its image was considerably

enhanced by the support it could claim from federalists in all sectors of Quebec society.

On March 31, the hitherto 'provisional' OUI and NON committees took on an 'official' existence. At this time, the committees formally named their chairmen - René Lévesque for the OUI; Claude Ryan for NON - and adopted official names (Le Regroupement national pour le OUI; Le Comité des Québécois pour le NON) and rules of procedure. The occasion was used by both sides for publicity purposes.

Sensing that the proclamation of the official start of the referendum campaign was near, the NON side began a gradual buildup of organizational activity. A rally on April 13 in Chicoutimi was to cap this buildup and signal the start of their campaign. However, this buildup had trouble gaining momentum. The Chicoutimi rally, in an area of PQ support, proved to be a tactical mistake. NON organizers had hoped to show strong support even here, but the expected crowd failed to appear and federalist speakers harangued a cold, half empty arena.

Some meetings and rallies were pluses for the campaign. In particular, NON organizers were able to exploit a 'faux pas' by Lise Payette, the PQ Minister of Social Development. She characterized women who were supporters of federalism as "Yvettes", an allusion to a female character in Quebec primary school readers who some consider a stereotype of the submissive, unambitious housewife. Many Quebec women felt insulted and the incident became a rallying cry for women supporters of federalism. Meetings and rallies of self-proclaimed "Yvettes" were organized and attracted large crowds, great coverage by the press and much unfavorable publicity for the PQ.

OUI side activity was much less intense as it awaited the return of its chairman, René Lévesque, from his vacation. Nevertheless, it did hold some organizational rallies.

THE OFFICIAL REFERENDUM CAMPAIGN APRIL 15-MAY 20

On April 15, the referendum writs were issued, signalling the start of the official referendum campaign. Both sides, by now clearly defined, shifted their campaign efforts into high gear.

Campaign Goals

From the start, both leaders emphasized that a simple majority for either option was not enough. Only a large majority could be considered a definitive statement of the wishes of Quebec society. Lévesque said that the OUI vote "must come not only from all regions but from all social

milieus and all cultural and ethnic communities" (Le Devoir, April 16, 1980, p. 14) However, in his prediction that the OUI would carry 55 per cent of the vote with 70 per cent of the francophone vote, Lévesque recognized that his desire to attain a majority of votes from all social sectors would be frustrated by a nearly unanimous NON vote among non-francophones.

As polls taken over the course of the campaign showed, Ryan's goal of a majority NON in every region and in every cultural group including francophones was more realistic (Globe and Mail, April 15, 1980, p. 10). As a result, although recognizing the symbolic importance of securing non-francophone votes, the OUI side concentrated on securing francophone votes, and in swaying the undecided voters.

Campaign Strategy

The OUI side tried to widen its appeal and transcend party lines in its search for a majority. The appeal to Quebec nationalist sentiment and the criticism of Quebec's position under Confederation was the core of its campaign. In these arguments, the PQ made use of topical issues such as the federal government's decision to buy the McDonnell-Douglas F-18A fighter aircraft for the Canadian Armed Forces. The PQ claimed that by choosing the F-18A over the General Dynamics F-16 the federal government had once again favored Ontario over Quebec since the F-18A contract created fewer jobs in Quebec than the F-16 contract would have. (For its part, the federal government claimed that last minute reworking of the F-18A contract had yielded extra benefits for Quebec).

However, wedded to these traditional types of arguments were calls for "solidarity" among Quebecers, an appeal directed chiefly to the francophone voters. The OUI side stressed that a positive vote would not necessarily mean independence. It would be a collective expression of a demand for change which English Canada could not ignore. It would give the government the bargaining power to break the current constitutional impasse. It would open many doors, and not just those leading into sovereignty-association. A NON vote would only close doors on both options - sovereignty association and renewed federalism. English Canada would quickly turn its back on any type of substantial change. Finally, the OUI side criticized the prospects for a renewed federalism and, in particular the Quebec Liberal party proposals.

In their quest for their "majority of majorities", the NON side emphasized three basic strategies. It repeated the arguments against a OUI vote which had been expounded in the National Assembly debate -- the ambiguity of the question, the identification of sovereignty-association with separation, and the costs of separation versus the benefits of remaining in Confederation. Evidently, the NON side felt that in the long run the reasons of the heart would succumb to the reasoning of the mind, an approach mirrored in their campaign slogans - "j'y suis, j'y reste, pour ma sécurité" and "plus que j'y pense, plus que c'est non."

However, since the OUI side had succeeded in turning the referendum into more than a vote on just the merits of sovereignty-association versus federalism, this strategy was not quite sufficient by itself. To counter assertions that a OUI majority would be the only option likely to give the Quebec government bargaining power and to open the constitutional debate to new ideas and possibilities, the NON side tried to convince Quebecers that a NON vote was not a vote for the status quo but a vote for a renewed federalism. A OUI would only prolong the impasse since English-Canada would never accept to negotiate sovereignty-association. To counter the OUI side's appeal to patriotic sentiment, the NON side in the last half of the campaign worked to develop and to exploit the emotional resonances which the concepts of "Canada" and "canadien" arouse in many Québécois. Being Québécois, the NON side argued, was not at odds with being Canadian. Canada was a country of which Québécois could be proud to be a citizen, even while Quebec remained their homeland.

Campaign Tactics

The campaign tactics used by the two sides showed both similarities and differences. Both sides publicized endorsements of their option by "vedettes" or "stars" of popular culture, by intellectuals, by community notables such as union leaders, business groups and by groups formed especially for the purpose of providing such endorsements such as "les grand-papas et grand-mamans du comté de Shepford pour le OUI." The NON side also invited provincial premiers such as Premiers Davis and Blakeney to Quebec to state their position that sovereignty-association was non-negotiable and that constitutional change would follow a NON vote.

The NON side's best card, however, was Pierre Trudeau. When the White Paper on sovereignty-association was published, Pierre Trudeau was no longer Prime Minister, having been defeated in the election of May 1979. He had even announced his resignation as leader of the federal Liberal party. However, the Clark government was defeated over its budget and in the following election he returned to lead his party to victory in great measure because his status as Quebec's "favorite son" resulted in a Liberal sweep of all but one of the seventy-five Quebec seats.

In Quebec City on May 7 and in Montreal on May 14, Prime Minister Trudeau electrified NON supporters with his oratory and his vision of Quebec in Canada, a vision which he, as a French Canadian Prime Minister, symbolized. Whether or not his intervention was a decisive influence on the NON's ultimate victory is difficult to tell. Clearly, however, he demonstrated his stature as Quebec's most powerful and popular federal politician.

Both sides used door-to-door canvasses which served not only to carry their message to the public but also to gauge the level of public support for their option. Symbols were important. Where the OUI side used only the fleur-de-lis, the NON linked it with the red maple leaf. Billboard ads carrying slogans, and small meetings of supporters were also widely used by both sides. Although both sides entertained the idea of a debate between Ryan and Lévesque, or Trudeau and Lévesque, only Lévesque declared himself in favour. No debate ensued.

The OUI side made greater use of the electronic media, in particular, spot television and radio advertising, than did the NON side. Such an approach had proved successful in the last election campaign for the PQ. However, some observers argued that such tactics, while influencing consumer spending on purchases such as toothpaste or cigarettes, are less effective in influencing action when the choice is the more fundamental one of the future of a society.

The NON side, in contrast, often seemed to be campaigning in the 19th century. They showed a liking for old style political campaigning - large rallies, many speakers and lengthy speeches - and were severely criticized in the media for it. The rallies were reported as boring, over-long and poorly organized. In short, they weren't the "media events" which the OUI side was careful to provide for the journalists covering its campaign. The NON side thus seemed to be gambling that the effect of the rallies upon those attending would be more fruitful than the coverage of the rallies in the media.

The Campaign Mood

It did not take long before the tone and style of the campaign intensified. Campaign speeches and rhetoric, revealed how deep was the division in Quebec society over the future of Quebec. At the start of the NON campaign on April 13 in Chicoutimi, Ryan described his adversaries as "experts of manipulation and blackmail" (*Le Devoir*, April 14, 1980, p. 1). As both sides became aware of irregularities and inequities in the campaign, the language became even more intemperate. Lévesque, after noting that federalists had been arguing that older persons would lose economic security if the OUI won, said,

The bogeymen of fear are pummelling the stomachs of the weakest and most vulnerable persons in our society and I find this attitude criminal (Le Devoir, April 21, 1980, p. 10).

Perhaps the most strongly worded attack came from Mr. Ryan who accused the OUI side of using fascistic tactics such as vandalism of NON signs and intimidation of NON workers and voters (Globe and Mail, May 3, 1980, p. 11). For their part, the OUI side rebounded with their own examples of intimidation and vandalism by NON supporters.

Emotions on both sides were particularly exercised by press coverage of the campaign. Mr. Ryan was the first to complain about insufficient coverage. However, Mr. Lévesque and the OUI forces complained that a leaked memo from the editorial board of the English language Montreal Gazette outlining how the campaign might be covered indicated that the paper would bias its coverage against the OUI side. Lastly, both sides criticized the number and conflicting nature of the many polls taken over the course of the campaign as confusing to the voters.

The OUI side strongly criticized some of the federalist tactics in the referendum campaign. It claimed that promises of change made by federalists and other provincial premiers were vague and insubstantial. It also objected to advertising campaigns undertaken by federal government agencies whose message, after an appropriate mental somersault, could be interpreted as a pro-federalist intervention on the campaign. An example was a billboard campaign urging moderation in the use of alcohol sponsored by Health and Welfare Canada that featured the words "No thank you; it's easy to say." The OUI side objected not only because of the alleged deviousness of the ploys but also because such federal expenditures were not counted under the spending limits for each side specified by the referendum law. Pierre-Olivier Boucher, the provincial director-general of political party financing who was made responsible for overseeing campaign expenditure asked the referendum council (see Appendix A) for an order to prohibit the news media from accepting federal ads and to have the funds spent by the federal government declared campaign expenses. In its judgment, the council did not rule on whether or not the ads were interventions in the campaign or not. Rather, it accepted the argument of the lawyer for the federal government that the referendum law is not binding on the federal government (nor, incidentally, upon the Quebec government) unless it wishes to be bound. No order was issued.

The mood of the campaign changed on both sides as the campaign progressed. At the beginning, Ryan and the NON side were aggressive, but appeared on the defensive. However, as it became clear from the various polls, the door-to-door campaign, and the rallies that the NON campaign was winning, the aura of dogged combativeness began to disappear. As William Johnson noted of a speech on May 8, 1980 to the Canadian Club, the Liberal

leader "...spoke with a serenity that comes to someone who has seen the tide turn" (Globe and Mail, May 9, 1980, p. 8).

In contrast, the OUI side began the campaign with the serenity of those who see the tide running in their favour. As it became increasingly apparent that a NON vote was likely, OUI efforts became more strident and aggressive. The strain of falling behind wore tempers thin and this only served to reinforce rather than halt the loss of support.

Outside Quebec

Canadians outside Quebec were for the most part on the sidelines, mere spectators to a debate that would determine their future as well. Many, however, were concerned that the breakup of Canada would follow a OUI vote. Not content with letting their premiers speak for them, they sought to influence events in Quebec directly. The most impressive examples of such efforts were the various petitions which Canadians from BC to Newfoundland signed urging Quebecers to remain part of Canada. Many groups circulated requests for signatures with local utility company bills. In the end, a petition with over one million signatures was presented to Montreal Mayor Jean Drapeau.

The effect of such efforts on the referendum campaign is difficult to judge. Reactions in Quebec seemed to range mostly from the cynical to the politely indifferent. Perhaps the chief effect of such efforts was not on Quebecers but on other Canadians who were allowed to participate vicariously in a debate of obvious national importance.

. . .

In sum, the campaign songs, slogans and speeches permeated Quebec daily life. While emotions were given loose rein at times, they were never unbridled or out of control. What instances of physical violence or destruction that did occur seemed sporadic and spontaneous rather than planned or organized. Yet the deep divisions involved in the campaign and the build-up of tension gave reason to fear that had the campaign run longer, a less civilized debate might have been the outcome.

Quebec
 THE RESULT: A VICTORY FOR THE NON

| | Popular Vote (percent) | Electoral Ridings Won |
|-----|---------------------------|-----------------------|
| NON | 59.5 | 95 |
| OUI | 40.5 | 15 |
| | <hr/> | <hr/> |
| | 100.0 | 110 |

The result was a surprise since most opinion polls had indicated a much tighter race. The magnitude of the victory allowed Ryan to claim that a majority of all ethnic and cultural groups including a (bare) majority of francophones had probably supported the NON option. Ryan fell short of his goal of a majority NON in every region, however. The OUI side took majorities in La Côte-nord and Saguenay-Lac St. Jean regions.

The many public opinion polls taken in Quebec during the pre-referendum phase are useful in further understanding these results. Table 2.1 summarizes the results of most major polls on the referendum question and it shows that the lead changed hands several times.

Matching "significant" events with poll results in Table 2.1 is a hazardous process given that the margin of error alone in some polls is large enough to reverse the result and that the proportion of refusals and undecideds is very high. It is thus hard to say in what way events influenced the outcome. If anything, the polls reflected the great difficulty that many Quebecers had in deciding once and for all how they would vote. This instability in electoral opinion likely continued right up until, in the solitude of the voting booth, voters made their final choice.

The polls gave more consistent results about the support of the different options by various sub-groups of the population. The most salient cleavage was between francophones and non-francophones. Often the figures indicated that a clear majority of francophones would vote OUI, while the support of the NON option by non-francophones was consistently 70 per cent or more, not counting undecideds and refusals.

The polls also considered sub-groups based on age, family income, education and occupation. Among francophones, the older, the less prosperous and the less well-educated were more likely to be NON supporters. There was, however, majority support by francophones for the OUI side among all occupational groups except managers and farmers, although the size of the majority was larger for white collar groups than for blue collar.

Table 2.1: Poll Results on the Referendum Question Compared with Significant Referendum Events

| <u>Date</u> | <u>Event</u> | <u>Poll Results</u> | | | | |
|------------------|----------------------------------------------------------------------------------------------------------------------------|---------------------|------|------------|------|------|
| | | Yes | No | Ref/ DK | Ref | DK |
| 1979 | | | | | | |
| June | CROP-Cloutier Poll taken | 54 | 29 | 16 | 2 | 14 |
| Nov. 1 | Release of PQ's White Paper | | | | | |
| Nov. 5 | Negative Reactions from English Canada to White Paper begin | | | | | |
| Nov. 14 | PQ loses 3 by-elections | | | | | |
| Nov. 21 | Trudeau Resigns | | | | | |
| Nov. 23-Dec. 3 | CROP Poll taken | 41 | 31 | 28 | n/a | n/a |
| Dec. 13 | Fall of Clark govt.; Supreme Court ruling on Bill 101; Quebec Court of Appeal blocks expropriation of Asbestos Corporation | | | | | |
| Dec. 20 | Release of Referendum Question | | | | | |
| Dec. 21-23 | IQOP Poll taken | 36.5 | 47.2 | 16.3 | n/a | n/a |
| 1980 | | | | | | |
| Jan. 10 | Release of Beige Paper | | | | | |
| Jan. 14-22 | Internal PQ Poll taken | 46 | 46 | 8 | n/a | n/a |
| Feb. 18 | Liberals win election | | | | | |
| March 4 | Debate begins in the National Assembly on the Referendum Question | | | | | |
| March 7-11 | IQOP Poll taken | 47.4 | 43.6 | 9 | n/a | n/a |
| March 20 | Debate on Question ends | | | | | |
| March 26-April 7 | CROP Poll taken | 44 | 44 | 12 | n/a | n/a |
| April 1-7 | Gallup Poll taken | 38 | 36 | 26 | 7 | 19 |
| April 10 | F-18A decision announced | | | | | |
| April 15 | Referendum Campaign officially begins | | | | | |
| April 14-16 | IQOP Poll | 41.2 | 40.9 | 17.9 | n/a | n/a |
| April 30 | Premier Davis of Ontario visits Quebec | | | | | |
| April 26-May 3 | CROP Poll taken | 39.6 | 45.5 | 14.5 | n/a | n/a |
| May 4-6 | IQOP Poll taken | 37.6 | 41.5 | 20.9 | 10.7 | 10.2 |
| May 7 | Prime Minister Trudeau speaks in Quebec City | | | | | |
| May 9 | Motion to patriate the Constitution approved by House of Commons | | | | | |
| May 4-9 | Hamilton-Pinard Poll taken | 37 | 49 | 14 | n/a | n/a |
| May 13 | PQ complaint about federal advertising | | | | | |
| May 12-14 | IQOP Poll taken | 40.5 | 36.5 | 23.0 | 14.0 | 9.0 |
| May 14 | Trudeau speaks in Montreal | | | | | |
| May 20 | Referendum Vote | | | | | |

* IQOP - Institut québécois d'opinion publique; CROP - Centre de recherches sur l'opinion publique

** All polls taken after December 20 used the actual referendum question in their surveys. The two polls dated June, 1979 and November 23-December 3 used similar questions. Other polls were taken before December 20 asking people for a more direct opinion on Sovereignty-Association. Since these polls are not directly comparable with polls taken after December 20 using the actual question, they have not been reproduced here.

Francophone males were more likely to support a OUI vote than francophone females. Similar tendencies can be noted among non-francophones though for the most part they were offset by large overall support for the NON.

The polls also gave consistent results on other questions. Given a list of constitutional options, a plurality of all Quebecers usually chose renewed federalism over other options, including sovereignty-association. Among francophones, however, the plurality was for sovereignty-association over renewed federalism. While Lévesque was felt to be a better leader than Ryan and while a majority of people were satisfied with the PQ government, more would vote Liberal than PQ in a general election. At the same time, Trudeau was considered a better leader than Lévesque.

The more sophisticated polls used the breakdown by sub-group on the referendum and other questions to estimate the intentions of undecided voters. Comparison of the socio-economic characteristics of undecided voters with those of committed voters showed they were much more like NON voters than OUI voters. As a result, the OUI lead in most of the polls was turned into a substantial margin of victory for the NON side when the undecided voted true to form on referendum day. A bare majority of francophones likely voted NON, once the overwhelming support of anglophones for the NON side was subtracted from the NON vote.

The poll results thus showed sharp divisions over the future of Quebec society. Yet, they also indicated that, these divisions notwithstanding, there was a consensus on the need for change. Very few voters felt they were opting for the status quo. There remains among Quebecers a fundamental consensus on many elements of Quebec political culture, a consensus that may act to moderate divisions in Quebec society over sovereignty-association *per se*. The polls imply that support for federalism is conditional upon its renewal, especially among francophones. The NON side realized this and constantly emphasized in its campaign that a NON vote was a vote for change, although federalists were never quite clear about the nature of this change.

THE AFTERMATH

On referendum night in Montreal's Paul Sauvé arena, René Lévesque, immensely saddened and physically drained, admitted the result had to be accepted. "The ball is back on the federal side" he said. He challenged Prime Minister Trudeau to put some content into the many federalist promises made over the course of the campaign. He warned against any attempt to impose on Quebec changes it did not want and vowed vigilance in safeguarding the rights and powers of the province.

Then, he spoke directly to his dejected supporters.

Let us never lose sight of so legitimate an objective as political equality...I remain convinced that we have a rendezvous with history, a rendezvous that Quebec will seize, and that we will be there - together, you and me - to assist in it. Tonight, I can't say when or how, but I believe it (Montreal La Presse, May 21, 1980, p. 2).

But for René Lévesque and his Parti Québécois, the referendum meant more than giving the federalists another chance. It had implications for party leadership and party strategy. The referendum was one element in the Parti Québécois' strategy of *étapisme* - sovereignty-association by stages. This policy had been supported by the party leadership over the objections of many militants in the party. The defeat of the referendum called into question *étapisme* and those who had proposed it. Small wonder then that in the days after the referendum, some observers predicted a "night of the long knives" at some upcoming PQ meetings. By the PQ national council meeting of October 4-5, it was clear the party did not want to change leadership but, it did want to change strategy. The party council rejected the use of referenda as a way of deciding changes in Quebec's political status if the PQ were re-elected to a second term in the next provincial election. It did not rule out the possibility of making sovereignty-association an election issue, but this was not to happen in the next election. For the moment, the PQ would "respect the present stage in Quebec's evolution" as Lévesque put it, and try to base its appeal on good government.

The result also called into question the PQ's right to continue as the government. How could it remain in power, critics asked, when their basic political goal had been rejected by the people? Premier Lévesque quickly responded that as a government it did not have a mandate to pursue sovereignty-association, but that this affected neither the right of the PQ party to continue to advocate that option nor its ability to govern in the best interests of Quebec.

Claude Ryan had a different opinion. For him, the referendum result had stripped the PQ government of all legitimacy. The people, he said, had decided their future lay in the renewal of Canadian federalism. Change had been promised by the rest of Canada and it would be offered to Quebec. But he questioned the ability and the good faith of the PQ to see these changes through. Let the people decide who would best represent their interests in the negotiations about to begin, he said, and urged Lévesque to call a general election for the fall.

Lévesque, however, argued that an election in the fall would be too soon for a Quebec exhausted from the referendum campaign. Events in Ottawa gave him further reason for delaying elections; constitutional talks were to begin soon, too soon to allow the luxury of provincial elections.

But the most immediate and important effect of the referendum result was to shift the constitutional debate to the national stage. The NON vote was widely interpreted as a vote for change in the federal system. The premiers of the provinces in their post-referendum comments agreed that reform was essential. This put Prime Minister Trudeau in a position of great strength. As French Canada's leading federalist politician, the results offered him a mandate to initiate change in the federal system and he took advantage of the opportunity. As a result, the country would set aside its other concerns over the summer and concentrate on renewing federalism.

PART TWO

CHAPTER III

THE SUMMER MEETINGS OF THE CONTINUING COMMITTEE OF MINISTERS ON THE CONSTITUTION

INTRODUCTION

Less than twenty-four hours after the referendum result was in, Prime Minister Trudeau announced that his Minister of Justice, Jean Chrétien, would tour the provincial capitals to consult with the provincial governments on the schedule and the agenda for a new round of constitutional talks.

The federal government's quick action reflected a number of concerns. All of Canada had been led to expect constitutional reform as a result of the Quebec referendum. The victory by the NON side meant that the federal government would have to initiate such reform. The prominent part played in the referendum by the Prime Minister, Justice Minister Chrétien and other government members gave the federal government the political strength and the self-confidence to take the lead in renewing federalism.

But, there was also the awareness that Quebecers had been promised change soon. Moreover, that promise would be harder to fulfill the longer action was delayed. Public support for reform would likely dissipate as other issues made claims on public consciousness and it became less urgent to deal with Quebec's claims. Without the pressure provided by public opinion, compromise would be harder to obtain and reform less likely to occur.

Although observers disagreed on just how much time Trudeau and the Premiers now had to reform the constitution - estimates ranged from six months to two years - most agreed with the federal government that the sooner a start was made, the better. The Premiers evidently felt the same way. Mr. Chrétien's trip resulted in a meeting of First Ministers being scheduled for June 9 in Ottawa. Premier Peckford of Newfoundland subsequently invited the Premiers to meet with him on June 8, but several such as Davis of Ontario, Bennett of BC and Hatfield of New Brunswick declined to attend. The provinces had their own agenda for change, quite different from Ottawa's. They were concerned that Trudeau would seize on the referendum victory to push for a quick solution which would ignore their concerns.

Other groups also sought to be part of the discussions. The opposition parties claimed the right to participate and Joe Clark and Ed Broadbent met the Prime Minister to discuss how this might be done. However, the

differences among the parties on constitutional change were great and no arrangements could be devised for coordinating a common position at the meetings. Rather than compromise his position in order to secure the support of the opposition or fragment the federal position by allowing the opposition to take independent positions, the Prime Minister chose to exclude them from participation.

The two territories, some native peoples' groups and other groups also sought to participate, although their demands stopped short of the right to vote on agreements. However, their claim to participation was recognized neither by the provinces nor by the federal government. Subsequently, some, including the territories, were offered observer status at the September talks. The constitutional talks thus remained a game which only the federal and provincial governments could play.

THE FIRST MINISTERS SET THE AGENDA

At their first meeting on June 9, relations between the two orders of government were cool. The Premiers rejected a statement of constitutional principles proposed by the Prime Minister. The statement affirmed the desire of Canadians to have a constitution based on certain fundamental principles: democracy, federalism, native rights and the official character of the French and English languages. The status of the statement was unclear; and in any case it was felt to be premature, and to prejudice the issues for negotiation. The First Ministers did agree upon an agenda and a timetable for discussion over the summer which combined the primary concerns of all governments.

The twelve items to be debated were:

1. Patriation (later including the amending formula)
2. Declaration of Principles
3. Charter of Rights
4. Equalization
5. The Senate
6. The Supreme Court
7. Resource Ownership and Interprovincial Trade
8. Offshore Resources
9. Fisheries
10. Communications
11. Family Law
12. Powers over the Economy

The schedule for discussing these items was a brisk one:

June 17 - organizational meeting of ministers and officials responsible for federal-provincial relations after which there would be a break until the first round of meetings on the twelve items.

July 7-25 - three weeks of meetings on the twelve items involving committees of ministers and officials responsible for federal-provincial relations; one week each in Montreal, Toronto and Vancouver; meetings followed by a break during which the participants considered their positions.

August 25-29 - Ministers and officials meet once again to compare positions; followed by a break to prepare for the conference of First Ministers.

September 8-12 - The Conference of First Ministers in Ottawa.

From the start, however, the agenda and timetable were the subject of dispute and differing interpretations. The Premiers almost unanimously insisted that the September First Ministers' meeting was not a deadline by which agreement had to be reached. In contrast, the Prime Minister felt time was short. He felt that real constitutional change had to be agreed upon by the end of the September Conference, at least in principle if not in its precise wording. He hinted that the federal government would take action on its own if there was no consensus on change by September; on this, he received support from Premier Davis of Ontario.

On the twelve items, the First Ministers declared themselves flexible. But a number of them used the June 9 meeting to state firm positions on a number of issues. Premier Lévesque rejected any suggestion of increased language rights in a new Constitution, for example, regarding education in the official languages. Education is an area of provincial jurisdiction and Mr. Lévesque objected to constitutional limitations in a policy field which successive Quebec governments have regarded as crucial to Quebec's cultural survival and development. Premier Peckford indicated that his province was deeply committed to greater control of offshore resources and fisheries. He regarded provincial control over these policy areas as vital for the economic prosperity and social well-being of his province. Premier Lyon was adamantly opposed to a Charter of Rights in any form because civil rights are a provincial jurisdiction and he did not want his province's ability to respond to changing conditions hampered by a constitutionally entrenched charter of rights.

The Prime Minister countered these "province-building" arguments with counter-arguments of his own. He distinguished between a "people's package"

and a "powers and institutions" package. The "peoples' package" consisted of patriation, a statement of constitutional principles and the Charter of Rights. The other items on the agenda concerned the balance of power in federal-provincial relations and institutions which were of more concern to governments. The Prime Minister argued that the "people's package" did not increase the power of either order of government but would benefit the people of Canada as a whole. He declared he would not trade shifts in power to the provinces for their support for basic human rights or change his mind on entrenching language rights.

THE SUMMER MEETINGS

The positions taken by some of the First Ministers after their June 9 meeting did not augur well for the conduct of subsequent rounds of constitutional negotiations over the summer. However, the First Ministers - except for Premier Hatfield - were not directly involved in these meetings. Rather negotiations were handled by the Continuing Committee of Ministers on the Constitution (CCMC) composed of federal and provincial ministers responsible for intergovernmental relations. The CCMC was co-chaired by Roy Romanow, Attorney General and Minister of Intergovernmental Affairs for Saskatchewan and Jean Chrétien, federal Minister of Justice. As well, sub-committees of officials from a variety of departments - Attorney-General, Intergovernmental Affairs, Finance - discussed the specific items on the agenda.

As these meetings proceeded over the summer, it was very difficult to say whether progress was being made. The moods of the participants appeared to change from day to day. Stances sometimes hardened and softened between morning and afternoon. External events often intruded into the discussions. While they were held in private, they attracted an enormous amount of media attention and participants sometimes felt they were negotiating in a fish bowl.

The difficulty of reaching agreement on complex issues was increased by uncertainty over the good faith of some of the participants. Initially, uncertainty was greatest over Quebec and the role it would choose to play. As the events of the summer were to show, the Quebec government's options were quite limited. On one side, its representatives were constrained by their ideals and by their membership in a party dedicated, not to renewing federalism, but to sovereignty-association. On the other side, they were constrained by their role as representatives of a people who had just rejected sovereignty-association. Thus, if the Quebec government could not appear to its party to be actively pursuing renewed federalism, neither could it be seen by the provincial electorate to be actively obstructing it. Only in this way could the PQ leaders retain the confidence of their party and maximize their chances for success in the next provincial election.

From the beginning, then, Quebec had to avoid isolating itself on the issues. If the talks failed, it could not be because of Quebec alone. If they succeeded, it could not be despite Quebec. The government thus based its bargaining position on holding the line on Quebec's existing rights and powers and reiterating Quebec's "traditional" demands. By emphasizing these commonly held values of the Québécois, the Quebec government found a compromise acceptable to nearly all points of view - the other provincial Premiers (who had come to share many of Quebec's demands), the party and its supporters (who could be told that at the very least Quebec was not losing ground) and the provincial electorate (which wanted evidence of the PQ's good faith). The weakness of this strategy, if there was a weakness, was that it pitted Quebec, not against the views of "English Canada", but rather against the views of a federal government headed by a French-Canadian, Pierre Elliot Trudeau, whose popularity in Quebec was at least the equal of René Lévesque's. Thus, one of the most remarkable developments during the summer was the forging of a close alliance between Quebec and many of the provinces, whose Premiers had so recently been campaigning against the referendum. Quebec also brought to the talks a high degree of experience and expertise in the constitutional field, which assisted it in playing a leading role in some areas.

Thus, by the middle of the summer, Quebec's role in the talks was no longer regarded with uncertainty. However, other events intruded upon the talks to maintain the aura of tension. On June 19, when the Energy Ministers of Canada and Alberta broke off talks on oil pricing and revenue sharing, the possibility was raised that the constitutional talks would become a forum for trading off constitutional issues against energy issues. At the very least it was supposed, attitudes would be hardened by failure to reach agreement. Even though Messrs. Trudeau and Lougheed themselves failed later to agree on energy policy, their difficulties did not seem to have an overt effect on the progress of constitutional talks.

By far the most consistent source of uncertainty was the federal government itself. For the provincial Premiers, it must have seemed that every day brought fresh evidence of federal intentions to proceed unilaterally. There was the Prime Minister's insistence that the September conference was a deadline and that if no agreement was reached by then, Parliament would have to "look to its duty to the Canadian people." There were the constitutional commercials paid for by the federal government urging Canadians to "Make it work. Make it right. Make it ours." There was the federal government's tough bargaining stance, much tougher than its position at the last First Ministers' meeting on the constitution in February 1979. This time Ottawa placed new issues on the table and pushed them hard, most notably "powers over the economy." It asserted over and over that patriation, a statement of principles and rights - the "people's package" - would not be traded off against provincial powers. Near the end of August, a confidential memo by Michael Pitfield, Secretary to the

federal Cabinet, was leaked, detailing how the government could proceed to patriate the constitution unilaterally. On September 2, the Prime Minister vowed that he would patriate the constitution with an amending formula and a Charter of Rights even if the talks failed to end in agreement.

Nevertheless, in the tabling and discussion of proposals and counter proposals in the committee meetings on the twelve items, many observers claimed to see real progress. Relations between the committee co-chairmen, Roy Romanow and Jean Chrétien were amiable, even jolly. Their joint press conferences came to be dubbed by the press the "Uke and Tuque show" in reference to their Ukrainian and French Canadian background respectively. Consensus on many issues seemed to be emerging even though it seemed that only the provinces were part of the consensus.

Yet an agreement was not reached at these summer meetings. The federal government, supported at times by Ontario, was isolated on issues like resource control, offshore mineral rights, powers over the economy and the Charter of Rights. On the issues that would have to form part of any agreement, differences seemed, if anything, even more polarized. Hampering the progress of the talks was the inability of some ministers and officials to commit their governments to a common position without first clearing the matter through their First Minister and the cabinet. Thus, the most the CCMC could do was finalize a "best efforts draft" which summarized the progress made, the points of agreement, the points of dispute and provided tentative wording of proposed amendments. It was now up to the First Ministers to take the CCMC's work - the product of months of intensive, careful, at times, frustrating labour - to the negotiating table and try to reach agreement on the country's constitutional future.

CHAPTER IV

THE SEPTEMBER TALKS: THE FIRST MINISTERS' CONFERENCE ON THE CONSTITUTION

The Premiers gathered in Ottawa on Sunday, September 7, to prepare for their meeting with the Prime Minister the next day. Many observers were optimistic that by building upon the work of the CCMC, the First Ministers could quickly resolve their remaining differences, paving the way for agreement by the end of the week.

Adding to this optimism was the feeling that Canadians were now more interested in constitutional reform than they had been before. Many were expected to watch the conference proceedings which would be televised. Over the summer, many organizations and individuals began to think through their constitutional positions. Business groups, women's groups, Indian associations and academics issued statements, wrote briefs and organized meetings, hoping perhaps to have some influence on a process which at last seemed to be nearing a conclusion. If any one theme consistently emerged from these activities, it was neither support for a stronger federal government nor support for a more decentralized federation. Rather, it was that the time to end the uncertainty was now. Governments should get their "act" together, and pass on to more pressing concerns like the economy and energy policy. Others, however, questioned whether the political will to agree existed among the First Ministers. Despite the progress and goodwill that had developed over the summer, the clash of differing interests could sour relations between the First Ministers and destroy the potential for agreement.

THE FIRST FOUR DAYS

In this mood of suspense and expectation, the Prime Minister, in his capacity as Chairman, opened the conference on Monday, September 8, 1981. The setting was the main conference room at the National Conference Centre in Ottawa (once the main Ottawa railway station). In the centre of the room the Prime Minister and the ten provincial Premiers sat around an oval table. Surrounding them were ministers, political advisers and government officials. Seated behind a rope barrier were several hundred journalists and observers. Television cameras and technicians were placed at strategic spots in the room.

For the next four days, the First Ministers, relieved as the occasion demanded by certain of their Ministers, debated the twelve items on the agenda. Prime Minister Trudeau's performance as Chairman irritated some provinces who felt he was abusing his position by his frequent interjec-

tions and by his ability always to have the last word. The participants would become physically exhausted. Each day of spirited debate was followed by long sessions with officials, often lasting into the early hours of the morning, discussing what had occurred and planning for the next day. There was much public posturing for the consumption of electorate tuned into the proceedings. Finally, discussion bogged down. Although there was some talk that the conference might be extended into a second week, the First Ministers decided to stick to their original schedule. Towards the end, however, time ran short and some items would receive only cursory discussion. At the end of four days the First Ministers adjourned their public sessions and met in private to try to put together a package satisfactory to all. Here's how the first four days went.

Day One: September 8

After some preliminary sparring about the order in which the items on the agenda would be discussed, the First Ministers made their opening statements. Resource Ownership and Interprovincial Trade, Communications and the Senate were then discussed. The talks started badly for most of the Premiers. Day One clearly belonged to the Prime Minister. In his opening statement, he went "over the heads" of the Premiers, presenting his vision of Canada directly to the Canadian public watching or listening to the proceedings. His proposals on Resource Ownership and Interprovincial Trade and on Communications were calculated to appear reasonable in light of provincial demands, even as they helped to fracture provincial solidarity on the issues. The provinces were clearly on the defensive.

Day Two: September 9

Day Two promised more of the same as the Ministers turned to discuss the Supreme Court, Family Law, Fisheries, Offshore Resources and Equalization. However, the leak of a second confidential federal strategy document broke the growing federal momentum in the talks (*Report to Cabinet on Constitutional Discussions, Summer 1980, and the Outlook for the First Ministers' Conference and Beyond*, prepared by officials involved in the constitutional negotiations under the direction of the Federal-Provincial Relations Office and the Department of Justice). Dated August 30, 1980, the document masterfully outlined several strategies the federal government could pursue in achieving constitutional reform, along with an assessment of the means required and the difficulties involved. Agreement on all twelve items at the conference, the document said, would be preferred but was very unlikely. An agreement on a smaller package was possible, provided everybody, or almost everybody, got something out of it and if the federal government were able to isolate what it called intransigent provinces on particular issues - for example, Alberta on resource ownership.

Failing agreement, the document argued that unilateral action would be legally and politically possible since public support would swing to the federal government on issues like the Charter of Rights and Patriation and away from the provinces whose demands for more power would be seen by the public as self-serving. Several strategies for proceeding unilaterally were outlined, leading provincial representatives to accuse the federal government of wanting the talks to fail.

Federal representatives were shaken and angered by the leak. As a result, they were unable to put on as effective a performance as they had on Monday. The provinces, however, did not carry the day themselves because of their differences on Family Law, Fisheries, and Equalization. The Supreme Court and Offshore Resources were also discussed. The Premiers met in camera on Tuesday night to discuss the previous two days of debate and to prepare for the remaining sessions.

Day Three: September 10

Day Three was dominated by the fundamental issue of protecting citizens' rights. The conference became a forum for a highly-charged philosophical debate in which the divergent positions were argued with force and eloquence. Many observers came away feeling that, for the first time, sincere differences of opinion were deeply and profoundly debated and that Canadian federalism was better for it. But equally, it was becoming increasingly clear that the differences, stated so uncompromisingly, were going to be too great to bridge - that the "package deal" would not emerge. Furthermore, time was growing short. The agenda had called for the First Ministers to spend only half a day on the Charter of Rights. Instead they spent a whole day and a fourth day of public sessions became necessary. Wednesday night the Premiers dined at the Prime Minister's residence.

Day Four: September 11

The debates on Day Four were brief and inconclusive. Patriation and the Amending Formula, Powers over the Economy and the Statement of Principles were touched upon. The Senate and the Supreme Court were briefly reconsidered. But too much time had been spent on previous items. There was not enough left to consider fully these remaining issues. As well, more time had been spent staking out positions than on building compromises. It was clear that any agreement would have to be forged at the private meeting of First Ministers to be held Friday at the home of the Prime Minister.

Here is where the participants stood after four days of public debate.

The Positions of the Participants On the Issues

Resource Ownership and Interprovincial Trade

The federal government agreed that the constitution should clearly recognize provincial ownership and provincial jurisdiction over the development and management of non-renewable resources, forestry and electrical energy. It also agreed that the provinces should have concurrent power to regulate exports to other parts of Canada, subject to federal paramountcy on international and interprovincial trade, and the power to tax resources and the products of the primary processing of resources, provided such taxation did not discriminate against citizens of another province. In this way, the Prime Minister argued, the demands of the provinces for greater control could be met, while the essentials of the Canadian economic union were still subject to federal guardianship. The federal government refused to abolish the declaratory power in the natural resource area or to expand the definition of resources as requested by British Columbia to include, for example, agriculture. It appeared that the new federal proposal did not go as far toward the provincial position, as had the February 1979 "best efforts draft", which had given the provinces paramountcy over trade in resources, except where there existed "a compelling national interest."

Four provinces raised substantial objections to the federal proposals on resource ownership and interprovincial trade. BC, Alberta, Manitoba and Quebec argued that the proposals did not go far enough because they excluded a provincial role in international trade. The provinces were upset that the federal declaratory power would still apply to the natural resource area and that the proposals offered no guarantees against federal taxation of exports of natural resources. (They did, however, recognize the federal role in international trade and times of emergency.)

Communications

While emphasizing the need for federal control over communications to preserve a system of national values as well as for technical reasons, the federal government was prepared to cede greater powers to the provinces. They were offered jurisdiction over intraprovincial telephone systems but the federal government would retain control over the regulation of interprovincial and international telephone lines. On cable distribution, the provinces would control licensing, set rates and authorize and regulate community institutional television and Pay Television. But interprovincial cable undertakings would stay under federal jurisdiction, as would the

regulation of foreign programming on cable systems. Cable systems would also be required to carry a national program service. The federal government insisted it would not give up its sole jurisdiction over broadcasting by Hertzian waves.

On the provincial side, there was consensus: the federal position did not go far enough. Its concessions were more apparent than real and left great scope for overriding federal authority to frustrate provincial policy. The provinces preferred to see concurrent jurisdiction with paramountcy reserved for each level in specified areas. Federal paramountcy would occur for frequency management and allocation, the regulation of networks extending to four or more provinces, foreign broadcast signals, satellite broadcasting and the use of communications for aeronautics, radio-navigation, defence or in national emergencies. The federal parliament could be called upon by the provinces to regulate disputes between provinces. For the rest, the provinces claimed jurisdiction in order to express better the culture and society of their provincial population via other broadcast media.

Senate

Among the provinces, British Columbia most forcefully pushed the case for a new Upper House which would have the power to ratify many federal laws and actions, such as the use of the declaratory and emergency powers, appointments to major federal agencies and federal laws to be administered by the provinces. This Council of the Provinces would have a membership of 30 with equal representation from all provinces. Quebec approval would be mandatory in votes of the Council on issues involving French language and culture.

None of the other provinces rejected the BC proposals, but support for them was lukewarm. Most provinces expressed their flexibility and willingness to negotiate. Alberta had been concerned that the new Council would eclipse the meetings of First Ministers and that it could approve the use of the declaratory power without the consent of the province affected. Quebec reserved its opinion on the Senate reform and asserted that the key to constitutional reform was a better division of powers; decisions on the Senate should come afterwards.

The federal government tabled no new detailed proposals on the Senate at these talks. It did argue that regional representation in Ottawa should be enhanced. Presumably, though, it would reject any reform which provided for provincially-appointed members only, or which involved substantial limitations on the federal parliament's power to act and to legislate. The one federal statement indicated its preference that the Senate play a role in coordinating intergovernmental relations rather than as an instrument of provincial participation in the formulation of national policies.

The Supreme Court

At present, the Supreme Court is established and regulated by a federal law; thus it has no constitutional status. The consensus for a long time has been that the Court should have its existence guaranteed by the constitution. At the September talks, most wished also to include in the constitution: the right of provinces to refer questions directly to the Court without having to go through their Courts of Appeal; the power of the federal government to appoint Supreme Court judges and the right of provinces to be consulted before appointments are made; and the guarantee that the chief justice of the court would be alternately a member of the Common Law Bar and the Civil Law Bar.

Consensus did not extend to include agreement on the size and composition of the Court. The federal government and some provinces wanted to expand the Court to eleven judges from nine. Most of the others preferred nine but seemed willing to compromise on eleven. Only British Columbia seemed firmly in favour of nine judges since, in its opinion, the workload of the Court did not require more.

Quebec, supported by PEI and Newfoundland, wanted six common law judges and five civil law judges from Quebec to better reflect the duality of the Canadian legal system. The other provinces and the federal government were not keen on a common law/civil law split greater than 7/4, on the grounds that the number of civil law cases coming before the court did not warrant a greater civil law membership. Those who preferred that the size of the court stay at nine, also preferred the retention of the existing 6/3 split between common law and civil law judges.

There was also little support for different proposals by Quebec and Alberta to create special procedures or a special court for constitutional questions and cases. Rather, it was generally felt that the Court should deal with these matters as with any others.

Lastly, most of the provinces felt that not only should provinces be consulted about appointments to the Supreme Court, but also that the consent of the Attorney General of the appointee's home province should be required. The federal government wanted some way to break the deadlock in case it and the provincial Attorney-General disagreed. But the provinces downplayed the likelihood of disagreement and argued that the federal government could always turn to another province if it had to.

Guaranteed representation on the Court for regions other than Quebec was not part of the "best efforts draft" of August 1980. BC pronounced itself in favour of guaranteeing regional representation under the system in the federal government's Bill C-60 (1978), whereby each region would be guaranteed at least one judge. However, the concern with regional representation was not a prominent part of the debate on the Supreme Court this time around.

The power of the federal government under section 96 of the BNA Act to appoint the judges of the superior, county and district courts was raised in conjunction with discussions on the Supreme Court. The provinces in general wanted this power of appointment transferred to them. In addition to being a very important tool of patronage politics, the power to appoint judges would allow the provinces to experiment with and rationalize their judicial system. The federal government did not express an opinion on this issue during the conference but simply took note of provincial concerns.

Family Law

Currently, marriage and divorce are primarily responsibilities of the federal government. Some provinces, notably Ontario and Quebec, have wanted greater control over these responsibilities in order to have concerns like grounds for divorce and custody and maintenance orders responsive to provincial mores and to allow a unified family court system. The federal government has been sympathetic to these concerns.

At the September conference, most governments pronounced themselves in favour of a proposal which would see jurisdiction over marriage and divorce largely concurrent with provincial paramountcy. Manitoba and Prince Edward Island opposed the proposal on the grounds that laws governing marriage and divorce should be the same across Canada. Saskatchewan and the federal government joined them in their concern that one section of the proposal would allow provinces to change or disallow orders for custody and maintenance made in other provinces. Nevertheless, despite these differences, agreement on the changes to be made on this item was very close.

The Fisheries

This item was added to the agenda apparently at the request of Newfoundland Premier Brian Peckford whose government has sought radical changes in the jurisdiction over fisheries. His proposal, which secured the support of seven other provinces, would see concurrent jurisdiction over seacoast fisheries. The federal government's authority would be paramount with respect to international affairs, conservation and the limits set for total allowable catches. Provincial authority would be paramount over licensing of fishing vessels, the allocation among provinces of the total allowable catches and all residual matters. In cases of conflict between provinces over the provincial fishing quotas, some mechanism for binding arbitration would be established.

The federal government, supported by Nova Scotia and New Brunswick, refused to give up any jurisdiction over seacoast fisheries or fish habitats, but did agree to constitutional guarantees of federal consultation with the provinces and did promise to develop administrative arrangements to ensure greater provincial input to fishery policy.

Fewer differences existed concerning the responsibility for aquaculture, inland species, sedentary species and anadromous species (such as salmon which spawn in freshwater but live most of their lives in saltwater). The federal government wished to retain control of anadromous species but, subject to its control over fish habitats and native rights, would cede to the provinces jurisdiction over inland fisheries (unless in tidal waters, or in waters exceeding the limits of a province), sedentary species (not including scallops, crabs or lobsters), and aquaculture. The provinces wanted these responsibilities but wanted also greater control over fish habitats in both non-tidal and tidal waters.

Offshore Resources

Claiming ownership of offshore resources and their duty to develop them in the best interests of Canada as a whole, the federal strategy on offshore resources was to promise administrative arrangements for revenue sharing and development policy but no constitutional resolution of the question of ownership and jurisdiction over offshore resources. In this way, the federal government seemed to be trying to move the issue out of the constitutional arena where it might constitute a barrier to agreement. Only Nova Scotia, Ontario and New Brunswick sided with this strategy.

Rejecting forcefully the federal claims, Newfoundland, supported by the other provinces, led the fight to have offshore resources treated in the same way as onshore resources in order to better pursue goals for provincial development. They argued that provincial ownership and jurisdiction of offshore resources should be recognized. Little compromise seemed possible between the two positions.

Equalization

All governments have long agreed that the principle of equalization should be entrenched in the Constitution. The federal government had no great objections to any of the proposals put forward in this matter although it stated its preference for the more "flexible" British Columbia proposal.

The other provinces rallied around a Manitoba-Saskatchewan proposal, which included elements from a Quebec proposal. It would commit Parliament and the Government of Canada to make equalization payments to provincial governments to ensure a reasonably comparable level of public services across Canada. The British Columbia proposal was not as precise, committing Parliament and the Government of Canada only to "such measures as are appropriate to ensure that provinces are able to provide the essential public services...."

All governments agreed that the review every five years of the mechanisms for equalization should be guaranteed in the constitution.

The Charter of Rights

Throughout the summer, Prime Minister Trudeau had expressed his view that a Charter of Rights had to be part of the new constitution. It was a non-negotiable part of the "people's package." While he may have been willing to entertain changes to the wording, or minor additions or deletions, he was not willing to have the principle of a Charter challenged.

Yet, challenged it was. Nobody argued against human rights *per se*. However, most Premiers argued that a constitutionally entrenched Charter of Rights was not the best way to protect rights. Rather, it was deemed better to leave the protection of rights to the legislatures, all of which, it was said, had shown themselves willing and able to protect human, legal, political and language rights. Quebec's Premier Lévesque challenged the Charter's minority education rights because they trespassed on linguistic and cultural issues which Quebec wished to control itself. He argued that Quebec treated its anglophone minority much better than francophone minorities were treated elsewhere and therefore they did not need constitutionally entrenched protections. Furthermore, the interests of francophone minorities in Canada could best be advanced by a series of reciprocal agreements between provinces on the treatment of minorities such as had been envisioned at previous interprovincial meetings of Premiers. Only Ontario and New Brunswick were prepared to support substantially the federal government's proposal on human, legal and political rights. On language rights, Ontario accepted only the right to minority education, and refused to have itself declared officially bilingual in the legislature and the courts. Saskatchewan, while opposing other elements of the Charter, agreed that language rights in some form might be included as part of the "Confederation bargain."

Prime Minister Trudeau and his Ministers believed that the refusal to consider guaranteeing language rights in the constitution seemed a betrayal of promises made by the English-Canadian Premiers to the people of Quebec. Nevertheless, the differences on this issue were profound and provided little scope for compromise.

Patriation and the Amending Formula

All governments agreed that patriation was desirable, and that an amending formula was needed for patriation to proceed. Most of the provinces made their support for patriation conditional on agreement on a "package" of items settling major constitutional issues regarding the division of powers. They warned the Prime Minister that unilateral patriation only with a limited set of objectives would negate the very purpose of the constitution-making exercise. On the amending formula itself many of the provinces preferred one based on the Alberta proposal - the so-called Vancouver consensus - which allowed provinces to exempt themselves from the application of some classes of amendments with which they disagreed (see Box). New Brunswick, Ontario and Saskatchewan sided with the federal government in their preference for the Victoria formula, but added that they were flexible in their stand (see Box). New Brunswick went so far as to accept the Vancouver consensus in the interests of seeing the constitution patriated. The federal government stood firm in its preference for the Victoria formula. The Vancouver Consensus with its "opting out" provisions would, it said, lead to a "checkerboard" Canada. Instead, amendments should apply uniformly across the country. It further argued that amendments should be based on the sovereignty of the people and referenda should also be available for the people to express their will in cases where a deadlock exists between governments on amendment proposals. All governments agreed that delegation of powers from one order to another on an individual basis should be permitted by the constitution instead of being prohibited under current law.

Powers over the Economy

This item dealt with the movement of people, goods, services and capital across Canada. The federal position held that the free movement of these "factors of production" between provinces was not adequately guaranteed in the present constitution. Thus, many kinds of non-tariff discriminatory measures can be undertaken by the provinces. A paper presented by Jean Chrétien provided a detailed comparison of Canada with other countries, and an elaborate list of provincial measures seen to hamper the "economic union" (later published as *Securing the Canadian Economic Union in the Constitution*, Hon. Jean Chrétien, Minister of Justice of Canada, Supply and Services Canada, 1980, Cat. No. CP 45-11/1980).

Accordingly, the federal government proposed several ways of strengthening the economic union.

1. entrench mobility rights in the Charter of Rights
2. rewrite section 91(2), giving greater powers to the federal government over Trade and Commerce
3. rewrite section 121 to prohibit non-tariff discrimination.

PROPOSED AMENDING FORMULAE

Best Efforts Draft, the Vancouver Consensus, 1980

The legal draft based on the Vancouver consensus provided a number of ways of amending the Constitution.

The basic method would require

- i. resolutions of the Senate and House of Commons
- ii. resolutions of the Legislative Assemblies of two-thirds of the provinces representing at least 50 per cent of the population of Canada

This amending formula would be required to amend only certain constitutional matters of general application.

- a) the office of the Queen, of the Governor-General and of the Lieutenant-Governor
- b) the requirement for yearly sessions of the Parliament of Canada and the legislatures of the provinces
- c) the maximum period fixed by the Constitution of Canada for the duration of the House of Commons and the Legislative Assemblies
- d) the powers of the Senate and provincial representation in it
- e) proportionate representation in the House of Commons
- f) the use of the English or French language.

However, any other amendment made in this way which affected

- a) the powers of the legislature of a province to make laws
- b) the rights or privileges granted or secured by the Constitution of Canada to the legislature or the government of a province
- c) the assets or property of a province, or
- d) the natural resources of a province

would have no effect in any province whose Legislative Assembly had expressed its dissent in a resolution, until that Assembly withdrew its dissent and approved the amendment.

Amendments which applied to one or more but not all of the provinces could also be made if resolutions were passed in favour of the amendment by the Senate, the House of Commons and the Legislative Assemblies of each province to which the amendments would apply.

Resolutions of the House of Commons, the Senate and the Legislative Assemblies of all the provinces would be required to change the basic method described above.

In all amending procedures, when the Senate had not passed a resolution in favour of an amendment within ninety days of its approval by the House of Commons, Senate approval would not be required if the House of Commons again approved the amendment.

(Source: Legal Texts forming Appendices to CCMC Reports to First Ministers, Document 800-14/061, Ottawa, September 8-12, pp. 1-4)

The Victoria Formula

At Victoria, BC, in 1971, all governments agreed on an amending formula, thereafter known as "the Victoria Formula". Under this formula, any amendment may be made by resolution of the House of Commons and the Senate, plus resolutions of the legislative assemblies of at least a majority of provinces that include:

- a) any province that has or at any time has had at least 25 per cent of the population (Quebec and Ontario),
- b) at least two Atlantic provinces,
- c) at least two western provinces whose combined populations according to the last general census form at least 50 per cent of the population of the western regions.

Certain matters could be changed only by the use of this formula and they broadly correspond to those matters of general application listed in the Vancouver formula.

(Source: Constitutional Conference Proceedings, Victoria, B.C. June 14, 1971, Appendix B, p. 63)

The ideal of the economic union was supported by all the provinces. All favoured including a declaration of commitment to that principle in the constitution, together with provision for annual meetings of First Ministers to discuss the economy. They felt that in practice some discrimination was inevitable if provinces were to seek to improve their economic situation. The trick was to coordinate economic policy so that the benefit of all was achieved. Some declared that federal fears about dangers to the economic union were exaggerated, while others accused the federal government of hypocrisy in preventing provincial policies from discriminating while allowing federal policies to do so. Too strict emphasis on the union could strengthen federal power and hamper provincial pursuit of legitimate goals.

Federal spokesmen responded that provincial freedom to make economic policy would not be unduly hobbled. Furthermore, a simple declaration of the principle was not enough; the courts must be able to enforce it. That was too much for the provinces to swallow at this time, so Ontario and the federal government remained isolated on this point. Ontario also proposed an intergovernmental forum to supplement judicial policing of the economic union and was supported by federal Minister of State for Economic Development Senator H. A. Olson. Saskatchewan had also sought to develop proposals for a "political mechanism", rather than a judicial method of ensuring the union.

The Preamble

In trying to come up with a short statement of values fundamental to all Canadians and inspirational to future generations, the governments ran into many problems. None of the proposed preambles attracted much support. Garde Gardom, BC's Minister of Intergovernmental Affairs observed of one proposal,

...the material in front of us now...reads more like a warranty for a household commodity than a preamble to the constitution of one of the greatest nations of the world...What we have today would be a very, very difficult thing, Mr. Prime Minister, to take into a high school and get the team up...

While the proposed preambles failed to be suitably inspirational for some governments, they also failed in other ways. Premier Lévesque felt that the character of the Quebec people, including the right to self-determination, should be more explicitly recognized. Others were concerned that the preamble could be used to justify particular legal interpretations of the constitutional text itself. In short a convenient reconciliation of the poetry and the politics of the preamble was not apparent to many governments at the talks.

DAY 5: SEPTEMBER 12, CLOSED MEETINGS

A series of closed meetings were held on Friday. Early in the morning, the Premiers met for breakfast in Manitoba Premier Sterling Lyon's suite at the Chateau Laurier Hotel. As chairman of the Premier's Conference for the year, Mr. Lyon was the coordinator of the provincial positions. The night before, the Quebec delegation had drawn up and circulated a "proposal for a common stand" to the other provincial delegations (Canadian Intergovernmental Conference Secretariat, Proposal for a Common Stand, Document: 800-14/085, Federal Provincial Conference of First Ministers). Over breakfast the ten Premiers accepted this position with minor alterations. For example, the requirement that Ontario become officially bilingual was apparently removed at the request of Ontario's Premier Davis (Toronto Sunday Star, September 14, 1980, p. A6).

Minor alterations notwithstanding, the Premiers had been able to agree on a position on every one of the agenda items. They had even been able to agree on a proposal for a Council of the Provinces and a preamble. But their agreement was based principally on provincial drafts or "best effort" drafts to which the federal government had previously announced its objections during the previous four days.

The Premiers took the "breakfast consensus" to their 10:30 meeting with the Prime Minister. Between 10:30 a.m. and 3:30 p.m., government officials, journalists and other observers waited nervously while the First Ministers met. According to one report,

Trudeau took the Premiers' summary of their stand and went down the two-page list calling out: "no deal, no deal, okay, okay, okay, no deal, no deal, okay, no deal, no deal, okay, no deal, no deal".

That was it. Trudeau made his position clear. He would make a deal only if he got concessions on strengthening the economic union, giving Canada a bill of rights, bringing back the constitution from Britain and adopting a formula for future amendments to the constitution.

In return he was willing to give in to the provinces' demands on Senate reform, the Supreme Court, family law, equalization and an amending formula he didn't like (Toronto Sunday Star, September 14, 1980, p. A6).

At 3:30, eight Premiers left the Prime Minister's residence. No one was talking but it was clear that the two positions had not been bridged. Premier Blakeney of Saskatchewan and Premier Davis of Ontario stayed an additional hour to explore further possibilities for compromise. Then

Between 4:30 p.m. and 8 p.m. there was a furious series of phone calls among the Premiers, their ministers of intergovernmental affairs, and their officials - all trying to work out wording for various parts of the proposed compromise (Toronto Star, September 13, 1980, p. 1).

At 8:00 p.m., the First Ministers met again, but only for an hour. At 9:00 p.m., they broke off talks agreeing only to delay announcement of the failure of the talks until Saturday morning.

Beyond this sketchy outline of events, the complete story of Day 5, particularly the five hours between 10:30 a.m. and 3:30 p.m., has yet to be told. Only the eleven participants know exactly what happened and none of them has been willing to enter their complete version of events into the public record. How close they came to agreement must remain a subject for speculation until more authoritative accounts become available.

DAY 6: SEPTEMBER 13

On Saturday morning, the eleven First Ministers walked back into the conference hall and one by one explained that they had failed once more to resolve the constitutional impasse.

In their concluding remarks, the Premiers echoed many of the unresolvable differences revealed in the debate of the last few days. Many Premiers - Lévesque, Lyon, Lougheed, Peckford - referred to the "breakfast consensus" developed on the Friday morning before they met the Prime Minister, and regretted that it had been rejected by the Prime Minister.

Although the exact details of this consensus were not made public at the time, Prime Minister Trudeau was clear about why it did not appeal to him. A Charter of Rights including language rights and safeguards for the economic union were not part of it. He would not accept their absence. A preamble which implied the provincial right to self-determination, an Upper House which lacked federal government representatives, and an amending formula which allowed a "checkerboard Canada" and left no recourse to the people were part of it. He would not accept their presence. These concerns were shared to varying degrees by Ontario and New Brunswick even though they had evidently been part of the "breakfast consensus".

Summary of Proposal for a Common Provincial Stand

1. Natural Resources: Provincial legislative power over natural resources; concurrent power over extra-provincial trade subject to equal pricing of resources exported and not exported; federal paramountcy in regulation of international trade and commerce or to serve a compelling national interest; provincial taxation by any mode or system which does not discriminate between resources exported and not exported. (1979 Best Effort draft).
2. Communications: provincial legislative power over telecommunications works wholly situate in the province; federal legislative power over telecommunications works not wholly situate in the province; provincial paramountcy over all works except concerning management of the radio frequency spectrum, space segment of communication satellites; broadcasting networks covering 4 or more provinces, foreign broadcast signals and the use of telecommunication works for aeronautics, radio and navigation, defence or in national emergencies. (Provincial Consensus Draft, August 26, 1980).
3. Upper Chamber: 30 member Council of the Provinces; 3 to be appointed by Lieutenant-Governor in Council of each province; each province to have one vote; ratification by two-third's majority of federal declaratory power, conditional grants to provinces, federal emergency power except for states of real or apprehended war, invasion or insurrection, approval of appointments to such federal boards, commissions or agencies as may be determined; Quebec approval required for all matters in relation to the French language or culture.
4. Supreme Court: entrenchment in the Constitution; eleven members, power of provinces to refer constitutional questions for an opinion; consent of provincial Attorney-General for appointment to Court; alternative chief justice; provincial power to appoint superior court judges.
5. Family Law: concurrent powers over divorce; provincial paramountcy; enforceability of orders across jurisdictions subject to some qualifications.
6. Fisheries: federal paramountcy over total allowable catch, allocation of quotas to foreign countries and licensing foreign vessels, and the conservation of fish stocks; provincial jurisdiction over licensing non-foreign vessels, allocation of total quotas among provinces and all other matters.
7. Off-shore Resources: Principle of equal treatment for onshore and off-shore resources.
8. Equalization: commitment to reduce disparities and further economic development; the principle of equalization payments to provincial governments entrenched.
9. Charter of Rights: Fundamental freedoms and Democratic Rights -- all existing laws deemed valid; judicial rights and discrimination rights qualified by a non-obstante clause; official bilingualism in Ontario, Quebec, New Brunswick and Manitoba; multilateral reciprocity treaty to be concluded without delay on language education.
10. Patriation and the amending formula: Alberta formula for matters subject to opting out, with provision for financial arrangements between governments; Victoria formula for other matters.
11. Powers over the Economy: No new section 121 or a statement of principles only
12. Preamble: The Quebec proposal.

Source: Proposal for a Common Stand, Quebec, Document No. 800-14/085, Ottawa, September 8-12, 1980.

Most of the provinces argued that they had changed their positions in order to reach this consensus but that no similar change in the federal government position came in response. Moreover, some provinces expressed their suspicion that the lack of response was intended to guarantee failure of the talks so the federal government could provide itself with an excuse to proceed unilaterally to attain the changes it wanted. Some federal officials alleged that a few of the provinces had wanted the talks to fail.

But if the differences were too profound to reach agreement on all twelve items, couldn't an agreement have been reached on a more limited set of items? After all, wasn't agreement on issues like Family Law, the Supreme Court, and equalization very close?

The problem here was that every participant had one or two items which were the minimum price for his agreement. A short agreement could not, therefore, satisfy everyone. Reports suggested that the Prime Minister had insisted on entrenching minority education rights and would not diminish federal control over offshore resources. Premiers Bennett and Peckford, however, made their support for a package conditional on a satisfactory arrangement on offshore resources (*Globe and Mail*, September 15, 1980, p. 1). Moreover, the amendment formula would still have been a stumbling block. In short, whichever package was considered, what the participants were each offered was not worth the price they would have had to pay.

Each First Minister was likely under pressure from a number of sources. Each had to protect the dominant economic groups in his territory, preserve or enhance the policy-making capability of his civil service, stand up for what he felt were the feelings of the voters who put him in office and safeguard the integrity and well-being of his political unit as a whole.

Moreover, the circumstances did not encourage the kind of give and take needed when so complex a set of important issues are at stake. Too much time had been spent staking out firm positions in the public sessions. The sessions were too rushed, too exhausting for the participants to see their positions and those of others clearly.

Accounts of what transpired at the private meetings diverge as do assessments of who is to "blame" for the failure in September. In the end, while personal factors were no doubt important, the gap between competing goals and visions must have seemed too wide to bridge. As a result, continued disagreement must have seemed a more preferable strategy than compromise.

PART THREE

CHAPTER V

THE FEDERAL CONSTITUTIONAL RESOLUTION

INTRODUCTION

So, gentlemen, I intend to reflect on these matters during the next few days and speaking for the Canadian Government I will meet with my caucus and my Cabinet next week and in due course we will announce our proposed plan of action to the Canadian people and to Parliament.

These were the Prime Minister's last words on the constitution before the September conference ended. What did they mean? How far would he go without unanimous provincial support?

Most observers seemed to feel that the strong provincial opposition to his plans at the September talks would prevent the Prime Minister from attempting large-scale unilateral change. They felt that the Premiers had performed much more persuasively than expected at the First Ministers' Conference. Their image of Canada had been presented as compellingly as that of the Prime Minister. But, since the Prime Minister had staked his prestige on reforming the constitution within ten months of the referendum, observers believed he would try to do something without provincial consent and in time for Canada Day, July 1, 1981. It was felt that the Prime Minister would likely try for a limited action - patriation plus an amending formula that preserved the unanimity rule. Others speculated that he would add language rights to the package but in a form which allowed the provinces either to opt in or to opt out of its application to their territory. These possibilities could be viewed with relative equanimity by the provinces.

THE PROPOSED RESOLUTION

It is a long and painstaking process, building a country to match a dream. But just as each generation has made the sacrifices so each has reaped the rewards. Every generation of Canadians has given more than it has taken.

Now it is our turn to repay our inheritance. Our duty is clear: it is to complete the foundations of our independence and of our freedoms.

(Statement by the Prime Minister, Office of the Prime Minister, Ottawa, October 2, 1980, p. 2)

With these words on the evening of October 2, 1980, the Prime Minister showed he felt his hand was much stronger than perceived by outsiders. He went on to describe to the television audience the resolution he wanted the Canadian Parliament to approve (*Proposed Resolution for Joint Address to Her Majesty The Queen Respecting the Constitution of Canada*, Government of Canada, Ottawa, 1980). It would request the Queen to pass a "Canada Act"; if the UK Parliament acceded to the request, the Act would give Canada a Charter of Rights including guarantees of fundamental freedoms, democratic rights, legal rights, language rights and non-discrimination rights (although these last would not take effect for three years). It would entrench a commitment by Parliament and the provincial legislatures to promote equalization and the reduction of regional disparities in the provision of essential public services. It would gather together a number of constitutional acts and redefine them as the Canadian Constitution. It would also exempt Canada from being affected by any law passed by Great Britain in the future, and thus achieve patriation.

The most complicated part of the Resolution concerned the several ways it would provide for amending the constitution in the future. These included:

1. A "modified" Victoria Formula (see p.50 for original Victoria formula); the modified formula introduced a fifty per cent population requirement for the Atlantic Provinces as well as for the Western provinces.
2. National referenda (requiring a national majority with a specified level of support in all regions, though not necessarily a majority in all regions).
3. Individual Consent (applying to amendments which affect one or more but not all provinces).

But, only option (3) could be used as soon as the Resolution was proclaimed law. The Resolution allowed a two year delay before options (1) and (2) could be used. In the meantime, the Resolution required the First Ministers to meet at least once a year to discuss the constitution unless a majority of the ministers decided against it. After two years, options (1) and (2) would automatically come into effect, unless one of two things had happened. The new procedures or some others could come into effect earlier

if approved by the unanimous consent rule. Or, if eight or more provinces representing at least 80 per cent of the Canadian population could together come up with a single proposal for alternative amending procedures, they could cause a referendum to be held which would ask the people to decide between the proposal of the federal government (which need not be the same as in the present Resolution) and the provincial proposal. The new amending formula would be approved by a simple majority of the population. This procedure applied to the constitutional amendment by legislatures; the provision for future amendment by referendum would remain in any case.

Thus, far from advancing a relatively limited set of proposals, the Prime Minister offered Canadians a Resolution that could radically change the shape of Canadian federalism. He justified his government's action by arguing that change had been promised to Quebecers and to all Canadians. Federal-provincial talks had failed, but there was a way to break the straitjacket on reform and now was the time to use it. Decisive action by the Canadian Parliament could accomplish for Canadians what years of federal-provincial wrangling could not. As a result,

Freed from the paralysis of the past, with our constitution home, with our rights and freedoms guaranteed, the process of reform and renewal can truly proceed. (Statement by the Prime Minister, op. cit., p. 8).

FEDERAL GOVERNMENT STRATEGY

The Process

The federal government's decision to ask Parliament to approve such a sweeping set of proposals was not made on impulse. Rather, a reasoned assessment of the Resolution's constitutionality and its chances of success lay behind the decision. This assessment rested on a particular interpretation of the steps necessary to amend the Canadian constitution and on a reassessment of Ottawa's political support.

Most interpretations of Canadian constitutional law agree that only the Parliament of the United Kingdom has the legal authority to make the kinds of constitutional changes proposed by the Resolution. This is the legacy of Canada's colonial history and of its previous failures to agree on an amending formula.

Previous constitutional conferences had been based on the assumption that the agreement of all the provinces and of the federal Parliament was necessary before changes to the British North America Act would be requested of the United Kingdom's Parliament. This assumption had even been recognized by the federal government in a 1965 White Paper on constitutional reform.

Now, however, the federal government was denying the assumption that provincial consent for its proposals was necessary. It was now arguing that it was both legal and proper for the Canadian Parliament to bypass the provinces and request the Parliament of the United Kingdom to alter the British North America Act (Statement by the Prime Minister, op. cit., p. 5).

The federal government had threatened such unilateral action during the summer. Some of the provinces had cautioned that they would challenge it in the courts. As his government did with its attempts to reform the Senate in 1978, (see Year in Review, 1979) the Prime Minister could have chosen in this instance to refer the question of the federal government's competence to request constitutional change to the Supreme Court of Canada. The government, however, decided against seeking court action in any form. It decided to open debate immediately in the Parliament of Canada.

The chief considerations governing the federal choice seemed to be: to minimize delay and avoid the possibility of an adverse legal judgement. Forging ahead with the Resolution underlined the government's argument that its action on the Resolution was legal. It was, after all, said the government, a political matter. Once the Resolution had been passed by the British Parliament the federal government could present the courts with a *fait accompli*. As noted in the Report to Cabinet, the federal government had received advice that the courts would probably uphold the constitutionality of the substance of any Act passed by the UK Parliament even if it ruled unconstitutional the process of requesting change.

As to the question of validity, it is the view of the Department of Justice that a law passed by the UK Parliament to patriate the Constitution, with an amendment formula and other changes, would not be successfully attacked in the courts. It seems abundantly clear that the legal power remains for the UK Parliament to enact such a law for Canada,...

...if the question came somehow before a Canadian Court, it would uphold the legal validity of the UK legislation effecting patriation. The court might very well, however, make a pronouncement, not necessary for the decision, that the patriation process was in violation of established conventions and therefore in one sense was 'unconstitutional' even though legally valid...(The Report to Cabinet, op. cit., pp. 50 - 51).

A direct reference to the Supreme Court, however, raised the possibility of an adverse legal judgement that would effectively end federal plans for constitutional change as had happened in 1978 with the Senate reference case. It would then be very difficult either to persuade the British Parliament to pass the Resolution or to justify politically to Canadians any attempt to proceed with the it. The government would then be forced back to bargaining constitutional reform with the provinces or to finding other ways to circumvent requirements for provincial consent.

Even if the federal government won its case, the delay involved would endanger the government's project by allowing more time for the provinces to mobilize public opinion against the Resolution. But this strategy had its dangers. It ran the risk of appearing afraid of an adverse Supreme Court ruling. More importantly it ran the risk that the dissenting provinces would themselves initiate their own references in provincial courts of appeal, in which they could frame the questions so as to maximize the possibility of a judgement against the federal government. An adverse judgement in a provincial court would force the federal government to wait for a definitive Supreme Court ruling, creating further loss of momentum.

The Substance

Prime Minister Trudeau argued that the Resolution would not take power from the provinces and transfer it to the federal government. Rather, power would be transferred from both orders of government to the people so that they might better protect themselves from abuses by public authorities (Statement by the Prime Minister, *op. cit.*, pp. 5-6). However that may be, the Resolution, nevertheless, clearly gave the upper hand to the federal government in the renewed federation it would establish.

The Charter of Rights implied that the Courts would gain added powers and responsibilities at the expense of federal and provincial governments, but the federal government would remain responsible for appointing the superior and Supreme Court judges who would be interpreting the Charter.

The position of the federal government in the amending process was also safeguarded. Of the three proposed amending formulae, the consent of the federal parliament is needed for amendments to occur in options (1) and (3) giving it a veto for changes it does not like. In option (2), the ultimate decision is made by the people, but only the federal Parliament can initiate a referendum, only the federal Parliament can authorize the rules governing the conduct of the referendum; and the federal government could be in a better position to conduct a coherent effective national campaign in any referendum that might be held.

The federal government argued that the Resolution gave the provinces the opportunity for two more years of negotiation on an amending formula with the option of presenting an alternative for the people's choice in a referendum. However, the federal government possessed a number of advantages in this interim amending process as well.

The approval of the federal Parliament is needed for interim changes to these formulae under the unanimous consent rule. In the case of a referendum, the people decide, but for any referendum challenging the amending formula(e) proposed by the federal government, Parliament again makes the rule. Ottawa could force a referendum even if the provinces were united on an amending formula.

Furthermore, the provinces proposing an alternative must have between them 80 per cent of the population. Since both Quebec and Ontario each have more than 20 per cent, if either withheld their approval then no referendum can be held. Finally, only a simple majority of all Canadians is required to approve a new formula. In any case, the most controversial innovation in the amendment procedures - the referendum as a deadlock breaking device - was not subject to replacement by any provincial alternative. The provinces could only suggest a replacement for the modified Victoria formula (option 1).

The Resolution also strengthened the federal government's position in constitutional reform in the long run. Patriation, the modified Victoria formula for amendment, a procedure for amendment by referendum, and the Charter of Rights all reflected federal government priorities for constitutional change. The Resolution did not deal with provincial priorities for the reorganization of the division of powers in certain key areas, or with institutional reforms to the Senate and Supreme Court. The federal Resolution threatened to leave the provincial governments in a weaker bargaining position: once the federal government received what it wanted, the provinces could no longer bargain as effectively for the reforms they wanted.

REACTION TO THE RESOLUTION

Objections to the Process

Following the release of the Resolution, opposition quickly formed, both over the substance of the changes proposed and over the method the federal government was using to implement them. Speaking immediately after the Prime Minister had unveiled his Resolution on October 2, 1981, the leader of the Official Opposition, Progressive Conservative Joe Clark, came before the television audience with a different perspective on what the Prime Minister was doing.

Because a constitution is so basic to a country, it must be the product of the broadest possible consensus. It cannot be arbitrarily imposed on this nation by only one individual or government. Nor can it be achieved through threat, ultimatum or artificial deadline. That kind of constitution-making does not serve Canada (Statement by Rt. Hon. Joe Clark on the Proposed Resolution Respecting the Constitution of Canada, PC News Release, October 2, 1980, p. 1).

In the following days, many of the provincial premiers also voiced their displeasure with the way the federal government was proceeding with its Resolution. Premier Bennett said the BC government considered the Resolution unacceptable simply "on the basis that it is unilateral" (Globe and Mail, October 4, 1980, p. 15). Premier Blakeney of Saskatchewan emphasized that,

I want to leave no doubt of my strong objection to the unilateral nature of Mr. Trudeau's proposed action. It is inconsistent with our historical traditions and with our present conception of Canada as a federal state (Globe and Mail, October 10, 1980, p. 10).

The Attorney-General of Prince Edward Island observed that

the proposed unilateral federal action violates certain constitutional conventions that have "elevated themselves almost to the status of law, certainly something to be recognized in courts" (Ottawa Citizen, October 18, 1980, p. 8).

Objections to the Substance

The content of the Resolution provoked objections just as strong as those concerning the process. Not surprisingly, opponents of the process, also inveighed against the substance of the reforms proposed. Opposition leader Joe Clark argued,

...Mr. Trudeau tonight offers Canadians the prospect of divisive referenda, prolonged constitutional challenges in the courts, and federal-provincial turmoil. That is betrayal of those Quebecers who voted "No" in the Quebec referendum, and all other Canadians who seek genuine renewal of our Confederation (Statement by Rt. Hon. Joe Clark on the proposed Resolution Respecting the Constitution of Canada, op. cit., p. 3).

Clark suggested instead that patriation should proceed without delay but that it should be accompanied only by an amending formula based on the Vancouver consensus.

Premier Buchanan of Nova Scotia argued that basing the amending formula on population gave Ontario and Quebec a veto over constitutional change. As a result, the amending formula treated Nova Scotians by comparison as "second class Canadians" (Halifax Chronicle-Herald, October 16, 1980, p. 3). Premier Peckford of Newfoundland and Labrador argued that the formula would allow his province to lose Labrador and constitutional guarantees for denominational schools (Montreal Gazette, October 22, 1980, p. 71). Premier Lévesque feared that the language rights in the Charter would erase the progress made by his government's language policy of the past four years. The Resolution he said,

...tears out the very heart of Bill 101. That is something which is totally unacceptable to Quebec. It would bring us right back to the confrontations and tearings apart we had about twelve years ago (Montreal Gazette, October 17, 1980, p. 1).

Premier Lyon of Manitoba charged that the proposed charter of rights was a "fundamental invasion" of provincial powers and rights, and that it undermined the Canadian system of parliamentary supremacy, thus taking the country closer to a republican system of government as in the United States (Globe and Mail, October 4, 1980, p. 15). Premier Lougheed of Alberta worried that the amending formula could force a province "to give up its resource-ownership rights against its will" (Financial Post, October 11, 1980, p. 5).

Support for the Resolution

The Prime Minister did have supporters. Ed Broadbent, leader of the NDP in Parliament, argued,

Some premiers have indicated that any unilateral action taken by Parliament would be unacceptable. My party and I do not share this view.

(Translation) Action is needed now. Progress must occur in resolving the constitutional question. We have to concern ourselves with economic problems such as unemployment and rising prices. (News Release: Statement by NDP Leader Ed Broadbent, October 2, 1980, p. 1)

The NDP leader however, felt that the Resolution did not go far enough. Patriation for Broadbent was "unquestionably desirable"; the amending formula proposed - requiring unanimity during a period used to work out a more desirable one - was "sensible". He noted that his party had long favoured constitutional entrenchment of certain fundamental liberties. But, he argued,

...Canadians, particularly those outside of central Canada, have wanted the assurance that their provincial governments own and control their resources... (For western Canadians) the clarification of their rights on resources is fundamental... Therefore... it is essential that the matter of resource control be added to the otherwise civilized set of proposals we heard about tonight (News Release: Statement by NDP Leader Ed Broadbent, October 2, 1980, p. 2).

Among the provinces, Ontario and New Brunswick supported the federal government. Premier Davis' endorsement was the most unequivocal. "The substance of the Resolution responds very closely to the specific goals which this government took to the First Ministers' meeting, on behalf of the citizens of Ontario." He cited mobility rights, the Charter, minority language rights and patriation. He called Ottawa's decision to "back away from its plan of imposing institutional bilingualism on Ontario" an important concession, "and a wise one in the context of sustaining an effective national consensus for constitutional reform and patriation." To fail to act now would be to admit "a victory for those who say this nation is unworkable" (News Release, Statement on the Constitution in the Legislature, October 6, 1980). Davis, a Progressive Conservative, publicly urged his fellow Conservatives at the federal level to repudiate the opposition of Joe Clark, their leader, to the federal government's proposals (Globe and Mail, October 4, 1980, p. 1).

Premier Hatfield of New Brunswick had serious reservations - about the weak position of PEI in the proposed variation on the Victoria amending formula, about the use of referenda, about the adequacy of the equalization provision, and about the failure to require official bilingualism in Ontario, and about some aspects of the Charter. But, he said, "The time has come to support the act of taking full control in Canada over the Constitution." He said he had always believed that change could be achieved through unanimous consent. But "after the most thoughtful consideration I have come to the conclusion that I was wrong" (Press Release, Premier Hatfield's Reaction, October 17, 1980).

. . .

Following the release of the Resolution, battles over the substance and the process of reform occurred on a number of fronts. In Parliament, debate on the Resolution began when Parliament resumed its session on October 6, a debate in which many predicted the Conservatives would be outgunned and outmanoeuvred by the Liberal - NDP alliance. Six - later eight - provincial governments began court actions challenging the constitutionality of the federal government's actions. Others such as the Saskatchewan government, turned their efforts to forging a compromise. In Great Britain, the British Parliament turned its attention to the changes it was being asked to make to the Canadian constitution. In the Canadian media, editorial opinion was stimulated by the political conflict over constitutional reform and by the imminence of the proposed changes while the Canadian public continued to be polled for their latest opinions on the constitutional debate. Each of these fronts will be examined in turn.

CHAPTER VI

PARLIAMENT AND THE RESOLUTION: THE DEBATE BEGINS

On October 6, 1980, the federal government introduced its Resolution to the House of Commons. Shifting the debate from the intergovernmental arena to the parliamentary forum brought a host of new actors and issues into the fray and altered the politics of constitution-making. For the next five months, the government's project was discussed on the floor of the House of Commons, in the Senate and in committee. The spectacle presented Canadians with some of the best and the worst moments of Canadian parliamentary history. At the end of the process, important changes had been made to the Resolution as it had been originally proposed (a final version of the Resolution has been included as Appendix B). More importantly, the opposition Conservatives had succeeded in doing just what federal strategy had attempted to avoid. They had succeeded in delaying Parliamentary approval of the Resolution long enough for the provincial courts to reach a decision on legal challenges to the Resolution. The Newfoundland Court of Appeal judgement of March 31, 1981 kicked the props out from under the federal government's position by ruling the federal action illegal. The legality of its action having been questioned, the federal government was forced to wait for a definitive judgement by the Supreme Court of Canada before asking Parliament to approve the Resolution. The process leading to this state of affairs occurred in three stages.

1. Initial Debate of the Resolution in Parliament.
2. The Deliberations of the Joint Committee of the House of Commons and the Senate on the Resolution.
3. The Second Debate in Parliament

INITIAL DEBATE OF THE RESOLUTION IN PARLIAMENT

The House of Commons, October 6 - October 23

Procedural Issues

When the House of Commons considers a resolution, it does not have to follow the same procedures as when it considers a bill. The only procedural questions concern when a resolution is introduced to the House and whether it is debated fully in the House or referred to committee.

The Liberals chose to introduce the Resolution to the House of Commons soon after the recall of Parliament in the fall. Debate in the House would proceed until House time was needed for debate on the budget, the energy program and other legislation which had been promised for late October. The Resolution would then be sent to a special joint committee of the House of Commons and the Senate for further examination.

The advantages of this strategy were several. The time of the House would be freed to deal with other legislation. While the House was dealing with other business, the Committee would be considering the Resolution. As well, interested individuals and groups could participate directly in constitutional review by appearing before a committee, whereas they could not speak in a House debate. Finally, the Report to Cabinet noted the political advantage in containing in Committee a "highly contentious issue" like the Resolution

...where it is more readily managed by the House Leader and his officers, and where easier and more effective relations can be maintained with the Press Gallery, since relatively few reporters will follow the proceedings" (Report to Cabinet, op. cit., p. 49).

There were disadvantages to this strategy. The Report to Cabinet noted that the debate on the motion to refer the Resolution to committee might be difficult. As a result the committee might end up with wide terms of reference. It might be empowered to travel. It might want to hear all who wished to appear. Its report might be voluminous or embarrassing to the government. Critics of the government position would likely be more numerous than supporters. As a result, the Report to Cabinet observed that

Careful choice of government members would be essential and careful orchestration of hearings would be needed to ensure effective presentation of the government's position (ibid., p. 50).

Despite its disadvantages, the government chose this strategy over delaying introduction of the Resolution until just before Christmas so that other business could be dealt with first, or keeping the Resolution in the House by extending its sitting hours. Though this latter option promised to be the quickest route, it would likely be very exhausting. Concerning the former option, the Report to Cabinet noted that essential business stemming from the budget, the energy program and other legislation would continue to make claims on House time past Christmas thus delaying the process of reform. Also, it would be difficult to refuse to renew discussions with provinces, should it be requested, if there were no federal action underway in the period between October and Christmas.

The Debate Begins

The opening debate in the House of Commons was not on the Resolution as such; rather it concerned the motion to refer the Resolution to a joint House of Commons - Senate Committee. But it did not take long before impassioned disagreement on both the substance of the Resolution and on the government's method of proceeding surfaced.

Jean Chrétien set the tone for the Liberals' position by introducing the motion as an opportunity for action. The people of Canada did not want more discussion, he argued, and the promises made in the Quebec referendum had to be fulfilled. Despite his government's efforts to reach agreement with the provinces they had been blocked by provincial attempts to bargain for more power. He assured the House that there was no legal impediment to the government's proposed action and concluded

...we are committed to continue the renewal of our constitution, to review the division of power, to change Canadian institutions. We have to get started, and the only way to succeed is by patriating the constitution in Canada and that, Madam Speaker, is exactly what we are doing today for the benefit of all Canadians (House of Commons Debates, October 6, 1980, p. 3288).

Conservative leader Joe Clark criticized the federal government for acting without the consent of the provinces. He attacked the use of referenda as an amending procedure because it would invite the break-up of the country by encouraging regional divisions on public policy issues. He repeated his proposal to patriate the constitution immediately with the Vancouver amending formula and letting all other changes (e.g., the Charter of Rights, equalization guarantees) be made in Canada by Canadians using the Vancouver formula. He argued,

We shall decide among ourselves whether...to entrench in the constitution a charter of rights and what this charter should contain. We shall decide among ourselves whether equalization should be the subject of a constitutional provision...The work of amending the Canadian constitution is for Canadians to do, not for the British to do (House of Commons Debates, October 6, 1980, p. 3295).

NDP leader Broadbent took a much milder approach. He said that much in the government's proposal was attractive to his party since it reflected NDP resolutions and motions over the years. And he offered the Liberals a deal.

If the government will show flexibility in committee and accept some amendments, we can have a decent piece of legislation. If the government wants our support in the House of Commons, the very minimum it must do is to make reasonable, fair changes in the constitution in the resource sector which are important to Canadians wherever they may live in this land (House of Commons Debates, October 6, 1980, p. 3299)

The Conservatives and the NDP did agree that public scrutiny of the Resolution must not be limited by tight deadlines, or imposition of closure. They argued that the Joint Committee's deadline of December 9 was too early to permit full examination. They also wanted to allow the Committee to travel and to have its proceedings broadcast. Moreover, they wanted assurances that they would be allowed to debate the Committee's report and to propose amendments when it returned to the House.

The Conservatives in particular pressed these arguments on the government with a vengeance. They were spurred on by Joe Clark, who, many said, saw this issue as an opportunity to shore up support for his leadership of the party by waging an all out campaign against the Liberal proposals. The Conservatives persistently raised questions of privilege concerning the government's use of advertising to sell its constitutional proposals which had to be dealt with before debate could proceed. Further, most Conservative MP's wanted to participate in the debate on the motion, thus promising to delay the process even more.

Nevertheless, the slow pace of parliamentary debate did not prevent the Liberals and the NDP from cementing an alliance on the Resolution. When Prime Minister Trudeau showed himself sympathetic to the NDP's argument on natural resources, Ed Broadbent took the further step on October 20 of writing Trudeau that he would support the Resolution on the condition that the government accept an amendment "confirming the provinces' right to levy indirect taxes in a non-discriminatory manner in relation to those resources, and providing to them a concurrent power with respect to inter-provincial trade in those resources to be exercised in a non-discriminatory manner and subject to federal paramountcy" (Halifax Chronicle Herald, October 23, 1980, p. 7). The next day, Prime Minister Trudeau replied that he would be prepared to accept such an amendment from the NDP. Trudeau could now claim parliamentary support for his proposals from at least some western MP's; Broadbent could claim his party had effectively bargained their support for tangible benefits for the West.

Having made its deal with the NDP and tiring of the Conservatives' attempt to keep the Resolution in the House and delay its consideration in committee, the Liberals invoked closure to end debate on October 23, arguing that opposition arguments had become repetitive and that the House had to move on to other business. But, over the course of the debate,

emotions had run high and when closure was invoked over the objections of both the PC's and the NDP, the Conservatives as a group responded by singing O Canada. The House became even more rowdy later in the day when the debate officially ended at 1 a.m., October 24. Before the deputy speaker could read the text of the motion for a vote to be taken, several Conservative MP's stood up and asked to speak. Others left their seats and besieged the Speaker's Chair demanding to be heard. The decorum of the House was replaced by a confused hubbub, and at points, physical violence seemed a possibility. Eventually, order was restored. The vote was taken with the Conservatives and NDP member Svend Robinson opposing the unamended motion to refer the Resolution to a joint committee.

The Debate in the Senate

The Resolution came to the Senate hard on the heels of a Senate Committee's Report on the role of the Senate constitutional reform (Canada, Senate, Standing Committee on Legal and Constitutional Affairs, *Report on Certain Aspects of the Canadian Constitution*, Ottawa, November 1980). The Lamontagne Report recommended that an appointed Senate be retained but the Senate's absolute veto over legislation should be replaced by a suspensive veto which could be overridden by the House of Commons after six months. The report recommended that the number of senators should be increased to provide for better regional balance, with one-half of its members appointed from lists provided by the provinces. The Senate's role as a protector of regional interests, linguistic minorities, and individual rights would thereby be enhanced.

Thus, when debate on the Resolution began on October 22, many of the senators had already studied in some depth the implications of constitutional reform. Their attention was drawn in particular to a provision restricting the power of the Senate over constitutional change by allowing the House of Commons to override after 90 days a refusal by the Senate to approve a particular reform.

The debate in the Senate concerned the motion to refer the Resolution to a joint committee, but the Resolution itself also came under attack. Several senators pressed the government leader in the Senate, Ray Perrault of BC, for assurances that they would be allowed to propose amendments to the Resolution once it left the Joint Committee. Like their colleagues in the House, they received from the government only vague assurances on this point. Nevertheless, the government majority in the Senate voted on November 3 to refer the Resolution to committee with two Liberal senators voting with the PC's against the motion.

THE SPECIAL JOINT COMMITTEE OF THE SENATE AND OF
THE HOUSE OF COMMONS ON THE CONSTITUTION OF CANADA

Procedural Issues

The Joint Committee met to decide organizational matters on November 6. Senator Harry Hays of Alberta and Serge Joyal, MP (Hochelaga-Maisonneuve) were elected co-chairmen. The committee also agreed to invite applications from those wishing to appear as witnesses and to accept written submissions from those wishing to make them, rather than requesting individuals to appear or commissioning briefs. The committee also agreed to give financial assistance to those who applied and then were invited to appear. Initially, opposition motions to have the committee travel about the country and to have its proceedings broadcast were defeated by the government committee members. But a few days later the government caved in to Opposition demands and supported a House of Commons motion to allow the Committee's proceedings to be broadcast in the interest of aiding a full and open public debate.

By late November, it was clear that the Committee would be able to hear only a small portion of the large number of groups and individuals who had requested to appear. Clause by clause analysis of the Resolution had not even begun, with the December 9 deadline only days away. The opposition, particularly the Conservatives, pressed hard for an extension of the hearings. Public and editorial opinion also seemed to favour an extension. As a result, on December 2, the House of Commons and the Senate agreed to extend the deadline for the committee's report until February 6, 1981. This extension did not occur without the attempt by the Liberal House Leader, Yvon Pinard, to trade the Liberals' support for the extension of the deadline for a promise by the Opposition parties not to obstruct the passage of the Resolution when it returned to the House and the Senate for third reading. This attempt did not succeed. The Liberals and the NDP clearly understood this to be the only extension the committee would receive but the Conservatives claimed to have agreed to the date only on the condition that they could press for a further extension if they felt that public opinion had not been adequately canvassed. The PC's also wanted the committee to hear witnesses until January 25, 1981, but the Liberal and NDP members on the Committee approved a deadline of January 9, 1981 for witnesses except for special cases (for example, provincial Premiers).

Dispute also arose over the question of expert witnesses. Early in the committee's deliberations it was decided not to hear individuals, but only representatives of groups because of the large number of requests to appear that were received. This decision excluded "expert" witnesses. The Liberals held that experts could be useful only for questions which were before the courts and therefore should not be discussed. They argued that the Conservatives had been disappointed by support given to the federal govern-

ment's resolution by witnesses and wanted "expert" support for their position. The Conservatives argued that expert testimony was relevant to the committee's deliberations regardless of legal complications. They said the Liberals were afraid that the experts would challenge the federal project. In the end, a compromise allowed each party to select "expert" witnesses - two by the Liberals, two by the Conservatives, and one by the NDP.

The committee heard its final witness, Jean Chrétien, beginning on January 12, 1981. Chrétien presented a revised Resolution which incorporated a number of changes suggested by the other witnesses. Following his presentation, the committee began a clause-by-clause analysis of the revised Resolution with Chrétien and other federal officials. Progress was slow and the House of Commons voted to extend the committee's deadline to February 13, 1981. Public scrutiny of each clause continued in public until February 9 after which the committee went in camera to prepare its report, which was presented to Parliament on February 17, 1981. (The Committee's Report is contained in Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (Report to Parliament), Issue No. 57, Friday, February 13, 1981).

Written Submissions to the Joint Committee

A statistical account of written submissions to Committee is contained in Appendix D of the Joint Committee's final report. A total of 962 written submissions were made: 323 by groups and 639 by individuals. Of 323 groups, 163 submitted briefs. The remainder were brief telegrams or letters often containing only a request to appear. Of 639 individual submissions, 409 had specific comments on the Resolution as a whole, on various of its parts or on its underlying goals. The remainder were either simple requests to appear, requests for information or were unrelated to the specific issue of the Resolution. In the case of both groups and individuals, many of the submissions focussed on only one or two aspects of the Resolution. Tables 6.1 and 6.2 summarize the viewpoints of those making submissions on the Resolution. It should be noted that submissions did not take account of changes proposed by Chrétien on January 12 or of the Committee's final report. Rather, they concern the Resolution as originally tabled in the House on October 6.

The Witnesses

As noted above, the committee decided to hear only groups, governments and expert witnesses. A total of 97 witnesses appeared before the committee - 92 groups and governments and five expert witnesses.

Groups

Groups appearing before the committee included research institutes, bar associations, human rights commissions and various organizations with special interests - gay rights, women's rights, the handicapped, aboriginal claims and rights, ethnic minorities, francophone rights, civil liberties and religious groups. Labour interests were under-represented among groups appearing, apparently since few made submissions or asked to appear.

A number of observations about the groups which appeared can be made. The major concern of most was the Charter of Rights. Relatively few opposed entrenching rights in the Constitution. However, many groups were critical of the Charter's specific provisions and offered suggestions for changing the wording of certain clauses or adding new clauses. Walter Tarnopolsky of the Canadian Civil Liberties Association went so far as to argue that several provisions of the Charter "make it so defective that we have come to the conclusion that we would be better remaining with the present Canadian Bill of Rights than enacting this charter unless those provisions are removed by amendment" (Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, hereinafter cited as Joint Committee Minutes, Issue 7, p. 8, November 18, 1980).

As shown in Table 6.1, the majority of those submissions expressing an opinion on the Resolution as a whole rejected it. However, they did so not on the grounds used by the provinces - its implications for federalism and provincial powers - but rather on the grounds that it did not go far enough in protecting and extending rights. Thus few, even among the opponents, challenged the legitimacy of federal action, or the desirability of a Charter. Specific sections of the original Resolution which drew criticism included Section 1 which guaranteed the rights and freedoms in the Charter "subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government." Critics argued that such a qualification did not protect rights and freedoms from interference through the parliamentary process. Other groups argued that legal rights should be strengthened in the Charter to include the right of an accused person to remain silent, the right to legal aid and a prohibition against the use in court of illegally obtained evidence, among others.

Table 6.1

OPINION CONCERNING PROPOSED RESOLUTION AS A WHOLE
OPINIONS EXPRIMÉES SUR L'ENSEMBLE DU PROJET DE RÉSOLUTION

| | TOTAL NUMBER OF COMMENTS/ NOMBRE TOTAL DE COMMENTAIRES | APPROVE APPROUVENT | DISAPPROVE DÉSAPPROUVENT |
|---------------------------|-----------------------------------------------------------------|-----------------------|-----------------------------|
| GROUPS/ GROUPE | 48 | 18 | 30 |
| INDIVIDUALS/ INDIVIDUS | 251 | 54 | 197 |

Table 6.2

GENERAL PRINCIPLES*

| SUBJECT | TOTAL NUMBER OF COMMENTS | | AGREE | | DISAGREE | |
|--------------------------------------------------|-----------------------------|-------------|--------|-------------|----------|-------------|
| | Groups | Individuals | Groups | Individuals | Groups | Individuals |
| Unilateral Patriation with Substantive Changes | 56 | 134 | 23 | 42 | 33 | 92 |
| Entrenchment of a Bill of Rights | 75 | 96 | 54 | 53 | 21 | 43 |
| Entrenchment of: | | | | | | |
| Fundamental Freedoms & Democratic Rights | 7 | 11 | 6 | 6 | 1 | 5 |
| Mobility Rights | 10 | 7 | 9 | 7 | 1 | 0 |
| Legal Rights | 1 | 8 | 1 | 8 | 0 | 0 |
| Equality Rights | 18 | 7 | 18 | 5 | 0 | 2 |
| Official Languages | 27 | 37 | 22 | 16 | 5 | 21 |
| Minority Language Educational Rights | 27 | 27 | 24 | 17 | 3 | 10 |
| Denominational School Rights | 26 | 66 | 26 | 62 | 0 | 4 |
| Native Rights | 43 | 29 | 42 | 27 | 1 | 2 |
| Multicultural Rights | 20 | 5 | 20 | 5 | 0 | 0 |
| Provision for Equalization in Constitution | 7 | 7 | 7 | 6 | 0 | 1 |
| Use of Referenda for Constitutional Change | 11 | 57 | 5 | 41 | 6 | 16 |
| Victoria Formual | 4 | 12 | 2 | 5 | 2 | 7 |
| Vancouver Consensus | 8 | 13 | 7 | 10 | 1 | 3 |
| Constituent Assembly | 7 | 4 | 7 | 4 | 0 | 0 |
| Senate Reform | 7 | 16 | 7 | 16 | 0 | 0 |
| Proportional Representation for House of Commons | 0 | 6 | 0 | 6 | 0 | 0 |
| Resource Control: | | | | | | |
| Federal | 0 | 1 | 0 | 1 | 0 | 0 |
| Provincial | 2 | 6 | 2 | 4 | 0 | 2 |
| Increased Powers: | | | | | | |
| Federal | 2 | 6 | 0 | 5 | 2 | 1 |
| Provincial | 3 | 9 | 2 | 5 | 1 | 4 |
| Inclusion of a Preamble in Constitution | 6 | 4 | 6 | 4 | 0 | 0 |

Source: Tables I and II, Joint Committee Minutes, Issue No. 57, pp. 91-92.

Section 15 concerning the right to equality before the law drew criticism from women's groups who argued that in Canadian judicial practice this phrase guaranteed only the right to "equality in the administration or application of the law by law enforcement authorities and the ordinary courts of the land" to use Supreme Court Justice Ritchie's phrase (*Women and the Constitution*, Audrey Doerr and Micheline Carrier, eds., Canadian Advisory Council on the Status of Women, Ottawa, 1981, p. 48). A law could itself be discriminatory as long as it was administered equally to all to whom it applied. They wanted the phrase to read "equality before and under the law". Handicapped and mentally disabled groups wanted to add a prohibition against discrimination on the grounds of physical or mental disability in addition to those against race, national or ethnic origin, colour, religion, age or sex.

On economic rights, business groups noted the absence of a guarantee of property rights or the right to free movement of capital, goods and services in Canada whereas the free movement of labour throughout the country was guaranteed by Section 6. Native peoples wanted greater recognition of their historically acquired rights in the Charter and feared that section 6 concerning mobility rights would negate affirmative action programs designed to increase native employment.

Sections 16 to 23 concerning language rights also drew substantial criticism. Many witnesses objected that the clause requiring education in the minority official language "where numbers warrant" and the clause restricting the right to minority official language education to the children of Canadian citizens whose "first language learned and still understood" is either French or English were too vague and discriminated against immigrants. The latter clause left open the question of how to treat those whose first language learned is neither French nor English. Many groups argued that minority control of the minority language school system was also necessary. Many language groups felt that official bilingualism should be extended to all provinces or at least to Ontario and New Brunswick as well as to Manitoba and Quebec. Meanwhile, many ethnic groups such as the National Black Coalition and the Ukrainian Canadian Committee wanted greater recognition of Canada's "multicultural reality". Some opposed the granting of minority language education rights to some languages and not to others. Finally, some groups argued that the procedure for amending the constitution by referenda made it too easy for simple majorities to remove the protection offered by an entrenched charter of rights and freedoms.

While specific criticisms of the Charter and other aspects of the Resolution were numerous, few of the groups appearing seemed opposed to unilateral action or would offer an opinion on its desirability, legality or its effect on federal-provincial relations. Notable exceptions to this rule were Canadians for One Canada, Canada West Foundation, Canadians for Canada and the Business Council on National Issues.

James Richardson, former Liberal cabinet minister and president of Canadians for One Canada urged that the committee not to give up the flexibility of statutory law passed by a democratically elected Parliament for the inflexibility of a written constitution. He expressed his group's opposition to the vetoes given Ontario and Quebec under the modified Victoria amending formula and proposed patriation with an amending formula based on the Vancouver consensus (Joint Committee Minutes, Issue no. 27, p. 8-11).

Stanley Roberts, president of the Canada West Foundation, voiced his organization's fundamental disagreement with unilateral federal action and the extent of the changes proposed by the Resolution. He urged the committee to consider involving the people of Canada in the drafting the constitution by means of a constituent assembly (Joint Committee Minutes, Issue No. 12, pp. 98-99).

Canadians for Canada expressed its worry about the danger to Canadian unity posed by hardening attitudes in different regions and the absence of a unifying strategy responding to all parts of the country. The federal action did not qualify as such a strategy and the group's chairman, Robert Willison, urged continued negotiations to secure general support for constitutional change (Joint Committee Minutes, Issue No. 34, pp. 101-103).

Peter Gordon of the Business Council on National Issues (BCNI) emphasized that no future constitution would work unless intergovernmental strife ends. As a result, BCNI opposed unilateral patriation and argued instead for substantial provincial agreement. It also rejected the use of referenda for amending the constitution (Joint Committee Minutes, Issue No. 33, pp. 136-37).

Political Organizations

While most provincial governments made written submissions to the committee (Ontario and Quebec did not), only four provincial governments, represented by their Premiers, appeared before the committee: Nova Scotia, New Brunswick, Prince Edward Island and Saskatchewan. PEI, Saskatchewan and Nova Scotia opposed unilateral federal action on the Resolution, arguing that it violated the federal nature of the country. They proposed further federal-provincial negotiations. New Brunswick's Premier Hatfield said

further discussion would be fruitless and that action was needed now, even though, like the others, he had reservations about the Resolution. All four Premiers criticized the procedures for amendment of the constitution by referenda. Such referenda would divide the country further and the federal proposals bypassed the provincial legislatures, while confirming federal control over referendum procedures. Premier Hatfield argued passionately for the extension of full official bilingualism to his province, and argued that similar provisions should apply to Ontario.

The committee paid substantial attention to the views of Premier Blakeney of Saskatchewan, who had not yet declared his government's opposition to the Resolution. His support for the Resolution would give the Liberals a major ally in the West and make their package more legitimate. His explicit opposition would further impair the federal project's chances of success.

During his appearance, Blakeney criticized the Resolution on several grounds. He opposed its modified Victoria amending formula because it gave Ontario and Quebec perpetual vetoes over constitutional change. He preferred a formula which required the support of a majority of provinces comprising at least 80 per cent of the population of Canada as well as support from all regions of Canada. He opposed on principle the amendment of the Constitution by referendum. If there were to be referenda, they should be used only after federal-provincial discussion had failed to produce agreement and only if a joint federal-provincial body were designated to conduct them. Provinces, as well as the federal government, should be allowed to initiate referenda so that balance of power in the federal system might be preserved. He opposed entrenching a Charter of Rights but favoured entrenching language rights as part of the "Confederation bargain". He wanted any amendment confirming provincial jurisdiction over natural resources to allow the provinces some control over international trade in those resources (subject to federal paramountcy).

Blakeney stopped short of outright opposition to the Resolution. His first preference was for the committee to recommend against proceeding with the Resolution and to advise that negotiations resume once again. He felt that: "The present process is pulling Canada apart. We say, 'Draw back'" (Joint Committee Minutes, Issue No. 30, p. 8).

But, he then went on to argue.

If you feel you cannot or should not draw back, then we suggest you recommend a package that has the essentials, patriation, and a simple amending formula, has some appeal to each of the regions and avoids elaborate proposals...a resolution that has claim to the broadest possible consensus.

If the contents of the resolution are substantially improved we

will be in a position to consider acquiescing in the process, even though we clearly object to it, in the interest of getting some agreement and reducing the level of controversy (Ibid., p. 8- 9).

Without such improvement, the Premier warned his government would use such weapons as were available to it.

. . .

Also appearing before the Committee were the governments of the Yukon and Northwest Territories. The Yukon government leader, Chris Pearson emphasized the desire of the Yukon to become a province but expressed concern that the Resolution did not lay down procedures whereby this could happen. He also emphasized the territory's desire to own its natural resources as a condition of its becoming a province. He also wanted a greater recognition of the aspirations of the aboriginal peoples who make up one third of the Yukon population. He criticized Section 6 of the Resolution which guaranteed mobility rights as endangering the application of preferential hiring practices desired by his government as part of the Alaska Highway Natural Gas Pipeline project. George Braden representing the Government of the Northwest Territories likewise criticized section 6 and pressed for greater recognition of aboriginal peoples in the Resolution. He also wanted a greater role for the territories in future constitutional discussion.

Provincial opposition parties appearing before the committee included: the New Democratic Party of Alberta, the Social Credit Party of Alberta, the Saskatchewan Progressive Conservative Party and the Union Nationale from Quebec. The Alberta NDP was dissatisfied with the Resolution but like its Saskatchewan counterpart indicated that major changes designed to mollify Western discontent might secure their support. The other parties opposed the federal action on the Resolution and counselled that a delay should be used to secure greater provincial support for constitutional reform.

Expert Witnesses

The expert witnesses were: Maxwell Cohen, professor emeritus of law at McGill University and Gérard LaForest, professor of law at the University of Ottawa, selected by the Liberals; Peter Russell, professor of Political Economy at the University of Toronto and Gilles Rémillard, a lawyer teaching at Laval University, selected by the Conservatives; and, Most Reverend Edward Scott, Archbishop of the Anglican Church of Canada, selected by the NDP.

Archbishop Scott argued that the federal government's plans put Great Britain in an unfair position. He felt that the federal government should give up its plans and convene a special constituent assembly which would include meaningful participation by native peoples.

Maxwell Cohen, while supporting the principle of an entrenched Charter of Rights, pointed to the inadequacies in the proposed Charter. He opposed the use of referenda, arguing that they would disrupt federal-provincial relations and proposed a federal-provincial secretariat to handle relations between the two orders of government. Gérard LaForest argued that federal unilateral action was not illegal since there was no strong precedent requiring unanimous provincial consent.

Peter Russell held that the Charter of Rights would fundamentally alter Canada's federal system by limiting the powers of provincial legislatures and increasing the importance of the courts. He preferred to keep fundamental principles out of the courts and in the realm of public debate and opposed entrenchment on these grounds. Gilles Remillard was the only expert to judge the federal action on the constitution illegal. Nevertheless, for some purposes, at least, he argued that the proposed resolution would be legal if accepted by Britain though the provincial governments could later refuse to acknowledge the legality of the Charter of Rights. He favored the establishment of a federal-provincial board of inquiry to study the constitution.

By the time the hearings of groups and experts ended on January 9, the committee was unanimously agreed that the proposed Resolution needed a clause by clause overhaul. However, their last witness, Jean Chrétien, tabled on January 12 a long list of amendments to the government's proposal. He argued that they went a long way towards answering the problems with the Charter that had been raised over the course of the committee's hearings. The government's first proposals, he argued, had been watered down to meet provincial objectives and, with the new set of amendments, the government was merely reverting to what it had considered desirable all along.

Chrétien's Amendments

The amendments proposed by the Justice Minister strengthened the Charter of Rights, but provincial objections to the referendum formula were only minimally recognized. The changes failed to go far enough to secure the support of Premier Blakeney. And, of course, the government showed no indication of ending its plans to proceed with its package.

Changes to the Charter

Section One was changed to subject the rights and freedoms in the Charter only to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" in order to better protect them from the action of the legislatures and Parliament. Better protection against search and seizure, detention and imprisonment, self-incrimination and double jeopardy was given. The rights to be informed, to retain counsel without delay, and to trial by jury for major offences were added.

Sub-Section 15(1) regarding "Non-discrimination Rights" was retitled as "Equality Rights". The section now offered protection "before and under the law". The phrase "and equal benefit" of the law was also added to ensure that equality relates to the substance of the law as well as its administration and to give the section a more positive aspect. Sub-section 15(2) allows affirmative action programs. However, mental or physical disability was not specifically mentioned as grounds on which discrimination was prohibited. Section 6 regarding mobility rights was now changed to allow affirmative action employment programs.

One of the major changes to the section on language rights was the inclusion of New Brunswick as an officially bilingual province. The other major change expanded the criteria under which minority language education is guaranteed. In addition to guaranteeing such education to the children of citizens whose "first language learned and still understood" is French or English, section 23 also guarantees it to the children of those citizens who received their primary school instruction in Canada in English or French. It also guaranteed to citizens one of whose children has received or is receiving primary or secondary school instruction in English or French the right to have all their children educated in the same language.

Native rights were made more specific and a clause added to require the Charter to be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians. Finally, an enforcement section was added permitting those whose rights have been infringed or denied to apply to the courts for a remedy.

Other Changes

The clause on equalization was changed to refer specifically to payments to provincial governments intended to provide "reasonably comparable levels of public services at reasonably comparable levels of taxation". Seven instead of eight provinces was set as the number needed to put together an alternative amending formula to compete in a referendum against the federal option but only the legislative assemblies of those provinces could authorize a referendum. In the original Resolution, provincial

governments had that power as well. A Referendum Rules Commission is to be appointed for all referenda. The Commission would be composed of the Chief Electoral Officer, a nominee of the federal government and a person recommended by the majority of provincial governments. The Commission would formulate a set of referendum rules but it would be up to Parliament to pass them into law. The amending formula itself was changed to drop the requirement that in the Atlantic Provinces, the two provinces approving the amendment must together have at least fifty per cent of the region's population. This requirement had effectively frozen PEI out of the amendment process since in no case could its small population combine with that of one other Atlantic province to secure an amendment. The formula now requires only that any two provinces in the Atlantic Region are required to approve the amendment. As well, a referendum could not be held until twelve months after the passage of a Parliamentary resolution supporting a particular amendment, underlining its role as a "deadlock-breaking" mechanism. However, the passage allowing the House of Commons to overrule Senate opposition to an amendment remained in the Resolution, though it could not exercise this power for 180 days instead of 90 days as in the original proposal. No changes were made to allow provincial governments to initiate referenda as Premier Blakeney has requested

The Committee's Final Report

The final report contained a brief history of the committee's work, its orders of reference, a list of groups and individuals who appeared or sent written submissions to the Committee and a statistical analysis of the evidence received by the Commission from groups and individuals.

The core of the report, however, was a revised Resolution which consolidated most of Chrétien's proposed amendments together with such rewording, changes and additions that the committee made. By the committee's own account, the government members proposed 58 amendments to the original Resolution and to Chrétien's proposals, all of which were approved. The Progressive Conservatives proposed 22 amendments of which seven were approved and the NDP proposed 43 amendments of which two were approved. Independent observers claimed that these figures underrepresented the contribution of the NDP members since they had been instrumental in proposing or refining amendments subsequently approved by the Committee and credited to the other two parties.

Changes to the Charter

The Committee added to the Chrétien proposals in a number of crucial areas. The right of Canadians to vote in federal or provincial elections was no longer qualified in the text of the Resolution by the phrase "without unreasonable distinction or limitation." However, sections 44(1)

and 50(1) continued to subject the right of citizens to vote in referenda on constitutional change to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Equality rights assuring non-discrimination before and under the law and the equal protections and benefit of law were explicitly extended to the mentally or physically disabled while at the same time permitting affirmative actions programs on their behalf.

Language rights were amended to include the right to minority language educational facilities provided out of public funds, where numbers warrant. Special provisions were also made to allow the application of language rights to other provinces upon their request without going through the full amendment process. The effect of the section is to make it easier for individual provinces to entrench language rights, an action which many of the committee members hoped Ontario would take.

A "catch-all" clause (section 26) was added to prevent the Charter from being construed as denying the existence of any other rights or freedoms that exist in Canada. Section 28 prevents abrogating or derogating from any rights or privileges guaranteed to denominational, separate or dissentient schools.

The Committee reworded section 25 dealing with aboriginal rights to buttress their status in the Resolution and created a new section 33 in the Resolution which "recognized and affirmed" the aboriginal and treaty rights of the aboriginal peoples of Canada. However, unlike section 25, section 33 was not made part of the Charter of Rights. This left its application open to amendment by agreement between the federal government and the provinces on a province by province basis rather than requiring a constitutional amendment applying to all provinces and territories as required for changes to the Charter.

Finally, section 24 was split into two parts. Subsection 24(1) continues to allow a remedy in the courts for the infringement or denial of rights guaranteed by the Charter. Subsection 24(2) added the qualification that evidence used in a proceeding under 24(1) may be excluded from the proceeding if it has been obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter and "if it is established that...the admission of it in the proceedings would bring the administration of justice into disrepute." In effect, the clause allows the courts to prohibit the use of evidence obtained unconstitutionally although it also offers them leeway to use their discretion in making this decision.

Other Changes

A number of significant changes in other parts of the Resolution were also made. The section concerning constitutional conferences was greatly

changed. As before, constitutional conferences must be held at least once a year until the new amending formula takes effect but these conferences cannot now be cancelled if a majority of First Ministers decide not to hold one. The new section also requires that the conference shall include on its agenda the treatment of aboriginal peoples under the Constitution and requires the Prime Minister to invite representatives of those peoples to participate in discussions on that item. It also requires the Prime Minister to invite elected representatives of the governments of the territories to participate in the discussions on any item on the agenda that, in the opinion of the Prime Minister, directly affects the territories.

The clause in the resolution allowing the House of Commons to override after 180 days any refusal by the Senate to authorize a constitutional amendment passed by the House of Commons was removed by the committee over NDP objections, apparently as a result of the threat by many Liberal Senators to oppose the Resolution in the Senate if it still contained this clause (see *Joint Committee Minutes*, Issue No. 52, p. 91). The method of selecting Senators was added to the list of elements in the Constitution of Canada which can only be amended by the more complicated amendment formula involving either the approval of at least six of the provinces or a national referendum.

Finally, a new Part VII was proposed by the NDP and approved by the committee. The new Part VII amended section 92 of the BNA Act to confirm aspects of provincial jurisdiction over their natural resources. The amendment confirmed the essentials of the deal on the Resolution made by the Liberals and NDP in October 1980 (see p. 69). However, passages in the proposed NDP amendment which would have given the provinces some control over the international trading of natural resources as well as their interprovincial trade (as desired by Allan Blakeney, NDP Premier of Saskatchewan) were removed by the Liberal majority on the committee.

Amendments Rejected by the Committee

Perhaps almost as important as the amendments that the committee made were those proposed by the opposition party members but defeated by the Liberals, either alone or in combination with the other opposition party. In a policy paper, released January 20 the Conservatives favoured splitting the Resolution into two parts. One part called the "Patriation Package" would be sent to Britain for immediate action. This package included patriation and an amending formula based on the Vancouver consensus. It would replace the Victoria formula and the provisions for referenda. There was the further requirement that the Prime Minister of Canada and the ten provincial Premiers meet at a constitutional conference at least twice a year in order to discuss constitutional reform. Liberal members of the Joint Committee pointed out that the Conservatives were, in fact,

recommending unilateral federal action to impose patriation and an amending formula upon the provinces. Conservative spokesmen defended themselves against these charges by arguing that the provinces had accepted the general substance of the Vancouver formula and would not object to its imposition. They further admitted that some additional details of the formula concerning financial compensation for provinces opting out of amendments had not been finalized. However, they were confident that such details could quickly be worked out at a meeting of First Ministers to be held after the Vancouver formula had become part of the Constitution (Joint Committee Minutes, Issue No. 41, p. 95).

The second part called "the Canadian Package" included the Charter of Rights and other aspects of the proposed Resolution, but with additions and amendments favoured by the Conservatives. The "Canadian Package" would not be sent to Britain. Rather, it would be presented to the provinces by the federal government at the constitutional conferences held after the "Patriation Package" had become law. In other words, the "Canadian Package" would have to be approved under the new amending formula. This procedure, the Conservatives argued, was preferable since it was important to Canadians to have a "made in Canada" Charter of Rights, not one passed by the British Parliament. The Liberal members of the Committee argued that in this procedure, three provinces could "opt-out" of the Charter of Rights even if it were accepted by the other seven, leaving Canadians in some parts of the country without rights possessed by Canadians in other parts of the country. The Conservatives replied that it was only fair in a federal system to allow provincial differences on these important matters.

Although willing to allow provincial "opting out", the Conservatives, nevertheless, felt the Constitution should contain a Charter of Rights and Freedoms. When presenting his party's proposals to the Committee, the Honourable Jake Epp stated,

Mr. Chairman, in presenting our proposed amendments to the government's resolution, we do so in the knowledge that it is the popular will of Canadians that our constitution rest in this country. It is also the popular will that we have a Charter of Rights and Freedoms for the Canadian people embedded in the Constitution. The Progressive Conservative Party's position in these matters reflects the popular will (Minutes and Evidence of the Joint Committee, Issue No. 41, p. 93).

However, the Conservatives were not entirely satisfied with the Charter presented by the Government and over the course of the deliberations of the Committee they proposed a number of additions and amendments. The more important of these included a preamble that acknowledged the supremacy of God and the position of the family. They wanted to include freedom from unreasonable interference with "privacy, family, home, correspondence and

enjoyment of property" and a right to government information. They also wanted Parliament's power to legislate regarding abortion and capital punishment preserved. They favoured requiring the federal Minister of Justice to report to Parliament on any inconsistencies between the Charter and any federal regulations or bills. The provincial Attorneys-General would have the same responsibility to their legislative assemblies. Finally, they wanted an amendment to transfer offshore resources to their adjacent provinces.

Although Solicitor-General Robert Kaplan had said the government would support entrenching the right to the enjoyment of property, a few days later, Jean Chrétien reversed that position after the NDP threatened to withdraw their support for the Resolution. Both the Liberals and the NDP argued that the provinces feared that entrenching that right would invalidate some provinces' land use regulations such as those restricting farm ownership to provincial residents. Of the above Conservative proposals, the NDP supported the right to information, the obligation of the federal Minister of Justice and provincial Attorneys-General to report on inconsistencies and provincial jurisdiction over the offshore.

The Conservative proposals did go some way towards assuaging some of the awkwardness of their position on the Committee. From the day the Resolution had been released, the Conservatives had been opposed to it. As a result, their position on the Joint Committee had been compromised. How could the party participate on the Committee and even suggest improvements to a Resolution to which it was opposed? By declaring its support for a Charter of Rights and by offering an alternative procedure for constitutional reform which nevertheless built upon the work of the Committee, the Conservatives felt they had removed the apparent contradiction.

The NDP also proposed many amendments which were not accepted. These included the right to organize and bargain collectively, the right of access to legal counsel and protection from self-incrimination and against being compelled to confess guilt. They favoured explicitly prohibiting non-discrimination before and under the law on the grounds of marital status, sexual orientation and political belief. The NDP also wanted to require that approval be given by four provinces before the referendum procedure could be used. They wanted to add the requirement that a majority of the residents of each region had to approve an amendment in any referendum. The Conservatives supported NDP amendments on self-incrimination and access to counsel.

. . .

The Joint Committee's final report containing a consolidated version of the government's original Resolution together with the Committee's amendments was finished on February 13, 1981. It did involve important compromises. But, in the end, the Liberal majority had preserved the "grand lines" of the government's project.

If the Liberals had hoped to create public awareness of the Resolution by shunting it off to a joint parliamentary committee rather than keeping it in the House, they were only partially successful. The committee developed its own momentum. Rather than removing the constitutional issue from the public scene, the committee served to pinpoint the issue and focus attention on it. A parade of witnesses from all parts of the country provided a constant source of variations on the constitutional theme. Politicking among committee members provided suspense and drama. Impressive performances by some of the committee members such as Liberal MP Serge Joyal (co-chairman of the committee), Conservative MP Jake Epp and NDP MPs, Lorne Nystrom and Svend Robinson earned them national prominence and "personalized" the committee's deliberations. An uneasy coexistence among committee members developed into a positive sense of camaraderie over the three months of committee sessions. At times, such as during moving presentations by Canadian native peoples and Japanese-Canadians on the need for the protection of minorities in Canada, this camaraderie coalesced into common purpose. As a result, the work of the joint committee engaged the interest and concern of the media, interest groups and the general public. The Liberal's sense of the public's interest in the committee seemed influential in convincing them to extend the committee hearing, thus delaying their project by two months.

However, the process was not without benefits for the federal government. By allowing public participation in the process of constitutional reform, the government could appear flexible as it first listened to the "voices of the people" and then responded with amendments to its Resolution. As a result, the federal government could gain a greater legitimacy for its proposals. As well, although the Joint Committee attracted a good deal of attention, its proceedings were always civilized and orderly, and did not present the opposition with the same opportunities for disruption as were apparent in the House either before the Resolution was referred to committee or, as it turned out, after the Resolution returned to the House on February 17, 1981.

THE SECOND DEBATE IN PARLIAMENT

With the final report of the Joint Committee the debate in Parliament entered a new stage. Parliament as a whole would consider the newly amended Resolution. The Liberals were concerned to have this new stage over with as quickly as possible. They seemed still to be aiming for a July 1st date for proclamation of the Resolution. However, their haste likely reflected as well their assessment of the result of the February 3 ruling of the Manitoba Court of Appeal on the constitutionality of the Resolution, in favour of the federal government. This confirmed to the federal government the correctness of its overall strategy. However, the court's decision was split 3-2 and implied that the federal government's legal case was not as strong as generally believed. Hence, there was still the risk that an unfavourable ruling might yet come from cases launched in Newfoundland and Quebec, a risk that would be minimized the more quickly the Resolution got through Parliament.

Initial attempts by the Liberals to secure an all-party agreement on quick passage of the Resolution were opposed by the Conservatives. By delaying the Resolution as much as possible, the Conservatives hoped to gain the time needed to build public opposition to the federal action (*Globe and Mail*, February 12, 1981, p. 1). As a result of these conflicting strategies, few doubted that the debate in Parliament would be prolonged and bitter or that it would end with the Liberals using closure to force a final vote on the Resolution.

Despite the tenseness of the situation the debate on the Resolution opened innocuously. Jean Chrétien moved that the Resolution be adopted. He summarized the federal argument for the project, saying the government was offering Canadians "a new foundation on which to build a more united, a more generous and a greater country" (*House of Commons Debates*, February 17, 1981, p. 7373). Conservative constitutional critic Jake Epp disagreed.

...the unilateral action, the divisiveness of the government's proposition remains unchanged and for that reason we oppose it (*House of Commons Debates*, *ibid*, p. 7381).

He emphasized the Conservative constitutional proposals (see p.83) as a constructive alternative. He ended by proposing an amendment to the Resolution which would remove the section authorizing the amendment of the constitution by national referendum.

Ed Broadbent claimed credit for pressuring the government to modify some of its constitutional proposals. Though he regretted the government would not adopt other NDP proposals such as limiting the power of the Senate, he continued to support the federal project. He further argued,

The serious question...about divisiveness, then, is not in the short run but in the long run...one has to look at the essence of what we are being asked to deal with and say, as our founding fathers did more than a hundred years ago: Is that going not only to please our children but our grandchildren and our great grandchildren? Is it going to keep the people in Atlantic Canada, in central Canada and in the west happy or make them happier or more content with their existence as Canadians? That is the serious question that has to be asked (House of Commons Debates, *ibid.*, p. 7390).

For the next month, the House debated Mr. Epp's amendment, though most of the speakers dealt with other aspects of the Resolution as well. Joe Clark chose to speak early in the debate. He argued that the government's proposal broke with Canadian tradition since its amending formula would treat provinces unequally or allow the federal government to bypass them with a referendum. He also argued Canadian sovereignty was violated by the federal government having the constitution reformed by the British. He rejected the notion that any controversy over the Resolution would pass away quickly and cited the Northwest Rebellion and the conscription controversy as examples of divisive issues which had affected the country permanently. He concluded,

The tragic irony is that at a time when there was that sense of Canadians wanting to build together and when regions which had felt inferior began to feel equal, instead of using that emotion and that great sense of Canada to build common Canadian purposes, this government brought in a measure which drives Canadians apart. Our Constitution could be a source of Canadian pride and unity. Our Constitution has been made a source of Canadian shame and division (House of Commons Debates, February 23, 1981, p. 7572).

The Conservatives badgered the Prime Minister fiercely, attempting to draw him into the debate. However, he bided his time until March 23 when he finally rose in the House to answer his critics and defend his position. Citing political figures from all parties and even Pope John XXIII, he argued that there was no division in Parliament or in the country over the substance of the Resolution, only over the process and timing. However, federal-provincial unanimity on change, he asserted was impossible; the provinces could not even agree among themselves what changes were desirable. He criticized the Conservative proposal for change based on the Vancouver amending formula.

Sure they want to protect the rights of Indians and women, refer to God in the constitution and insert property rights. But then they recommend a way that is sure to fail, either because we would need unanimity -- and we have already been told by one Tory premier that we could not count on it -- or else they would propose the Vancouver formula, one which permits opting out. As the Minister of Justice has said in his speech, it would permit God to be

acknowledged in the Constitution perhaps, in Ontario and Quebec, but not in Manitoba and Saskatchewan. What kind of a charter is that? (House of Commons Debates, March 23, 1981, p. 8511).

He then turned to justify his own government's proposals. The modified Victoria amending formula was the only one ever to have been agreed to by all the provinces. The provision for a referendum as a deadlock breaking device was not outlandish in a democratic country. In concluding he attempted to shame the opposition who would not "seize the day" and take action for a cause which everybody agreed is what the people want. For support he quoted Georges Vanier.

The best time is always the present, because it alone offers the opportunity for action, because it is ours, because on God's scale it is apocalyptic, a time when the lines between good and evil are clearly drawn, and each one of us must choose his side, a time when there is no longer room for either the coward or the uncommitted (House of Commons Debates, *ibid.*, p. 8520).

Although the Prime Minister talked of action, his government was having a great deal of difficulty taking it. The Conservatives prolonged debate on Mr. Epp's amendment. This was very frustrating to the NDP who wanted to propose amendments of their own and to the Liberals who wanted to speed the debate on the Resolution to a conclusion as well as propose amendments of their own.

Part of the Liberal haste to end debate was also due to the erosion of parliamentary support for the Resolution both within their own party and among the NDP. One Quebec Liberal MP, Louis Duclos and four Liberal senators (McIlraith and Thompson of Ontario, Deschatelets of Quebec and Cook of Newfoundland) had by March 18 declared their opposition to their own party's Resolution (Montreal Gazette, March 18, 1981, p. 17; Le Devoir, March 19, 1980, p. 16). Dissatisfaction with the Resolution existed particularly among Quebec Liberals because Ontario would not be made officially bilingual and further defections seemed possible.

Among the NDP, four members from Saskatchewan (Nystrom, de Jong, Anguish and Hovdebo) declared on February 19, 1981 that they would vote against the Resolution (Globe and Mail, February 19, 1981, p. 1). The dissenters broke with the party on the issue a week after a meeting between federal Saskatchewan MP's and provincial MLA's in Regina where Saskatchewan Attorney-General Roy Romanow urged the federal members to withdraw their support (Globe and Mail, February 13, 1981, p. 11). Discipline seemed tighter among the Conservatives where only one MP, Bill Yurko, announced support for the Liberal proposal.

Various Liberal attempts to strike a deal with the Conservatives on limiting debate failed. Finally, on March 19, Liberal House leader, Yvon Pinard served notice of a motion to limit the constitutional debate to four

more days while extending House hours, limiting speeches in order to allow more participation and allowing members' speeches to be tabled rather than actually spoken (Globe and Mail, March 20, 1981, p. 1).

Pinard's motion was never debated. The opposition and, in particular, the Conservatives persistently raised questions of privilege or points of order at the appropriate times during the House day thereby preventing Mr. Pinard's motion from coming to debate. The Conservative tactics paralysed the operation of the House.

As Joe Clark later remarked, sooner or later the Conservatives would have made a mistake and Pinard would have been able to put his motion (Interview with the Right Honourable Joe Clark, Leader of the Opposition on Question Period, CTV Television Network, April 10, 1981, p. 3). Before this could happen, however, outside events took hold. On March 31, 1981 the Supreme Court of Appeal of Newfoundland ruled the federal action illegal. The Liberals were forced to compromise and they did so quickly. They agreed to send the Resolution to the Supreme Court of Canada for a definitive ruling on its legality as the Conservatives had urged. If the Supreme Court of Canada ruled the Resolution illegal, they promised to end their attempts to have it passed. The Prime Minister also agreed to meet the Premiers one more time.

In exchange, the government required that final amendments be passed so that the Supreme Court might have a finished document to consider. The Resolution itself, however, would not be passed. It would be put to a final vote only if the Supreme Court of Canada ruled the Resolution to be legal. The Liberals further required that only a short debate in the House of Commons (two days) be allowed before the Resolution came to a final vote. To these conditions the opposition parties agreed.

Thus on April 23, 1981, the final votes on amendments to the Resolution were taken. Mr. Epp's amendment was defeated. An NDP amendment guaranteeing the rights and freedoms in the Charter equally to male and female persons and giving greater protection to aboriginal rights was unanimously approved. A long and detailed Conservative amendment which, among other things, would have mentioned God, instituted a permanent Conference of First Ministers and exempted the authority of Parliament to make laws regarding abortion or capital punishment from being affected by the Charter was rejected. A Liberal amendment was approved which added to the Charter a short preamble mentioning God and which would allow constitutional amendments to pass with the support of two or more Western provinces thus dropping the requirement that the two western provinces together have 50 per cent of West's population and putting them on the same basis as the four eastern provinces. The Resolution as it was sent to the Supreme Court has been reproduced in Appendix B and the final amendments in Appendix C.

Thus, a long and bitter fight in Parliament came to an end. The Conservatives had succeeded in frustrating the two key objectives of Liberal strategy: minimize delay and avoid the possibility of an adverse legal judgement. Looking back on the experience Joe Clark evaluated his party's performance.

...We had a number of goals and we've accomplished all of them but one. The one we didn't accomplish was...to defeat the Bill.... I had thought at one point earlier in the discussions that some of the Liberal members might break loose, particularly some of the nationalist Quebecers,...Party discipline held them together and I didn't see any likelihood that it would break in the end. But we accomplished a delay. Their original schedule was to have it in Britain and passed into law by Christmas. That won't happen. It will be in Canada at least until June. We arranged time for the Supreme Court to be heard...so we'll know whether it's legal, and we arranged time for the premiers to become part of the process again...So we accomplished all those goals and we did, I think, the only thing that an opposition can do. We used our resources, I think effectively, to stop the sudden passage of a bad Resolution (Interview from Question Period, op. cit., p. 1).

THE SITUATION IN JUNE, 1981

Parliament is now waiting for the Supreme Court to render its verdict. If the Supreme Court rules the federal action legal, then the Resolution returns to Parliament and the Liberal majority in the House of Commons and the Senate would ensure passage of the Resolution. Canada may have a new Constitution within the year. If the Supreme Court rules the federal action illegal, then the present Resolution would be dead in Parliament. If the Court rules some parts legal or others not, the government would have to consider what to salvage or amend in the Resolution accordingly and perhaps reopen the whole process to lengthy Parliamentary debate.

Regardless of the outcome, it can be speculated that the progress of the Resolution through Parliament changed the nature of the debate about constitutional reform. The hearings of the Joint Committee allowed various groups access to the process of constitutional reform in a way that had not occurred at federal-provincial conferences. As a result, it could be argued that the federal government created a national constituency for patriation and for a Charter of Rights, if not for the rest of its proposals. Moreover, the apparent responsiveness of the parliamentary process to the interest groups may enhance the image of Parliament as the central political decision-making body in the country. In the long run, this may act to undermine, in the public's opinion, provincial claims to a status equal to the central government's. But, if they were largely excluded from the Parliamentary arena, the provinces compensated by being active in others, as the following chapters show.

CHAPTER VII

THE COURT CHALLENGE TO THE RESOLUTION: THE PROVINCES RESPOND

On October 2, the federal government had taken the initiative, asserting the unilateral right of the Parliament of Canada to undertake constitutional reform. This action implied that the legal status of the provincial governments was little more than that of ordinary interest groups. The provincial governments, thus, faced a choice. They could accept the federal government's project and the implicit role assigned to them. Or they could try to block the federal effort by challenging its legality and by mobilizing opinion against it both in Canada and in Great Britain.

On October 14, the ten premiers met in Toronto to discuss the Resolution, but no common response emerged. By the end of the meeting, five provinces had committed themselves to court action: Newfoundland, Quebec, Manitoba, Alberta and British Columbia. A few days later, they were joined by PEI. New Brunswick and Ontario affirmed their support for the federal package. Saskatchewan expressed doubts and withheld its support from the package but decided against joining the court challenge for the moment. It favoured pressing the federal government for a renewal of negotiations and the formulation of a compromise position. While it had seemed on October 14 that Nova Scotia would soon join the court challenge, the province later drew back. Though it continued to oppose the federal project, like Saskatchewan, Nova Scotia favoured a compromise solution, and only joined the court challenge when this seemed no longer possible.

THE COURT CHALLENGE

Provincial Strategy

Court action by the provinces aimed at a Supreme Court ruling that federal action on the Resolution was unconstitutional. Such a ruling would checkmate the federal initiative just as the Supreme Court had blocked Ottawa's attempt to reform unilaterally the Senate. An equally important goal of this strategy was delay. Delay would allow greater time for the provinces and the Official Opposition to turn popular opinion against the federal action. It was believed that widespread public opposition to the Resolution might force the federal government to back down or negotiate its proposals even if it received a favourable Supreme Court ruling.

Finally, court actions and the resulting coverage by the media served to publicize provincial objections and to force the federal government to defend its position in an extraparliamentary forum against the provincial governments.

The Mechanics of the Court Challenge

Unlike Ottawa, the provinces cannot take their case directly to the Supreme Court by way of a reference. Since Ottawa would not itself refer the question to the Supreme Court, the dissenting provinces had to start first with lower courts whose decisions could then be appealed to the Supreme Court.

By early 1981, the three provinces which were to take the Resolution to court - Quebec, Manitoba and Newfoundland - had filed references with their Courts of Appeal. The wording of the questions was carefully coordinated by several meetings of provincial Attorneys-General, as was the choice of the provinces where the legal battles would take place (*Montreal Gazette*, October 24, 1980, p. 1).

Manitoba's reference was heard first on December 4, 1980. Lawyers representing the Attorney-General of Manitoba supported by those representing Quebec, Newfoundland, Alberta, British Columbia and Prince Edward Island argued against the Resolution. The federal Attorney-General supported it. Counsel for the Four Nations Confederacy (representing 45,000 Manitoba Indians) was also present and argued against the Resolution. On February 3, 1981, the Manitoba Court of Appeal rejected the provincial arguments by a vote of 3-2. Manitoba indicated it would appeal the decision to the Supreme Court and on March 26, 1981 formally applied to appeal.

Argument was heard in the Court of Appeal of the Supreme Court of Newfoundland beginning on February 10, 1981. Again, the six dissenting provinces confronted the federal government. On March 31, 1981, the Court ruled against the federal government by a vote of 3-0.

By this time argument had already been heard in the Quebec Court of Appeal on March 9, 1981, again involving the six provinces and the federal government. Judgement was not rendered until after the federal government's deal with the Opposition and the Supreme Court's decision on April 7, 1981 to hear the appeals from Manitoba and Newfoundland. On April 15, 1981, the Quebec court upheld the federal power to amend unilaterally the constitution, even while unanimously arguing that the Resolution infringed on provincial jurisdiction. Last minute discussions resulted in the appeal from the Quebec court being included with the other two in the hearings before the Supreme Court.

The stage was thus set for the final legal battle in the Canadian courts. On April 28, 1981 hearings on all three appeals began, ending on May 4, 1981. This time all governments were involved. Arguing against the federal Resolution were eight provincial governments; the original six dissenters were joined by Nova Scotia and Saskatchewan. The federal government's position was supported by Ontario and New Brunswick. The Four Nations Confederacy also appeared before the Court arguing against the federal position.

The Questions

Each provincial Court of Appeal was asked to rule on a set of questions regarding the federal government's Resolution. The Manitoba reference asked the Court to answer these questions.

1. If the amendments to the Constitution of Canada sought in the "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada", or any of them, were enacted, would federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments be affected and if so, in what respect or respects?
2. Is it a constitutional convention that the House of Commons and Senate of Canada will not request Her Majesty the Queen to lay before the Parliament of the United Kingdom of Great Britain and Northern Ireland a measure to amend the Constitution of Canada affecting federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments without first obtaining the agreement of the province?
3. Is the agreement of the provinces of Canada constitutionally required for amendment to the Constitution of Canada where such amendment affects federal-provincial relationships or alters the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments?

The Manitoba government argued 1. Yes; 2. Yes; and 3. Yes.

The Newfoundland Court heard arguments on three questions identical to the three posed to the Manitoba Court, plus a fourth. The fourth question concerned whether, as a result of the Resolution, the terms of Newfoundland's entry into Confederation, and especially guarantees of its boundaries and its denominational school system, could be changed without Newfoundland's consent.

If Part V of the proposed resolution referred to in question 1 is enacted and proclaimed into force could

- (a) the Terms of Union, including terms 2 and 17 thereof contained in the Schedule to the British North America Act 1949 (12-13 George VI, c. 22 [UK]), or
- (b) section 3 of the British North America Act, 1871 (34-35 Victoria, c. 28 [UK])

be amended directly or indirectly pursuant to Part V without the consent of the Government, Legislature or a majority of the people of the Province of Newfoundland voting in a referendum held pursuant to Part V?

The Attorney General of Newfoundland argued: 1. Yes; 2. Yes; 3. Yes; and 4. Yes.

Argument in the Quebec court concerned two questions.

- A. Whether the Canada Act and the Constitution Act, 1980, if they should come into force and if they should be valid in all respects in Canada, would affect:
 - 1. The legislative competence of the provincial legislatures under the BNA Act, 1867 as amended.
 - 2. The status or role of the provincial legislatures or governments within the Canadian federation.
- B. Does the Canadian constitution empower whether by statute, convention or otherwise the Senate and the House of Commons of Canada to cause the said constitution to be amended without the consent of the provinces and in spite of the objection of many of them in such a manner as to affect:
 - 1. The legislative competence of the provincial legislatures under the Canadian constitution?
 - 2. The status or role of the provincial legislators or governments within the Canadian federation?

The Attorney General of Quebec argued: A. Yes; and B. No.

Leaving aside Newfoundland's fourth question, the references each raised three basic issues for the consideration of the courts:

1. Whether the Resolution affected provincial rights, powers or privileges;
2. Whether a convention of unanimous provincial consent existed and whether it is legally enforceable;
3. Whether an actual constitutional requirement for provincial consent existed.

Both sides made essentially the same arguments at all the hearings and buttressed them by citing an extensive, even if conflicting, list of legal authorities and political and legal opinions. Both sides quoted politicians, federal and provincial, British and Canadian, and of every political hue, as evidence supporting their case.

Most of the dissenting provinces together with the Four Nations Confederacy sought to demonstrate either that a legally enforceable convention or an already existing constitutional requirement required the unanimous consent of the provinces for action to amend the constitution in the way proposed by the Resolution. Saskatchewan, however, argued that only "substantial" provincial consent - not unanimity - was needed, but concluded nevertheless that the Resolution did not even have substantial consent. The federal government argued that provincial consent was not legally necessary for its Resolution. The Canadian Parliament could act on its own discretion in requesting the UK to amend the constitution.

A SUMMARY OF THE ARGUMENTS

(Most of the information in the following sections is drawn from various legal facts presented by both sides in the provincial appeals and represents a summary of arguments, rather than a comprehensive survey).

The Arguments Against the Resolution

The Effect of the Resolution on the Provinces

The dissenting provinces claimed that the Resolution would offset their rights, powers and privileges, and in particular, their legislative power as guaranteed under the BNA Act. They focussed on the Charter of Rights and Freedoms, saying it would limit legislative power over property and civil rights. Quebec lawyers, for example, cited for the judges of the Quebec Court of Appeal a number of Quebec laws which they said would be struck down because they would conflict with the provisions of the Charter.

According to this argument, because the Resolution affected provincial powers, rights and privileges, it was beyond the power of the federal government to pass. Furthermore, any amendments to the constitution required the unanimous consent of the provinces. On these points the provinces were on controversial legal ground and they used a number of arguments to support their position.

The Appeal to Convention

The provinces argued that examination of the list of existing amendments to the BNA Act provided evidence of a convention that unanimous, provincial consent had to be sought before the federal government could request Britain to amend the constitution.

Every amendment which directly affected provincial legislative powers had occurred with the required provincial consent. No amendment changing provincial legislative powers, rights and privileges had occurred when the required provincial consent was withheld.

For example, the dissenting provinces argued that amendments which empowered Parliament alone to create new provinces (1871), to change provincial boundaries (1871), to provide for territorial representation in Parliament (1886), to increase subsidies paid to the provinces under the BNA Act (1907), and to transfer ownership of lands and resources to the four western provinces (1930) did not affect their powers and, therefore, that the lack of provincial consent in these cases did not violate the convention. Their argument depended however, on a particular judgement as to what provincial rights, powers and privileges are, when they can be said to be directly or substantially affected and which are the provinces whose consent is required. Federal lawyers did not always agree with provincial interpretations and there was some variation among dissenting provinces themselves (cf. Manitoba and Saskatchewan).

The provinces further asked the courts to rule that the convention had "crystallized" into a rule of law that would be enforceable by the courts. They cited examples of judicial recognition and adoption of other conventions as law to support their case.

The Appeal to the Requirements of the Constitution

The dissenting provinces chose to emphasize arguments which asserted there was a constitutional requirement for provincial consent and used the appeal to convention as a fallback position (*Globe and Mail*, April 29, 1981, p. 1). The basic argument held that Confederation originated as a compact or an agreement among the founding provinces to which subsequent provinces acceded. Hence, its terms could not be legally altered without the consent of each party. As the BC factum argued,

The word 'compact'...quoted above means agreement amongst delegates of the provinces. The federal union so described means a division of legislative powers and interests between on the one hand those at whose instance the union took place and on the other the newly created instrument of this union - a Parliament consisting of a Lower and an Upper House. If Parliament may alter the legislative competence or the status or role of the Provinces without their consent there is no federal union....Such a result would not conduce to the welfare of the Provinces and it would be a contradiction in terms to find in the 1867 Act the power to achieve such a result (p. 5).

Another provincial argument held that Canada had become a sovereign nation no later than 1931 with the passing of the Statute of Westminster. As a result, Canada could make its own laws without being overruled by Great Britain and possessed the right to determine which amendments should be made to the Canadian constitution. But the surrender of superior sovereignty by Great Britain did not as a result place that superior sovereignty in one or the other order of government. Rather it left each order legislatively and constitutionally supreme in its own areas of jurisdiction. Thus, the agreement of both orders is necessary for amendments which significantly affect federal-provincial relationships (including the division of powers).

As well, the provinces argued that the federal Resolution attempts to accomplish indirectly what the BNA Act does not allow the federal government to do directly. That had been made clear by the ruling in the Senate Reference, which denied Ottawa the power to make changes affecting the provinces under its amending power in Section 91.1 of the BNA Act. Finally, they argued that the character of federalism as a political system is incompatible with the possibility that constitutional amendments may be accomplished without the consent of all the constituent units of the system. Taken to its extreme, they argued, the federal government's position implied that Canada could be converted into a unitary state without the consent of the provinces.

In support of their arguments, the provinces again cited the list of previous amendments to the Canadian constitution as evidence that a legal requirement for provincial consent had been observed. They also cited the judgement in the Senate Reference case as well as other cases as precedent that the requirement for provincial consent has been legally necessary (see *Factum of the Attorney-General of Manitoba*, p. 34). In effect, they were inviting the Court to define the nature and philosophy of Canadian federalism.

The Saskatchewan Position

The Saskatchewan position was put only at the Supreme Court level and seemed clearly designed to offer the Court a compromise solution. Instead of asserting a convention or a requirement for unanimous consent, Saskatchewan held that "substantial" provincial support is needed for amendments directly affecting the legislative power of the provinces. Since the Resolution did affect directly such power, the Courts had to decide whether the support of Ontario and New Brunswick was "substantial" enough to allow the federal government to take action on the Resolution. Saskatchewan argued the support of those two provinces did not constitute substantial consent and that the court should declare the Resolution unconstitutional. In offering this compromise solution, the Saskatchewan government hoped to avoid a court declaration on the unanimity rule. If the court could declare that substantial support, at least, was required but had not been obtained, then it could avoid locking Canada into the very rigid formula of unanimous consent while rejecting the Resolution.

The Argument in Favour of the Resolution

The Effect of the Resolution on the Provinces

The federal lawyers argued that the content of the Resolution was irrelevant, that it was not a reasonable issue for the courts to consider since it was a political matter and that it did not shift the balance of power between the two orders in favour of the federal government.

The first line of argument held that if the court decided that provincial consent is not needed for amendments to the constitution which affect federal-provincial relationships, then there is no purpose in determining whether the content of the Resolution has this effect. The question then becomes irrelevant and need not be answered.

Moreover, the federal government argued, it would not be reasonable for the courts to consider and rule on the issue in the way the provinces have requested. In appearances before the provincial courts, federal lawyers termed the issue of the Resolution's content "premature" and "hypothetical" since the Resolution had not been approved in any form by Parliament. The federal government dropped this argument before the Supreme Court since Parliament had approved a final form for the Resolution. But it repeated other arguments that this issue was too broadly and too vaguely worded and hence impossible to answer satisfactorily. Further, in the absence of "concrete factual situations" i.e. a particular case, the Court would have to engage in speculation of a difficult and far-reaching nature on the possible effect of the Resolution on a multitude of provincial laws.

Federal lawyers recognized that the courts might reject this line of argument. They, therefore, offered the argument that there would be "no basic change in the equilibrium between the federal and provincial governments and any change in the balance would be in favour of provincial governments and legislatures". Patriation was a neutral action. The amending formulae constituted a change in favour of the provinces. Both the interim and the proposed amending formula formally recognize the role of the provinces, a role which, according to federal arguments, they do not presently possess. The proposals for referenda are compatible with Canadian federalism and the parliamentary system. A referendum does not in itself affect the balance of federalism or the division of legislative powers. The Charter of Rights and Freedoms does not transfer power from the provincial order to the federal. Rather it limits both levels in order to protect fundamental rights and freedoms of the individual and does so without changing the balance of power between the two orders of government. The provisions on equalization and aboriginal rights do not change the existing federal-provincial balance. The amendments on natural resource powers benefit the provinces.

The Appeal to Convention

Federal lawyers argued that this issue was not an appropriate one for consideration and judgement by the courts. They termed the passing of a resolution a question of internal parliamentary procedure and cited references to prove that resolutions do not create legally enforceable rights and may not be considered by the courts. Arguing before the Supreme Court, J. J. Robinette said the Resolution had the same status as a birthday greeting to the Queen and the courts had as little right to interfere with it.

But the bulk of federal argument on this issue was directed at the provinces' claim that a convention exists requiring provincial consent for such a Resolution. Federal lawyers tried to argue that it was not appropriate for courts to proclaim conventions and enforce them. The degree and extent of provincial consultation is a matter determined by political considerations, not by law. Hence the judges have no concern in the matter. The definition of conventions is itself unclear and a matter for debate. Finally they argued that the imprecise and flexible nature of conventions (as opposed to laws) makes conventions unsuitable for judgement by the courts.

If the courts rejected this line of argument and chose to consider conventions as an appropriate matter for judgement, the federal government went on to argue that in fact, no convention requiring provincial consent exists.

The federal government cited a number of instances where requests for amendments affecting the federal-provincial balance were accepted by the United Kingdom in the absence of provincial consent. In all cases, the simple request of the federal Parliament was regarded as sufficient authority for the passage of an amendment. This, of course, contradicted the provincial assertion that no requests for amendments substantially affecting federal-provincial relationships had been accepted without provincial consent (see p. 97 above). The technicalities of the arguments will not be dealt with here). Like the provincial briefs, the federal government's brief quoted a multitude of authorities - prominent politicians, lawyers and judges - in order to buttress its case.

Finally, federal lawyers asserted that the non-existence of the convention is demonstrated by the fact that it cannot be defined. They held that it could not be specified who was bound by the convention - federal ministers, or members of the Canadian Parliament since they can propose resolutions as well? When did it come into existence? What degree of provincial consent is required - all provinces or all affected provinces? Whose consent is needed - provincial governments or provincial legislatures?

The Appeal to the Requirements of the Constitution

Having argued that there was no convention that required provincial consent, the federal government sought to show that provincial arguments supporting a constitutional requirement for provincial consent held no water as well. On this point, the federal government maintained that only the United Kingdom Parliament has the full legal power to amend the Constitution. While the provinces are legislatively supreme within the fields of their jurisdiction, the "supremacy" is purely "internal". It is not "sovereignty" since the supremacy of the provinces is qualified in several respects; for example by the peace, order and good government clause, by the federal power to reserve and disallow provincial laws, by limitations on the extra-territorial application of provincial laws, and by the doctrine of federal paramountcy.

Federal argument was also directed at the compact theory of Confederation. It pointed to difficulties with the theory.

If there was a compact between the three original provinces...what is the position of the provinces which later joined Confederation? What is the position of the three provinces which were created by the federal Parliament?

While admitting that the compact theory has a factual base in the conferences leading to the creation of the Dominion, the federal lawyers asserted that it

...ignores the fact that the present status of the provinces is not determined by that historical process, but by the relationship created...by the terms of the British North America Act, 1867, and in the case of Newfoundland, the British North America Act, 1949 (*ibid.*, p. 90).

The federal government emphasized that the only question before the courts was the legality of the Resolution. It was not the role of the courts to pronounce on the wisdom of the proposal. Rather the courts should confirm that the only way amendments may be made at this time is by the Parliament of the United Kingdom upon receipt of an address from the Senate and the House of Commons of Canada.

This position was supported by both Ontario and New Brunswick. Ontario's Attorney-General Roy McMurtry even allowed that it was legally possible for the federal government to deprive completely a province of its legislative powers. In one of the lighter moments in the proceedings, he also admitted under questioning by Justice Martland, that the federal government could impose official bilingualism on Ontario but that he would refrain from commenting on the political wisdom of doing so (*Globe and Mail*, May 2, 1981, p. 1).

Newfoundland's Fourth Question

Newfoundland argued that provincial boundaries confirmed by the terms of Newfoundland's union and requiring provincial consent for their change under section 3 of the BNA Act (1871) could be changed without provincial consent if the amending formula in the Resolution were used to remove the requirement for provincial consent contained in sections 48 and 52 of the Resolutions. These sections require provincial consent for amendments affecting one or more but not all provinces (for example concerning boundaries or special provisions such as Newfoundland's Terms of Union). These sections could be changed to remove the requirement for provincial consent by the more general amending formula. In the more general formula,

however, Newfoundland's consent is not necessary. Hence, by a two step process, the terms of Newfoundland's entry into Confederation could come to be changed without its consent.

In their argument before the Supreme Court, federal lawyers conceded the major points of the province's argument but insisted that the court note that the possibility of Newfoundland's Terms of Union being amended in this way would be very remote.

THE RULINGS

At the time of writing, all three provincial courts of appeal had ruled on their questions. However, the Supreme Court had not. This ruling and its consequences will be reported on in next year's Review.

The Manitoba Court of Appeal: February 3, 1981

The majority of the judges rejected provincial arguments and upheld those of the federal government. On the first question, regarding the effect of the Resolution on provincial powers, rights and privileges, Justices Freedman, Hall and Matas ruled that it was premature and hypothetical, since the Resolution was still before Parliament, and its final content could not be known. On the second question, Justices Freedman, Matas and Huband ruled against the provinces, saying they had not proved the existence of any constitutional convention requiring unanimous provincial support for requests for the amendments to the constitution. Justice Hall refused to answer, saying that questions of convention are political matters, not legal ones and hence not appropriate for judicial response. On the third question, Justices Freedman, Hall and Matas ruled against the provinces. There being no convention, Justice Freedman argued, it cannot have crystallized into a rule of law. The Justices did not find the provinces' arguments for a constitutional requirement convincing either. Practice did not support them nor did the fact of provincial legislative supremacy. However, Justice O'Sullivan (who also sided with the provinces on the questions 1 and 2) and Justice Huband agreed with the provinces' arguments on provincial sovereignty. Federal pleasure with this ruling was tempered by the split decision. They had hoped for a unanimous decision; clearly there was a case against them.

The Newfoundland Court of Appeal: March 31, 1981

By a vote of 3-0, the Court ruled against the federal Resolution on each of the questions which had been considered by the Manitoba court. On the first question, Chief Justice Mifflin, and Justices Morgan and Gushue ruled that the Charter of Rights and Freedoms would restrict the legisla-

tive competence of the provinces by infringing on their powers to legislate in respect of property and civil rights. As for the amending formula, they held that a province's rights could be "altered, abridged or, in fact, displaced" without the consent of that province (Globe and Mail, April 1, 1981, p. 1).

On the second question, the Court ruled that a convention does exist which requires the unanimous consent of the provinces to any request of the federal Parliament to the Parliament of the United Kingdom for constitutional change. The Court cited prior amendments and former prime ministers and cabinet ministers in support of its ruling.

As for the crucial third question, the Court held that the provinces did have supreme authority in the legislative areas given to them by section 92 of the BNA Act. It decided that

While the Parliament of Great Britain is constitutionally entitled to accept a resolution passed by both houses of the Canadian Parliament as a proper request for a constitutional amendment from the whole Canadian community, it is nonetheless precluded...from enacting an amendment restricting the powers, rights and privileges granted the provinces by the BNA Act...over the objections of the provinces (Globe and Mail, April 1, 1981, p. 1).

On the fourth question, the Court held that the proposed amending formula could result in a change to Newfoundland's boundaries or its schools system without the consent of the Newfoundland legislature or government. But the court termed the likelihood of this happening remote. It also argued that in the event of a national referendum, a majority of the people of Newfoundland would have to approve any change to the Terms of the Union. The federal government argued in its submission to the Supreme Court that the Court misinterpreted the section on national referenda.

The significance of the Newfoundland ruling lay less in its analysis of the legality of the Resolution and of Canadian constitutional law than in its effect on the federal course of action. Once the Court had ruled against the federal project, the federal government's argument that its actions were legal and, hence, did not require reference to the Supreme Court was irreparably damaged. As a result, on the day of the Newfoundland ruling, Prime Minister Trudeau offered to wait for a Supreme Court decision on the legality of the Resolution before sending it to Britain, if the Conservatives would agree to pass the Resolution so that the Supreme Court would have a finished document to consider. As described above, a compromise was reached which would allow the Resolution to be presented in a final form to the Supreme Court without actually being passed by Parliament.

The Quebec Court of Appeal: April 15, 1981

The political agreement following the Newfoundland decision reduced interest in the decision of Quebec Court of Appeal. Nevertheless, the Quebec Court of Appeal's decision contained some interesting observations about the Resolution. On Question A, the Court agreed 5-0 that the Resolution would interfere with provincial powers and with the status and role of provincial legislatures and governments. However, despite such interference, the Court ruled 4-1 (Chief Justice Crete, Justices Owen, Turgeon and Bélanger for the majority; Justice Bisson for the minority) that the federal Parliament could modify the Canadian constitution in this manner without provincial consent and despite provincial objections. The opinion of Chief Justice Marcel Crete concluded that "the constitutional undertaking of the federal government - even if it is unilateral - is legal" (Montreal Gazette, April 16, 1981, p. 87).

THE SUPREME COURT OF CANADA

The decision now rests with the Supreme Court of Canada. The Justices may try to stick to strict legal precedent and dodge the vague issues of convention, history and the philosophy of federalism. However, they are unlikely to avoid catching their robes in the political thicket in which they have been placed by the contending political forces in Canada. The absence of clear precedents, the presence of conflicting judgements in the lower courts, and the political implications (international in scope) of any decision render the task of the courts very difficult. Failing a political accommodation on the issue of constitutional reform, few individuals in Canada are likely to experience as keenly the dilemma posed by the federal Resolution as the judges of the Supreme Court of Canada.

Beyond the Supreme Court

The dissenting provinces indicated that if the Supreme Court verdict went against them, they would open another legal battle in Great Britain (Globe and Mail, June 6, 1981, p. 14). Such action would not necessarily reflect dissatisfaction with the Supreme Court decision. Rather, it would likely aim at questions which the Supreme Court did not consider and could not consider because they concern British constitutional law over which the Canadian Supreme Court does not have jurisdiction. These questions would ask the British courts to decide whether it is the constitutional obligation of the United Kingdom Parliament to fulfill automatically any request from the Canadian Parliament for amendment to the Canadian constitution or whether the British Parliament is in some sense a trustee of provincial rights and is entitled to "look behind" any request from the Canadian Parliament to ensure that it conforms to the federal nature of the Canadian political system.

TABLE: 7.1

THE RESOLUTION IN THE COURTS

COURT: Court of Appeal of Manitoba

REFERENCE FILED: October 24, 1980 - Order in Council 1020/80

ARGUMENT HEARD: December 4, 1980

PARTICIPANTS: Attorney-General of Manitoba, supported by the Attorneys-General of Quebec, Newfoundland, Alberta, British Columbia and Prince Edward Island and counsel for the Four Nations Confederacy; JUDGEMENT DESIRED: Question One - Yes; Question Two - Yes; Question Three - Yes.

Opposed by the Attorney-General of Canada; JUDGEMENT DESIRED: Question One - Not answerable or No; Question Two - Not answerable or No; Question Three - No.

JUDGEMENT DELIVERED: February 3, 1981; VERDICT (Five Judges presiding): Question One - Not answerable (3), Yes (2); Question Two - No (3), Not answerable (1), Yes (1); Question Three - No (3), Yes (2).

COURT: Court of Appeal of the Supreme Court of Newfoundland

REFERENCE FILED: December 5, 1980 - Order in Council 1479-80

ARGUMENT HEARD: February 10, 1981

PARTICIPANTS: Attorney-General of Newfoundland, supported by the Attorneys-General of Quebec, Manitoba, Alberta, British Columbia and Prince Edward Island; JUDGEMENT DESIRED: Question One - Yes; Question Two - Yes; Question Three - Yes; Question Four - Yes.

Opposed by the Attorney-General of Canada; JUDGEMENT DESIRED: Question One - Not answerable or No; Question Two - Not answerable or No; Question Three - No; Question Four - Possibility is remote.

JUDGEMENT DELIVERED: March 31, 1981; VERDICT (Three Judges presiding): Question One - Yes (3); Question Two - Yes (3); Question Three - Yes (3); Question Four - with qualifications, Yes (3).

COURT: Court of Appeal of Quebec

REFERENCE FILED: December 17, 1980 - order in Council 3850-80; January 21, 1981 - Order in Council 198-81

ARGUMENT HEARD: March 9, 1981

PARTICIPANTS: Attorney-General of Quebec, supported by the Attorneys-General of Manitoba, Newfoundland, Alberta, British Columbia and Prince Edward Island; JUDGEMENT DESIRED: Question A(i) and (ii) - Yes; Question B(i) and (ii) - No.

Opposed by the Attorney-General of Canada; JUDGEMENT DESIRED: Question A(i) and (ii) - Not answerable or No; Question B(i) and (ii) - Yes.

JUDGEMENT DELIVERED: April 15, 1981; VERDICT (Five Judges presiding): Question A(i) and (ii) - Yes (5); Question B(i) and (ii) - Yes (4), No (1).

COURT: Supreme Court of Canada

APPEAL FILED: March 19, 1981 by the Attorney-General of Manitoba from the decision of the Manitoba Court of Appeal; April 3, 1981 by the Attorney-General of Canada from the decision of the Court of Appeal of the Supreme Court of Newfoundland; April 16, 1981 by the Attorney-General of Quebec from the Quebec Court of Appeal

PARTICIPANTS: Attorneys-General of Manitoba, Newfoundland and Quebec, supported by the Attorneys-General of Alberta, British Columbia, Nova Scotia, Prince Edward Island and Saskatchewan; JUDGEMENT DESIRED: (See above and also text).

Opposed by the Attorney-General of Canada, supported by the Attorneys-General of New Brunswick and Ontario; JUDGEMENT DESIRED: (See above and also text).

JUDGEMENT NOT YET DELIVERED.

CHAPTER VIII

OTHER PROVINCIAL ACTIONS

LEGISLATIVE ASSEMBLIES

The various court actions were the key elements of the opposing provinces' strategy. However, they took a number of other steps to emphasize their opposition to the federal project. On October 20, for example, the Alberta government introduced to its assembly a bill allowing it to hold a referendum on the issue, but later put off passing it into law. Other provinces such as Newfoundland and BC also considered the use of referenda (*Constitutional Express*, Government of Quebec, Issue No. 1, p. 10; Issue No. 12, p. 13).

Quebec, BC, Alberta, Newfoundland, Saskatchewan, PEI and Nova Scotia all passed resolutions in their legislatures opposing the federal proposal. However, only in Alberta and Saskatchewan did the official opposition - the Social Credit and the Conservatives, respectively - support the resolutions passed. Of all opposition leaders, Quebec Liberal leader Ryan was in the most awkward position. While he favoured much of the substance of the federal package, he was on record as opposing federal action without provincial consent. Nevertheless, he felt that to support the PQ motion condemning the federal action would be unwise politically. Consequently, he moved an amendment to the PQ resolution which affirmed the National Assembly's commitment to renew the Canadian constitution in accord with the principles of federalism. When the PQ refused to support his amendment word for word, Ryan had his "out" and voted against the PQ motion. Ryan's manoeuvrings seemed to have little effect on his fortune at the provincial elections on April 13, 1981. The PQ gained a resounding victory, strengthening their determination to oppose the federal package.

Many provinces had committees of their legislative assemblies consider the constitutional issue. They included: Quebec, Ontario, Alberta, Manitoba, New Brunswick, Nova Scotia and Prince Edward Island. Ontario's committee had been established as far back as May, 1980, and visited a number of provincial capitals. Its report was finished October 21, 1980 and supported the Government of Ontario's position with one major qualification. If the federal and provincial governments failed to agree on an amending formula, "patriation with specific and guaranteed safeguards for the provinces is an acceptable though not a desirable alternative." (Ontario, *Report of the Select Committee on Constitutional Reform*, 4th Session 31st Parliament, 29 Elizabeth II, p. 3). The two safeguards were:

1. patriation will take place from Westminster to the people of Canada and will formally reside with Parliament;
2. all provincial powers, privileges, prerogatives and rights will remain inviolate until such time as there is federal and provincial agreement on an amending formula (*Ibid.*, p. 3).

Most of the other committees were set up after October 2 and had not reported at the time of writing.

PUBLIC RELATIONS

In order to publicize their case, some Premiers undertook speaking engagements in other parts of the country and abroad. A recurring theme in statements by Premiers opposed to the Resolution was their desire that federal-provincial constitutional negotiations resume. Premier Bennett of BC, for example, proposed a 60 day moratorium on federal policy both on the constitution and on energy. The moratorium would be followed by two national conferences on those subjects.

In addition, some provinces - Quebec, Alberta, Saskatchewan and PEI - mounted publicity campaigns to inform their residents about their provincial government's position. Provincial governments opposed to the Resolution met at intervals to coordinate strategy on court action and other measures. These meetings were coordinated by Manitoba, whose Premier Sterling Lyon was the current chairman of the Premiers' Conference. Richard Hatfield, one of the two Premiers supporting the Resolution, became particularly prominent after a speech given in London warning the British of the danger of a unilateral declaration of independence by Canada if it blocked the federal Resolution (see p. 115) and after a New York speech attacking Premier Davis of Ontario for his refusal to allow Ontario to become officially bilingual. Davis, meanwhile, sought to demonstrate his flexibility in other ways. In a speech to the Vancouver Board of Trade on December 5, 1980, he stated that he took seriously the expression of deep feelings of alienation by western Canadians and proposed a National Commission on Western Equality to study western complaints. Provinces also sought to influence the opinion of British legislators (see p.115).

SASKATCHEWAN

Alone among the provinces which had opposed the major elements of the federal proposals at the September conference, Saskatchewan did not immediately declare itself against the Resolution or join the court action. Saskatchewan chose to play a different game. Arguing that the Resolution

could still be changed to make it more acceptable to the provinces, Saskatchewan sought to negotiate its support for the Resolution in return for changes in it. Saskatchewan's support for the package would have allowed the federal government to claim the support of at least one western province.

How successful Saskatchewan was is difficult to determine. Saskatchewan's opposition to the entrenchment of property rights in the Constitution may have been an important reason why the federal government dropped it from the Resolution after first agreeing to support it. In addition, newspaper reports indicated that in order to get Saskatchewan onside, the federal government was willing to give the provinces the right to veto holding a referendum for amending the constitution if enough of them could agree (Ottawa Citizen, February 10, 1981, p.8).

But Saskatchewan wanted more than that. It argued that provinces should be allowed to initiate referenda themselves. It wanted greater power over the international trading of natural resources, something the federal government removed from the federal NDP amendment on natural resources. Finally, it objected to the federal government's decision to retain a Senate veto over constitutional reform. On these points, the federal government refused to budge. Negotiations broke down and Saskatchewan announced its formal opposition to the federal project, including joining the court challenge. Even here, however, Saskatchewan pursued an independent course, arguing that substantial, rather than unanimous provincial consent was required.

THE FEDERAL GOVERNMENT RESPONSE

Until the ruling of the Newfoundland Court of Appeal, the federal government consistently took the line that it was doing nothing illegal in proceeding with the Resolution. It argued that the question was political, rather than legal and therefore not properly a matter for the courts. Prime Minister Trudeau also challenged the dissenting provinces to agree on an alternative proposal but argued in the same breath that differences among them would prevent any such common alternative. Hence, there was no use renewing negotiations since impasse would result again. The Prime Minister also denied he was acting unilaterally because both Ontario and New Brunswick supported his project.

THE PROVINCIAL ALTERNATIVE

Sensitive to the Prime Minister's criticism of their inability to offer an alternative proposal, the dissenting Premiers accelerated their efforts to reach a consensus on constitutional reform. On April 16, 1981, they succeeded. Eight Premiers (the original six had now been joined by Nova Scotia and Saskatchewan) agreed on a **Constitutional Accord: Canadian Patriation Plan** (See Appendix D). They agreed to patriate the constitution with a new amending formula, to enter into a three-year period of intensive constitutional negotiations based on the formula, and to discontinue their court actions. In return, Ottawa would have to withdraw its Resolution. No mention was made of the Charter.

The amending formula adopted on April 16 was a modified version of the Vancouver proposal discussed at the September 1980 First Ministers' Conference. Essential differences included a requirement that all provinces agree to amendments to the offices of the Queen, the Governor-General or the Lieutenant-Governor, to provincial representation in the House of Commons, to the use of the English and French languages, to the composition of the Supreme Court and to any of the amending procedures in the proposal. Previously the requirement for unanimous consent had extended only to the amending formula itself. The April 16 proposal also provided for delegation of legislative authority between federal and provincial governments by mutual agreement. Unchanged was the opting out provision, except that it did not apply (by definition) to amendments requiring unanimous consent and to amendments concerning the principle of proportional representation of the provinces in the House of Commons, the powers of the Senate, selection of Senate members, the representation of provinces in the Senate, the establishment of new provinces and to provisions concerning the delegation of legislative authority. There was some effort to have any opting out by a province subject to approval by a two-thirds majority of its provincial legislature, but this met stiff opposition from Quebec Premier René Levesque (*Globe and Mail*, April 17, 1981, p. 1) and approval by a simple majority was retained.

This formula, the Premiers said, combined "flexibility and stability." It is preferable to the formulae because it:

- recognizes the equality of the provinces within Canada.
- avoids the need for a referendum to choose an amending formula or as a method of amending the constitution.

EXCERPTS FROM STATEMENTS BY THE EIGHT PREMIERS
on their signing of a constitutional accord

PREMIER WILLIAM BENNETT
BRITISH COLUMBIA

I (hope) the signing of this accord today and the Canadian patriation plan will not be reported nor dealt with as on a scorecard of winners and losers as to who has won the great debate over how we deal with our constitution. I hope it will be looked upon as an opportunity for us to get on with the job within our own country.

I'd like to congratulate my colleagues for their willingness to compromise for the good of the country and to work towards drafting in detail not what we've had in the past, which has been a consensus in principle, but a detailed proposal that will work and help us to achieve our end.

PREMIER ALLAN BLAKENEY
SASKATCHEWAN

What has taken place here today was said to be impossible. Eight premiers have come together to demonstrate that Canadians are able and willing to resolve differences through a spirit of compromise and accommodation....

In pursuing our course of negotiation, in seeking to go the extra mile, we were convinced that there had to be a third way between the divisive unilateral action of the federal Government and the obvious inadequacies of the status quo. We believed that a way could be found to make the constitution a fully Canadian document and to do this by means which would unite Canadians, not divide them....

This proposal also removes two of the most damaging features of the federal resolution: the referendum proposal and the perpetual Senate veto. Neither had been part of previous constitutional discussions, and neither had any significant support in the country.

PREMIER JOHN BUCHANAN
NOVA SCOTIA

Mr. Chairman, our constitution has served us well. But it is clear that our constitution and our political system face challenges today that oblige us to re-examine our political institutions and our processes of government so that we may be assured that they are appropriate to the needs not only of today but the expectations of tomorrow....

We have come to an accord that enables us to preserve and enhance a federal and parliamentary political system under the Crown.

We are today taking a major step towards renewed federalism. What the eight provinces have constructed on this very historic day will surely encourage all Canadian governments.

PREMIER LEVESQUE
QUEBEC

This opposition (to the Resolution) has been shown by us before and during the election campaign which has just been concluded in Quebec. We promised the people of Quebec to oppose by all legitimate means the federal attempt to impose on us a charter of rights which would limit the essential powers of our National Assembly, particularly in the area of language of education. We received from the people of Quebec three days ago a mandate which appears to us not only clear but also unchallengeable, to pursue our standpoint; whereas Mr. Trudeau, we have to say this, has never requested or received any mandate to do what he is trying to impose on Quebec and on the rest of Canada....

It's clear that this participation on the part of Quebec to the interprovincial accord before us today in no way affects the inalienable rights of Quebecers to decide democratically, by themselves, on their future. This right will continue in the future as it does now, and in no way will be limited by the new amending formula which we recommend today....

We made an honest and sincere effort and we worked hard to find a compromise which would be honorable for everybody. It's now up to the Prime Minister to show good sense and to come back to the negotiation table.

PREMIER PETER LOUGHEED
ALBERTA

Regretfully, the process that has been embarked upon - that causes so much concern across Canada - by the Prime Minister starting last October has tended, in my judgment, not to strengthen Canadian unity but to create even deeper divisions in our country. The reason for that is clear - Canadians want a federal state. They want a strong central Government. They want strong provinces to reflect the regional nature of Canada....

Today Canadians see eight provinces very strongly submitting that there is a better way, a positive constructive way for not a made-in-Britain constitution but a made-in-Canada constitution. There is the general awareness of Canadians, across this country in every province, that it is a federal nation; these decisions should be made with the concurrence of the provinces....

I believe that if the Prime Minister persists, supported by the federal Government, there will be deep and long-lasting divisions. It is no flag-debate issue. And the result, if it does occur, will be a very hollow victory indeed.

PREMIER STERLING LYON
MANITOBA

The purpose of this meeting of the premiers of eight of Canada's ten provinces is to put before the people of Canada an alternative to the patriation of the Canadian constitution - an approach based on consensus and agreement among Canadians....

We propose instead that we ask Britain only to send our constitution home. Canadians themselves can be trusted to work together as we have throughout our history in a spirit of cooperation, reason and stability to make such changes in our constitution as are needed....

We invite the federal Government and the governments of the two provinces who are not represented here today to sign that accord and to associate themselves with us in bringing Canada's constitution home....

We've had enough of discord, disunity and confrontation. It is time for Canadians to agree and for us to work together as a united, federal country.

PREMIER ANGUS MACLEAN
PRINCE EDWARD ISLAND

In the midst of the controversy of recent months there's a danger that Canadians might lose sight of the central point. That point is that the present course of action by the federal Government is a denial of the federal principle. It treats Canada as though it were an association of individuals rather than an association of provinces each of which is sovereign within its own jurisdiction.

Canada is not a monolith. It is not simply a larger version of pre-Confederation Canada, but a partnership of neighbors. Each of these partners came freely into Confederation with the understanding that its integrity and uniqueness would be respected and safeguarded within the union. That understanding is at the heart of our national life. If it is harmed, Canada - as we have known it - is harmed....

Federalism is not an impasse from which we all must be rescued by the federal Government acting on its own. Our presence here today demonstrates that the road of consensus is still open and passable.

PREMIER BRIAN PECKFORD
NEWFOUNDLAND

In my view, this is what federalism is all about - partners sitting down together to tackle problems and arriving at a workable compromise for all concerned. What we have achieved by our action today stands in stark contrast to what has been imposed on this nation by the unilateral actions of the Trudeau regime over the past year....

From Newfoundland's point of view, this unilateral action destroys the fundamental basis of Confederation. It undermines the delicate balance in our federation. It creates two classes of provinces - the powerful and the weak - and it increases vastly the powers of the federal Government at the expense of the provinces. Finally, and perhaps most importantly, it ignores the fact that constitutional changes must be made in Canada and by Canadians based on consensus.

- Removes the absolute veto power that the federal government proposes to give the Senate over constitutional reform, including Senate reform.

(News Release - Constitutional Accord, April 16, 1981, Canadian Intergovernmental Conference Secretariat Document No. 850-19/001, p. 2)

On the other hand, Premier Blakeney viewed the Premiers' proposal as a reasonable compromise between the federal fear of "opting out" and some provinces' desire to safeguard important areas of their jurisdiction.

This proposal allows opting out, but under such restrictions that it will occur only rarely. Not precisely what any one government wanted, but something we can all live with (Notes for Remarks by Premier Allan Blakeney on the Signing of the Patriation Plan, Document No. 850-19/007, Canadian Intergovernmental Conference Secretariat, April 16, 1981, Ottawa, p. 2).

The Accord was signed by the eight Premiers in a formal ceremony at the National Conference Centre in Ottawa. They claimed they had done what the federal government said was impossible. Their "historic" patriation plan "shows clearly and positively that significant constitutional progress is possible when all parties approach the issue with sincerity and goodwill.... By working together, the federal and provincial governments now have an opportunity to make a modern, made in Canada constitution" (Document No. 850-19/001, op. cit., p. 3).

Prime Minister Trudeau was unenthusiastic. He said the accord was little different from that which had been unacceptable in September and, in particular, kept "the most obnoxious aspect of it, the opting-out provision" (Globe and Mail, April 18, 1981, p. 3). He criticized the Premiers' inability to agree on the basic values which Canadians hold in common and which provinces could not opt out of. Although the Prime Minister said he was willing to discuss the Premiers' proposals, he questioned their good faith. He termed the accord a public relations exercise and argued that the Premiers were just interested in stalling constitutional reform (Globe and Mail, April 18, 1981, p. 13).

SUMMARY

Since the failure of the September talks, the provinces were isolated from the process of constitutional reform which took place in Parliament. The national media focussed on Ottawa. Although the Prime Minister offered to meet with the dissenting eight provinces as part of his deal with the Official Opposition, they were slow to react. By the time they accepted, Prime Minister Trudeau had gone on vacation and would not interrupt it to meet with the provinces.

Thus, both the federal government and the provinces opted for a winner-take-all situation and eschewed compromise.

Looking back, it seems that there were few incentives for either side to compromise. The federal government felt its legal position to be very strong. Hence, compromise would have to come from the provinces. However, it could be argued that the provinces have more to gain than they have to lose in a winner-take-all situation. If the federal government is overruled, then each province retains a veto power over future constitutional change. If the federal government can proceed, then they will have to live with the Resolution. But they will have two years of further discussion on an amending formula perhaps with a final recourse to a national referendum. There is also the option of appealing the matter in the British courts - an option approved by the dissenting eight on June 4, 1981 (Globe and Mail, June 6, 1981, p. 14).

CHAPTER IX

THE ROLE OF THE BRITISH PARLIAMENT

INTRODUCTION

That the Parliament of the United Kingdom might play a pivotal role in the outcome of Canada's constitutional struggles seemed more and more probable as 1980 drew to a close and 1981 began. The "British Connection" first became prominent over the course of the summer talks on the constitution. On the assumption that constitutional change was imminent, a number of meetings occurred between Canadian and British ministers and officials with the aim of smoothing the path of the constitutional reform proposal through the UK Parliament. While the general expectation was that such a proposal would emerge as a result of federal-provincial agreement during the September conference, the possibility of unilateral action was raised by Prime Minister Trudeau in the House of Commons soon after the First Ministers' meeting in June. The position of the British government on a unilateral request therefore became an issue.

The initial reaction of British officials was measured and cautious. In a visit to Canada on June 18-19, Nicholas Ridley, a British Minister of State at the Foreign and Commonwealth Office said that Britain had no intention of involving itself in an "acrimonious debate" on the patriation of the constitution. He said further that if presented with a joint address from the Canadian Parliament, his government would introduce a bill to give effect to the address and would advise its members to support it "on the good ground that to do anything else would be to interfere in the internal affairs of Canada" (*Globe and Mail*, June 19, 1980, p. 6). But, he warned, if the address provoked opposition in Canada, such opposition could find spokesmen in the British Parliament (*Le Devoir*, June 19, 1980, p. 1). Pressed on whether or not the British government would introduce a bill in the face of strong opposition from provincial legislatures, Mr. Ridley termed the question hypothetical depending on the nature of the objection and on its constitutional basis. However, he added "a joint request would be difficult to refuse" (*Globe and Mail*, June 19, 1980, p. 6).

The issue remained cloudy even after Prime Minister Trudeau's visit to British Prime Minister Thatcher in London on June 25, 1980. When asked about Mrs. Thatcher's views on how difficult it would be to pass amendments that were opposed by some provinces, press reports quoted Mr. Trudeau as answering that "is a hypothesis that I didn't ask her to examine and I don't believe she did examine" (*Globe and Mail*, June 26, 1980, p. 1).

Nevertheless, subsequent statements by federal ministers and officials reinforced the impression that Britain would act on a request from the Canadian Parliament regardless of any provincial opposition. For example, Mark MacGuigan reportedly said after a July meeting with British Foreign Secretary Lord Carrington,

There was general agreement that a request which is made by the Canadian Government would be honored here...I have no doubt that any Government would prefer to have as much unanimity as possible. But that is not a pre-condition (Globe and Mail, July 9, 1980, p. 3).

With the failure of the September talks, the question of the British attitude toward unilateral federal action gained new importance. The release of the federal Resolution indicated that the federal government believed the British Parliament would have to pass any request from the Canadian Parliament even if it were not supported by a majority of the provinces.

THE GROWTH OF POLITICAL OPPOSITION TO THE PACKAGE IN BRITAIN

Popular interest in Britain in the constitutional reform issue was first piqued in September 1980 by delegations from Canadian Indian groups invoking memories of treaty obligations from days of imperial glory long past. Some British MP's vowed to represent the opposition of Indians to constitutional reform in Parliament unless such reform recognized aboriginal claims. By late November they had formed an ad hoc all party Committee to discuss the Canadian constitution and to coordinate backbencher response to any request. They had also widened their concerns to include the issue of federal-provincial relations. By December they had begun to pepper government ministers responsible for the matter with questions (see Regina Leader Post, November 14, 1980, p. 14; The Times of London, December 10, 1980, p. 12).

① Quote

Provincial attempts to present their point of view also increased interest in the constitutional question. Provincial government officials, in particular, those of Quebec, lobbied British MP's and peers to explain their point of view. Their efforts were supported by visits to London by provincial Premiers such as Peckford of Newfoundland, Hatfield of New Brunswick and Lyon of Manitoba who spoke outside Parliament to chambers of commerce, press associations and other groups. Premier Hatfield drew attention from the British and Canadian press for suggesting that a unilateral declaration of independence (UDI) by Canada might follow the refusal of the British Parliament to act on a federal government request.

The Select Committee on Foreign Affairs

Attention soon focussed on the work of the Select Committee on Foreign Affairs. On November 5, 1980, the Committee decided to inquire into the role of the United Kingdom regarding Canadian constitutional reform. The Committee heard only British witnesses, but written submissions from Canadian interest groups and governments were received and considered, including the governments of Newfoundland, Quebec, Prince Edward Island, Alberta and British Columbia.

Officials of the British Foreign Office appearing before the Committee took the line that resistance by the British Parliament to swift passage of any Canadian request would constitute meddling in internal Canadian affairs. However, the testimony of British experts before the Committee contradicted the federal government's position and contributed to the growing opposition. Dr. Geoffrey Marshall of Oxford University and Professor H. W. R. Wade of Cambridge as well as others argued before the Committee that the British constitutional convention required more than a simple "rubber-stamping" of Canadian requests. Wade said that it would be constitutionally wrong for Westminster to act in a case in which there were substantial objections from the provinces (*Globe and Mail*, December 17, 1980, p. 8). Marshall argued that Britain had to act in accordance with Canadian constitutional practice but added that since Canadian constitutional practice was unclear, there was a need for clarification by Canadian courts when provincial support for a reform is lacking (*Montreal Gazette*, December 4, 1980).

The Kershaw Committee (named after its chairman, Sir Anthony Kershaw) issued its report on January 30, 1980. A long and carefully worded document, the Kershaw Report (Great Britain; House of Commons, First Report from the Foreign Affairs Committee, 1980-81 Session, *British North America Acts: The Role of Parliament*) undermined the federal government's position on constitutional reform.

In its conclusions, the Kershaw Report argued that the history of the development of the Canadian constitution had left the UK Parliament with a particular role to play. As a result,

...it would not be in accord with the established constitutional position for the UK government and Parliament to accept unconditionally the constitutional propriety of every request coming from the Canadian Parliament (Kershaw Report, op. cit., p. xiii).

In other words, there is no requirement for automatic action by the UK Parliament when presented with any request from the Canadian Parliament. The Report relied heavily on an exhaustive historical analysis of the

circumstances surrounding enactment of the Statute of Westminster, 1931, which, at Canadian request, left the BNA Act in British hands. However, the Committee did not say that the unanimous consent of the provinces was necessary before any amendment could be passed. Rather,

The UK Parliament's fundamental role in these matters is to decide whether or not a request conveys the clearly expressed wishes of Canada as a whole, bearing in mind the federal character of the Canadian constitutional system.

Where a requested amendment or patriation would directly affect the federal structure of Canada, and the opposition of Provincial governments and legislatures is officially represented to the UK government or Parliament, the UK Parliament is bound to exercise its best judgement in deciding whether the request, in all the circumstances, conveys the clearly expressed wishes of Canada as a federally structured whole (ibid., p. xii).

To decide when a request does convey such clearly expressed wishes, the Committee offered the following suggestions.

...Parliament would be justified in regarding as sufficient a level and distribution of Provincial concurrence commensurate with that required by the least demanding of the formulae for a post-patriation amendment (similarly affecting that federal structure) which have been put forward by the Canadian authorities...(ibid., p. xii).

"Implicitly, proposals lacking such provincial concurrence could be refused by the British Parliament with justification." The Committee, though, did reject the idea that the provincial governments alone could have a voice. "We think", the Committee said, "that if the UK Parliament is to take into account the clearly expressed wish of Canada as a whole, the approval of the majority of voters in a Province could properly be regarded as signifying the wish of that Province for that purpose" (ibid., p. iv).

The Kershaw Report considered briefly other issues bearing on the UK Parliament's responsibilities for amending the Canadian constitution. They rejected arguments that the UK Parliament should not patriate the BNA Acts until it was satisfied that Indian rights secured by the Royal Proclamation of October 7, 1763 or by other treaties subsequently entered into by the Crown were being protected. The Committee argued that the BNA Act (1867) gave responsibility over Indians to the federal Parliament and that the Statute of Westminster (1931) prevents any British laws from affecting Canadian affairs in general and Indian rights in particular without the request and consent of Canada.

The Committee also rejected the idea of Britain's terminating uni-

laterally its power to amend the Canadian constitution. This it termed a grave breach of the constitutional convention against unilateral British action. The Committee did not say whether the court cases brought by the provinces against the Resolution should influence the British Parliament's response to any federal request. Rather, it advised that this question should be considered "in the light of all the circumstances at the time when such request is received in London" (ibid., p. xiii).

The Kershaw Report was widely reported as a blow to the federal government's project. It challenged the basic federal assumption of an automatic British response to a parliamentary request. While it did not support the provinces' argument that unanimous provincial assent was needed, it did argue for substantial provincial concurrence. As such, the Kershaw Report provided a potential rationale for British delay on the federal project and damaged the credibility of the federal legal position in the public's eyes.

But, the Kershaw Report did slight the role of provincial governments and legislatures by accepting referenda as a valid test of provincial consent. The acceptance of the federal government's amending formula as a suitable test of the presence of adequate provincial consent indicated that a proposal which split the Charter of Rights from patriation and the amending formula might be more acceptable to the British than the present one.

Many observers saw the Kershaw Report as ammunition for British members of Parliament seeking to delay the passage of the Resolution in Britain. With such ammunition concerted efforts to delay its passage would be more likely to succeed and thus disrupt Prime Minister Trudeau's plans for proclaiming the Resolution on July 1, 1981. Nevertheless, Kershaw himself predicted the Resolution would likely pass in any event (*Montreal Gazette*, January 30, 1981, p. 10).

The Progressive Conservative Party of Canada and the provincial governments opposing the Resolution seized on the Kershaw Report as a vindication of the justice of their struggle. Prime Minister Trudeau saw the Report as meddling in Canadian affairs. In Britain, the Foreign Office refused to comment while Prime Minister Thatcher repeated her position that law and precedent would guide her government in the matter of any request (*Le Devoir*, February 4, 1981, p. 2).

THE ATTITUDE OF THE THATCHER GOVERNMENT

Soon after the release of the Resolution, Canadian External Affairs Minister Mark MacGuigan and Environment Minister John Roberts met with British Prime Minister Margaret Thatcher. They reported that they had received her assurance that the Resolution would be passed by Parliament quickly regardless of any provincial opposition. Similar assurances were reportedly received from Opposition leader James Callaghan. MacGuigan did acknowledge that Thatcher and Callaghan had warned him that some MP's might try to obstruct passage of the Resolution over the issue of native rights. He added that Thatcher's only concern had been how much time it would take from a tight agenda in the British House of Commons (Winnipeg Free Press, October 9, 1980, p. 19).

However, as opposition to the Resolution began to develop in Britain, reports from London indicated that the British government was beginning to re-think its role in the federal government's project of constitutional reform. At the end of October, a British government spokesman observed that a bill of rights would provoke a much greater debate in Parliament than just patriation and an amending formula. He further stated, that while the British government would agree with whatever Ottawa wants, the issue was quickly evolving into more than a "question of timetables" (Globe and Mail, October 28, 1980, p. 9). The Guardian quoted a senior minister in the Thatcher Government who put the argument more strongly,

...if present discussions with Mr. Pierre Trudeau's Liberal Government failed to persuade the Canadians to withdraw their request for a bill of rights, there would be a major hold up in legislation planned for the new parliamentary session. It could wreck the whole thing (Globe and Mail, October 28, 1980, p. 9).

Other newspaper reports that Prime Minister Thatcher had requested that the Resolution be delayed until provincial support had been secured were denied by British and Canadian officials (Globe and Mail, October 31, 1980, p. 8; Ottawa Citizen, November 1, 1980, p. 8).

Nevertheless, British statements of support for the federal government's project continued to be cautious and measured. The first official pronouncement by the British Prime Minister of her government's position came in a reply to a question in the House of Commons. She said that her government had not as yet received any request from Canada, but that when a request comes "we shall try to deal with it as expeditiously as possible" (The Times of London, December 10, 1980, p. 12). She added

- (c) The detailed conditions suggested by the Kershaw Report as to the extent of provincial concurrence required, or, alternatively, the type of changes in the proposal required, to justify British acceptance of an amendment request, offend the Committee's own advice that "it would be quite improper for the UK Parliament to deliberate about the suitability of requested amendments or methods of patriation".
- (d) If the Parliament of the United Kingdom followed the advice of the Kershaw Committee on these matters, it would "constitute an "interference" in Canadian internal affairs".

(The Role of the United Kingdom in the Amendment of the Canadian Constitution, op. cit., pp. 37-38).

The likelihood that the Resolution would encounter difficulty in the British Parliament led some observers to fear that the situation could be exploited by the Liberal government to stir up public opinion against any delay of the Resolution by the British Parliament. While this could galvanize public opinion in favour of speedy patriation and as such could be a suitable prelude to a federal election or referendum on the issue, it could also poison Canada - UK relations for many years to come much in the same way that General deGaulle's declaration "Vive le Quebec libre" chilled Canada-France relations for nearly a decade. The decision to wait for the ruling of the Supreme Court of Canada on the legality of the Resolution made these possibilities much less likely.

Ottawa attempted in other ways to clear the way for the smooth passage of its Resolution even while it maintained a firm position publicly. These attempts occurred behind the scenes as much as possible. However, it was increasingly apparent that the Canadian High Commission in London was being used as a base to coordinate federal lobbying efforts even though its head, Mrs. Jean Wadds, had been appointed by the Conservatives during their brief stint as the government. Reeves Hagan was sent by the government as a special adviser to Mrs. Wadds on the constitution in late November 1980. At the end of April 1981 Montreal MP Serge Joyal, former co-chairman of the Joint Committee on the Constitution, was sent to London for two weeks of meetings with British MP's and peers.

Many Canadians found this lobbying of British Parliamentarians and officials by both federal and provincial representatives to be akin to a "washing of dirty linen" in public. Their embarrassment was increased in early February when telegrams purportedly from Mrs. Wadds to External Affairs in Ottawa were leaked. One welcomed the retirement to the backbenches of one minister, St. John Stevas who had opposed the Trudeau plan and it also urged a "snow job" on Jonathan Aiken, an MP opposing the package. Another noted the friendship between former NDP party leader David Lewis and leading Labour politician, Michael Foot (now Leader of the Labour

Party), and suggested that

If Lewis is supportive (of the Constitutional proposals) it might be suggested that he contact Foot (Today's London Press Service, February 11, 1981).

Still another revealed High Commission fears that telephone conversations between its London office and Ottawa had been intercepted and cautioned,

We must take it for granted that phone conversations of this sort are all monitored and taped by suitably-equipped countries, including certainly Britain, France, the USA and the Soviet Union. Why give Britain notice of our strategy concerns or judgements of some of its key players? Why give others...opportunity for mischief? (Today's London Press Service, February 12, 1981).

Ironically, the cable went on to argue that classified telex messages were "immeasurably safer". As a result of the leak, the government launched an investigation into the source of the leaked cables and into the allegations of wire tapping. Although the incident embarrassed Ottawa at the time, it appeared to have no lasting effect on the situation. Jonathan Aiken who was mentioned in the cables said he was amused by them, but he observed,

One thing this does do is destroy the myth that the federal government is staying aloof and only the dirty provinces are doing the lobbying (Globe and Mail, February 12, 1981).

SUMMARY

Thus, there seemed no way to avoid Britain becoming enmeshed in Canadian affairs, or, as a result, being seen as "interfering". Canadians were determined to involve the British. The ironies of the situation were self-evident: it was only because Canadians had not been able to agree in the past on a procedure for amendment that the British remained involved and were now receiving small thanks for it. And, while ending the last vestige of colonial status was a central purpose of the patriation exercise for Ottawa, it was only by virtue of that same colonial status that Ottawa could achieve what it could not achieve within Canada.

CHAPTER X

THE PUBLIC RESPONSE

INTRODUCTION

Leaders of both the provincial and the federal governments sought to enlist public support for their positions on the constitution. Federal politicians not only used the Parliamentary platform, but also spoke widely across the country. Despite much controversy over use of public funds for "partisan" purposes, federal advertisements supporting patriation filled the media. Provinces also pressed their case - in speeches, in legislative resolutions, and in other ways. Several - including Alberta and Saskatchewan - distributed publications outlining their positions. In addition, while it was often said that few Canadians really cared about the debate, a large number of public meetings were held, and a lively battle of the newspaper advertisements took place with various groups trying to enlist support.

PUBLIC OPINION ON THE CONSTITUTION

Various polls taken in the summer of 1980 indicated widespread public support for patriation, a charter of rights and other federal proposals. A Gallup poll taken in early July and released in early August showed that more than 75 per cent of Canadians approved of patriation, a constitutional charter of rights, a constitutional guarantee of French and English language educational rights and a constitutional commitment to sharing economic opportunity among provinces (see Table 10.1). Strong support for federal proposals was shown in all regions. Government polls taken in July and September but released in December confirmed the Gallup results and showed greater than 75 per cent support for mobility rights and for the use of French and English in the courts of Manitoba, Ontario, Quebec and New Brunswick.

The bargaining position of the federal government at the summer talks was strengthened by these results. However, later Gallup polls showed that this general support for the content of the Liberals' proposals did not necessarily translate into support for their method of implementation. A Gallup poll taken in early November and released in December showed that a majority of Canadians (58 per cent) opposed the federal government's acting to implement its Resolution without the agreement of all the provinces (See table 10.2). Opposition was strongest in the Prairies but in no region did the level of opposition drop below 50 per cent. A Gallup poll taken in late

Table 10.1 Public Opinion on the Substance of Constitutional Reform

| Question | Nat'l | All | Que. | Ont. | Prairies | B.C. |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|----------------|----------------|---------------|---------------|----------------|
| A. That Canada should have its own constitution, written and adapted by Canadians, rather than continuing to use the BNA Act of 1867. | 78 12 10 | 74 16 10 | 79 7 14 | 76 16 9 | 82 13 5 | 82 4 13 |
| B. That the constitution guarantee basic human rights to all Canadian citizens. | 91 2 7 | 96 2 2 | 83 4 13 | 93 2 5 | 95 2 3 | 95 1 4 |
| C. That where their numbers warrant, French minorities outside of Quebec, and English minorities inside of Quebec, be guaranteed the right to education in their own language. | 81 11 8 | 89 - 11 | 83 7 10 | 80 12 8 | 78 17 5 | 75 18 7 |
| D. That Canadians in all provinces agree to share their economic opportunities by means of the richer provinces helping the poorer ones. | 83 10 8 | 93 - 7 | 78 11 11 | 92 4 5 | 73 23 4 | 75 12 12 |

Source: The Gallup Report, August 6, 1980.

Table 10.2 Public Opinion on the Method of Constitutional Reform

| | | | | | | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------|----------------|----------------|----------------|----------------|----------------|
| A. Overall, would you say you approve or disapprove of the federal government acting on its own, and without unanimous approval of the provinces to bring the amended constitution home? | 27 58 15 | 18 58 23 | 28 55 17 | 35 52 13 | 18 72 10 | 21 61 18 |
| | Approve | | | | | |
| | Disapprove | | | | | |
| | Qualified/Don't know | | | | | |

Source: Winnipeg Free Press, December 10, 1980, p. 17.

November and released in January 1981 showed that few Canadians (22 per cent) wanted the UK Parliament to add a Bill of Rights to the constitution while a majority (64 per cent) favoured having changes made to the constitution only after it had been brought under Canadian control.

In his criticism of the federal government's Resolution, Joe Clark had emphasized the faults of the method of implementing it. The Conservatives thus claimed credit for the results shown by the polls. However, as early as August, a Gallup poll taken showed that few Canadians supported unilateral action by the federal government (*The Gallup Report*, September 17, 1980). This conclusion could also have been drawn from the government polls taken in July and September. They indicated that Canadians prefer a high degree of consensus on constitutional changes. Nearly 41 per cent would oppose change even if agreed to by provinces representing 50 per cent of Canada's population. A majority (59 per cent) would accept change as long as provinces with three-quarters of the population agree on it. On referenda, a majority (52 per cent) felt that a majority in each province was necessary to approve an amendment (*Globe and Mail*, December 13, 1980, p. 12).

The polls did confirm, however, Clark's sense of the Liberals' political vulnerability and he and his fellow Conservatives put the government under pressure to justify their acting contrary to public opinion. The government's response ranged from the colloquial to the cynical. Jean Chrétien argued that the process was like going to the dentist: people may not like it but it had to be done. Pierre Trudeau denied acting unilaterally and cited the support of Ontario and New Brunswick and the federal NDP. Other Liberals drew parallels with the controversy surrounding adoption of the Canadian flag. Once over with, they argued, the changes would be enthusiastically embraced, and the past acrimony forgotten. Behind all of these arguments lay the more hard-edged argument that the provinces were blocking desired reforms for their own purposes and that no further progress could be made in attaining agreement by resuming negotiations.

Editorial opinion had generally been opposed to the federal government's position and many commentators criticized the federal government for acting against public opinion. The use of poll results to buttress editorial argument clashed in some cases with editorial comment in October concerning the Trudeau government's use of polls to influence policy. At that time, the government was criticized for being overly guided by poll results and for not providing enough leadership (compare for example, *Globe and Mail*, October 21, 1980, p. 6 and *Globe and Mail*, December 11, 1980, p. 6).

Complicating the issue is the volatility of Canadian opinions regarding constitutional issues. The federal government polls taken in July after the referendum indicated that 40.2 per cent of Canadians felt that the constitution and national unity needed attention immediately. By September,

the number had dropped to 26 per cent while concern with energy issues had increased from 10 per cent to 42 per cent (*Montreal Gazette*, December 13, 1980, p. 1). The Ontario Conservatives were returned to power in the provincial general election of March 19, 1981 despite their support for federal action on the constitution. In Quebec, the Parti Québécois was returned to power on April 13, 1981 despite the defeat of their constitutional option in the May 1980 Referendum.

The use of polls to probe public opinion on constitutional issues was widespread in 1980 and there was a growing tendency of government to use such polls as aids to policy-making (see also p. 133, for polls on Western separatism). However, their significance proved to be very much a matter of interpretation and convenience.

Constituent Assemblies

One aspect of the public's response deserving special note were calls for a constituent assembly to draft proposals for constitutional reform. Opposition leader Joe Clark proposed in a speech on September 1, 1980 that a constitutional convention be set up to recommend changes to the constitution. The convention would be composed of 50 federal MP's, 48 provincial members, two territorial representatives and 10 "outstanding and qualified Canadians" (*Charlottetown Guardian*, September 2, 1980, p. 4). The convention's recommendations would be voted on in a referendum.

Press reaction to Clark's proposals was highly critical. Columnist Douglas Fisher wanted good arguments for substituting such an assembly for negotiations between federal and provincial governments, not the "shambles of a speech" which prefaced Clark's proposal (*Ottawa Citizen*, September 8, 1980, p. 8). The *Winnipeg Free Press* termed Clark's proposal an idea whose time was long past (*Winnipeg Free Press*, September 2, 1980, p. 6).

At the time, Clark's proposal was bucking an optimistic outlook on the September First Ministers' conference. When the conference ended in failure, the idea of a constituent assembly became more attractive. For example, the Positive Action Committee (representing 50,000 non-francophone Quebecers) held a "mini-colloquium" on the topic. John Lamont, a University of Winnipeg professor of law, argued for an assembly composed 50 per cent of elected delegates and 50 per cent of representatives of the eleven governments.

In late November 1980, participants at a conference organized by the Canada West Foundation in Banff, Alberta, supported the idea of a constituent assembly. Rejecting the methods used by the federal government to amend the BNA Act, the conference recommended that

1. A constituent assembly be elected by the people with equal representation from each province and territory.
2. The constituent assembly be charged with rewriting a constitution within a period of 12 months.
3. The constituent assembly report back to the people.

The participants also recommended that a petition calling for such an assembly be circulated across Canada.

The call for a constituent assembly had two basic roots. Many Canadians were frustrated by the inability of their leaders to agree on constitutional change. A constituent assembly was seen as a way around the deadlock. The matter had to be taken out of the politicians' hands and put to an assembly of persons not enmeshed in the political process. Freed from the constraints imposed by political obligations and antagonism such persons would be more likely to reach agreement on constitutional reform. The country could then get on to more pressing problems. The assumption here is that citizens are less polarized on issues than their governments.

An equally important consideration for many was the content of the federal government's Resolution and its method of implementation. Many felt that a constituent assembly would lead to a different proposal, one which reflected better the people's conception of Canadian federalism. Others, disagreeing with the process of implementation, felt that a constituent assembly would give greater legitimacy to constitutional reform and avoid sharpening conflict between the regions as the federal government's proposals were doing.

Proposals for a constituent assembly never got off the ground. Their failure can be attributed to a lack of influential political support. As historian David Bercuson observed in a paper written for the Canada West Foundation.

...Canada's political leaders have never been shy about asserting their power and prerogatives in the determination of constitutional questions. (Towards a Wider View: A Proposal for a Constitutional Convention in Canada, David J. Bercuson, November 1980, p. 13)

This applies as much to provincial as well as federal politicians. The federal government chose to proceed with its Resolution. The provincial governments opposed to the Resolution, although advocating its withdrawal,

have consistently advocated a return to the federal-provincial bargaining table not a constituent assembly. Clark's proposals seemed to be very much his own and failed to secure the support of his caucus or his party. Lacking political support, no grass roots movement in favour of a constituent assembly developed much momentum, even though the idea of a constitution "made by the people" is intuitively appealing.

Although the idea of a constituent assembly does have some appeal, it also has drawbacks. There are first the practical considerations. Who would be its delegates? Should representation be by region or by province? Should each unit be equally represented or should representation be by population? How would decisions be taken? Should a simple majority rule apply or should vetoes be given to regions, ethnic groups or language groups? The debate over issues such as these is likely to be as difficult to resolve as the constitutional issues themselves.

But there are more theoretical considerations. It must be asked whether the deadlock on constitutional reform has occurred merely because politicians are capricious individuals or because they represent real regional and national interests which are legitimately in conflict. If the latter is the case then replacing politicians by delegates to a constituent assembly would not eliminate the reasons for the deadlock. Indeed, the greatest drawback to a constituent assembly might not be that it would produce a faulty, simplistic document. Rather, it might not produce a document at all. Instead, it might also break up in disunity and disaccord over the substance of constitutional reform.

As of June 1981, the idea of a constituent assembly had not received substantial support. However, depending on the outcome of the Supreme Court decision, the idea may once again become appealing. It does seem likely however, that in any future constitutional discussion, whatever the outcome in the Supreme Court, there will be demands for greater citizen involvement, and that governments will seek to mobilize opinion in a number of forums, including perhaps, referenda.

WESTERN SEPARATISM

Grievances against the central government have long animated political discussion in the west. However, in 1980, the 75th anniversary of the entry of Alberta and Saskatchewan into Confederation, western dissatisfaction with its position in Confederation seemed to reach a new peak. The result was increased activity by western separatist groups and some evidence of growing popular support for the concept of separatism.

The immediate causes of this resurgence of western separatism included the defeat of the Conservative government late in 1979 and the election of a Liberal government on February 18, 1980. The election of the Conservatives with strong western support in May, 1979 was welcomed by westerners as an opportunity to participate more fully in the federal government than had been possible with a Liberal government whose support was based in Quebec and Ontario. This opportunity ended abruptly with the election of the Liberals on February 18. When westerners turned on their television sets that election night, they learned that a Liberal majority was inevitable, regardless of how the west voted. Later, as western results flowed in, they discovered that their alienation from the centre of political power was virtually complete. The Liberal government elected only two members west of the Ontario-Manitoba border (both in Manitoba).

Westerners' apprehension over their fate under the new Liberal government grew over the summer as the constitutional talks and the oil pricing negotiations sputtered and stalled. The level of tension was raised by the failure of the constitutional talks in September and the federal Resolution early in October. But it was the federal budget of October 28 with its oil pricing schedule and the accompanying National Energy Program which sparked public protest and a surge of separatist activity in the west.

Separatist Organizations

By the end of 1980, at least three separatist organizations had become prominent: Western Canada Federation, (West-Fed), Western Canada Concept (WCC) and the Unionest Party. West-Fed was founded by Elmer Knudsen, a millionaire Edmonton businessman, shortly after the federal election in February. West-Fed's goal is an independent western Canada comprising the four western provinces. However, it has not sought status as a political party, preferring to remain a pressure group, lobbying existing political parties to implement its proposals (Calgary Herald, December 5, 1980, p. B-6).

Coexisting on uneasy terms with West-Fed is Western Canada Concept (WCC) led by Doug Christie, a Victoria lawyer. Christie founded the separatist Western National Party in 1975, but later split from that party. Like West-Fed, WCC believes in independence for the west but, unlike West-Fed, WCC is a political party. It claims that status in BC and, at year's end, was seeking formal recognition as a party in Alberta. Its political platform includes the promise of a referendum on separation.

The Unionest Party wants separation of the west from Canada, to be followed by union with the United States. The party has two members in the Saskatchewan legislature, including its leader, Richard Collver. Both are former members of the Saskatchewan Progressive Conservative Party (Mr. Collver is a former leader of that party) and have never fought an election on the Unionest platform. The party was formed after their election as Conservatives. Mr. Collver's party has also been seeking official status as a political party in Alberta.

The Nature of the Movement

Separatism and political protest in the west have traditionally been rooted in the rural areas where they were nurtured by farmers' grievances against federal agricultural and transportation policies. This round of separatist resurgence has touched base in the rural areas but unlike previous movements has also seemed to make inroads among the urban population which fears its oil based prosperity is threatened by federal energy policy. But the movement has also tapped deeper political roots than just those feeding regional protest. Roger Gibbins, a political scientist at the University of Calgary, observed of separatist supporters that,

they are at odds with changes in Canadian society itself - bilingualism, capital punishment, free enterprise and the CBC. Separatism appeals to people who have been the ideological losers on issues in the last 20 years (Regina Leader-Post, December 22, 1980, p. 7).

Newspaper reports emphasized the anti-French, anti-Trudeau and anti-socialist tendencies displayed by separatists at meetings but a deeper cause seemed to be a sense of powerlessness with respect to national institutions (Globe and Mail, November 24, 1980, p. 11; Montreal Gazette, November 22, 1980, p. 12; Vancouver Sun, November 25, 1980, p. A-4).

Popular Support for Separatism

The extent and trend of popular support for western separatism are difficult to gauge. The movement attracted attention initially because of the size of some of its meetings. Perhaps the largest was in late November in Edmonton, Alberta where 2,500 people came to a rally.

However, it is likely that not all who attended such meetings and rallies were committed separatists. Many probably came out of curiosity. Attendance at rallies and meetings has also been uneven. Poor turnouts have occurred even after substantial publicity and hecklers have been common (*Globe and Mail*, December 13, 1980, p. 8). In terms of membership, West-Fed claims 20,000-30,000 members. Among them is Carl Nickle, a highly respected Calgary oilman whose presence in West-Fed gave the organization greater legitimacy. Western Canada Concept claims over 2,500 members. Both groups, however, admit that their support is based substantially in Alberta where the federal energy policy has caused the greatest protest.

Public opinion polls indicate that separatists form a small minority of the western population and that they are concentrated in Alberta. The most comprehensive survey of western Canadian political attitudes in the last quarter of 1980 was commissioned by the Canada West Foundation. The survey conducted one week before the federal budget indicated that when confronted with an explicit choice, 90 per cent of all westerners wished to remain part of Canada. Only 8 per cent chose options involving separation (see Table 10.3). This 8 per cent would represent about 400,000 westerners, assuming the survey to be representative. Support for separatism was highest in Alberta at 11 per cent. There was consensus that the west is ignored in national politics (see Table 10.3). Another question elicited substantial support for the belief that the west gets few benefits from Confederation and that it might as well go it alone (Table 10.3).

Other more limited surveys taken after the budget showed higher levels of support for separatism in Alberta. A poll taken two days after the budget by Calgary and Edmonton newspapers indicated that 23 per cent of Albertans supported separatism. A poll taken in the middle of November suggested 13.8 per cent of Albertans favoured separatism.

Comparison of these results with those of a poll taken shortly after the February 1980 election indicates a growth in separatist feeling. The earlier poll indicated that only 5 per cent of the Alberta population favoured separatism (*Globe and Mail*, November 27, 1980, p. 8). In general, the survey data seem to suggest that outright separatist attitudes are the tip of an iceberg of a much more pervasive discontent with the structures of power and influence in Canadian politics.

Table 10.3 : Western Political Attitudes on Separatism
and Powerlessness

A. Would you prefer that the provinces of Western Canada:

| | All West | BC | Alta. | Sask. | Man. |
|---------------------------------------------|----------|----|-------|-------|------|
| 1. Combine to form an independent country | 5 | 4 | 7 | 3 | 3 |
| 2. Join the United States as separate state | 3 | 2 | 4 | 2 | 3 |
| 3. Remain part of Canada | 90 | 92 | 85 | 94 | 91 |
| 4. Other | 1 | 1 | 2 | 0 | 1 |
| 5. Don't know/No opinion | 2 | 2 | 3 | 1 | 2 |

B. The West usually gets ignored in national politics because the political parties depend upon Quebec and Ontario for most of their votes.

| | | | | | |
|----------------------|----|----|----|----|----|
| 1) Agree strongly | 32 | 32 | 29 | 32 | 40 |
| 2) Agree | 52 | 53 | 55 | 55 | 43 |
| 3) Disagree | 10 | 11 | 10 | 8 | 9 |
| 4) Disagree strongly | 1 | 1 | 1 | 3 | 1 |
| 5) Don't know | 4 | 3 | 5 | 2 | 7 |

C. Western Canadians get so few benefits from being part of Canada that they might as well go it on their own.

| | | | | | |
|----------------------|----|----|----|----|----|
| 1) Agree strongly | 4 | 6 | 3 | 2 | 6 |
| 2) Agree | 24 | 23 | 27 | 23 | 19 |
| 3) Disagree | 47 | 45 | 53 | 58 | 42 |
| 4) Disagree strongly | 18 | 22 | 7 | 21 | 26 |
| 5) Don't know | 7 | 5 | 11 | 6 | 7 |

Source: Canada West Foundation, Public Opinion Update, October, 1980.

The Federalist Response

Prime Minister Trudeau dismissed the growth of separatism and said chances for separation were "nil". He described its supporters as "hysterical" and as "blackmailers" (*Montreal Gazette*, November 27, 1980, p. 9). Editorialists were more concerned about the threat to the country posed by the separatist movement, and criticized the Prime Minister for underestimating the depth of western feelings of alienation (*Montreal Gazette*, November 27, 1980, p. 9). They pointed to his long standing difficulties in coming to terms with the west and, as proof of his indifference, quoted him as saying "I came to Ottawa to save Quebec. Somebody else is going to have to save the west" (*Ottawa Citizen*, October 16, 1980, p. 8; *MacLean's*, December 1, 1980, p. 27).

Some western separatists looked to Premier Lougheed as a potential leader of their movement. But Lougheed was unequivocal: "I don't agree with their position and never will," he told reporters. Nevertheless, he said, Canadians must understand the anger and frustration which have generated the movement.

I believe it is important for those of us who are in positions of responsibility to be as calm and cool (and it is not easy) as possible in these difficult months. I know by instinct what the people of this province want - they want to play an ever greater role in Canada.... What they really want - the people I am elected to represent - is to play a larger, positive and constructive role in Confederation, and all they ask is fairness and equity in return (*Speech to Canada West Foundation*, November 29, 1980).

The growth of the separatist movement put Premier Lougheed and the Alberta Conservative party in an awkward political position. He needed a strong political base to conduct his fight against Ottawa. To denounce supporters of separatism too vehemently could alienate them from his leadership, and run the risk of encouraging their more active support for a separatist political party. But to fail to oppose separation could disappoint the more moderate supporters of his party. In the end, Lougheed stated his support for Confederation but tempered his position by saying he understood the anger and frustration motivating those attending separatist meetings (*Globe and Mail*, November 22, 1980, p. 13).

Other western federalists mobilized against separatism. On December 1, 1980, Alberta NDP leader Grant Notley announced that he would tour the province speaking on behalf of Canadian unity (*Globe and Mail*, December 1, 1980). Edmonton publisher Mel Hurtig undertook to organize a pro-Canada Association to show "that the overwhelming majority of Albertans oppose separation strongly; and to provide a vehicle to demonstrate their faith in Alberta" (*Edmonton Journal*, December 1, 1980, p. C-2).

THE FUTURE OF THE MOVEMENT

Towards the end of 1980, some analysts were arguing that the growth of western separatist sentiment was tapering off (*Globe and Mail*, December 13, 1980, p. 8; *Regina-Leader - Post*, December 22, 1980, p. 7). According to these analyses, the movement was failing to gain and hold support among urban populations. It had not provided an attractive set of policies on issues other than separatism. Some observers argued that the movement's "right wing" position on social and political issues hindered its spread to other segments of the population not sharing a similar discontent with current trends in public policy. The movement had not expanded its base of support outside Alberta. This discouraged many who felt separatism would work only if the result was a western Canadian nation and not just an independent Alberta. Failing some resolution of these difficulties, separatism seems condemned to remain a fringe movement. Indeed, by the end of 1980, western entrepreneurs were exploiting the satiric potential of the movement. Quick to hit the novelty market were bogus bilingual Alberta passports (English and Ukrainian) and buttons bearing slogans like "Vive Alberta Libre".

Premier Blakeney of Saskatchewan warned, however, that the root causes of alienation in the west remained and that separatist groups would likely flourish in 1981 as a result (*Montreal Gazette*, December 30, 1980, p. 8). Others argued that millions of dollars of oil money being generated in the west could be harnessed to the separatist cause by a charismatic leader which the separatist movement currently lacked (*Vancouver Sun*, November 27, 1980, p. A-6; *Globe and Mail*, December 1, 1980).

Further federal-provincial conflict over the constitution, energy pricing and development and the renegotiation of the Federal-Provincial and Fiscal Arrangements and Established Programs Financing Act could fuel western separatism whereas some resolution of these issues responsive to western interests could assuage the protest. In the longer run, reform of some of the country's central political institutions could increase the west's sense of participation in the governing of the country. Nevertheless, the polarization of economic and political interests in the country suggests that the political will to reach accommodation must be present if reform is to have its desired effect. In the absence of such political will, western separatism may continue to be a prominent part of Canada's pattern of political conflict in the coming years.

CHAPTER XI

STRUGGLE OVER THE CONSTITUTION: SOME OBSERVATIONS

The story chronicled here remains unfinished. As this book goes to press, the justices of the Supreme Court are considering their judgement on the federal government's Resolution. "Their decision will be a vital factor in the future course of events. If the Court decides in favour of the legality of the Resolution, its adoption in Canada and Britain will be virtually assured, although debate on its merits will continue. If the court finds the Resolution illegal, we return to the impasse of September 1980, with no indication of whether the participants wish to reopen the debate, let alone bring it to a conclusion." (Page

While the debate has yet to conclude, it has illuminated several important aspects of the politics of constitution-making. The process in 1980 and 1981 differed from earlier episodes of constitutional discussion, and opened it up to new forces.

First, the idea of popular participation in constitutional choice through referenda became prominent. The Quebec referendum gave citizens the opportunity to speak directly on their constitutional future through the ballot box. The federal government chose to include a referendum procedure for future constitutional amendment as a centerpiece of its Resolution. The use of referenda for settling intergovernmental disputes raises a number of questions hotly debated over the past 18 months. Some were procedural in nature: who should be able to initiate referenda and determine the question and rules of procedure; what sorts of majorities are required for passage? Others debated the nature of democracy in Canada: does fundamental constitutional change require direct democracy through referenda; what role is there for elected representatives?

Second, apart from referenda, the recent experience led to heightened popular participation in a number of other ways. Following failure of the First Ministers' Conference, many voices called for a constituent assembly to settle issues which the politicians had been unable or unwilling to resolve. The Parliamentary committee on the constitution provided a platform for numerous groups to air their concerns about constitutional change which often differed from those issues which dominated the intergovernmental bargaining. While constitution-making was still a majority concern, a vocal constituency for change, especially concerning the Charter of Rights, was created. Several provinces established legislative committees on the constitution, passed resolutions concerning it. Governments extended greater efforts to mobilize popular support,

through advertising and speaking tours. Now that citizens have been involved, future constitutional discussions will have to take these expectations for participation into consideration.

Third, past constitutional discussion never went beyond the inter-governmental arena and conflict was essentially between the federal and provincial governments, rather than between parties. The process in 1980 and 1981, however, led to sharper partisan division on the constitution than in the past, and to internal tensions within the major parties. While Liberals and Conservatives have differed in their approach to issues of federalism before, the conflict was more pointed, as the Tories led the opposition in Parliament. Coordinating their activities with those of the dissenting provinces proved difficult on a number of occasions despite their common political affiliation. The Ontario and national Conservatives were sharply divided on the issue. The NDP, following the traditional social democratic predilection for a strong national government, supported the Resolution at the cost of great regional tension; several members of the caucus broke with the party and the national party was pitted against the only elected NDP government.

Fourth, the events of 1980-81 illustrated some of the tensions between parliamentary government and federalism. Does the sovereignty of Parliament in Ottawa imply that its definition of the national interest on fundamental questions as spelled out by a majority government must eventually prevail, as implied by the federal government? Or is Parliament's sovereignty inherently limited in a federal system? The dynamics of the debate in the First Ministers' Conference and Parliament were quite distinct, yet each reflected a legitimate element of representation. No mechanism exists to bring the two forums together if indeed they are compatible.

Fifth, the debate not only revealed the clash between competing ideologies of federalism, but also their intimate links to other, more concrete, conflicts over power and wealth in Canada. In particular, the constitutional debate was profoundly influenced by westerners' sense of powerlessness in national institutions, and by continuing regional and intergovernmental conflict over issues such as energy. Neither debate can be considered in isolation.

Sixth, conflict over the constitution showed that Canadians are deeply divided on some basic characteristics of their political system. Power politics were mingled with important issues in political philosophy concerning representation, community and legitimacy. What is the legitimate process of constitutional change? Whose consent is necessary? None of the contending mechanisms commended complete support. It was simultaneously a debate about how to change the constitution and what changes to make.

It is impossible to predict what the long-run consequences of the events summarized here will be - especially as we cannot know the outcome of the present federal initiative. It may be, as its proponents hope, that passage of the Resolution and achievement of patriation will eventually unite the country and build a stronger identity with the whole Canadian community. It may be, as its opponents fear, that the experience will drive a deeper wedge between regions and governments.

In the short run, the tension and mistrust between governments seems never to have been as intense. That may make it much more difficult for governments to cooperate on a host of other questions, bringing the federal system to a standstill. That, in turn, is likely to frustrate policy-making on matters which many Canadians feel are more important than the Constitution. In the longer run, the debate has undermined the legitimacy of the existing constitution, while not providing a replacement. The legitimacy of the revised constitution proposed by the federal government may itself be tainted in the minds of many by the circumstances of its birth.

We can be sure that, climactic as many of the events described here seemed to be, they were neither the beginning nor the end of the long-running debate over the constitution. Whatever happens to the Resolution, many issues remain unresolved. The constitution will continue to be the point on which the conflict and contradictions of Canadian politics are focussed.

PART IV

CHAPTER XII

POLITICAL DEVELOPMENT IN THE NORTHWEST TERRITORIES

In recent years, the Yukon and Northwest Territories have consistently pressed for greater powers as part of their general campaign in pursuit of provincial status within Confederation. As a result of changes introduced by the Conservatives in 1979 which reduced the powers of the territorial commissioner, the Yukon has made great progress toward this goal. It now has an effective form of responsible self-government, long considered an essential prerequisite for provincial status. Political development in the Northwest Territories has been slower but seems likely to accelerate now that the report of the Special Representative of the Prime Minister for Constitutional Development in the Northwest Territories has been completed. However, such development may be complicated by native land claims whose settlement could become a bargaining point in the debate over the territory's constitutional status. (The Special Representative was prohibited from making recommendations on land claims). The stakes in this debate are increased by the presence of substantial gas, oil, uranium and other mineral resources in the NWT and the pressure from the petroleum and mining industries to speed up the exploitation of these resources.

THE REPORT OF THE SPECIAL REPRESENTATIVE

On August 2, 1977, an order in council appointed the Honourable C.M. (Bud) Drury as Special Representative of the Prime Minister for Constitutional Development in the Northwest Territories. His terms of reference directed him to consider "specific measures modifying and improving the existing structures, institutions and systems of government in the Northwest Territories" and to report back to the government so that it may take decisions relating to the territory's constitutional development at the earliest possible date.

On December 12, 1979, Bud Drury delivered his report to Prime Minister Clark. Constitutional Development in the Northwest Territories dealt with a wide variety of concerns ranging from community development to public finance. Portions of the report specifically concerned federal-territorial relations. The report observed that there had been a general drift towards the conventional model of federal-provincial relations. However, the extent of federal control over territorial affairs was still inconsistent with fully responsible government.

LIST OF APPENDICES

| Appendix | page |
|------------------------------------------------------------------------------------|------|
| A. A Short Guide to Quebec's Referendum Act | A-1 |
| B. The Federal Government's Resolution | B-1 |
| C. Final Amendments Proposed by the three Parliamentary Parties, April 22, 1981 | C-1 |
| D. The Dissenting Provinces Constitutional Accord | D-1 |

APPENDIX A

A Short Guide to Quebec's Referendum Act (assented to on June 23, 1978 as Bill 92: Referendum Act)

The Referendum Process

The process of holding a referendum on a particular subject begins when the premier introduces a question to the National Assembly and asks that it be approved. (A slightly different process is followed when a bill of the Assembly is to be the subject of the referendum. Ballots are to be in English, French and, where applicable, in native languages.

Within three days after the adoption of the question, the secretary-general of the Assembly notifies each Assembly member that over the next seven days, he may register with the Director-General of Elections as a supporter of one of the options of the referendum. All registered members form the 'provisional' committees in favour of the options. As soon as possible after their formation, the provisional committees are summoned to a meeting with the Director-General of Elections where they adopt the by-laws which are to govern the operation of the official 'national' committees and name their chairmen. The committees then await the issuing of the referendum writs.

The date for the referendum is officially determined when referendum writs are issued. However, twenty days must pass from the date the question is approved before writs can be issued by government. This interval is to allow the provisional committees to organize the 'national committees' whose membership is not necessarily restricted to members of the National Assembly.

Once the writs are issued, there follows a 'referendum period' which must last at least 28 days in some cases and at least 35 in others. In any case, the period cannot last more than 60 days.

Referendum Campaign Rules

With few exceptions, all campaign expenditures are regulated. All regulated expenditures are to be either incurred or authorized by an agent of one or the other national committee. The agent is to ensure that total expenses for his committee do not in total exceed 50 cents per elector. A limit of \$3,000 is imposed on a voter's contribution. Volunteer work is not charged as an expense. Government subsidies to each option are allowed as long as the amounts given are the same.

Irregularities in the referendum process are to be brought before a referendum council composed of three provincial court judges. On matters of substance, its decisions are final and without approval. Some appeals on questions of law are allowed to the Court of Appeal.

The results of the referendum may be contested up to fifteen days after the vote. However, the council is to receive and consider the contestation only if the alleged facts show that the result of the referendum would have been changed.



Department of Justice
Ministère de la Justice

Consolidation of proposed constitutional resolution tabled by the Minister of Justice in the House of Commons on February 13, 1981 with the amendments approved by the House of Commons on April 23, 1981 and by the Senate on April 24, 1981

Text of proposed constitutional resolution filed by the Deputy Attorney General of Canada with the Supreme Court of Canada on April 24, 1981

THAT, WHEREAS in the past certain amendments to the Constitution of Canada have been made by the Parliament of the United Kingdom at the request and with the consent of Canada;

AND WHEREAS it is in accord with the status of Canada as an independent state that Canadians be able to amend their Constitution in Canada in all respects;

AND WHEREAS it is also desirable to provide in the Constitution of Canada for the recognition of certain fundamental rights and freedoms and to make other amendments to that Constitution;

A respectful address be presented to Her Majesty the Queen in the following words:

To the Queen's Most Excellent Majesty:
Most Gracious Sovereign:

We, Your Majesty's loyal subjects, the House of Commons of Canada in Parliament assembled, respectfully approach Your Majesty, requesting that you may graciously be pleased to cause to be laid before the Parliament of the United Kingdom a measure containing the recitals and clauses hereinafter set forth:

SCHEDULE A

An Act to give effect to a request by the Senate and House of Commons of Canada

Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The *Constitution Act, 1981* set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act.

Constitution Act, 1981
enacted

APPENDIX B

THE FEDERAL GOVERNMENT'S RESOLUTION (Abridged)

Note: Schedule I of the proposed Constitution Act is not included in this abridged version of the federal government's Resolution. Schedule I lists the various Acts and Orders-in-Council of the Canadian and British Parliaments which are to be consolidated into a modernized constitution. The text of the Resolution, however, has been reproduced in its entirety.

2. No Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1981* comes into force shall extend to Canada as part of its law.

3. So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.

4. This Act may be cited as the *Canada Act*.

SCHEDULE B CONSTITUTION ACT, 1981

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

Democratic Rights

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House

of Commons or the legislative assembly, as the case may be.

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Mobility Rights

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

- (a) to move to and take up residence in any province; and
- (b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

- (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
- (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention

- (a) to be informed promptly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right; and
- (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

11. A person charged with an offence has the right

- (a) to be informed without unreasonable delay of the specific offence;
- (b) to be tried within a reasonable time;
- (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Official Languages of Canada

Official languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official languages of New Brunswick

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement of status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

Proceedings of Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

Proceedings of New Brunswick legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

Parliamentary statutes and records

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

New Brunswick statutes and records

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

Proceedings in courts established by Parliament

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

Proceedings in New Brunswick courts

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

Communications by public with federal institutions

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Communications by public with New Brunswick institutions

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

Continuation of existing constitutional provisions

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

Rights and privileges preserved

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

Language of instruction

23. (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

Continuity of language instruction

Application where numbers warrant

Enforcement of guaranteed rights and freedoms

Exclusion of evidence bringing administration of justice into disrepute

Aboriginal rights and freedoms not affected by Charter

Other rights and freedoms not affected by Charter

Multicultural heritage

Rights guaranteed equally to both sexes

Rights respecting certain schools preserved

Application to territories and territorial authorities

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include

a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

Legislative powers not extended

31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

Application of Charter

32. (1) This Charter applies

(a) to the Parliament and government of Canada and to all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province and to all matters within the authority of the legislature of each province.

Exception

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this Act, except Part VI, comes into force.

Citation

Citation

33. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of aboriginal and treaty rights

34. (1) The aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "aboriginal peoples of Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

PART III

EQUALIZATION AND REGIONAL DISPARITIES

Commitment to promote equal opportunities

35. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

- (a) promoting equal opportunities for the well-being of Canadians;
- (b) furthering economic development to reduce disparity in opportunities; and
- (c) providing essential public services of reasonable quality to all Canadians.

Commitment respecting public services

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

PART IV

CONSTITUTIONAL CONFERENCES

Constitutional conferences

36. (1) Until Part VI comes into force, a constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada at least once in every year.

Participation of aboriginal peoples

(2) A conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

Participation of territories

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

Provincial alternative procedure

PART V

INTERIM AMENDMENT PROCEDURE AND RULES FOR ITS REPLACEMENT

Procedure for perfecting alternative

37. Until Part VI comes into force, an amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by resolutions of the Senate and House of Commons and by the legislative assembly or government of each province.

Referendum

38. Until Part VI comes into force, an amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by resolutions of the Senate and House of Commons and by the legislative assembly or government of each province to which the amendment applies.

39. (1) Notwithstanding section 41, an amendment to the Constitution of Canada

(a) adding a province as a province named in subsection 16(2), 17(2), 18(2), 19(2) or 20(2), or

(b) otherwise providing for any or all of the rights guaranteed or obligations imposed by any of those subsections to have application in a province to the extent and under the conditions stated in the amendment,

may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by resolutions of the Senate and House of Commons and the legislative assembly of the province to which the amendment applies.

(2) The procedure for amendment prescribed by subsection (1) may be initiated only by the legislative assembly of the province to which the amendment applies.

Coming into force of Part VI where referendum held

40. (1) The procedures for amendment prescribed by sections 37 and 38 may be initiated either by the Senate or House of Commons or by the legislative assembly or government of a province.

(2) A resolution made or other authorization given for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

Right to vote

Establishment of Referendum Rules Commission

41. Sections 37 and 38 do not apply to an amendment to the Constitution of Canada where there is another provision in the Constitution for making the amendment, but the procedure prescribed by section 37 shall be used to amend the *Canadian Charter of Rights and Freedoms* and any provision for amending the Constitution, including this section.

42. Part VI shall come into force

(a) with or without amendment, on such day as may be fixed by proclamation issued pursuant to the procedure prescribed by section 37, or

(b) on the day that is two years after the day this Act, except Part VI, comes into force,

whichever is the earlier day but, if a referen-

dum is required to be held under subsection 43(3), Part VI shall come into force as provided in section 44.

43. (1) The legislative assemblies of seven or more provinces that have, according to the then latest general census, combined populations of at least eighty per cent of the population of all the provinces may make a single proposal to substitute for paragraph 46(1)(b) such alternative as they consider appropriate.

(2) One copy of an alternative proposed under subsection (1) may be deposited with the Chief Electoral Officer of Canada by each proposing province within two years after this Act, except Part VI, comes into force but, prior to the expiration of that period, any province that has deposited a copy may withdraw that copy.

(3) Where copies of an alternative have been deposited as provided by subsection (2) and, on the day that is two years after this Act, except Part VI, comes into force, at least seven copies remain deposited by provinces that have, according to the then latest general census, combined populations of at least eighty per cent of the population of all the provinces, the government of Canada shall cause a referendum to be held within two years after that day to determine whether

(a) paragraph 46(1)(b) or any alternative thereto approved by resolutions of the Senate and House of Commons and deposited with the Chief Electoral Officer at least ninety days prior to the day on which the referendum is held, or

(b) the alternative proposed by the provinces, shall be adopted.

44. Where a referendum is held under subsection 43(3), a proclamation under the Great Seal of Canada shall be issued within six months after the date of the referendum bringing Part VI into force with such modifications, if any, as are necessary to incorporate the proposal approved by a majority of the persons voting at the referendum and with such other changes as are reasonably consequential on the incorporation of that proposal.

45. (1) Every citizen of Canada has, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society, the right to vote in a referendum held under subsection 43(3).

(2) If a referendum is required to be held under subsection 43(3), a Referendum Rules Commission shall forthwith be established by commission issued under the Great Seal of Canada consisting of

- (a) the Chief Electoral Officer of Canada, who shall be chairman of the Commission;
- (b) a person appointed by the Governor General in Council; and
- (c) a person appointed by the Governor General in Council

(i) on the recommendation of the governments of a majority of the provinces, or

(ii) if the governments of a majority of the provinces do not recommend a candidate within thirty days after the Chief Electoral Officer of Canada requests such a recommendation, on the recommendation of the Chief Justice of Canada from among persons recommended by the governments of the provinces within thirty days after the expira-

tion of the first mentioned thirty day period or, if none are so recommended, from among such persons as the Chief Justice considers qualified.

Duty of Commission

(3) A Referendum Rules Commission shall cause rules for the holding of a referendum under subsection 43(3) approved by a majority of the Commission to be laid before Parliament within sixty days after the Commission is established or, if Parliament is not then sitting, on any of the first ten days next thereafter that Parliament is sitting.

Authorization of referendum

Rules for referendum

(4) Subject to subsection (1) and taking into consideration any rules approved by a Referendum Rules Commission in accordance with subsection (3), Parliament may enact laws respecting the rules applicable to the holding of a referendum under subsection 43(3).

Proclamation

(5) If Parliament does not enact laws under subsection (4) respecting the rules applicable to the holding of a referendum within sixty days after receipt of a recommendation from a Referendum Rules Commission, the rules recommended by the Commission shall forthwith be brought into force by proclamation issued by the Governor General under the Great Seal of Canada.

Time limit for referendum

Computation of period

(6) Any period when Parliament is prorogued or dissolved shall not be counted in computing the sixty day period referred to in subsection (5).

Rules to have force of law

(7) Subject to subsection (1), rules made under this section have the force of law and prevail over other laws made under the Constitution of Canada to the extent of any inconsistency.

Amendment of provisions relating to some but not all provinces

PART VI

PROCEDURE FOR AMENDING CONSTITUTION OF CANADA

General procedure for amending Constitution of Canada

46. (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

(a) resolutions of the Senate and House of Commons; and

(b) resolutions of the legislative assemblies of at least a majority of the provinces that includes

(i) every province that at any time before the issue of the proclamation had, according to any previous general census, a population of at least twenty-five per cent of the population of Canada,

(ii) two or more of the Atlantic provinces; and

(iii) two or more of the Western provinces.

Amendments respecting certain language rights

Initiation of amendment procedure

Initiation of amendment procedures

Definitions

"Atlantic provinces"

"Atlantic provinces" means the provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland;

"Western provinces"

"Western provinces" means the provinces of Manitoba, British Columbia, Saskatchewan and Alberta.

Revocation of authorization

Amendment authorized by referendum

47. (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by a referendum held throughout Canada under subsection (2) at which

(a) a majority of persons voting thereat, and

(b) a majority of persons voting thereat in each of the provinces, resolutions of the

Right to vote

Establishment of Referendum Rules Commission

legislative assemblies of which would be sufficient, together with resolutions of the Senate and House of Commons, to authorize the issue of a proclamation under subsection 46(1),

have approved the making of the amendment.

(2) A referendum referred to in subsection (1) shall be held where directed by proclamation issued by the Governor General under the Great Seal of Canada, which proclamation may be issued where

(a) an amendment to the Constitution of Canada has been authorized under paragraph 46(1)(a) by resolutions of the Senate and House of Commons;

(b) the requirements of paragraph 46(1)(b) in respect of the proposed amendment have not been satisfied within twelve months after the passage of the resolutions of the Senate and House of Commons; and

(c) the issue of the proclamation has been authorized by the Governor General in Council.

Duty of Commission

(3) A proclamation issued under subsection (2) in respect of a referendum shall provide for the referendum to be held within two years after the expiration of the twelve month period referred to in paragraph (b) of that subsection.

Rules for referendum

48. An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

Proclamation

49. (1) Notwithstanding section 55, an amendment to the Constitution of Canada

(a) adding a province as a province named in subsection 16(2), 17(2), 18(2), 19(2) or 20(2); or

(b) otherwise providing for any or all of the rights guaranteed or obligations imposed by any of those subsections to have application in a province to the extent

Computation of period

and under the conditions stated in the amendment,

may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by resolutions of the Senate and House of Commons and the legislative assembly of the province to which the amendment applies.

Rules to have force of law

(2) The procedure for amendment prescribed by subsection (1) may be initiated only by the legislative assembly of the province to which the amendment applies.

Limitation on use of general amendment procedure

50. (1) The procedures for amendment prescribed by subsection 46(1) and section 48 may be initiated either by the Senate or House of Commons or by the legislative assembly of a province.

Idem

(2) A resolution made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

Amendments by Parliament

51. (1) Every citizen of Canada has, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society, the right to vote in a referendum held under section 47.

Amendments by provincial legislatures

(2) Where a referendum is to be held under section 47, a Referendum Rules Commission shall forthwith be established by commission issued under the Great Seal of

Matters requiring amendment under general amendment procedure

Canada consisting of

(a) the Chief Electoral Officer of Canada, who shall be chairman of the Commission;

(b) a person appointed by the Governor General in Council; and

(c) a person appointed by the Governor General in Council

(i) on the recommendation of the governments of a majority of the provinces, or

(ii) if the governments of a majority of the provinces do not recommend a candidate within thirty days after the Chief Electoral Officer of Canada requests such a recommendation, on the recommendation of the Chief Justice of Canada from among persons recommended by the governments of the provinces within thirty days after the expiration of the first mentioned thirty day period or, if none are so recommended, from among such persons as the Chief Justice considers qualified.

(3) A Referendum Rules Commission shall cause rules for the holding of a referendum under section 47 approved by a majority of the Commission to be laid before Parliament within sixty days after the Commission is established or, if Parliament is not then sitting, on any of the first ten days next thereafter that Parliament is sitting.

(4) Subject to subsection (1) and taking into consideration any rules approved by a Referendum Rules Commission in accordance with subsection (3), Parliament may enact laws respecting the rules applicable to the holding of a referendum under section 47.

(5) If Parliament does not enact laws under subsection (4) respecting the rules applicable to the holding of a referendum within sixty days after receipt of a recommendation from a Referendum Rules Commission, the rules recommended by the Commission shall forthwith be brought into force by proclamation issued by the Governor General under the Great Seal of Canada.

(6) Any period when Parliament is prorogued or dissolved shall not be counted in computing the sixty day period referred to in subsection (5).

(7) Subject to subsection (1), rules made under this section have the force of law and prevail over other laws made under the Constitution of Canada to the extent of any inconsistency.

52. (1) The procedures prescribed by section 46, 47 or 48 do not apply to an amendment to the Constitution of Canada where there is another provision in the Constitution for making the amendment, but the procedures prescribed by section 46 or 47 shall, nevertheless, be used to amend any provision for amending the Constitution, including this section.

(2) The procedures prescribed by section 46 or 47 do not apply in respect of an amendment referred to in section 48.

53. Subject to section 55, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate or House of Commons.

54. Subject to section 55, the legislature of each province may exclusively make laws amending the constitution of the province.

55. An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with a procedure prescribed by section 46 or 47:

(a) the office of the Queen, the Governor

General and the Lieutenant Governor of a province;

(b) the *Canadian Charter of Rights and Freedoms*;

(c) the rights of the aboriginal peoples of Canada set out in Part II;

(d) the commitments relating to equalization and regional disparities set out in section 35;

(e) the powers of the Senate;

(f) the number of members by which a province is entitled to be represented in the Senate;

(g) the method of selecting Senators and the residence qualifications of Senators;

(h) the right of a province to a number of members in the House of Commons not less than the number of Senators representing the province; and

(i) the principles of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada.

Consequential amendments

56. (1) Class 1 of section 91 and class 1 of section 92 of the *Constitution Act, 1867* (formerly named the *British North America Act, 1867*), the *British North America (No. 2) Act, 1949*, referred to in item 22 of Schedule I to this Act and Parts IV and V of this Act are repealed.

Idem

(2) When Parts IV and V of this Act are repealed, this section may be repealed and this Act may be renumbered, consequential upon the repeal of those Parts and this section, by proclamation issued by the Governor General under the Great Seal of Canada.

"Primary production"

Existing powers or rights

Idem

PART VII

AMENDMENT TO THE CONSTITUTION ACT, 1867

Amendment to Constitution Act, 1867

57. The *Constitution Act, 1867* (formerly named the *British North America Act, 1867*) is amended by adding thereto, immediately after section 92 thereof, the following heading and section:

"Non-Renewable Natural Resources, Forestry Resources and Electrical Energy"

Laws respecting non-renewable natural resources, forestry resources and electrical energy

92A. (1) In each province, the legislature may exclusively make laws in relation to

(a) exploration for non-renewable natural resources in the province;

(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

Export from provinces of resources

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

Primacy of Constitution of Canada

Constitution of Canada

Authority of Parliament

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

Consequential amendments

(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom; and

(b) sites and facilities in the province for the generation of electrical energy and the production therefrom,

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

French version of Constitution of Canada

(5) The expression "primary production" has the meaning assigned by the Sixth Schedule.

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section."

English and French versions of certain constitutional texts

58. The said Act is further amended by adding thereto the following Schedule:

"THE SIXTH SCHEDULE

Primary Production from Non-Renewable Natural Resources and Forestry Resources

English and French versions of this Act

1. For the purposes of section 92A of this Act,

Commencement

(a) production from a non-renewable natural resource is primary production therefrom if

Exception

(i) it is in the form in which it exists upon its recovery or severance from its natural state, or

(ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil; and

Short title and citations

(b) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood."

PART VIII

GENERAL

59. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes

(a) the *Canada Act*;

(b) the Acts and orders referred to in Schedule I; and

(c) any amendment to any Act or order referred to in paragraph (a) or (b).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Amendments to Constitution of Canada

60. (1) The enactments referred to in Column I of Schedule I are hereby repealed or amended to the extent indicated in Column II thereof and, unless repealed, shall continue as law in Canada under the names set out in Column III thereof.

(2) Every enactment, except the *Canada Act*, that refers to an enactment referred to in Schedule I by the name in Column I thereof is hereby amended by substituting for that name the corresponding name in Column III thereof, and any British North America Act not referred to in Schedule I may be cited as the *Constitution Act* followed by the year and number, if any, of its enactment.

61. A French version of the portions of the Constitution of Canada referred to in Schedule I shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada.

62. Where any portion of the Constitution of Canada has been or is enacted in English and French or where a French version of any portion of the Constitution is enacted pursuant to section 61, the English and French versions of that portion of the Constitution are equally authoritative.

63. The English and French versions of this Act are equally authoritative.

64. Subject to section 65, this Act shall come into force on a day to be fixed by proclamation issued by the Governor General under the Great Seal of Canada.

65. Part VI shall come into force as provided in Part V.

66. This Schedule may be cited as the *Constitution Act, 1981*, and the Constitution Acts 1867 to 1975 (No. 2) and this Act may be cited together as the *Constitution Acts, 1867 to 1981*.

APPENDIX C

FINAL AMENDMENTS PROPOSED BY
THE THREE PARLIAMENTARY PARTIES

SOURCE: Order Papers and Notices,
House of Commons, Volume 124, Num-
ber 186, 1st Session, 32nd Parlia-
ment Wednesday, April 22, 1981.

**NOTICES OF AMENDMENTS TO THE
MOTION OF THE MINISTER OF
JUSTICE RESPECTING THE
CONSTITUTION OF CANADA
PURSUANT TO ORDER ADOPTED
WEDNESDAY, APRIL 8, 1981.**

April 21, 1981—That the proposed *Constitution Act, 1981* be amended by

(a) adding immediately after line 40 on page 9 the following section:

"28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

(b) renumbering the subsequent clauses accordingly;

(c) adding to clause 54 immediately after line 20 on page 20 the following paragraph:

"(c) the rights of the aboriginal peoples of Canada set out in Part II;" and

(d) relettering paragraphs (c) to (h) of clause 54 as paragraphs (d) to (i).—*Mr. Knowles.*

April 21, 1981—That Motion Number 36 in the name of the Minister of Justice, be amended as follows:

(a) by deleting Clause 1 of Part I and substituting the following therefor:

"1. Affirming that

(a) the Canadian nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free individuals and free institutions, and

(b) individuals and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law,

the *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

(b) by deleting Clause 7 of Part I and substituting the following therefor:

"7. Everyone has the right to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

(c) by adding after Clause 27 of Part I the following new Clause:

"28. Notwithstanding anything in this Charter, the rights and freedoms set out in it are guaranteed equally to male and female persons."

(d) by adding after new Clause 28 of Part I the following new Clause:

"29. Nothing in this Charter affects the authority of Parliament to legislate in respect of abortion and capital punishment."

(e) by deleting Clause 35 of Part IV and substituting the following therefor:

"35. (1) No later than two months after the coming into force of this Act, the Prime Minister of Canada and the first ministers of the provinces shall constitute a permanent conference to be designated the "Constitutional Conference of Canada" hereinafter referred to as the "Conference".

(2) The Conference shall examine all Canadian constitutional laws and propose amendments necessary for the development of the Canadian federation.

(3) A Conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification

and definition of the rights of those peoples to be included in the Constitution of Canada and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

(4) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a Conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

(5) The Conference shall meet at least twice each year.

(6) The Conference shall be assisted by the Continuing Committee of Ministers on the Constitution."

(f) by deleting Part V.

(g) by deleting Clause 45 of Part VI and substituting the following therefor:

"45. (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

(a) resolutions of the Senate and House of Commons; and

(b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have in the aggregate, according to the then latest decennial census, at least fifty per cent of the population of all the provinces.

(2) Any amendment made under subsection (1) derogating from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province shall require a resolution supported by a vote of a majority of the members of each of the Senate, of the House of Commons, and of the requisite number of legislative assemblies.

(3) Any amendment made under subsection (1) derogating from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province shall not have effect, financially or otherwise, in and for any province whose legislative assembly has expressed its dissent thereto by resolution supported by a majority of the members prior to the issue of the proclamation, provided, however, that the legislative assembly, by resolution supported by a majority of the members, may subsequently withdraw its dissent and approve the amendment.

(4) The provisions of subsections (2) and (3) do not apply to the *Canadian Charter of Rights and Freedoms*."

(h) by adding after Clause 48 of Part VI the following new Clause:

"49. An amendment to the Constitution of Canada may be made by proclamation under section 45 or section 47, as appropriate, without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the passage by the House of Commons of a resolution authorizing its issue, the Senate has not passed such a resolution and if, at any time after the expiration of those one hundred and eighty days, the House of Commons again passes the resolution."

(i) by deleting Clause 49 of Part VI and substituting the following therefor:

"49. (1) The procedures for amendment prescribed by subsection 45(1) and section 47 may be initiated

by either the Senate or House of Commons or by the legislative assembly of a province.

(2) A resolution authorizing an amendment made for the purposes of this Part may be revoked at any time before the issue of a proclamation.

(3) A resolution of dissent made for the purposes of this Part may be revoked at any time before or after the issue of a proclamation."

(j) by deleting Clause 54 of Part VI and substituting the following therefor:

"54. An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with the procedure prescribed by section 45(1):

(a) *The Canadian Charter of Rights and Freedoms*;

(b) the commitments relating to equalization and regional disparities set out in section 34;

(c) the powers of the Senate;

(d) the number of members by which a province is entitled to be represented in the Senate;

(e) the method of selecting Senators and the residence qualifications of Senators; and

(f) the principles of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada."

(k) by adding after Clause 54 of Part VI the following new Clause:

"55. An amendment to the Constitution of Canada in relation to the following matters may be made only by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by resolutions of the Senate and the House of Commons and by the legislative assembly of each province:

(a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(b) the right of a province to a number of members in the House of Commons not less than the numbers of Senators representing the province; and

(c) any of the provisions of this Part." and

(l) by deleting Clause 63 of Part VIII and substituting the following therefor:

"63. (1) This Act, or any provision thereof, shall come into force on a day or days to be fixed by proclamation to be issued by the Governor General under the Great Seal of Canada where so authorized no later than July 1, 1983 by resolutions of the legislative assemblies of at least two-thirds of the provinces that have in the aggregate, according to the then latest decennial census, a population of at least fifty per cent of all the provinces.

(2) A resolution made for the purposes of this section may be revoked before the issue of a proclamation authorized by it."—*Mr. Baker (Nepean—Carleton).*

April 21, 1981—That the proposed *Constitution Act, 1981* be amended

(a) by adding immediately after the heading "CANADIAN CHARTER OF RIGHTS AND FREEDOMS" on page 3, the following:

"Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:"

(b) by striking out in clause 11 of the French version, line 36 on page 5 and substituting the following:

"déclaré coupable et puni;"

(c) by striking out subclause 33(1) of the French version at lines 27 to 29 on page 10 and substituting the following:

"33. (1) Les droits, ancestraux ou issus de traités, des peuples autochtones du Canada sont, par les présentes, confirmés."

(d) by striking out in subclause 45(1), lines 20 to 24 on page 16 and substituting the following:

"inces."—*The President of the Privy Council.*

APPENDIX D

THE DISSENTING PROVINCES' CONSTITUTIONAL ACCORD

PART A

AMENDING FORMULA FOR THE CONSTITUTION OF CANADA

1. (1) Amendments to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada when so authorized by:
 - (a) resolutions of the Senate and House of Commons; and
 - (b) resolutions of the Legislative Assemblies of at least two-thirds of the provinces that have in the aggregate, according to the latest decennial census, at least fifty per cent of the population of all of the provinces
- (2) Any amendment made under subsection (1) derogating from the legislative powers, the proprietary rights or any other rights or privileges of the Legislature or government of a province shall require a resolution supported by a vote of a majority of the Members of each of the Senate, of the House of Commons, and of the requisite number of Legislative Assemblies
- (3) Any amendment made under subsection (1) derogating from the legislative powers, the proprietary rights, or any other rights or privileges of the Legislature or government of a Province shall not have effect in any province whose Legislative Assembly has expressed its dissent thereto by resolution supported by a majority of the Members prior to the issue of the proclamation, provided, however, that Legislative Assembly, by resolution supported by a majority of the Members, may subsequently withdraw its dissent and approve the amendment.
2. (1) No proclamation shall issue under section 1 before the expiry of one year from the date of the passage of the resolution initiating the amendment procedure, unless the Legislative Assembly of every province has previously adopted a resolution of assent or dissent.
- (2) No proclamation shall issue under section 1 after the expiry of three years from the date of the passage of the resolution initiating the amendment procedure.
- (3) Subject to this section, the Government of Canada shall advise the Governor General to issue a proclamation forthwith upon the passage of the requisite resolutions under this Part.
3. In the event that a province dissents from an amendment conferring legislative jurisdiction on Parliament, the Government of Canada shall provide reasonable compensation to the government of that province, taking into account the per capita costs to exercise that jurisdiction in the provinces which have approved the amendment.
4. Amendments to the Constitution of Canada in relation to any provision that applies to one or more, but not all, of the provinces, including any alteration to boundaries between provinces or the use of the English or the French language within that province may be made only by proclamation issued by the Government General under the Great Seal of Canada when so authorized by resolutions of the Senate and House of Commons and the Legislative Assembly of every province to which the amendment applies.
5. An amendment may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the passage by the House of Commons of a resolution authorizing its issue, the Senate has not passed such a resolution and if, after the expiration of those one hundred and eighty days, the House of Commons again passed the Resolution, but any period when Parliament is dissolved shall not be counted in computing the one hundred and eighty days.
6. (1) The procedures for amendment may be initiated by the Senate, by the House of Commons, or by the Legislative Assembly of a province.
- (2) A resolution authorizing an amendment may be revoked at any time before the issue of a proclamation.
- (3) A resolution of dissent may be revoked at any time before or after the issue of a proclamation.
7. Subject to sections 9 and 10, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.
8. Subject to section 9, the Legislature of each province may exclusively make laws amending the constitution of the province.
9. Amendments to the Constitution of Canada in relation to the following matters may be made only by proclamation issued by the Governor General under the Great Seal of Canada when authorized by resolutions of the Senate and House of Commons and of the Legislative Assemblies of all of the provinces:
 - (a) the office of the Queen, of the Governor General or of the Lieutenant Governor;
 - (b) the right of a province to a number of members in the House of Commons not less than the number of Senators representing the province at the time this provision comes into force;
 - (c) the use of the English or French language except with respect to section 4;
 - (d) the composition of the Supreme Court of Canada;
 - (e) an amendment to any of the provisions of this Part.
10. Amendments to the Constitution of Canada in relation to the following matters shall be made in accordance with the provisions of section 1 (1) of this Part and section 1 (2) and 1 (3) shall not apply:
 - (a) the principle of proportionate representation of the provinces in the House of Commons;
 - (b) the powers of the Senate and the method of selection of members thereto;
 - (c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;
 - (d) the Supreme Court of Canada, except with respect to clause (d) of section 9.
 - (e) the extension of existing provinces into the Territories;
 - (f) notwithstanding any other law or practice, the establishment of new provinces;
 - (g) an amendment to any of the provisions of Part B.
11. A constitutional conference composed of the Prime Minister of Canada and the First Ministers of the provinces shall be convened by the Prime Minister of Canada within fifteen years of the enactment of this Part to review the provisions for the amendment of the Constitution of Canada.

PART B

DELEGATION OF LEGISLATIVE AUTHORITY

1. Notwithstanding anything in the Constitution of Canada, Parliament may make laws in relation to a matter coming within the legislative jurisdiction of a province, if prior to the enactment, the Legislature of at least one province has consented to the operation of such a statute in that province.
2. A statute passed pursuant to section 1 shall not have effect in any province unless the Legislature of that province has consented to its operation.
3. The Legislature of a province may make laws in the province in relation to a matter coming within the legislative jurisdiction of Parliament, if, prior to the enactment, Parliament has consented to the enactment of such a statute by the Legislature of that province.
4. A consent given under this Part may relate to a specific statute or to all laws in relation to a particular matter.
5. A consent given under this Part may be revoked upon giving two years' notice, and
 - (a) if the consent was given under section 1, any law made by Parliament to which the consent relates shall thereupon cease to have effect in the province revoking the consent, but the revocation of the consent does not affect the operation of that law in any other province;
 - (b) if the consent was given under section 3, any law made by the
6. In the event of a delegation of legislative authority from Parliament to the Legislature of a province, the Government of Canada shall provide reasonable compensation to the government of that province, taking into account the per capita costs to exercise that jurisdiction.
7. In the event of a delegation of legislative authority from the Legislature of a province to Parliament, the government of the province shall provide reasonable compensation to the Government of Canada, taking into account the per capita costs to exercise that jurisdiction.

Legislature of a province to which the consent relates shall thereupon cease to have effect.

Source: Amending Formula for the Constitution of Canada - Text and Explanatory Notes - Constitutional Accord: Canadian Patriation Plan, Canadian Intergovernmental Conference Secretariat, Document No. 850-19/004, Ottawa, April 16, 1981.