

**Canadian Constitutional Renewal,
1968-1981:
A Case Study in
Integrative Bargaining**

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FOREWORD

Currently there is much critical discussion of the processes of executive federalism which produced the Meech Lake Accord of 1987. In this situation it is worth looking back to review the processes involved in the protracted constitutional negotiations during the period 1968-81 which finally culminated in the Constitutional Accord of 1981 and the Constitution Act, 1982. This study by Michael Stein of that process is timely in illuminating the conditions which are required for successful constitutional bargaining. His analysis applies the concept of "integrative bargaining" drawn from the literature on bargaining theory.

In retrospect the negotiations between 1968 and 1981 went through a remarkable number of phases. It included some false starts and some near resolutions. The period began with the round of negotiations commencing in 1968 and leading up to the Victoria Agreement of 1971. It saw the rise of the Parti Québécois and of western alienation, the abortive Bill C-60 of 1978, the report of the Pépin-Robarts Commission in 1979, the Clark interlude 1979-80, and the Quebec Liberal Party's Beige Paper. Among the most contentious events were the debate culminating in the Quebec referendum of May 1980, the negotiations of the Committee of Ministers on the Constitution during the summer of 1980, and the Trudeau government's unilateralist thrust following the failure of the First Ministers' Conference in September 1980. A feature of the latter was the effort of the Trudeau government to seek popular support for its position through emphasis upon the Charter. After the Supreme Court judgment of September 1981 altered the context for constitutional negotiations, the First Ministers' Conference in November 1981 produced a Constitutional Accord supported by all the First Ministers except René Lévesque. With some further revisions, subsequently agreed to by the signatories, it was this 1981 Accord that was passed by Parliament, endorsed by Westminster, and proclaimed in April 1982 as the *Constitution Act 1982*.

While it is not within the scope of Michael Stein's analysis, it is interesting to speculate what might have happened to that Accord had the constitutional amendment process now in effect been applied to the 1981 Accord itself. It would then have required debate and assent in each of the provincial legislatures. As it happened, the only provincial legislature which debated the 1981 Accord was the Quebec National Assembly, and there all the major parties (including the federalist ones) rejected it.

Michael Stein's study attempts to analyse the character of the constitutional negotiations that occurred in all the various phases between 1968 and 1981 and which culminated in the Accord of 1981. Three features mark this study. The first is his attempt to analyse the constitutional negotiations during that period within a framework based on the theoretical literature on bargaining models drawn from social psychology, industrial relations and international relations. The second is that he has based his study on information obtained from a series of interviews of a large number of the leading constitutional actors at both the federal and provincial levels during the 1968-81 period. These interviews have provided some new material and perspectives. The third is that, in order to maintain the flow and coherence of the analysis, a substantial amount of supporting evidence and comment has been relegated to a very lengthy section of detailed endnotes.

Michael Stein is Professor in the Department of Political Science at McMaster University and is a former chairman of his department. During 1978-79 he was a member of the Research Steering Committee of the Pépin-Robarts Commission. Since the publication of his article "Federal Political Systems and Federal Societies" in *World Politics* in 1968 he has had a particular interest in the political processes occurring within federal systems. In 1984, in an article in *Publius* he reviewed the processes of constitutional reform in Canada during the period 1927-82. He has also written a number of publications on the sociology of politics and in 1973 published *The Dynamics of Right Wing Protest: A Political Analysis of Social Credit in Quebec*.

This study on *Canadian Constitutional Renewal, 1968-1981* is being published by the Institute of Intergovernmental Relations in its *Research Papers/Notes de recherche* series. This series consists of scholarly publications on a broad range of subjects touching on federalism and related social, political and economic issues. All contributions to this series are peer-reviewed.

Ronald L. Watts
Director
December 1989

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Michael B. Stein

SOMMAIRE

L'on a assisté ces dernières années à l'éclosion d'un certain nombre d'ouvrages théoriques en psychologie sociale, relations industrielles et relations internationales qui réfèrent aux concepts de "négociation" et de "marchandage". En revanche, bien peu de tentatives ont été faites pour appliquer ce bagage théorique au processus de marchandage qui caractérise, de fait, la dynamique constitutionnelle et les relations intergouvernementales au Canada. Dans la présente étude de cas, l'on a formulé un certain nombre de propositions touchant divers aspects du marchandage et partant, on s'est employé à les appliquer aux récentes négociations constitutionnelles ayant eu lieu au Canada. Ces propositions renvoient aux éléments-clés du marchandage c-a-d: les acteurs; les buts, les ressources et le pouvoir; les stratégies et les tactiques; la substance et le contenu; et finalement, les mécanismes d'interaction et les communications. Au demeurant, cette étude insiste particulièrement sur les diverses formes qu'emprunte la communication au regard du marchandage et en quoi ceci peut déboucher parfois sur la conclusion d'"ententes intégratives". De telles ententes impliquent tantôt des échanges, tantôt des compromis voire des concessions réciproques pouvant aboutir, en définitive, à des avantages pour l'ensemble des acteurs de la négociation. D'ordinaire, ces ententes interviennent en adoptant des approches dites de résolution de problème ainsi qu'en recourant à des méthodes de médiation. Celles-ci sont rendues possibles en favorisant des formes directes et indirectes de communications, des échanges par tâtonnements, et tentatives de compromis par les négociateurs eux-mêmes sinon, par des "tiers médiateurs" de diverses espèces.

On adopta ce type d'approche à l'occasion des tentatives successives, formelles et informelles, auxquelles procédèrent de 1968 à 1981 les autorités fédérales et provinciales dans le but d'en arriver à une révision constitutionnelle. Les conditions nécessaires pour obtenir un véritable marchandage "intégratif" s'étaient avérées inexistantes jusqu'à l'automne 1981. Ce n'est qu'au moment des négociations de novembre 1981 que plusieurs de ces conditions apparurent. Ainsi, maints acteurs importants affectés à la négociation furent disposés alors à remplir leur rôle de médiateur. On parvint tout compte fait à réaliser une entente intégrative, laquelle consista pour l'essentiel en une sorte de compromis entre la formule d'amendement de Vancouver et une Charte des droits modifiée (sous réserve d'une clause dérogoratoire). Cependant, cette

entente constitutionnelle ne fut obtenue qu'au prix (coûteux) de l'exclusion du Québec du groupe des signataires.

Cette étude s'appuie pour une large part sur du matériel informatif issu d'une série de rencontres intensives avec 43 acteurs de premier plan sur le plan constitutionnel, ayant oeuvré sur les scènes provinciale ou fédérale de 1968 à 1981. Les entrevues ont été menées entre 1983 et 1985.

ABSTRACT

Despite the burgeoning of theoretical literature on negotiation and bargaining in social psychology, industrial relations and international relations in the past few years, there has been little attempt to apply it to the bargaining process in constitutional and intergovernmental relations in Canada. In this case study, a series of propositions concerning different aspects of bargaining are generated and applied to recent constitutional negotiations in Canada. They encompass bargaining structures; actors; goals, resources and power; strategies and tactics; substance or content; and the process of interaction and communications. Particular emphasis is placed on various communications aspects of bargaining, and the related effort to achieve "integrative agreements". Such agreements involve give-and-take, mutual compromises and trade-offs leading to greater joint benefit to all negotiating parties. They are most likely to be negotiated by using a range of problem-solving approaches and mediating devices. These are "discovered" by promoting direct and indirect forms of communications, trial-and-error exchanges, and searches for compromises by the negotiators themselves or by "third-party mediators" of various types.

This approach is applied to the long series of formal and informal efforts by federal and provincial authorities to negotiate constitutional renewal in Canada between 1968 and 1981. The requisite conditions for genuinely integrative bargaining were found to be absent in all earlier phases prior to the autumn of 1981. By the time of the November 1981 negotiations, many of these conditions had emerged. Moreover, several of the important negotiating parties were ready to assume mediating roles. Consequently an integrative agreement was finally obtained, consisting essentially of a trade-off between the Vancouver amending formula and a modified Charter of Rights (subject to an override provision). However, the accord was achieved at a high cost; namely, the exclusion of Quebec.

The study depends heavily for its information and findings on a series of open-ended interviews of 43 leading constitutional actors at both the federal and provincial levels during the 1968 to 1981 period. These were conducted between 1983 and 1985.

CANADIAN CONSTITUTIONAL RENEWAL, 1968-1981: A CASE STUDY IN INTEGRATIVE BARGAINING

I — INTRODUCTION: THE NEED FOR A BARGAINING APPROACH TO THE STUDY OF CANADIAN CONSTITUTIONAL RENEWAL

Recent criticism of the negotiation process for the Meech Lake Accord in 1987 has highlighted once again the centrality and controversial nature of the quasi-diplomatic bargaining process in executive federalism in Canada. The highly elitist nature of this process in constitutional matters, conducted by 11 first ministers in a closed, intense bargaining environment, has been strongly and justifiably censured by those concerned about public and group participation in policy areas directly affecting the general population.¹

An aspect of the controversy that has not yet been subjected to careful analytical scrutiny is the rationale itself for conducting constitutional negotiations in such an elitist and secretive manner. According to the conventional wisdom among politicians, constitutional negotiations can only result in success (in the technical sense of achieving an accord) if they are conducted by first ministers and their top advisors behind closed doors. The prevailing belief is that in no other way can the necessary compromises and trade-offs among those in leading positions of authority be negotiated. Yet little is known about the actual process of bargaining among constitutional actors that can serve as a basis for such an evaluation. We need to learn more about the respective roles of the various political and administrative actors, the nature, scope and development of administrative arrangements established during constitutional negotiations, the range of bargaining strategies and tactics applied, the nature and development of the items under negotiation, the subtlety and sophistication of the communications processes operating among the negotiating actors, and the structure and dynamics of coalitions forged among them. This would provide the necessary information for an overall assessment of the factors making for successful constitutional bargaining.

My purpose in this paper is to analyze in depth the bargaining process in one major sphere and period of constitutional negotiations in Canada, that preceding and culminating in the November 1981 Accord and the *Constitution Act of 1982*. It is not my intention in doing so to give central place to the controversy over the closed and elitist nature of the constitutional bargaining process. Nor will I be including here the subsequent and complementary negotiations since 1984 revolving around the Meech Lake Accord.² Rather, my focus in this paper will

be on uncovering the essential dynamic of the constitution-making process and evaluating the strengths and weaknesses of each concerted effort to achieve a negotiating breakthrough on a renewed constitution over a fourteen year period between 1968 and 1982. The major questions I am posing here are: Why did the constitutional negotiations in November 1981 succeed after so many earlier efforts had failed? And on a more general level, what factors make for successful constitutional bargaining in Canada?

In order to understand and evaluate this process of negotiation there is a need to adopt what social scientists call a bargaining approach or perspective. This approach has not been applied in any of the recent studies of constitutional renewal in Canada. There are, however, some applications of the approach in earlier studies of intergovernmental policy-making.³

In subsequent sections of this paper I will attempt to provide such a bargaining overview by focusing on such factors as bargaining structures, actors, goals and resources, strategies and tactics, and the processes of social communication (including moves and countermoves, trade-offs and compromises, and use of mediators and mediating devices) which result in a mutually beneficial and broadly accepted political accord. Among the central questions I will be posing within this perspective are:

Are there differences in the pattern of constitutional bargaining which occurred in the final negotiations of November 1981, in comparison to that which operated in earlier negotiations between 1968 and 1981? Did a process of "integrative bargaining" among central and provincial government authorities involving give-and-take, mutual compromise and trade-offs leading to greater joint benefit for all negotiating parties⁴ occur at this stage? If so, what were the major factors which contributed to this process? Does the negotiating process between 1968 and 1981 provide us with any lessons as to how such accords ought to be successfully negotiated in the future?

The essay will be divided into three major sections: 1) analysis of some elements of a bargaining approach applied to constitutional and intergovernmental relations in Canada; 2) the process of bargaining in Canadian constitutional renewal, 1968-81 (including seven phases); and 3) application and evaluation of the bargaining approach and its implications for understanding and managing past and future constitutional negotiations. Much of the empirical support for both the description of the bargaining process from 1968-81 and for the analysis and evaluation which follows is drawn from a series of elite interviews of major actors involved in the process at both the federal and provincial levels. The interviews were conducted between 1983 and 1985.⁵

II — SOME ASPECTS OF A BARGAINING APPROACH TO CONSTITUTIONAL AND INTERGOVERNMENTAL RELATIONS IN CANADA

DEFINITION OF THE CONCEPT OF "BARGAINING"

In general, there is a broad consensus in the social science literature over the meaning of the concept of "bargaining". A standard definition is offered by Rubin and Brown (1975). According to them, "bargaining" occurs when the following conditions are met: 1) at least two parties are involved in the interaction; 2) these parties have a conflict of interest with respect to one or more different issues; 3) whether or not they were previously acquainted, the parties are temporarily involved with one another in a voluntary relationship; 4) the essential activity in this relationship involves either the exchange of one or more specific resources or the resolution of one or more issues among the parties (or both); 5) the nature of this activity is sequential rather than simultaneous, in the sense that there is presentation of proposals or demands by one party followed by the evolution and presentation of counterproposals by the other, until a resolution or impasse occurs.⁶

Central to this definition of "bargaining", then, are three ideas: conflict, sequential communication, and attempted resolution of the conflict by exchange of resources. There is generally no fundamental distinction made between the concepts of "bargaining" and "negotiation", although "negotiation" sometimes refers to a more formal process of bargaining between more complex social units.⁷ I shall use the two terms interchangeably in relation to constitutional and intergovernmental relations in Canada.

A further useful distinction can be made between bargaining and other forms of social communication between conflicting parties involving some kind of exchange relationship. Bargaining can only occur if the parties involved in the interaction share some measure of equality of power and resources, so that each has a degree of influence over the other and neither is able to impose its will on the other. Thus bargaining involves a genuine effort to reach a solution that falls somewhere between the starting positions of each of the negotiating actors, although the attempt itself might end in stalemate. In the case of constitutional and intergovernmental relations in Canada, despite an apparent exchange relationship involving some mutual give-and-take, bargaining often does not occur between federal and provincial governments over issues on which these parties differ. If one government has exclusive or paramount jurisdiction in a particular policy sector, or if it has major financial resources, it can virtually dictate the nature of that policy. In such circumstances, the process of communication or interaction between the two levels of government is essentially one of consultation or information rather than genuine bargaining.⁸ This may also be the case

at certain stages in the development of a "negotiated" intergovernmental agreement.

Unilateral action is another form of social communication that cannot be considered to be an integral part of bargaining, since no substantive exchange occurs between the negotiating parties. However, it may have an important impact on the bargaining process by acting as an effective mechanism for unblocking stalled negotiations.

BARGAINING STRUCTURES

Bargaining structures are those contextual conditions within which genuine bargaining, defined as a process of social communication, occurs. They may be subdivided into three components: 1) social components, 2) physical components and 3) issue components. Social components of bargaining structures include the number of parties in the bargaining exchange, the presence or absence of an audience (i.e., whether the bargaining is open or closed), the availability and role of third parties, and the existence and pattern of bargaining coalitions. Physical components of bargaining structures include the nature and location of the bargaining site, the availability and use made of communications channels or devices (e.g., meeting rooms, telephones, face-to-face verbal exchanges, and the time available for communication). Issue components of bargaining structures include the number of issues involved in the bargaining process, their relative importance, the incentives for dealing with them, the manner in which they are defined, presented and debated, and the weight given to possible solutions for each issue.⁹

Obviously the relative importance of such contextual conditions for bargaining will vary, depending on the nature and sphere of negotiations. In constitutional and intergovernmental relations two aspects of bargaining seem to stand out: First, among social components, the number of parties involved in the negotiation and the pattern of bargaining coalitions; and second, among issue components, the number, relative importance, and manner of presentation of the items under negotiation. Other aspects of bargaining structures (such as physical components) have a more secondary role.¹⁰

More specifically, we may propose that the fewer the number of parties involved in the intergovernmental negotiations, and the simpler and more cohesive the coalition pattern (e.g., bipolar rather than multipolar alliances), the greater the likelihood of achieving success in intergovernmental bargaining. We may also propose that the fewer the number of issues or contentious items at stake in the process, the greater their relative importance to the actors involved, and the greater the incentives for taking up these issues and solving them in terms of potential rewards or the avoidance of losses by the actors, then the more likely is the possibility of achieving intergovernmental agreement.

BARGAINING ACTORS

There are two major aspects pertaining to the bargaining actors that help to shape a bargaining success: 1) demographic and personality factors of the actors and their impact on their interpersonal orientations and bargaining predispositions and 2) the social and political interdependence of the actors.¹¹ Demographic and personality factors that influence the interpersonal orientations and bargaining predispositions of the major negotiating actors include similarities or differences in age, gender, ethnicity, class, occupation, education, intelligence (such as capacity to grasp complex ideas or information), and various attributes of disposition or temperament that relate to bargaining orientations such as risk-taking propensity, rigidity, machiavellianism, tolerance of ambiguity, etc. The social and political interdependence of the bargaining actors includes such factors as their past contacts and current social relationships, their relative power by virtue of their offices, the political rivalries or dependencies attached to their political positions, and their patterns of political alliances or formal coalitions. Some of these are intangible qualities which would be difficult either to agree on or measure. Nevertheless, there may be some consensus among close observers about these attributes and their congruence and intermeshing, which can serve as a useful guide.

In intergovernmental bargaining situations, the actual social background, class and personality characteristics of actors are less important than the nature and interrelationship of the political roles that they assume. Thus two successive incumbents of the same political office may develop surprisingly similar bargaining postures despite great differences in their social background and personality, not to speak of their party labels and ideological orientations. The reason for this is simply that the incumbents of these offices have important constraints placed on their bargaining flexibility and leverage because they are expected to articulate particular political positions and to defend particular political interests which are closely identified with the offices they hold and their relative political resources and power. For example, in the intergovernmental area a prime minister of Canada is highly likely to articulate the interests of a strong, unified national government against the narrower, parochial interests of particular regions or provinces. Similarly, a premier of a province like Ontario, Alberta or Quebec will be highly likely to defend political positions on a given policy matter that are generally perceived to be in the best interests of his or her particular province or region. This pattern will generally be true regardless of the partisan attachments of these actors (that is, whether the prime minister or premier is Conservative, Liberal, N.D.P., P.Q. or Social Credit), although partisan considerations may sometimes assume an important role, particularly around the time of an election. The pattern will also tend to operate irrespective of the ideological propensity of the actors (that is, whether they are right-wing, centrist or left-wing), better educated or less educated, older or

younger, and more rigid or flexible in bargaining style. If there is some consistency in such political role-playing, it should be possible to identify certain patterns of political interdependency that increase the likelihood of a political accord.

In the constitutional and broader intergovernmental area in Canada, the shared political interests, past political alliances, and at times partisan affiliations will have an important role in determining the likelihood of a bargaining success. More specifically, we may propose that the closer the previous political contacts and current political ties and alliances of the major political actors (based essentially on shared political resources, interests and power); and in certain circumstances the more common the party labels or affiliations of the negotiating parties, the more likely are the negotiations to lead to some agreement.

BARGAINING GOALS, RESOURCES AND POWER

Among the major factors that impinge on the intergovernmental bargaining process itself are the bargaining goals, resources and power of the principal bargaining actors. Bargaining goals refer to the major long-term political objectives and substantive rewards that each political actor defines for itself and seeks to obtain through the negotiation process. In the intergovernmental area these may include economic objectives such as increased transfer payments, royalties, tax concessions; political objectives such as increased representation and power for that actor and its constituency in governmental and intergovernmental structures; and even symbolic objectives such as recognition of the distinctiveness, enhanced status or separate jurisdiction of the actor and its constituency.

Bargaining resources refer to the means at the disposal of the key bargaining actors to achieve these objectives. In intergovernmental relations these might include positive economic inducements such as financial resources put at the disposal of other actors for purposes of borrowing, transfer payments made available to other less well-off actors for regional equalization programs, and expertise and technology which can be provided to other actors and their constituencies. They might also include political inducements such as promises of political support for other actors in achieving their bargaining priorities, assistance in political campaigns, or mere recognition of the symbolic objectives sought by others. They might involve negative economic or political instruments such as threats to cut off economic or financial assistance to other political actors, imposition of quotas or trade barriers on economic transactions, or withdrawal of campaign support. Finally, actors can enhance their bargaining positions simply by calling on symbolic resources of a tangible or intangible sort, such as their constitutionally guaranteed rights or their recognized leader-

ship role based on their past performance at intergovernmental conferences, or their representation in established governmental and political institutions.

The potential bargaining capacity of each bargaining actor in intergovernmental relations may be viewed in abstract terms as the total weight or measure of its positive and negative economic, political and symbolic resources; it is often described as its relative "political power". As is the case in other political contexts, the notion of "political power" is a highly subjective and perceptual one; nevertheless, it has a real and independent impact on the intergovernmental bargaining process. Thus those bargaining actors who are perceived to have more "political power" will generally be given greater latitude to play a leading or influential role in the intergovernmental bargaining process.

With respect to the role that bargaining goals, resources and political power play in achieving intergovernmental agreements, we may propose that the more limited and more mutually compatible the long-term bargaining goals of the major bargaining actors, the more extensive and varied the range of bargaining resources (both positive and negative) at their disposal, and the more equal the political power distribution among the major bargaining actors or coalitions of actors, then the greater is the likelihood of achieving intergovernmental agreement.

BARGAINING STRATEGIES AND TACTICS

In order to achieve these goals, bargaining actors devise a number of bargaining strategies and develop a variety of bargaining tactics. Bargaining strategies refer to the series of alternative options or plans formulated by bargaining actors in their efforts to achieve their bargaining goals. In intergovernmental relations, the range of such options is somewhat limited and includes both cooperative and conflictual actions. Examples of cooperative actions are initiation and participation in joint discussions among actors and their jurisdictional representatives in an effort to develop joint programs, or coordinate policies. Some examples of more conflictual behaviour are unilateral actions such as the imposition of taxes or royalties on goods destined for interprovincial markets, establishment of governmental programs without offering prior consultation or advance information to others, or the application of restrictions on employment of workers from other jurisdictions. In more extreme form, conflictual action may involve a decision to opt out of joint programs entirely, or to exercise a veto on intergovernmental initiatives, or even to secede from a federation.

Bargaining tactics are the short-term methods or techniques that are intended to help bargaining actors choose among their long-term options and realize their bargaining goals. In intergovernmental relations, these tactics are closely related to the strategies or options available, and include such instruments as organizing conferences of officials or ministers, arranging backroom consulta-

tions or cabals, making telephone calls or sending facsimiles, telexes or letters to other bargaining actors, and dispatching envoys or bargaining representatives to other jurisdictions in an effort to influence or coerce them.

We may offer the general proposition that the more diversified and flexible the bargaining strategies of the major bargaining actors, and the greater the range and diversity of bargaining tactics employed by bargaining actors in an effort to achieve their bargaining goals, the greater the likelihood of achieving intergovernmental bargaining success. However, more specific discussion of the bargaining strategies and tactics most likely to yield maximum political benefits to negotiating actors may be found in the section below dealing with the bargaining process.

BARGAINING SUBSTANCE OR CONTENT

In the literature on bargaining and negotiation, very little attention has been given to the impact of the substantive items under negotiation on the likelihood of bargaining success. This is in part due to the inherent difficulty in generalizing about objects which are so variable in their content from one situation to the next. But it may also be because behaviourally-oriented social scientists, by the very nature of their disciplines, tend to overemphasize or exaggerate the importance of behavioural interactions and process in determining behavioural outcomes.

However, the content or substance of the issues and items under negotiation may be crucial in shaping bargaining outcomes. In intergovernmental policy-making, for example, the items under negotiation may consist largely of symbolic intangible goods in constitutional matters such as a charter of rights, an amending formula, or a reformed Senate. These items are more difficult to negotiate, since they are not readily quantifiable and divisible (i.e., susceptible to being measured or valued in fairly precise numerical terms, and then broken down into smaller units and components which can be allocated in a reasonably equitable manner among the different negotiating parties). On the other hand, the substantive bargaining items may consist largely of tangible and quantifiable economic goods, such as fiscal-sharing formulas or royalties on energy resources; these items lend themselves more readily to compromise and bargaining trade-offs.¹²

Similarly, if the items under negotiation are extremely valuable or costly, are long-term and far-reaching in their political impact, or are highly salient and contentious issues symbolically or materially for one of the bargaining parties, then they are less likely to be susceptible to distributive solutions and bargaining compromise. An example of a valuable or costly item, which has been a major issue at constitutional conferences on aboriginal rights, is a native land claim amounting to hundreds of millions of dollars. An example of an item that

is long-term and far-reaching in its political impact is a demand for provincial self-determination or secession by ethnic minorities or cultural groups such as the Quebecois or the native peoples. And an example of a highly salient or contentious issue is a jurisdictional claim over off-shore oil or fish by "have-not" provinces like Newfoundland.

We may propose, then, that the more tangible and divisible the items under negotiation in constitutional and intergovernmental relations, the greater the likelihood of achieving bargaining success. Similarly, the less high the bargaining stakes and the less costly, politically consequential or contentious the items under negotiation, the greater the possibility of concluding successful intergovernmental negotiations. The content of the items under negotiation will also significantly shape the type of bargaining process and agreement that will be negotiated, as we shall see in the section below on the bargaining process.

THE BARGAINING PROCESS

The preceding discussion dealing with bargaining structures, actors, goals and resources, strategies and tactics, and bargaining substance or content concentrates on the more static aspects of bargaining; namely those ingredients of bargaining that are already present at the outset of bargaining interactions, and that remain relatively unchanged through the subsequent phase of bargaining actions or behaviours leading to a given outcome. But the actual dynamics of bargaining are clearly a central factor in shaping this bargaining outcome. These dynamics, which involve a series of moves and countermoves designed to produce a mutually acceptable accord, have been generally neglected in the literature of negotiation in general and intergovernmental relations in Canada in particular.¹³ When treated they are normally portrayed in the literature as a highly rational process of collective decision-making or choice. According to this perspective, the bargaining actors define the issues for themselves in relation to their goals and resources, and attempt to achieve these goals through the available structures. They define a set of strategies and tactics intended to move them rationally and strategically towards the desired bargaining outcome. The process of interaction, then, is portrayed as a series of sequential moves in an n-person non-zero-sum game, or as a set of political/military interactions in an international diplomatic and military conflict. Bargaining theorists draw particularly on the literature of game theory and strategic theory to trace the process of moves and countermoves, concessions and trade-offs, coalition building, and the payment of side-benefits to players which result either in a mutually compatible agreement or "solution", or in stalemate.¹⁴

This approach has proved to be useful in defining the broad parameters of bargaining actions or behaviours, and in highlighting the important strategic dimension that is always present in any bargaining situation. However, it places

excessive emphasis on the assumption that a rational calculus is most important in shaping bargaining actions and decisions. In many instances in which bargaining agreement is achieved in the socio-economic or political sphere, it is primarily a result of factors external to the process of strategic interaction among the major actors. These may include various methods of direct or tacit communication, intervention by mediators and third-party actors, and efforts at consensus-building by neutral or outside parties. In the political sphere, moreover, the role of power seems particularly significant in shaping the bargaining process, and communications methods by impartial external actors may help to reduce the level of conflict produced by the mutual exercise of power.¹⁵

Recently, more attention has been paid in the social science literature to forms of problem-solving which can contribute substantive alternatives leading to the achievement of bargaining accords, and to overcoming psychological obstacles which place limits or constraints on actors seeking to reach such agreements. We may call this the communications approach to bargaining. This approach has a marked prescriptive orientation, and is found particularly in social psychology and labour relations studies.¹⁶

An important contribution to this literature has been made by Dean Pruitt, a social psychologist. Developing the distinction first made by Walton and McKersie (1965), he sees the overall process or style of bargaining in social situations as assuming one of two basic forms: integrative bargaining or non-integrative (compromise or distributive) bargaining.¹⁷ Pruitt defines integrative bargaining as "the process by which bargainers locate and adopt options that provide greater joint utility to themselves taken collectively [than does non-agreement or compromise agreement]".¹⁸ This process does not involve locating a series of alternative options on a matrix in order to find a common "rational solution". Rather, it entails the application by bargainers of a variety of forms of problem-solving. They include methods of "expanding the pie" or increasing the available resources for all parties (e.g., in Canadian intergovernmental relations, devising new forms of tax-sharing which would increase the revenues of both levels of government); "logrolling" or trading concessions on low priority issues for concessions on high priority issues¹⁹ (e.g., in intergovernmental relations in Canada, promoting compromises and common positions on contentious constitutional issues such as powers over the economy, natural resources, off-shore oil and fisheries); "bridging" or finding new options that satisfy the major principles and fundamental needs underlying each party's demands (e.g., in Canadian intergovernmental relations, devising an amending formula which satisfies both the desire of the larger provinces like Ontario and Quebec to exercise a veto and the desire of some smaller provinces like Alberta to have equality of status for all provinces); and "cost-cutting" or getting what one wants while cutting the other parties' costs (e.g., in intergovernmental relations in Canada, proposing national cost-sharing programs in areas of

provincial jurisdiction). These methods or solutions can be discovered by resorting to a number of different problem-solving strategies, including exchanging information, searching for distributive solutions in which rewards are shared, encouraging bargainers to engage in trial-and-error exchanges, and promoting indirect forms of communication. Central to this entire problem-solving orientation is the promotion of underlying attitudes of "dual concern" (or concern both about one's own and the other party's outcomes), mutual trust, and a posture of "firm flexibility" (or unwillingness to compromise on ends but open-mindedness on means) by all negotiating parties.²⁰

Problem-solving approaches are only one of four types of bargaining approaches or strategies. The others are two types of "coping strategies", "contending" and "yielding", and a non-coping strategy, inaction. "Contending" strategies involve first the adoption of fixed positions and then the attempt to force one's will on others through pressure tactics or threats. They are viewed as generally resulting in poor outcomes, although they may sometimes encourage problem-solving.²¹ "Yielding" involves reducing one's bargaining goals without changing one's demands. It is possible to use several different bargaining strategies in sequence in order to achieve one's bargaining goals; however, using them simultaneously runs the risk of sending the other parties contradictory signals. The preferred bargaining approach is clearly that of problem-solving.²²

It is insufficient to describe only the broad forms or methods of problem-solving designed to achieve bargaining accords. One must also take account of some of the major psychological constraints or obstacles impeding such negotiation efforts. These include cognitive biases such as whether negotiators have a positive or negative view of their gains or losses; whether they adopt unwarranted or mythical assumptions in some circumstances that the negotiations are only a fixed pie; whether they succumb to the nonrational human tendency to escalate conflict and seek victory over their opponents; whether they adopt the normal predisposition to be overconfident about the correctness of their position and the likelihood that it will prevail if they do not compromise or "give in"; and whether they undervalue the importance of reliable information that their opponent is willing to accept an offer.²³

Another major obstacle to problem-solving in negotiation is the occasional or even regular tendency for some negotiators to resort to lying or deception. In bargaining this may take several forms such as misrepresentation of their position to their opponents, bluffing, deliberate falsification of information or arguments, attempts to mislead, or selective disclosure of information to their constituents. The objective of lying is to gain power and tactical advantage over one's opponent.²⁴ However, there is a danger in using this device in that exposure of the lying or deception can jeopardize trust ties and undermine long-term efforts at building mutual confidence for purposes of achieving an

accord. Still other obstacles to problem-solving in negotiations are deep-rooted personality conflicts or antagonisms and political or partisan loyalties.

If normal problem-solving techniques used by the negotiating parties themselves are unable to overcome these obstacles, then negotiators must resort to supplemental devices or aids. A most important short-term device of this kind is the creative use of a third-party mediator.²⁵ A mediator can play a variety of roles, from convening and chairing negotiating sessions to analyzing differences and suggesting creative compromise solutions.²⁶ One important technique at his/her disposal is the single negotiating text, which is successively modified in later negotiating sessions by all parties until general agreement is reached. Another is the use of a "contract embellisher" who proposes a contract that both sides prefer to the single negotiating text.²⁷

But there are longer-term methods of overcoming these obstacles to problem-solving in negotiation. A major one has been described by one bargaining analyst as "political learning", in which bargaining is viewed as a search process. It involves the gradual acquisition of understanding of the main issues under negotiation, probing the sources of conflict among negotiating parties, internalizing the styles of bargaining, until the negotiation process can be reduced to a few theoretically manageable outstanding issues, and then finding mutually beneficial exchanges.²⁸ The process of "political learning" in intergovernmental relations may be a long, drawn-out one, given the sporadic nature of intergovernmental interaction, the frequent change of actors and issues, etc. It may take several years to achieve.

If and when the final stage of "political learning" is reached, one further ingredient is necessary: a commitment on the part of the parties in the intergovernmental negotiation to bargain seriously in search of a compromise agreement which can bring greater joint benefits to themselves, and to be amenable in this process to compromise and trade-off. Such a commitment may emerge as a culmination of the pre-bargaining conditions mentioned earlier, or may constitute an independent decision or action.²⁹ At that stage, integrative political bargaining may begin, and the chances of achieving an integrative accord in the intergovernmental area, where cooperation and reconciliation are still widely-held norms, are good.

It seems to me that this kind of communications approach to bargaining offers some promising additional insights into intergovernmental relations which earlier game-theoretical and strategic approaches had failed to do. In the first place, as Dupré has recently pointed out, the bargaining solutions in this area are generally not quantifiable, except perhaps in some policy issues such as fiscal-sharing or energy. In the constitutional review area in particular, there is an absence of perfect information, the major bargaining issues are abstract and symbolic rather than concrete and tangible, and the differences are not subject to simple measurement and trade-offs.³⁰ Much guesswork and risk-taking based

on mutual confidence must be resorted to. In such circumstances, the negotiation process should be more amenable to an integrative style of bargaining (as opposed to a compromise or distributive approach). Secondly, in most of the bargaining cases in intergovernmental relations, the issues are not "solved", as the strategic approach seems to imply; rather, they are managed or contained until some longer-term arrangement or agreement can be achieved. Communications approaches seem more suitable for diagnosing and containing such conflicts. Thirdly, communications approaches place some emphasis on eliminating negative underlying attitudes and emotions which may bar the way to an agreement; these attitudes may be widespread and inhibiting in the intergovernmental area. Fourthly, the perceptual dimension is generally overlooked by strategic theorists, but may form an important part of the communications processes in intergovernmental bargaining. The communications approach seems well equipped to incorporate this dimension into an analysis of intergovernmental bargaining.

It would seem, then, that an understanding of the bargaining processes in intergovernmental relations can be gained by supplementing the tools of game theory and strategic theory with the insights of social psychology. This is particularly true of this area in Canada in recent years, in which there has been a marked tendency for such processes to result in deadlock or stalemate.³¹ The pattern may be attributable primarily to objective structural factors such as increasingly incompatible goals, unequal political resources and power, and conflictual strategies and tactics among major intergovernmental actors. But it may also be due to a considerable extent to cognitive biases, strong personality differences, and deep distrust arising from perceived political blackmail, deception or public posturing by bargaining opponents. These subjective, perceptual elements may contribute in important ways to non-integrative forms of bargaining which result in stalemate and temporary failure.³²

We may propose, therefore, that the greater the number and range of problem-solving approaches that are applied to the bargaining process at this stage of conflict and stalemate, and the more intensive the process of political learning, the more likely it is that the negotiation process will be transformed into one characterized by integrative types of bargaining, leading ultimately to an integrative agreement. Such approaches may include developing techniques for expanding the pie, logrolling, bridging and cost-cutting. They are "discovered" by promoting direct and indirect forms of communication, trial-and-error exchanges, and searches for integrative solutions among the bargaining actors. These problem-solving approaches and techniques may be evolved by the negotiators themselves or by third-party mediators of various types.

Let us turn now to our case study of attempted constitutional renewal in Canada from 1968 to 1981, with the intention of sketching the broad overall patterns of bargaining and seeing what support there is for the preceding

propositions. The period from 1968-1980 will be viewed essentially as a series of "learning experiences" in constitutional negotiation, or what we shall call phases in "non-integrative bargaining", prior to the phase of "integrative bargaining" itself. The propositions set out in this section will be explored, however, in relation to all phases from 1968-1981, whether "non-integrative bargaining" or "integrative bargaining".

III — THE PROCESS OF BARGAINING IN CANADIAN CONSTITUTIONAL RENEWAL 1968-82

NON-INTEGRATIVE BARGAINING PHASE I, 1968-71: THE VICTORIA ROUND

The process of negotiation that culminated in the adoption of the *Constitution Act of 1982* has its roots in the long 54-year search for an amending formula for Canada, and the related effort of patriation.³³ However, the more recent quest for comprehensive constitutional renewal originates with Quebec's Quiet Revolution of the 1960s. The demands that the government of the province assume the leadership of the Quebecois' struggle for national survival and expansion (*épanouissement*) led inevitably to a proposal that its constitutional powers be extended. The first major political personality in recent times to articulate that proposal was Daniel Johnson, the Union Nationale leader who succeeded Jean Lesage as provincial premier in 1966. Johnson's efforts to win concessions from the federal government in a range of areas involving taxing and spending powers and the distribution of legislative jurisdiction between the two levels of government led to a series of federal-provincial conferences between 1968 and 1971 which attempted to achieve a consensus on a constitutional reform package. The discussions and consultations occurred at all levels: prime-ministerial, ministerial and official, and involved at least 45 formal meetings. Many different types of negotiating fora were used, including televised first-ministers conferences, closed bargaining sessions of ministers and officials, and cross-country tours by leading bureaucratic and political actors.³⁴ Approaches to the question ranged from broad propositions from each jurisdiction outlining areas of constitutional conflict and potential change to specific position papers on narrow jurisdictional disputes.³⁵ The federal government initially attempted to structure the negotiations around its priorities of a limited charter of rights, linguistic rights, some minor institutional reforms, and an amending formula, but it was soon forced to shift the agenda to economic matters such as federal-provincial taxing and spending powers, and the broad area of social policy. By early 1971, as government and public pressure to obtain an agreement began to mount, the Trudeau government announced an apparent "breakthrough" on a new package of reforms, most notably, a new, regionally-based amending formula.³⁶ A conference was called for Victoria, and after a

few days of preliminary discussion, and a marathon negotiating session on the final day, a tentative agreement was reached between Quebec and the federal government in the crucial social policy area.³⁷ However, its terms were conditional on a final approval within 12 days by all negotiating parties after consultation with their full cabinets, caucuses and extra-parliamentary parties. Faced with strong opposition in his home province, Premier Bourassa finally rejected the agreement.³⁸

This first phase clearly involved an intensive expenditure of time, energy and resources in the intergovernmental area and succeeded in identifying the major areas of potential constitutional reform. According to one top federal official, "Victoria was a kind of afterthought of a process that was eventually to have covered every single heading of the constitution. It was a very gentle exercise, conducted almost at an academic level, in the best sense of the word."³⁹ A top intergovernmental official from British Columbia concurred: "We succeeded as much in 1971 as in 1981...The best staff work, ministerial work and first minister's work took place between 1968 and 1971. The meetings were well-structured and well thought-out."⁴⁰ But when it became apparent that there was no sign of agreement arising from the process, and the problems involving Quebec were mounting, there was a consensus that something concrete had to be achieved. Unfortunately, this final effort did not ultimately yield an agreement.

The actual negotiations in 1971 also appeared to satisfy a number of the conditions for successful, integrative intergovernmental bargaining mentioned in the previous section. These included a relatively small number of principal negotiators, a closed bargaining process, a simple bipolar coalition pattern among the negotiating parties, and a reasonably small number of relatively uncontentious issues under negotiation. There was also, according to one senior official from British Columbia, a greater intellectual rapport among the negotiating delegations than was the case in later phases of the constitutional review process.⁴¹ However, in a number of other crucial areas, it completely failed to meet these conditions.

First, apart from the federal and Quebec governments, most negotiating parties showed a lack of serious involvement in and commitment to the constitutional reform process.⁴² Many considered the issues to be too abstract and too tangential to their principal policy concerns on "bread and butter" issues. Second, according to one provincial participant, there was a lack of personal "chemistry" between the Quebec delegation and those of the other provinces, which inhibited the process of coalition formation and mutual accommodation.⁴³ Third, and most important, the bargaining goals of the two principal actors, Ottawa and Quebec, were fundamentally at odds, and the issue gap between them was too wide to be bridged. According to one senior federal official,

One should have expected that Bourassa would do exactly as he did. If I had been in his shoes, I would have turned down the deal at that time. Because the whole position of the government of Quebec from 68 to 71 had been, "Look, we're in this to discuss powers. The rest of it, patriation, a charter, we'll agree to anything reasonable [in those areas] as long as we get the autonomy we need, as long as we get extra powers to control the degree to which you interfere in what we regard as our proper provincial jurisdiction." At Victoria, from Bourassa's point of view, Quebec got zilch in terms of extra powers and added protection against the misuse of federal power.⁴⁴

In the constitutional discussions from 1968 to early 1971, the federal government had created the impression that they were ready to make some concessions, "if not for devolution of power, then at least for perhaps a more clear sharing of power. They could take this, and maybe we'll take that...When the Victoria package was pulled out of this much broader background of material, this meant that things like power trade-offs just weren't included."⁴⁵

The federal government strategy throughout the 1968-71 period was to make every concession, such as limitation of its spending power, contingent on acceptance of its entire package. Thus:

When they started to pull items out for Victoria, of course things like that...were just taken off the plate. From the federal government's point of view, they weren't about to put those into the pot, because they were their traders for the future in order to protect, say, their jurisdiction under transportation, under whatever.⁴⁶

In short, the bargaining strategies and tactics used by the two principal parties were too limited in scope and too rigid, the issue gap between the federal government and Quebec arising from the choice of bargaining items for the "package deal" was too large, and the actual process of negotiation between Ottawa and Quebec was obviously characterized by non-integrative, positional styles of bargaining on a too narrow range of bargaining items.⁴⁷

Finally, a general atmosphere of distrust prevailed, and this contributed to the failure. Many federal officials questioned the Quebec government's motives, and viewed its approach to patriation as a technique used to "blackmail" the federal government into making concessions on the distribution of powers. Some even alleged that the process of negotiation was deliberately sabotaged by Claude Morin, then a leading Quebec Intergovernmental Affairs official. He is said to have persuaded Quebec Social Affairs Minister Claude Castonguay to make genuine federal concessions in social policy a *sine qua non* of an agreement out of fear that the interests of Quebec were being jeopardized by a too conciliatory Quebec premier.⁴⁸ On the Quebec side, there were charges that the federal government had acted in bad faith, since it had misled the provinces into thinking that there would be some devolution or at least a more equitable sharing of power.⁴⁹ But the "package deal" finally offered by Justice Minister

Turner at Victoria simply met the constitutional priorities that Ottawa had set for itself three years before.

NON-INTEGRATIVE BARGAINING PHASE II, 1975-76: PURSUIT OF A MINIMUM PACKAGE

After the failure at Victoria, the Trudeau government left the matter of constitutional renewal in abeyance for several years. In late 1975, in the face of the growing threat of Quebec independence, led by the Parti Québécois, it decided to explore the possibility of achieving a consensus on a minimum package involving patriation, an amending formula, and some extension of the protection provided for the French language and culture. In this way, it hoped to undercut the argument of the P.Q. that agreement on fundamental intergovernmental issues in Canada was impossible. After sending an initial exploratory letter to the provincial premiers, in early 1976 Trudeau dispatched two of his closest constitutional advisors across the country to consult with the provincial authorities on the matter. He also sent a formal letter to the chairman of the interprovincial conference, Alberta Premier Lougheed, laying out the federal proposal in the form of a Draft Proclamation. The federal strategy, although it assumed an operational multilateral form, was essentially a bilateral one directed at containing independence forces in Quebec.⁵⁰ But the western premiers realized that their goal of achieving greater control over their natural resources could be effectively advanced by linking this issue with federal constitutional concerns.⁵¹ Consequently, Premier Lougheed, acting as spokesman for the group, responded in October 1976 by calling for a broader negotiating agenda involving, as a minimum, several important concessions to the provinces in the sphere of the distribution of powers.⁵² He also communicated the provinces' unanimous support for the "traditional" Quebec position rejecting patriation unless it also involved changes in the distribution of powers.

It was apparent that Trudeau's bilateral negotiating strategy and his goal of achieving a limited consensus on the constitution had failed.⁵³ Even Quebec Premier Bourassa, who might have been expected to support this effort by the federal government to combat the separatist threat, deplored the absence of a meaningful concession to Quebec aspirations in the proposed federal package. He also reacted angrily to the threat by the federal government to patriate the constitution unilaterally if provincial consent to the federal proposals were withheld.⁵⁴

The 1976 exploratory constitutional initiative marked an important turning-point in the bargaining process on constitutional renewal. The bargaining structures, actors and issues had been transformed in a fundamental sense. Instead of only two principal negotiating actors, Ottawa and Quebec, there were several additional actors, including Alberta, Saskatchewan and British Columbia, whose fundamental interests were now considered to be at stake. These

were reflected in some contentious new bargaining issues which were placed on the constitutional agenda, notably involving jurisdiction over natural resources such as oil and gas energy and potash. Even the Atlantic Provinces were beginning to make contentious claims over fisheries and off-shore resources.⁵⁵ These provinces, sensing that the constitutional review process could be used to increase their relative power vis-à-vis the federal government in other areas (such as their representation and participation in federal institutions like the Senate and Supreme Court, their control over their tax revenues, and restriction of federal spending in areas of provincial jurisdiction) began to show a stronger interest in constitutional negotiations. This manifested itself in the establishment of more complex intergovernmental machinery in most provinces, sometimes assuming the form of separate and politically powerful departments of Intergovernmental Affairs.⁵⁶ Naturally, with this change in administrative structures and actors, there was a corresponding redefinition and increase in the number and scope of the bargaining objectives pursued, the range of strategies and tactics employed, and in the complexity of the communications processes used. Of particular importance was the decision by the other provinces to support Quebec's position linking patriation to concessions in the distribution of powers. The possibility of achieving a constitutional accord in such altered circumstances would seem to have been considerably diminished.⁵⁷

NON-INTEGRATIVE BARGAINING PHASE III, 1978-79: QUEBEC SEPARATISM AND WESTERN ALIENATION

It was not long before political exigencies in the country had altered radically, making it imperative that new efforts be made to achieve constitutional renewal even in the face of such difficulties. In November 1976, the Parti Québécois was suddenly elected with a large governmental majority. It had pledged to call a referendum before the end of its first term in office. A major theme in the Parti Québécois' independence appeal was that despite Quebec's longstanding call for constitutional renewal, all efforts at satisfying Quebec's demands for more provincial autonomy or some kind of special status had failed.

From the federal government's perspective, if it were to head off the strong current of nationalism sweeping across the province, a meaningful constitutional accord would have to be struck. First it briefly explored the possibility of ceding greater constitutional and administrative autonomy to Quebec.⁵⁸ Second, in July 1977 it established a Task Force on Canadian Unity under the co-chairmanship of former federal cabinet minister Jean-Luc Pépin and former Ontario premier John Robarts with a three-fold mandate: 1) to support, encourage and publicize the efforts of the general public and particularly those of voluntary organizations with regard to Canadian unity, 2) to contribute the initiatives and views of the Commissioners concerning Canadian unity, and 3)

to advise the Government of Canada on unity issues.⁵⁹ Finally, in late 1977, a new federal constitutional strategy was adopted. Ottawa proposed its own constitutional reform package in areas falling exclusively within federal government jurisdiction, such as the monarchy, the Senate, the Supreme Court, and an expanded charter of rights (including linguistic rights) applicable only at the federal level, but with an opting-in provision for the provinces. These changes were to be submitted to the provincial governments for their information and discussion, but not their consent. Other constitutional reforms directly affecting the jurisdiction of the provinces were to be left to intergovernmental negotiation at a later stage. Among the items that were to be postponed until this later phase were: patriation and a new amending formula, an entrenched charter of rights applicable to both levels of government, and changes in the distribution of powers.

The federal government was hoping that the unilateral reforms it proposed to enact in the first phase would be adequate to meet at least some of the demands then emanating from Quebec; in this way, it would undercut the Parti Québécois and its referendum strategy. Its proposed reforms for Phase I were embodied in a detailed draft Constitutional Amendment Bill, tabled in the federal Parliament in June 1978 as Bill C-60. It was accompanied by a brief paper containing a statement of federal constitutional goals (together with a timetable for their implementation) which was entitled *A Time for Action*. The new constitutional reform strategy was formulated and given concrete expression in an atmosphere of secrecy by a small group of officials in the Privy Council Office and the Ministry of Justice.⁶⁰

Some strategists for the federal government have insisted that this new two phase approach, consisting initially of unilateral change of federal institutions and then multilateral negotiation on other constitutional items, was not intended to be a coercive device or "club" designed to put pressure on the provincial premiers to adopt a more flexible and realistic bargaining posture. But there is powerful evidence to the contrary. According to one leading federal official, "its underlying motivation was to get a little blackmail going both ways".⁶¹ Not surprisingly, it was strongly criticized by most provincial governments, the federal opposition parties, and the media, and this severely undermined federal government efforts to advance the legislation.⁶² Moreover, the proposal for Senate reform, which went some distance towards meeting the demands of several provincial governments for greater participation in national policy-making affecting their interests, was discredited on legal grounds. The federal government was forced to submit it to the Supreme Court in the form of a reference, and it was subsequently ruled *ultra vires* because it went beyond the powers accorded it under section 91 (1) to amend its own institutions.⁶³ By September 1978, it appeared as if Bill C-60 was no longer a priority item in the

federal government's constitutional agenda.⁶⁴ Once again, the federal government strategy had failed.

In the fall of 1978 the federal government was forced once again to re-orient its strategy for constitutional renewal, this time to take serious account for the first time of provincial demands for changes in the division of powers. Two federal-provincial first ministers' conferences were convened for November 1978 and February 1979, in which an attempt was made to negotiate an agreement on one or more of 12 (later 14) items constituting an amalgam of Bill C-60 issues and demands made by the provinces at the Premiers' Annual Conference in the summer of 1978. The items under discussion included both the traditional areas of federal constitutional priority such as patriation and the amending formula, a charter of rights, the monarchy (later dropped) and Senate and Supreme Court reform, and provincial constitutional priorities such as limitation of the federal spending power, natural and off-shore resources, communications, fisheries, and equalization and regional development, and family law.⁶⁵ Between the first ministers' conferences, the ministers responsible for intergovernmental relations in each jurisdiction would meet on a regular basis to set the agenda for the next first ministers' conference and negotiate over differences.⁶⁶

What was clearly at the root of this concession by the federal authorities was the pressure coming from two forces that were simultaneously eroding the position of the Liberal Government towards the end of its five year mandate: growing western alienation and increasing support for separatism in Quebec. Both federal and provincial governments entered these negotiations with the upcoming federal elections clearly in mind. Under such conditions, the likelihood of negotiating an accord was slight. Apart from election considerations, there were simply too many substantive areas of contention among too many conflicting jurisdictional actors in an area of fundamental importance to all parties.⁶⁷

The 1978-79 bargaining process, which has also been called the "best efforts draft process", had a clear decentralizing or devolutionary thrust.⁶⁸ A useful description of its bargaining dynamics can be found in Romanow et al. (1984).⁶⁹ Drafts of opposing positions were first prepared in the intergovernmental relations offices of the federal and provincial governments, and then placed on the bargaining table by the relevant first ministers and/or ministers for intergovernmental relations. There was, initially, a noticeable tendency for the negotiators to adopt a rigid bargaining posture, by first presenting their bargaining positions on an item, and then refusing to budge. Moreover, the simultaneous operation of ministers and officials meetings, the former dealing with broader political issues and the latter with technical details, had the effect of increasing the reliance of the former on the latter. This hampered freewheeling discussions and genuine bargaining among ministers which might have pro-

duced a consensus. Occasionally, however, "the ministers attempted to break out of the mould of structured responses through a series of private ministerial meetings which were akin to constitutional group therapy sessions".⁷⁰ These sessions, predictably, were dominated by the ministers from the federal government and the provinces most directly affected by the negotiations: Quebec, Ontario, Alberta and Saskatchewan.⁷¹ Alliance patterns and linkages were established between those seeking a "middle ground" on a range of issues, such as the representatives of Ontario and Saskatchewan, and those adopting more extreme positions.

By late January 1979, the earlier formality and rigidity in negotiations had been replaced by an atmosphere of informality and a greater receptivity to compromise, at least among the responsible ministers.⁷² A kind of consensus emerged on each of the 14 items, which was embodied in a so-called "best efforts draft". These drafts were then presented to the first ministers for negotiation at the February 1979 conference, in an effort to obtain their unanimous support. On one item, the monarchy, the desired unanimity was attained, and on two others, family law and equalization, the negotiations fell short of achieving unanimity by only one vote. On most other items, however, including such contentious issues as natural resources, fisheries, off-shore resources, the federal spending power, the Charter of Rights, the Senate, the Supreme Court, and patriation and the amending formula, there was considerably more conflict and division.⁷³ More important, "there emerged no coalition of governments agreeing upon a set of proposed solutions and capable of persuading the minority of its position".⁷⁴

Considered in their totality, the "best efforts drafts", comprised a far more devolutionary package of constitutional reforms than any proposals that had been negotiated previous to that time, and probably subsequently as well.⁷⁵ The federal government gave only reluctant concurrence to a number of the proposed compromises. According to one senior federal official who played a central role in these negotiations, "These were changes in the federal position which Prime Minister Trudeau was offering only under duress".⁷⁶ Trudeau himself is reported to have exclaimed at one point, "We've almost given up the shop to you people".⁷⁷ The federal government was undoubtedly forced into that compromising position by its need to accommodate to some of Quebec's and the western provinces' more decentralist demands in order to strengthen its position in the approaching federal election and Quebec referendum.⁷⁸ The reasoning, according to a leading federal negotiator, was as follows:

We had more stuff out there than I know darn well the Prime Minister wanted to have out there. The thing was judged on the basis of what is the reasonable minimum we can get away with in order to achieve some agreement, given the total political circumstances.⁷⁹

Why, then, did some of the more intransigent provinces, such as Quebec and Alberta, not show greater bargaining flexibility in February 1979, in the face of these federal concessions? What caused the negotiation process in 1978-79 to fail? One reason is that, as Prime Minister Trudeau and many other leading federal political actors have charged, provincial government appetites for greater power, when accommodated to a degree, sometimes become too insatiable.⁸⁰ Another is that all of the provincial leaders at that time were members of opposing political parties, who recognized that it was in their partisan interest to appear intransigent. Thus, "although the governments generally endeavoured to submerge their political and ideological differences while engaged in federal-provincial discussions at the CCMC level, by February 1979, with the general federal election only weeks away and the defeat of the Trudeau government looming as an increasingly important political event, the policy of non-partisanship evaporated."⁸¹ Thirdly, the Parti Québécois was strongly committed to its sovereignty-association option, and therefore, despite its formal commitment to play by federal-provincial rules, it actively worked to undermine any constitutional accord at that time.⁸² Undoubtedly, each of these factors had some role in the failed outcome. One other factor is suggested by bargaining theory: the inherent weakness in the bargaining structures and processes themselves, and the absence of a commitment to integrative bargaining. There were too many major political actors attempting to achieve an agreement on too many complex and divisive fundamental issues without the benefit of simplified coalition or alliance patterns, and without adequate preparation for and commitment to problem-solving, give-and-take and compromise based on learning "political learning".⁸³

Perhaps because it foresaw the need to strengthen its bargaining hand in future efforts at achieving an accord, the federal government introduced a second list of 11 items towards the end of the conference, which it proposed to consider at a later date. It included economic matters that were then contentious issues between the federal government and some provinces, such as control over non-tariff barriers to interprovincial and international trade; guarantees of the free movement of goods and services across provincial boundaries; and powers to fight inflation, unemployment and regional disparities. The federal government contended that these powers, which were initially assigned to it as part of the 1867 constitutional design, had been gradually eroded, in part by the parochial and self-serving actions of certain provinces. By asserting its jurisdictional claim over these matters, it could provide itself with a strong bargaining card to trade off against future decentralizing demands of the provinces, thereby preserving the constitutional balance between the two levels of government. Although the need for economic recentralization was first asserted in the Report of the P  pin-Robarts Commission tabled in January, 1979,⁸⁴ the main impetus for this claim appears to have come from a private study commissioned

by the Federal-Provincial Relations Office, conducted by a former Deputy Minister of Finance.⁸⁵

NON-INTEGRATIVE BARGAINING PHASE IV, 1979-80: THE CLARK INTERLUDE, 1979-1980⁸⁶

Shortly after the failure of the February 1979 constitutional conference, a federal election was called, and the Progressive Conservatives assumed power as a minority government headed by Joe Clark. The Conservatives had not adopted a clear constitutional position and negotiating strategy prior to the election; however, they did issue a brief discussion paper in April 1978, and a rather vague communiqué at a party policy meeting at Kingston in September 1978, calling for a more flexible and decentralist constitutional approach than that of the Trudeau Government.⁸⁷ During their brief eight-month tenure in office, little was done to advance constitutional renewal.⁸⁸ There was only one meeting of the CCMC, chaired by the new minister of Federal-Provincial Relations, William Jarvis, and it was at best inconclusive.⁸⁹ One official attributed this to the tendency of the new federal minister to bypass his civil service advisors and rely more on interpersonal relations among the ministers involved, on the grounds that they could provide the necessary political will that was lacking. Moreover, the Federal-Provincial Relations Office no longer reported directly to the Prime Minister, as it did under Trudeau, but rather communicated with Clark through Jarvis. "Thus memoranda no longer flowed in rapid, uninterrupted fashion from FPRO to the PM."⁹⁰ The approach tended to produce highly generalized, untechnical discussions and failed to provide mechanisms for follow-up or implementation.⁹¹

Both Clark and Jarvis preferred to conduct intergovernmental relations, including constitutional negotiations, on a bilateral basis with the province or provinces most directly concerned. Thus, an agreement in principle was struck with Premier Brian Peckford of Newfoundland transferring jurisdiction over off-shore resources to that province, although the details were never worked out.⁹² Similar bilateral talks on oil and gas energy resources with Premier Lougheed of Alberta ended in stalemate.⁹³ Critics of the bilateral approach to intergovernmental bargaining contended that it would fragment the process of constitutional renewal, and diminish the possibility of forging bargaining alliances leading to trade-offs.⁹⁴ Supporters of this approach argued that bilateralism simplified the bargaining process on the most contentious issues, and fostered a less confrontational bargaining atmosphere, thereby opening the way to a quicker and neater solution on each of the items under negotiation. A more convincing argument for bilateral bargaining, in my view, is that it can serve as a useful prelude to multilateral constitutional negotiation.⁹⁵

Clark did belatedly foresee the need to develop a more integrated and comprehensive constitutional strategy for his government. Towards the end of

his tenure in office, he appointed a former Quebec Deputy Minister of Intergovernmental Affairs, Arthur Tremblay, to the Senate and to head a Privy Council Office constitutional task force charged with defining such a strategy. Tremblay chose to work with those leading PCO officials who remained after the Trudeau departure, rather than bring in his own recruits. All the team managed to produce, however, before the defeat of the Clark Government was a sketchy grid or matrix of possible federal constitutional options.⁹⁶ Perhaps this is all that could have been expected of a new government of such short duration, given the complexity and generally slow pace of constitutional bargaining.

NON-INTEGRATIVE BARGAINING PHASE V: SUMMER, 1980: THE "TWO-TRACK" FEDERAL STRATEGY

In the first months after his return to power with an overall majority in February 1980, Trudeau's main concern was to assist the "No" side in the Quebec Referendum headed by Quebec Liberal leader Claude Ryan, in defeating the Parti Québécois' sovereignty association option. He pledged during this period that a vote for federalism would be a vote for some kind of "third option" or renewed federalism, embodied in a revised constitution.⁹⁷ Within twenty-four hours of that momentous referendum success in May 1980, he called on Jean Chrétien, his Justice Minister, to establish the groundwork for this new effort at constitutional renewal.⁹⁸ Trudeau seemed to be seriously committed to still another round of federal-provincial negotiations designed to achieve a constitutional accord. Chrétien's initial plan was to achieve this agreement quickly on a limited number of items that seemed close to commanding a consensus, such as a charter of rights, equalization, and family law. He hoped in this way to capitalize on the atmosphere of good will arising out of the referendum's defeat, and the pressure exerted by public opinion.⁹⁹

However, there is convincing evidence that also points to Trudeau's embracing at this time an alternative strategy, namely that of recentralization or strengthening of the federal government's power vis-à-vis the provinces in a number of intergovernmental policy areas.¹⁰⁰ This would be achieved in part by pursuing a unilateral approach to patriation and some other federal government priority items, such as energy and fiscal sharing, without depending on the consent or cooperation of the provinces.¹⁰¹ It appears that this alternative strategy was not embraced to the exclusion of the multilateral consultative strategy pursued by Chrétien;¹⁰² evidence suggests that the two options were adopted at about the same time, as part of a new, rather ingenious "two-track" strategy. It was apparently devised by Trudeau in May 1980 in conjunction with Michael Pitfield, his resurrected Clerk of the Privy Council, and Michael Kirby,

Pitfield's protégé, who had recently been appointed Secretary for Federal-Provincial Relations.¹⁰³

It was Kirby's responsibility to translate this "two-track" strategy into concrete terms designed to achieve the federal government's constitutional objectives. For this he relied heavily on a new hand-picked group of officials which he seconded to his office.¹⁰⁴ His approach to constitutional renewal was a much more rational and strategic one than that which had been pursued by his predecessor, Gordon Robertson, throughout the 1970s. It was also much more aggressive and conflictual in its negotiating posture towards the provinces.¹⁰⁵

The Kirby team, backed by Trudeau and Pitfield, was prepared to support Chrétien's multilateral bargaining efforts through one more intensive round of negotiations with the provinces.¹⁰⁶ The Justice Minister conducted an initial "whirlwind tour" of provincial capitals, in which he consulted with the premiers of all provinces except Quebec.¹⁰⁷ It was followed by a brief one-day meeting in Ottawa in early June, in which the original negotiating format and agenda were altered to allow for consideration of a broader number of items over a more extended time period. There was an agreement to re-establish the Continuing Committee of Ministers on the Constitution (CCMC), which would meet for four week-long intensive bargaining sessions in four major Canadian cities, the first three at the start of the summer, and the last at the end. This would be followed by another First Ministers' Conference on the Constitution, scheduled for Ottawa in early September. The negotiations would adopt as their starting point the "best efforts" drafts of February 1979, and would include most of the earlier bargaining items and contentious issues then under negotiation (now reduced from 14 to 12 items, and including for the first time the item "powers over the economy").¹⁰⁸ Most first ministers assumed a posture of flexibility on these agenda items, but there were a few exceptions. For example, the federal government attempted to divide the agenda items into two groups of issues, the "people's package" (including patriation and an amending formula, a preamble, an entrenched charter of rights containing linguistic rights, and equalization, all supposedly of primary concern to individual citizens) and a "powers package" (including all other issues pertaining to the balance of power between the two levels of government). It also sought to give priority to the first group of items. This proposal, however, failed initially to gain provincial acceptance.¹⁰⁹

When the CCMC negotiations opened in Montreal in early July, it was clear that the entire bargaining strategy of the federal Liberal Government had changed radically from that adopted in the 1978-79 period. Chrétien, as co-chairman, declared that the "people's" issues were fundamental, and could not be traded off against issues involving government powers and institutions; that the federal government was no longer bound by its positions in the "best efforts" drafts of 1979 on such key matters as resource ownership and interprovincial trade; that items such as resources, off-shore resources and fisheries had to be

considered in one package in conjunction with the new item "powers over the economy": and that the principle of entrenchment of the charter of rights was non-negotiable. The federal government had apparently decided on a strategy of redefining the agenda of constitutional renewal to avoid the dangers of devolution that had manifested themselves in 1979.¹¹⁰ As one leading federal strategist put it, "All this emerged on day one of the meeting in Montreal. This was not a random or accidental affair. It was a clearly thought out game plan."¹¹¹ The federal authorities now had a strong bargaining card, powers over the economy, which they could use to neutralize provincial claims in other areas of the division of powers.¹¹² And they were determined to make their own preferred areas of renewal—patriation and the amending formula, a charter of rights including linguistic rights, and equalization—the priority areas of negotiation. Despite the strong initial provincial objections, they largely succeeded in this objective.¹¹³

For the rest of the summer, the initiative on constitutional renewal lay essentially with the federal government. Twelve intergovernmental committees were established with separate memberships and distinct negotiating items; this had the effect of reducing the opportunity for linkages and trade-offs on contentious items.¹¹⁴ The federal government also managed to expose deep divisions among the different provinces on negotiating items even in the face of its own rigidity and open threats of unilateral action. On most of the 12 items under negotiation, there was even less agreement than there had been in 1978-79.¹¹⁵ On the issue of charter entrenchment, the consensus was weaker than at Victoria in 1971.¹¹⁶ When the premiers met for their annual interprovincial conference, they were unable to bridge the chasm that had opened up among their ministers and officials. Ontario and New Brunswick had tended to side with the federal government on many important issues, and in the case of the former province, particularly on matters relating to the economy. They were generally at the opposite pole on different items from Alberta and Quebec.¹¹⁷ Even a leaked memorandum from Privy Council Clerk Michael Pitfield outlining a strategy of unilateral action on patriation to be implemented sometime before Christmas 1980, failed to unify the provincial first ministers.¹¹⁸ They managed to reach a consensus on only three items: off-shore resources, fisheries and communications. An effort by the federal government in the fourth and final week of negotiation in Ottawa to meet some of the provincial objections to earlier federal proposals was generally cold-shouldered. As one former senior Ottawa official put it,

You could characterize those discussions, first of all, as endless repetition of the same points around the table, a constant decrying of the fact that the federal government was offering no movement on anything...The concessions were very small, and in almost any other context, would have been ludicrous. So, needless

to say, one went into the meeting of September without having made very much progress.¹¹⁹

Whatever meager prospects for a September accord still remained were quickly dissipated, however, when a detailed memorandum from Michael Kirby, the FPPO head, was leaked to the media on the eve of the September conference.¹²⁰ After briefly reviewing the progress of the summer negotiations, and lauding the federal government for its "effective strategy",¹²¹ it argued that "it is by no means certain that consensus on a significant number of items will, in the end, emerge, and...where the provinces do reach full agreement on certain items...the federal government may not be party to it."¹²² It therefore recommended that

the federal government try to bring out the agreement on a package which appears to be within reach, and failing this, to show that disagreement leading to unilateral federal action is the result of an impossibly cumbersome process, or of the intransigence of the provincial governments, and not the fault of the federal government.¹²³

In essence, the Kirby Memorandum was arguing that unilateral action was an acceptable option, and was probably more realistic than that of negotiated agreement under the existing stalemated conditions.¹²⁴ But it did not underestimate the likely strength of the opposition to such an action. It anticipated strong protest from the federal opposition parties, the provinces, and many sections of the media and public. It projected difficulties in the courts, particularly on the question of constitutional practice or convention. It offered thoughtful strategies for combatting this opposition.¹²⁵ Its prognosis and advice as it turned out, were remarkably prescient.

Given the fragile structure of the negotiations and the highly conflictual nature of the bargaining atmosphere, it is not surprising that the 8-12 September First Ministers' Conference proceeded according to script. Much of the debate was conducted in public. The first ministers began with opening statements that indicated no desire or intention to move from the positions adopted by their ministers at the end of August.¹²⁶ There was deep division on four major items: the preamble, language rights, natural resources and off-shore resources. Prime Minister Trudeau was locked in fierce public and private combat with Premiers Lévesque and Lougheed. In apparent desperation, the premiers sought to force a united front behind a memorandum drafted by Quebec and embodying a "consensus" based on the highest number of provincial government endorsements on each negotiating item. This so-called "breakfast" (or Chateau) consensus was presented privately to Prime Minister Trudeau on Friday, 12 September, and dismissed as just another provincial "shopping list".¹²⁷ The conference broke up publicly the next day.¹²⁸

Some have argued that a major cause of the failure of the September 1980 negotiations was the tendency of the first ministers to disregard any common

positions reached during the four weeks of intensive yet genial negotiations conducted during the summer by officials and ministers. Rather, these leaders were determined to articulate their own bargaining parameters in their opening, public statements. This has been attributed to their desire to reap political benefits by "playing to the gallery".¹²⁹ However, there seems to be little evidence to support this contention. The members of the CCMC of the summer 1980, were not anywhere near a consensus on any of the major bargaining items.¹³⁰ There also appears to be little foundation for the contention of some that the summer negotiations had proceeded in an atmosphere of such good will and geniality that there was a genuine basis for euphoria about the possibility of reaching an agreement at the First Ministers' Conference.¹³¹ The overall conclusion of the Kirby Memorandum, as well as the testimony of most other summer participants, suggests otherwise. What is somewhat surprising is the fact that this geniality had been preserved despite the obviously wide areas of disagreement among ministers and officials of the different governments.

A major factor contributing to the failure of the summer 1980 talks almost from the outset was the complex structure and style of multilateral, multi-item bargaining. Clearly, in a multilateral bargaining context in which ten provincial authorities tend to align themselves against a single federal authority in order to enhance their jurisdiction and power, there is a tendency for different provinces to link issues of differing intensity and concern to them in order to build mutual support and a united front. The outcome of such an effort at forging provincial unity is a package that in its totality is bound to be far too devolutionary for any federal government, not to speak of one dedicated to recentralizing intergovernmental power in the face of a perceived challenge to its integrity and effectiveness. Nor was a limited accord possible, since "every participant had one or two items which were the minimum price for his agreement. A short agreement could not, therefore, satisfy everyone."¹³²

The "breakfast" or Chateau consensus reached by the provinces was not a credible bargaining position, but a desperate last-minute attempt by the provinces to project publicly some unified opposition in the face of an already predetermined policy commitment by the federal government to include unilateral action as part of its strategy for achieving constitutional renewal. Moreover, the normal problems of multilateralism in the intergovernmental context were complicated by the presence of the Parti Québécois Government, whose genuine commitment to a negotiated constitutional renewal was very much in doubt.¹³³ And still another party to the negotiations, the Alberta Government was then locked in a fierce struggle with the federal government over oil pricing, and this inevitably spilled over into the constitutional arena. Finally, it has been argued that "circumstances did not encourage the kind of give-and-take needed when so complex a set of important issues are at stake... The sessions were too rushed, too exhausting for participants to see their positions

and those of others clearly."¹³⁴ In fact, a great deal of time had been spent during the summer attempting to generate conditions for such integrative-type bargaining. But the chasm that had opened up between the different participants proved impossible to bridge.¹³⁵

NON-INTEGRATIVE BARGAINING PHASE VI: ESTABLISHING PRECONDITIONS FOR INTEGRATIVE BARGAINING: RESORT TO UNILATERAL ACTION AND ITS AFTERMATH, 1980-81

Within three weeks of the failure of the September 1980 First Ministers' Conference, Prime Minister Trudeau finally carried out his long-standing threat to resort to unilateral action to achieve constitutional renewal. He announced that he was placing a resolution before Parliament which included three of the twelve items which had been negotiated at the September conference: patriation and an amending formula, a charter of rights (including linguistic rights), and equalization.¹³⁶ It was, in essence, the People's Package. The amending formula that was proposed was an interim procedure to be established for two years, during which an attempt would be made to negotiate a permanent procedure. It was a variant of the Victoria Charter formula, but with a provision for a national referendum in case of federal-provincial deadlock.¹³⁷ The Charter of Rights would be entrenched, and would include a guarantee of fundamental rights and freedoms, democratic rights, mobility rights, legal rights, non-discriminatory (equality) rights, official language rights, and minority language educational rights.¹³⁸

The initial strategy of the federal government was to pass the resolution through both houses of parliament, after a brief period of closed parliamentary hearings, by December 1980. It then hoped to obtain quick assent by the British Parliament. Thus, with the acquiescence of the general public, and possibly the support of one or more federal opposition parties and provincial governments, it could successfully fend off the anticipated strong opposition from some major federal quarters, most provinces, and important sections of the public such as media and academic representatives.¹³⁹

However, the plan did not unfold precisely as the federal government had intended. The federal NDP (apart from a few western dissidents) gave the project its approval after wringing a promise from the federal government to include an amendment on ownership of natural resources in the unilateral package.¹⁴⁰ However, the Progressive Conservative federal opposition, led by a determined Joe Clark, forced the federal government to televise the special joint parliamentary committee hearings and open them to representation from interested outside groups. The response from these groups was overwhelming,¹⁴¹ and eventually led to the acceptance of a number of important amendments to the initial constitutional resolution, especially in the Charter of Rights.¹⁴² The opposition also forced the government to withhold the vote

providing final House of Commons approval for the resolution until the initiated court actions on its constitutionality could run their course.¹⁴³ Even the British Government initially offered only lukewarm support.¹⁴⁴

The provinces, for their part, were quickly mobilized into common political action in opposition to the resolution. But they were divided on both the question of *whether* to oppose the resolution and if so, *how* to do this. Two provinces, Ontario and New Brunswick, sided with the federal government almost from the outset.¹⁴⁵ Another, Saskatchewan, openly hesitated for a considerable period of time, before it actually joined the opposition.¹⁴⁶

The provincial common front was eventually dubbed "the gang of eight", but it was not a very cohesive group. It decided initially to challenge the constitutionality of the resolution only by submitting references to three provincial lower courts, with the option of eventually making an appeal to the Supreme Court. It also agreed to establish informal lobbies directed at British MPs through provincial government representatives in London, in the hope of blocking passage of the resolution at its final stage.¹⁴⁷ Finally, in April, just after the Parti Québécois had won re-election in Quebec partially on the basis of a promise to defer its sovereignty-association objectives for another full term, the provincial front managed to endorse an alternative amending procedure, the so-called Vancouver formula. Under this formula, constitutional amendments would require concurrence by the federal Parliament and the legislatures of at least two-thirds of the provinces containing at least 50 per cent of the population of Canada. On the urging of Quebec, the formula also provided that provinces which opted out of such amendments would be entitled to full fiscal compensation.¹⁴⁸

The events of 1980-81, following the resort to unilateral action, had an important impact on the bargaining process on constitutional renewal. First they altered the structure of negotiations from a multipolar to what was now in essence a bipolar situation. Although there was still considerable *internal* bargaining among the parties *within* each of the two negotiating camps, a facade of unity was maintained publicly for the purposes of formal bargaining.¹⁴⁹ Second, the number of items now under negotiation had been significantly reduced, thereby greatly simplifying the bargaining process. Third, and most important, an element of political coercion, in the form of a decision to carry out a long-standing threat, had been injected into the process. Unilateral action in intergovernmental relations seemed to serve as the equivalent of a show of force in the international arena or in labour relations. In practical terms, it had a similar effect of forcing those who were the targets of this action to consider making real concessions in renewed negotiations as one possible defensive response, in the absence of more effective opposition tactics. In the words of one senior federal official, unilateralism constituted "the strategic use of intransigence" by the federal government.¹⁵⁰

However, it still required an outside, formally neutral arbiter, in the form of the Supreme Court, to bring this temporary "war" to an end and force the opposing parties back to the bargaining table. The hearing by the Supreme Court in early May 1980 had been preceded by a 2-1 split in favour of the federal government in the courts of Manitoba, Quebec and Newfoundland on the question of the legality of the federal government's unilateral constitutional action. The Supreme Court, after hearing argument on both sides from the best legal minds in the country, waited for a further five months until it finally announced its momentous decision, in late September 1981. It pronounced the federal government constitutional resolution to be legal but contrary to accepted constitutional convention.¹⁵¹ Soon after, a decision was taken by all parties in the constitutional process to participate in another formal round of negotiations.¹⁵² At this point, "non-integrative bargaining" on constitutional renewal was finally transformed into a form of genuinely integrative bargaining.

PHASE VII: THE PROCESS OF INTEGRATIVE BARGAINING, AUGUST TO NOVEMBER 1981

Immediately after the decision of the Supreme Court had been announced, the two most moderate of the eight opposing provinces, British Columbia and Saskatchewan, began to press openly for a return to the bargaining table.¹⁵³ Premier Bennett of British Columbia, as Chairman of both the premiers' conference and of the "gang of eight", met on several occasions with Trudeau and expressed some optimism about the Prime Minister's willingness to accept a negotiated compromise.¹⁵⁴ This "upbeat" perception, although regarded with skepticism by most major actors at the time, nevertheless had the effect of promoting a constructive bargaining atmosphere. At the same time the Saskatchewan delegation, encouraged by Attorney-General Roy Romanow, began to take soundings of the various provincial positions for signs of possible movement. They both discovered an important ally in the search for compromise in Premier Davis of Ontario.¹⁵⁵ All three delegations began to develop possible approaches to bargaining compromises and trade-offs, although their approaches were somewhat different. British Columbia favoured the use of such labour relations bargaining techniques as the "no name text" or draft compromise, embodying possible common positions of all parties. Saskatchewan and Ontario preferred what came to be labelled the "teeter-totter" approach, in which the major items amenable to compromise among the opposing bargaining groups are placed on each end of a teeter-totter (or balance) and then subjected to adjustments until the two are brought into approximate equilibrium.¹⁵⁶

Trudeau had agreed to convene one final round of negotiations among the first ministers in early November. By late October, the representatives of all three "soft" provinces, who had maintained close contact throughout most of the month, had managed to reduce the items amenable to compromise essen-

tially to two: the Charter of Rights supported by the federal government and the Vancouver amending formula endorsed by the provincial "gang of eight".¹⁵⁷ Among the adjustments or compromises in the Charter which were considered in order to make it more acceptable to its provincial opponents were the application of a legislative override or *non obstante* clause to all or parts of this bill, a delay in the time period for implementing certain sections of the bill such as equality rights, and opting-in provisions for minority language education clauses. Similarly, ways of making the Vancouver amending formula more palatable to its federal and provincial opponents were debated, including the elimination of the provision for full fiscal compensation for provinces which exercise their right to opt out of amendments affecting their jurisdiction, and the requirement that more than a simple majority of the legislature approve such a decision before a province would be permitted to opt out. While these consultations were taking place among the "soft provinces" largely at the ministerial level, some senior advisors to Premier Davis were attempting to soften the federal government position by prevailing on it to adopt a genuine posture of flexibility at the outset of negotiations. They also declared Ontario's willingness to surrender its veto, which was protected under the 1980 federal draft resolution amending formula. The federal government also indicated that it would agree to drop its earlier insistence on a Senate veto on all amendments. However, over and above these substantive differences, there continued to be uncertainty about the capacity of the bargaining groups to maintain their internal cohesion as they adopted more flexible positions and accepted compromises.¹⁵⁸

On the surface, during the first two days of the November conference, negotiations seemed to be once again at an impasse over controversial items such as use of a referendum procedure for the amending formula (which all provinces except Quebec opposed).¹⁵⁹ In reality, however, the delegations of the "soft provinces", notably Saskatchewan and Ontario, were quietly working behind the scenes to prepare a draft compromise. On 4 November Saskatchewan produced a proposal which was very close to Ontario's original compromise position at the outset of the conference. That same day the leading intergovernmental ministers for these two "soft provinces" (Romanow of Saskatchewan and Wells and McMurtry of Ontario) and the federal Justice Minister Chrétien met and agreed that "the essential compromise should be based on a complete Charter and complete Vancouver amending formula, and any move from either extreme should be balanced by a move on the other side".¹⁶⁰ It was a clear application of the "teeter-totter" or balance approach promoted by these "soft provinces"; only this time it also had obtained the approval in principle of a leading federal actor.

It is not surprising, therefore, that when the formal negotiating session had adjourned on the afternoon of 4 November, after the referendum option had

been firmly rejected, all efforts concentrated on eliminating the remaining gap between the two opposing positions.¹⁶¹ In particular, there were two persisting problems: the precise form of the *non obstante* clause and the scope and nature of minority language rights as they would apply to Quebec. These were negotiated in a celebrated "kitchen meeting" between Chrétien, Romanow and McMurtry, and then submitted to Trudeau for his approval.¹⁶² Premier Davis also attempted to convince the Prime Minister, that night, of the workability of the compromise.¹⁶³ However, it was Chrétien who seems to have had most weight in convincing Trudeau to accept the compromise.¹⁶⁴ The draft was circulated among all delegations except that of Quebec in the early hours of the morning of 5 June, and obtained their unanimous consent.¹⁶⁵ At the breakfast meeting at 9:30 that morning, the agreement was signed, with Quebec objecting strongly.¹⁶⁶

During the following days, powerful lobbies mobilized and succeeded in pressuring two reluctant premiers, Lougheed of Alberta and Blakeney of Saskatchewan, to alter their earlier somewhat restrictive positions respectively on the wording of native peoples and women's rights in the agreement.¹⁶⁷ At this point, the historic constitutional accord of November 1981 was finally in place.

IV — ANALYSIS AND EVALUATION: BARGAINING THEORY APPLIED

It seems clear from our case study of Canadian constitutional bargaining that for most of the 13 years of intermittent but intensive efforts at negotiating comprehensive constitutional renewal, the prerequisites of a genuinely integrative process of bargaining, in Pruitt's terms, were absent. The negotiating parties seemed unwilling or unable to search for a solution or package arrangement that would have provided greater joint benefits to them than a purely distributive (compromise) solution or the absence of any agreement. There was little evidence of a "give-and-take" attitude on their part, particularly on bargaining means and short-term objectives. They seemed reluctant to make linkages and accept bargaining trade-offs on matters of secondary importance. They did not make extensive use of intermediaries to find areas of common interest, nor show much openness to, or readiness to experiment with, a wide range of "problem-solving" methods and mediating techniques such as single negotiating texts, contract embellishers, personnel exchanges or diplomacy, which might have facilitated the effort at reaching a consensus.¹⁶⁸ They were slow to acquire "political learning", and seemed to lack political commitment or will.

For example, the First Ministers' Conference at Victoria in 1971 was promoted as the culmination of three years of intensive official and ministerial committee work and several well-publicized and open first ministers' confer-

ences which explored most aspects of comprehensive constitutional renewal. It was recognized that a comprehensive and fundamental constitutional revision could not be negotiated politically, and that agreement could only be attained on a small package of limited but mutually acceptable or beneficial items. Yet it was evident at the First Ministers' Conference in June that only two parties, Ottawa and Quebec, viewed the negotiations as a matter of priority concern; in other words, the structure of bargaining at Victoria was essentially that of a simple bipolar model. This itself might have been conducive to the negotiation of an accord, had the two principal bargaining actors and poles not been so far apart. Despite the appearance of consensus created by the initial, provisional verbal accord, it soon became obvious that genuine constitutional agreement between the two jurisdictional actors was absent. The federal government controlled the bargaining agenda, and was not prepared to yield on any of the major demands for constitutional devolution of federal power that had been advanced by successive Quebec governments since that of Daniel Johnson in 1966. The main institutional political elites in Quebec were therefore not prepared to support Premier Bourassa in his flexible bargaining posture. The compromise proposed by the federal government at Victoria on social policy was immediately recognized by them to be a mere papering over of the deep, fundamental divisions between the two major negotiating parties on reforms in jurisdictional powers and institutions. If this was not yet apparent to the Quebec premier while at Victoria, despite his insistence on submitting the verbal accord to cabinet and caucus approval, it must surely have become so upon his return to his home province. The verbal accord was stillborn from the outset because it lacked the necessary underpinning of elite and institutional consensus in Quebec.¹⁶⁹

With respect to the propositions related to successful integrative bargaining presented in section II above, although Victoria satisfied two of the conditions of having a small number of negotiators debating a brief, manageable package of items, in other respects it fell far short of meeting those conditions. First, with respect to bargaining structures, no coalition pattern had formed between Quebec and other provinces, thereby creating an alliance which could provide an effective counterweight to the federal government.

Second, the principal items under negotiation in the Victoria Charter package were not considered to be of major salience to any of the negotiating actors besides the federal government. In the case of Quebec, with the exception of the proposed amendment on social policy, these items were largely peripheral to that province's main constitutional goals concerning a revised distribution of powers. In the case of the other provinces, they were viewed as of far less importance than the "bread-and-butter" issues discussed in non-constitutional meetings. There was therefore little incentive for these provinces to take up

these issues and try to develop new or compromise solutions which might have bridged the gulf between the bargaining principals.

Third, in 1971 there had been little in the way of past political contacts and current political ties established among the parties to the negotiation, which might have facilitated the formation of political coalitions. A new generation of young, able and innovative first ministers was beginning to emerge in 1971, but it had not yet had time to fully develop and assert itself. Partisan ties were also loose.¹⁷⁰ The long-term bargaining goals of the provincial actors were markedly different, their political resources were still limited, and their relative political power was still much inferior to that of the federal government. Most had not yet developed very diversified or flexible intergovernmental bargaining strategies and tactics. The principal items under negotiation (patriation, an amending formula, a limited bill of rights, minor political institutional changes, jurisdiction over social policy) were largely symbolic and intangible rather than substantive concerns, and therefore were not readily divisible or susceptible to imaginative compromise solutions. Problem-solving approaches such as third-party mediators, best efforts drafts, and contract embellishers had not yet been discovered or tried. The general atmosphere surrounding the negotiations was permeated by much personal distrust.

The gap between the federal government and those provinces seeking devolution of federal authority widened in the years that followed, as new and contentious policy issues, such as natural resources, fisheries and off-shore energy, were forced onto the constitutional agenda. Moreover, with the advent to power of a Quebec party committed to achieving political independence, the bargaining stakes were dramatically raised. Yet despite the investment of much time, effort and resources in constitutional negotiations during the period between 1976 and 1980, agreement proved elusive.

Most of the constitutional initiatives during this period were taken by the federal government, and most were patently inadequate for achieving an integrative agreement. For example, Trudeau's 1975-76 patriation initiative was too limited in its scope, too narrowly oriented to containing Quebec nationalism, and too neglectful of growing jurisdictional concerns in western and eastern Canada to provide any real basis for integrative bargaining. A provincial coalition had been forged in opposition to the federal government, thereby facilitating the adoption of a uniform negotiating position. But the long-term goals of the provincial governments, including substantive changes in the distribution of powers, were now in direct conflict with the federal government's more limited constitutional objectives.

Similarly, the 1978-79 constitutional negotiations, despite the progress it achieved on a number of fronts, failed to meet most of our proposed conditions for successful integrative bargaining. For example, the June 1978 federal initiative embodied in Bill C-60 was produced by too small a group in too secret

a manner, with too little outside consultation to be a credible and serious basis for federal-provincial negotiation. Even as a strategic weapon designed to prod the provinces into making concessions, it was poorly timed and poorly packaged. The negotiations surrounding the November 1978 and February 1979 First Ministers' Conferences were more promising in this respect, since their 12- and 14-item agendas did include most of the major issues of concern to the negotiating parties, and they did establish a useful informal negotiating forum in the free-wheeling ministerial meetings of the CCMC. They also experimented for the first time with a valuable problem-solving mechanism, the "best-efforts" drafts. However, there were too many interested but unaligned parties in these negotiations. The lines of division and alliance patterns among them were still very unclear, despite the multiplication of political contacts and ties through regional meetings and other intergovernmental administrative arrangements. There were also too many agenda items to negotiate in a single package, and many were not easily divisible or linkable. There was too much partisanship and political posturing due to pre-election concerns, and too much personal conflict and distrust. Above all, there was too much uncertainty about the real motives and intentions of the independentist Quebec government.

Despite its promise to establish intergovernmental and constitutional negotiations on a more solid, less conflictual foundation, the Clark Government was in office for too short a period to implement its constitutional strategy. Neither the flexible bilateral bargaining style it adopted on a few intergovernmental issues nor the preliminary draft efforts of its special constitutional advisor provide much clear evidence as to what that approach would have been.

When Trudeau returned to power in 1980 and shortly after helped to defeat the Parti Québécois' referendum on sovereignty-association, the ground was laid for a new federal approach to constitutional and intergovernmental renewal, that of recentralization. An important method used to achieve this goal was the threat of or actual resort to unilateral action. In the constitutional field, this was translated by Trudeau and his closest official advisors into a "two-track" strategy. The willingness of the provinces to make concessions agreeable to the federal government became the prime factor in determining which of the two tracks the federal government would choose: negotiated agreement with the provinces or unilateral action on its own constitutional package. This new "two-track" strategy aimed at recentralization was applied in the summer of 1980 with rather mixed results. While the federal government did succeed in shifting the constitutional agenda to favour its own priorities (embodied in the "people's package"), and while it did strengthen its relative bargaining position with the provinces by introducing a new bargaining "chip" for itself ("powers over the economy"), it also succeeded in dissipating much of the good will it had generated among the provinces after its referendum success. Its decision to disown its previous positions in the 1979 negotiations by taking the "best

efforts" compromises "off the table" contributed much to the collapse of the September 1980 negotiations. Indeed, there is good reason to believe that its expectation, if not its underlying preference in the summer of 1980, was that of bargaining failure rather than success, as a pretext for unilateral action. The provinces, of course, fell readily into this trap by their inability to forge a strong alliance around some palatable alternative package.

In short, until the federal government's resort to unilateral action in the fall of 1980, few of the preconditions for "integrative" bargaining, as defined by the theoretical bargaining literature, were present. With respect to bargaining structures, there were by then a large number of parties to the negotiation who perceived that their vital interests were at stake. Yet there was little sustained attempt at this stage to build broadly-based coalitions in order to simplify the complex, multilateral process of negotiation among 11 first ministers. There were no provinces and few individuals committed and available to play neutral roles as bargaining intermediaries.¹⁷¹ There were a dozen or more items on the constitutional agenda, and few seemed capable of resolution either individually or collectively, through linkage methods.

With respect to bargaining goals and resources and strategies and tactics, several of the provinces, notably Quebec and the three westernmost provinces, had strengthened their relative political power and resources considerably since the beginning of the decade, and they now offered formidable bargaining counterweight to the federal government. They had also increased their informal and formal consultations with each other on a whole range of intergovernmental matters, thereby forging closer political ties among themselves.¹⁷² Their bargaining goals had become more comprehensive and uncompromising, in conjunction with their altered perception of their vital interests. They had also developed a broader array of bargaining resources which they could bring to bear on the negotiations. For example, they could threaten or actually implement unilateral action in intergovernmental areas over which they had some legitimate claim to jurisdiction (such as natural resources, off-shore resources or fisheries), even if these measures were seen to operate against the national or some other regional interest. They could also refrain from providing party or campaign support to their federal or provincial counterparts or could actively campaign against their opponents at these governmental levels. They could erect barriers to trade or economic mobility which could work against national or regional interests.

All of these developments made flexible constitutional bargaining more difficult to achieve. With respect to bargaining strategies and tactics, the heightened actor involvement, growing complexity and interrelatedness of the bargaining items, and increasing "spillover" of contentious issues from other policy areas such as energy or fiscal-sharing, encouraged more sophisticated and more tough-minded bargaining strategies and tactics than had been the case

during the Victoria Charter phase. These strategies and tactics were sometimes forged in ministries or departments of intergovernmental affairs whose principal mandate was to coordinate an overall policy designed to maximize the intergovernmental position of that government.¹⁷³ This occasionally had the effect of producing a highly rigid and polarized set of bargaining options, and a commitment to bargaining goals and means which did not allow for much compromise or "give-and-take".¹⁷⁴ An example of such inflexibility can be seen in the rigid response of most provinces to the important federal concessions in the February 1979 First Ministers' Conference.

Conflict over the substance or content of bargaining came increasingly to a head during the 1979-80 period, as new items found their way onto the constitutional bargaining agenda. The federal government bemoaned its position of having to bargain "rights" (embodied in a charter) against "fish" or "oil". Its efforts to combine the bargaining items into a "people's" versus "powers" package was in large part strategic; but it also stemmed from its frustration with the substance of constitutional negotiations, and in particular, the asymmetry and unlinkability of symbolic and material goods.

Finally, with respect to the actual process of bargaining, an attitude of deep distrust or even antagonism existed between several of the leading political actors. For example, the federal government was convinced, despite the Quebec government's pledge of good faith, that the P.Q. was not seriously interested in striking a constitutional deal, and this attitude was reinforced by the long-standing personal and ideological antagonisms between Trudeau and Lévesque.¹⁷⁵ A similar attitude of hostility existed between Trudeau and Lougheed, fuelled by their differences over energy policy.¹⁷⁶ Under such conditions, mediating devices such as "best efforts" drafts and efforts to foster camaraderie at the CCMC ministerial meetings in late 1979 and at the summer meetings of officials and ministers in 1980 ultimately proved ineffective.¹⁷⁷ The federal government, once it became convinced in the spring of 1980 that its bargaining position in intergovernmental negotiations was becoming increasingly vulnerable, adopted a much more aggressive, strategic negotiating posture, nourished particularly by its new FPRO head, Michael Kirby. When the extent of this new, tougher federal posture was fully exposed with the leak of the Kirby Memorandum, remaining "trust ties" between officials of the two levels of government quickly dissolved.

Ironically, the resort to unilateral action by the federal government in October 1980 may actually have helped to unblock the constitutional bargaining impasse.¹⁷⁸ First, it transformed the structure of negotiations from a multipolar to a bipolar one. Both the federal government and its provincial opponent realized that they needed to forge strong alliances in order to maintain their legitimacy and political credibility with the public, the courts, and the parliament at Westminster. These alliances cut across partisan political lines; their

composition was determined by a complex set of factors, including the calculation of one's position as a future winner or loser in the proposed constitutional restructuring embodied in the federal resolution package.¹⁷⁹ While the alliances simplified the structure of bargaining by reducing the alternative options on each major item to two, they did not transform the negotiation into a contest between two cohesive, rigidly polarized opposing camps. Within each alliance or common front there were adherents of both a "hard" and a "soft" line. Moreover, some of the members of each alliance had hesitated for a time before opting for one or the other side. They continued to maintain their contacts with members of the opposing alliance, and to press for a "softer" line within their own camp. This provided a measure of flexibility in bargaining which was invaluable in later efforts to introduce problem-solving mechanisms, create a greater role for facilitating intermediary bodies like the courts,¹⁸⁰ and find compromises and trade-offs on specific agenda items.

Second, the decision to act unilaterally also forced the federal government to reduce the constitutional package to a few manageable items, since this was all they could legitimately "renew" without alienating public support. It also had the effect of shifting the constitutional agenda in favour of the federal government's priorities, including the major items in the "people's package". But if this seemed temporarily to advantage the federal side, it also forced both camps to consider seriously negotiating meaningful compromises and trade-offs within this narrower package, something which they were unwilling to do in the summer and September of 1980.¹⁸¹

Third, unilateral action enabled the federal government to broaden the consultative process on constitutional reform to include elements of the interested public, particularly with respect to the Charter of Rights. Those public proposals for amendments which were adopted substantially improved the content of the constitutional package. Such public input prior to a negotiated agreement among first ministers is rare in Canadian intergovernmental bargaining, because it is generally viewed as subversive of the delicate balance in federal-provincial and national-regional interests which these accords are supposed to embody.¹⁸²

But unilateral federal action also had some highly negative consequences for the constitutional bargaining process. First it transformed the climate of bargaining in constitutional renewal and intergovernmental relations from one of moderate conflict and impasse to one of intense hostility, deadlock and inaction. The major energies of all jurisdictions over the next year were directed to mobilizing public, group and institutional support for their particular position both on the substance and process of constitutional renewal. Thus, members of both camps strove to win the approval of the media, public opinion, British parliamentarians, and finally the courts. In the process, they resorted to ugly vituperation, spent large sums of money, used extensive bureaucratic resources,

and expended much time and effort on the conflict. Most other intergovernmental policy matters were brought to a standstill. A residue of bitterness and betrayal was left which made ongoing intergovernmental negotiations much more difficult.

Second, bargaining goals and resources, strategies and tactics which might have been directed towards solving intergovernmental policy conflicts were diverted to maximizing each side's political advantage. By the time the issue of the legality and constitutionality of the federal resolution came before the Supreme Court, the two camps had fought the battle of public opinion, the parliamentary "Battle of Britain", and the battle in the lower courts to a virtual standstill. With the signing of the April accord by the "gang of eight", the lines of division were firmly delineated and alternative, seemingly irreconcilable negotiating positions were solidified.

It was the intense feeling of frustration and unhappiness with this stalemated situation, as well as the anticipation of a possible breakthrough arising from the Supreme Court pronouncement, that finally set the process of "integrative" constitutional bargaining in motion at the end of the summer of 1981. The Supreme Court decision not only reinforced the perception of stalemate by recognizing some legal and moral basis in each side's constitutional position; it also pointed the way to overcoming this impasse by redefining the procedural rules for achieving an accord. Henceforth the consent of all 11 parties to the negotiation would no longer be a prerequisite for any agreement, as had been assumed to be the case since 1968. All that was needed was the consent of a "sufficient" (but indeterminate) number of provinces. This encouraged a loosening of the previously hardened lines of division between the two camps, and offered possibilities of doing an "end run", if necessary, around a deviant or obstructionist province.

Fortunately, at this stage, in the absence of formal, neutral intergovernmental arbiters, three of the negotiating parties, one in the federal camp and two in the provincial common front, decided to assume roles as intermediaries and explore possibilities for a compromise accord. They managed to narrow the distance between the two camps on the items under negotiation, and to produce potential compromises and trade-offs. They also succeeded in persuading all parties to try once again to negotiate a settlement to the dispute. Nevertheless, the outcome of the bargaining was still very much in doubt when formal negotiations resumed among the first ministers in November 1981.

There were two major remaining question-marks: First, it was not clear what was the relative strength of "hawks" and "doves" within the federal camp, and how amenable each of these groups was even at this stage to the first (negotiated compromise) rather than the second (unilateral action) of the two options in the federal government's "two track" strategy. Second, the willingness of the Quebec Government to give its consent to the emerging compromise package

was very much in question. Not only was there an obligation on the part of the other members of the provincial front to consult with that province before taking further action; there was a reluctance on their part to exclude one of the two largest and most important provinces, and the only one which had a French-language majority.

These final obstacles were surmounted when the two governments briefly vied over the question of a referendum device in the amending formula and then dropped the issue. The incident allowed the federal "hawks" to see that this option was a clear "non-starter" with the provinces (except Quebec), and would be vehemently opposed by them in any future constitutional moves by the federal government. Yet unilateral constitutional action without some ratification by the Canadian public was clearly unthinkable. As for Quebec, its determination to maintain its ideological and historical consistency on this question served to release its provincial common front partners from their self-imposed moral obligation to consult it in advance of any change in their negotiating position. The result was the breakdown of any prior lines of division, the final resolution of minor points still under contention, and the achievement, through a final process of bilateral bargaining, of an integrative accord. Unfortunately, this had to be negotiated over the bitter opposition of the government, the official opposition and much of public opinion in Quebec.¹⁸³ It was, nevertheless, an exercise of considerable imagination and statesmanship.

It would seem, then, that the propositions drawn from the bargaining literature were, for the most part, supported at this final stage of negotiation. "Integrative bargaining" finally did occur at the very end of the 13-year constitutional renewal process, despite the federal government's retention, almost to the end, of its unilateral option, and the Quebec Government's persistent opposition to the developing compromise. Bargaining structures were simplified and contentious items were gradually reduced in number and eventually eliminated through compromise and trade-off. A compromise proposal gradually evolved; it consisted of a basic trade-off between the federal charter of rights and the provincial amending formula, but included some novel further inducements in the form of the notwithstanding clause on charter rights and the opting-out provision on constitutional amendments. The leading actors now had wider constitutional goals, more diversified political resources, expanded political power and more sophisticated strategies and tactics than at earlier negotiations; but they also bore a legacy of deep distrust, bitter personal differences and profound perceptual conflicts and biases. Nevertheless, they were finally able to achieve an accord. This was due in no small part to the facilitating decision of the Supreme Court and to the imagination and capacity of some "soft provinces" to mediate differences, develop compromises and trade-offs, and "discover" novel arrangements which would provide greater

joint benefits to all parties. Above all, it was the culmination of a long process of "political learning", leading to a final act of statesmanship and political commitment by the first ministers. The outcome may appear to have favoured one or the other side. It may have been a small success in its substantive implications when measured against the broader objectives of constitutional renewal.¹⁸⁴ Its compromises may have had some undesirable long-term consequences.¹⁸⁵ But it represented a final bargaining success after all previous efforts in this area had failed. This was no mean achievement.

Although the isolation of Quebec may have been necessary for achieving an accord at this time, it was hardly a long-run solution to constitutional negotiations. Since all governments and opposition parties at both levels, regardless of political stripe, clearly recognized this fact, it seemed only a matter of time until this particular deficiency in the 1981 accord would be corrected. The Meech Lake Accord, which obtained the unanimous agreement of the first ministers in June 1987, has attempted to do just that. In return for certain concessions, most notably its constitutional recognition as a "distinct society", Quebec agreed to participate as a full partner in future constitutional negotiations.¹⁸⁶ If this Accord is eventually ratified,¹⁸⁷ the first major step in the process of constitutional renewal which began in 1968 will finally have been completed.

V — CONCLUSIONS

This review of the bargaining process in Canadian constitutional renewal from 1968 to 1981 underlines how difficult it is to achieve agreements on major intergovernmental issues within the Canadian federal system. Accords in the constitutional area have posed a particular challenge in this respect because the items under negotiation in this sphere are frequently of an intangible or symbolic nature, and are therefore not readily divisible, measurable or susceptible to simple compromise. A creative approach to bargaining using special problem-solving techniques is required in this area. Over a long process of trial and error, including many failed negotiating efforts, our leading constitutional actors have gradually come to grasp and accept this notion intuitively. They have been helped in this "political learning" process by certain "forcing" or facilitating mechanisms, such as the Supreme Court. In November 1981 they finally negotiated a compromise agreement which, however imperfect or incomplete, at least provided significant mutual benefits for the negotiating parties and some important constitutional outcomes.

To help us understand, interpret and evaluate this process, we turned to the theoretical literature on bargaining and negotiation. We employed certain constructs and propositions drawn from this literature to describe the various phases of negotiation and the gradual process of "constitutional learning" in Canada between 1968 and 1981. In particular, we have highlighted one such

theoretical approach, which we have labelled "integrative bargaining", associated most closely with Pruitt. The approach was useful in delineating certain conditions for successful constitutional bargaining. It helped to explain why in terms of these conditions, earlier efforts at achieving constitutional renewal failed. It also helped us account for the bargaining success in the fall of 1981. The approach can also be used in a prescriptive manner to suggest ways of achieving bargaining success in future constitutional negotiations.

Another, more recent case to which the concept of integrative bargaining may apply analytically is the negotiation of the Meech Lake Accord in 1987. This Accord was designed to complete the process of constitutional bargaining that was unfinished as a result of Quebec's exclusion from the 1981 agreement. In some respects it appears to be an even more clearcut and convincing example of successful integrative bargaining. The initial agreement was a unanimous one including all 11 first ministers. It dealt with a specific and limited list of issues.¹⁸⁸ Moreover, it did not involve the use of overt facilitating or forcing mechanisms like the Supreme Court. However, the Meech Lake Accord, unlike the 1981 Accord, also has a ratification process which is required for its implementation.¹⁸⁹

The Meech Lake Agreement, which must be approved by the legislatures of all 11 of the governments acting as signatories, is currently in grave danger of being defeated. Opposition to it is in part due to its substance, and in part to the process by which it was negotiated. Much of the opposition to the Meech Lake negotiating process comes from interested political groups who feel that they have been denied the right to have an impact on the way in which the Accord has been negotiated and implemented thus far. Not only was the Accord negotiated behind closed doors by 11 first ministers; it has been ratified by legislatures under majority government control, without much serious attention to or accommodation of the grievances and suggestions of interested parties and groups.

This experience has raised questions about the propriety of our elitist and closed bargaining process under executive federalism. It may also call into question the appropriateness of integrative bargaining as an approach to constitutional negotiations. The analysis of these criticisms of the elitist and closed nature of the constitutional bargaining process in Canada, and particularly the negotiations surrounding the 1987 Meech Lake Accord, will be dealt with fully in a subsequent paper (after completion of a further series of in-depth interviews of participants in these later negotiations).

There are, however, some lessons that may be derived from the analysis in this paper that can be applied to such an assessment of the Meech Lake negotiations and of the broader process of executive federalism in Canada. In the first place, it is clear that constitutional negotiations are an extremely complex, delicate and conflictual type of political activity, which require

optimal use of our available skills and talents. They are generally conducted over a long period of time, and their eventual success certainly depends on a large dose of discretion, trust and confidence by the major participants. Much of this activity, therefore, must be carried on behind closed doors, and ultimately must include those in final positions of authority, the first ministers. The complex search for workable compromises, linkages, and integrative and/or distributive solutions likewise must be carried out in confidence if it is to be effective. It must be done by third-party intermediaries, generally talented and politically experienced people with imagination, negotiating skills, and authority. These are probably not the negotiating mechanisms and the personnel held in highest esteem by the critics of the existing constitutional policy process or the opponents of executive federalism.

On the other hand, constitutional negotiations have important consequences for the average citizen, since they involve fundamental questions of rights and institutions. There is, therefore, a need to provide some political procedures or mechanisms that will enable individual citizens or representative groups to have input into the constitutional policy process. These procedures or mechanisms can operate as adjuncts to the elite bargaining process in executive federalism. An example of such a structure was the special parliamentary joint committee on the constitution that held hearings and received briefs from many interested citizens and groups on the constitutional resolution in 1980-81. It was possible in this case for the public to have a real impact on the content of the constitutional package, although its major elements were framed by elites in closed bargaining sessions.¹⁹⁰

In short, the negotiation of a constitutional accord, including one which is essentially integrative, may constitute a bargaining "success" in the technical sense, but it does not ensure that the agreement will command broad public support. Successful constitutional bargaining must involve not only elite consensus and mutual governmental benefits, but also wider public legitimacy and consent. The search for a more effective process of constitutional negotiation and decision-making in Canada will continue and will undoubtedly yield further studies of bargaining; however, such a process should be defined in the future in this broader, more inclusive sense, encompassing public interest groups and interested citizens.

Notes

1. See, for example, A.C. Cairns, "Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake", *Canadian Public Policy*, vol. XIV supplement (September, 1988), pp.121-145.
2. This problem of the closed, elitist nature of constitutional negotiations, and its impact on the signing and ratification of the Meech Lake Accord,

will be the principal concern of another research study which I am just beginning, with the generous support of the SSHRCC, under Grant #410-89-0697.

3. Among studies which reflect different aspects of this approach are: Richard Simeon, *Federal-Provincial Diplomacy* (Toronto: University of Toronto Press, 1972), Richard J. Schultz, *Federalism, Bureaucracy and Public Policy* (Montreal: McGill-Queen's Press, 1980) and Kenneth McRoberts, "Unilateralism, Bilateralism, and Multilateralism: Approaches to Canadian Federalism" in Richard Simeon (ed.), *Intergovernmental Relations*, vol. 63, Macdonald Commission Research Studies (Toronto: University of Toronto Press, 1985), pp. 71-130. See also Neil Caplan, "Some Factors Affecting the Resolution of a Federal-Provincial Conflict", *CJPS* (1969), recently reprinted in Garth Stevenson (ed.), *Federalism in Canada: Selected Readings* (Toronto: McClelland & Stewart, 1989), ch. 16.
4. The concept of "integrative bargaining" is defined more fully in notes 17 and 18 below.
5. A total of 43 interviews were conducted on a confidential basis with leading actors in the 1968-81 constitution-making process. They were held between December 1983 and August 1985 in Ottawa and 7 provincial capitals: Victoria, Edmonton, Regina, Toronto, Quebec City, Halifax and St. John's. An additional interview was arranged in Saskatoon. A breakdown of the government, position, and role of these interviewees in each of the phases of the 1968-81 constitutional review process is provided below. Most of the interviews were tape-recorded, although the interviewees were allowed a choice, and some asked not to be taped. Wherever data from these interviews are included in this paper, the interviewee will be identified according to his/her general position or office (e.g., a leading official in the Federal-Provincial Relations Office), and the date and place of the interview will also be included.

Government and position of interviewees

<u>Ottawa</u>	<u>Number</u>
Cabinet ministers	1
MPs or Senators	3
Political aides	4
Public servants	13
Sub-total	21
<u>Ontario</u>	
Cabinet ministers	--
MPPs	--

Political aides	1
Public servants	3
Sub-total	<hr/> 4
<u>Quebec</u>	
Cabinet ministers	1
MNAs	--
Political aides	1
Public servants	1
Sub-total	<hr/> 3
<u>British Columbia</u>	
Cabinet ministers	1
MPPs	--
Political aides	1
Public servants	1
Sub-total	<hr/> 3
<u>Alberta</u>	
Cabinet ministers	1
MPPs	--
Political aides	--
Public servants	1
Sub-total	<hr/> 2
<u>Saskatchewan</u>	
Cabinet ministers	2
MPPs	--
Political aides	--
Public servants	2
Sub-total	<hr/> 4
<u>Nova Scotia</u>	
Cabinet ministers	1
MPPs	--
Political aides	--

Public servants	1
Sub-total	<u>2</u>
<u>Newfoundland</u>	
Cabinet ministers	1
MPPs	--
Political aides	--
Public servants	3
Sub-total	<u>4</u>
TOTAL	43

Number of interviewees who participated in each phase of constitutional negotiations*

Phase I, 1968-71 (Victoria Charter)	8
Phase II, 1975-76 (Minimum package)	10
Phase III, 1978-79 (Quebec separatism and western alienation)	14
Phase IV, 1979-80 (Clark interlude)	13
Phase V, summer 1980 ("two-track" federal strategy)	31
Phase VI, 1980-81 (unilateral action)	32
Phase VII, fall 1981 (integrative bargaining and the November accord)	31

*Most interviewees participated in several phases of the constitutional review process between 1968 and 1981, performing either major or minor roles.

6. Jeffrey Z. Rubin and Bert R. Brown (eds.), *The Social Psychology of Bargaining and Negotiation* (New York: Academic Press, 1975), p.5.
7. *Ibid.*, p.2.
8. An example of such a process of consultation and/or information might be federal government contacts with the province of Newfoundland prior to determining its position on allocation of fishing stocks and fishing rights to different countries seeking permission to fish off the Newfoundland coast. Although control over the off-shore fishery falls within the exclusive jurisdiction of the federal government, intergovernmental consultation and mutual agreement might reap political benefits for both levels of government in Canada. This process of intergovernmental consultative interaction is not, however, one of bargaining.
9. *Ibid.*, chs. 4-6.

10. In his excellent pioneering study of intergovernmental relations bargaining in Canada in the 1960s, Simeon, *Federal-Provincial Diplomacy*, placed considerable emphasis on contextual conditions or structures in determining federal-provincial bargaining outcomes. He encompassed these structures, which he defined in terms of actors operating in a social and institutional context, largely under the chapter headings of sites and procedures (chapter 6) and issues (chapter 7). Although his discussion of these structures is generally valuable, he seems to me to have over-emphasized the physical structures, which in my view serve largely as background conditions with only a marginal impact on bargaining outcomes.
11. Rubin and Brown, *The Social Psychology*, chapters 7-8.
12. On this point, see J. Stefan Dupré, "Reflections on the Workability of Executive Federalism", in R.D. Olling and M.W. Westmacott (eds.), *Perspectives on Canadian Federalism* (Scarborough: Prentice-Hall of Canada, 1988), pp. 243ff.
13. Simeon, *Federal-Provincial Diplomacy*, discusses the outcomes and consequences of federal-provincial negotiations (chs. 11-12). But he does not attempt to delineate the process of bargaining interaction, compromise and trade-off which produces these outcomes.
14. See, for example, Oran Young (ed.), *Bargaining* (Urbana: University of Illinois Press, 1975). For an application of game theory to intergovernmental policy-making in Canada, see James A. Brander, "Economic Policy Formation in a Federal State: A Game Theoretic Approach", in Richard Simeon, *Intergovernmental Relations*, op. cit., pp. 33-69. For an application of this approach to constitutional reform in Canada, see Louis M. Imbeau, "Why Didn't All Dissenting Provinces Dissent in 1981? A Qualitative voting game analysis of the 1981 constitutional decision in Canada", unpublished paper presented to the Canadian Political Science Association, Winnipeg, Manitoba, 1986.
15. We are not suggesting here that political bargaining is fundamentally different from other forms of bargaining among social actors, but merely that "political power" has a more central role in such a process. The reason for this is that in politics, "political power", defined as the capacity to influence others to adopt one's political preferences, is a major determinant and motivator of behaviour. "Political power" may even be viewed as what political actors *primarily* seek to obtain or maximize when they engage in political activity. For an expanded discussion of this point, see Robert A. Dahl, *Modern Political Analysis*, rev. 5th ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1988), chapter 1.
16. For example, Daniel Druckman (ed), *Negotiation: Social-Psychological Perspectives* (Beverly Hills: Sage Publications, 1977), Roger Fisher and

William Ury, *Getting to Yes* (Boston: Houghton Mifflin, 1981), Max Bazerman and Roy J. Lewicki (eds.), *Negotiating in Organizations* (Beverly Hills: Sage Publications, 1983), Lawrence Susskind and Jeffrey Rubin (eds.), *Negotiation: Behavioral Perspectives*, special issue of the *American Behavioral Scientist*, v. 27, no. 2 (Nov-Dec. 1983), and John T. Dunlop, *Dispute Resolution: Negotiation and Consensus-Building* (Dover, Mass.: Aukeen House Publishing Company, 1984).

17. For the initial distinction, see Richard E. Walton and Robert B. McKersie, *A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System* (New York: McGraw-Hill, 1965), esp. chapters I-V. They define integrative bargaining as "the system of activities which is instrumental to the attainment of objectives which are *not* in fundamental conflict with those of the other party, and which therefore can be integrated to some degree. Such objectives are said to define an area of common concern, a *problem* (p. 5). Distributive bargaining, on the other hand, refers to "the system of activities instrumental to the attainment of one party's goals when they are in basic conflict with those of the other party ... It can involve allocation of any resources (e.g., economic, power or status), in what game theorists refer to as fixed-sum games in which one person's gain is a loss to the other ... The area of common concern in which the negotiating objectives of the two parties are assumed to be in conflict is referred to as an *issue*". (p. 4).

Pruitt uses the term "non-integrative" or "compromise" rather than "distributive" bargaining, but has essentially the same idea in mind. His major advance over Walton and McKersie is in his discussion of methods and techniques of problem-solving in "integrative bargaining" situations.

18. Dean G. Pruitt and Stephen A. Lewis, "The Psychology of Integrative Bargaining", in Daniel Druckman *Negotiation: Social-Psychological Perspectives*, p. 161. See also Pruitt, *Negotiation Behavior*, chs. 5-6. In this later work, Pruitt distinguishes more clearly between integrative and non-integrative agreements, which he calls "compromise" agreements (p. 138). An integrative agreement is frequently (although not always) "a novel alternative that was not under consideration at first." (p. 139) It is generally developed "by means of a problem-solving discussion". It provides the negotiating parties with greater joint benefit than they would achieve through non-agreement or through a compromise agreement (Joint benefit is defined in this case as either the sum of the parties individual outcomes or the outcome achieved by the less benefitted party) (pp. 140-141).
19. In political negotiations, the term "linkage" is often used to express the same basic notion.

20. Dean G. Pruitt, "Achieving Integrative Agreement" in Bazerman and Lewicki (eds.) *Negotiation in Organizations*, ch.2.
21. Dean G. Pruitt, "Strategic Choice in Negotiation," in Susskind and Rubin, *Negotiation: Behavioral Perspectives*, p.170. An example may be the federal government's unilateral action on the constitution in the fall of 1980.
22. *Ibid.*, p.167.
23. Max H. Bazerman, "Negotiation Judgments: A Critical Look at the Rationality Assumption," in Susskind and Rubin, *Negotiation: Behavioral Perspectives*, p.212ff.
24. R.J. Lewicki, "Lying and Deception," in Susskind and Rubin (eds.) (1983), pp. 75-76.
25. A "third-party mediator" may be defined as a party in a conflict who does not participate directly in the conflict with explicitly formulated negotiating positions, but produces plans or develops strategies or procedures for how an agreement between these parties can be facilitated. Such a party need not be completely disinterested in or neutral on the issues of the dispute, but may have an interest of his or her own in a particular solution. Moreover, a negotiating party or external office-holder (e.g., a judge or manager) may become a third party mediator (intervenor, intermediary) by assuming that role at a particular point in the conflict, even if he or she played an alternative role as direct participant or outside arbiter at another stage in the dispute. In other words, we are defining the concept of "third-party mediator" in generic terms, based on the role or function assumed. For a more extended discussion of the definition of "third-party mediator", see Lars-G. Stenelo, *Mediation in International Negotiations* (Lund, Sweden: Studentlitteratur, 1972), p. 36.
26. According to Howard Raiffa, "there is a continuum of roles, from weak to strong, that a mediator can play. On the weak side the mediator may be just a convenor of meetings or a nonsubstantive, neutral discussion leader...In more complex negotiations, the mediator might prepare minutes of the discussions and summarize or articulate any consensus that can be gleaned. He or she might help in implementing agreements by preparing well-written public relations documents that explain the necessity for compromise, by giving a stamp of approval to compromise agreements, by attesting that both sides negotiated in good faith and that no hidden agreements were secretly arrived at, by helping with the verification of agreements, by helping with grievances that might arise in the future because of ambiguities in the accord." (p. 218). He adds, although "mediators are not supposed to dictate solutions to the disputants, as arbitrators do, the distinction between mediation and arbitration is sometimes fuzzy. Strong mediators may suggest solutions or use their prestige to push

disputants towards certain solutions. Also mediators might want to think about what would be a fair solution and let these reflections partially govern their mediating behavior." (p. 218). See Howard Raiffa, *The Art and Science of Negotiation* (Cambridge: Harvard University Press, 1982), chapter 15.

In the case of constitutional and intergovernmental negotiations in Canada, the role of "third-party mediators" may be assumed at times by direct parties to the negotiations (e.g., representatives of a federal or provincial government adopting a "neutral" stance on an issue, judges of a lower court or the Supreme Court of Canada attempting to frame their judgements in a manner conducive to further negotiation and compromise by the parties to the dispute, royal commissions or task forces formulating recommendations which are intended to encourage bargaining consensus and compromise). At other times it may be played by those outside the negotiation process, such as a retired politician, diplomat or judge who has the confidence of all parties to the conflict. However, thus far there has been little effort to develop such mediating actors and roles in a formal sense in the intergovernmental area in Canada.

27. Howard Raiffa, "Mediation of Conflicts," in Susskind and Rubin, *Negotiation: Behavioral Perspectives*. See also Raiffa, *The Art and Science of Negotiation*, op. cit., pp. 220-221. Some other mediating devices have been suggested by Louis Stern and his collaborators. They include: 1) exchange of personnel among the conflicting organizations for a specified time period, 2) introduction of a superordinate goal of high appeal to the contending groups by a third party, and 3) use of "diplomats" such as ambassadors or envoys. See Louis W. Stern, Richard P. Bagozzi and Ruby Roy Sholaki, "Mediational Mechanisms in Interorganizational Conflict" in Daniel Druckman (ed.), *Negotiations, Social Psychological Perspectives* (Beverly Hills and London: Sage Publications, 1977) ch. 13, pp. 367-387. The latter are discussed in the context of organizational conflict, and may therefore be less applicable to constitutional concerns.
28. John G. Cross, "Negotiation as a Learning Process," in I. William Zartman (ed.), *The Negotiation Process: Theories and Applications* (Beverly Hills and London: Sage Publications, 1978), pp. 34-35.
29. This type of political commitment is frequently described by politicians as the exercise of "political will". However, the concept is too vague to be very useful analytically.
30. J. Stefan Dupré, "Reflections on the Workability of Executive Federalism", in Richard Simeon, *Intergovernmental Relations*, p. 21.
31. See, for example, Smiley, *Canada in Question*, 3rd ed.
32. Which is not to say that one can attribute most instances of bargaining failure in such political situations to problems of process rather than to the

- limitations inherent in the structural political context or to the difficulties associated with the substance or content of the negotiations.
33. For a brief summary of this long historical quest, see Michael B. Stein, "Canadian Constitutional Reform, 1927-82: A Comparative Case Analysis over Time" (1984), *Publius* 14, 1 (Winter, 1984), pp. 121-139.
 34. For a detailed account of these meetings, the agenda items under discussion, and the positions on major questions adopted by the leading constitutional actors of the time, see *The Constitutional Review, 1968-1971*, Secretary's Report, Canadian Intergovernmental Conference Secretariat (Ottawa: Information Canada, 1974), pp. 9-43.
 35. *Ibid.* See also Simeon, *Federal-Provincial Diplomacy*, chapter 5.
 36. Simeon, *Federal-Provincial Diplomacy*, p. 115. The formula was labelled the Turner-Trudeau formula, after the federal Justice Ministers who had developed it. It required approval of the federal Parliament and a majority of the legislatures in each of the four regions of Ontario, Quebec, the West, and the Atlantic Provinces. The package also included patriation, a limited charter of rights, a regional equalization provision, and Supreme Court entrenchment with minor changes. According to one senior federal official, "Victoria was simply cutting out a chunk of the huge amount of work we had done, and saying, 'perhaps we can put it together, reach agreement on it.'" Interview, Ottawa, 9 May 1985.
 37. *Ibid.*, p. 117. For a detailed discussion of the conference and the items under negotiation see *The Constitutional Review, 1968-1971*, Secretary's Report (1974), pp. 36-44, 183-189. See also Edward McWhinney, *Quebec and the Constitution, 1960-1978* (Toronto: University of Toronto Press, 1979), pp. 49-51, and Claude Morin, *Quebec versus Ottawa* (Toronto: University of Toronto Press, 1976), ch. 9.
 38. The agreement on social policy was rejected by the Quebec authorities on the grounds that it lacked substantive legal meaning. Other elements of the Victoria Charter were viewed as having the effect of straitjacketing Quebec in its efforts to achieve more sweeping constitutional changes. See McWhinney, *Quebec and the Constitution, 1960-1978*, p. 49 and Morin, *Quebec Versus Ottawa*, p. 68.
 39. Interview with a former senior official, Federal-Provincial Relations Office, Ottawa, 9 May 1985.
 40. Interview with a former top official, Ministry of Intergovernmental Relations, British Columbia, Victoria, B.C., 9 May 1985.
 41. *Ibid.*
 42. Interview with a former senior official, Federal-Provincial Relations Office, Ottawa, 9 May 1985.
 43. Interview with a senior official, Ministry of Intergovernmental Relations, British Columbia, 9 May 1985.

44. Interview with a former senior official, FPRO, Ottawa, 9 May 1985. It should be recalled that Bourassa did not formally "turn down the deal" at Victoria, but rather accepted in principle the compromise proposal on social policy, and then rejected it after he returned to Quebec and faced strong cabinet, legislative and public opposition to it. His behaviour seems inconsistent with the argument above that the issue gap between the principal negotiating parties was too wide to be bridged. A possible explanation for this apparent contradiction is that Bourassa himself was at first seriously out of step with his own cabinet and most of the political elite in Quebec on this issue. At Victoria he sought to be accommodating, despite the obvious shortcomings of the Charter accord, in response to group pressure from the first ministers. When he returned to Quebec, political realities forced him to recant. See, for example, McWhinney, *Quebec and the Constitution, 1960-1978*, pp. 49-51.

For a somewhat different version that portrays these events as a successful strategic effort by the Quebec delegation (with Bourassa's tacit support) to expose the federal government's insincerity in its constitutional bargaining posture at Victoria, see Morin, *Quebec Versus Ottawa*, pp. 63-71, and see also pp. 33-35 above.

45. Ibid.
46. Ibid.
47. For a similar view, see Claude Morin, *Quebec versus Canada*, p. 61 ff. The terms are drawn from Pruitt, *Negotiation Behavior* and Fisher and Ury, *Getting to Yes*, and describe a similar pattern of bargaining from a fixed position without serious contemplation of compromise, trade-off, or problem-solving.
48. Interviews with two former leading Ottawa officials, Privy Council Office, Ottawa, 11 January 1984 and Toronto, 19 January 1984.
49. Interview with a former leading Quebec official, Ministère des affaires intergouvernementales, Quebec City, 16 April 1985. See also Morin, *Quebec versus Canada*, chapter 9.
50. Interview with a former senior official, Federal-Provincial Relations Office, Ottawa, 9 May 1985.
51. Interview with a former Alberta Minister of Intergovernmental Affairs, Edmonton, 9 May 1985. See also Romanow et al., *Canada...Notwithstanding*, p. 5.
52. Romanow et al., *Canada...Notwithstanding*, p. 4.
53. Interview with a former senior official, Federal-Provincial Relations Office, Ottawa, 9 May 1985. Trudeau did offer the provinces a revised Draft Proclamation in January 1977. But the changes were only marginal, and it was quickly rejected by the provinces.
54. Ibid.

55. Ibid. At this time Ontario went along with the other provinces for the sake of peace. But the largest and wealthiest province was already becoming the natural ally of the federal government.
56. Interviews with former Deputy Ministers of Intergovernmental Affairs, Alberta and Saskatchewan, Edmonton, 9 May 1985 and Regina, 6 May 1985. See also Timothy B. Woolstencroft, *Organizing Intergovernmental Relations*, (Kingston: Institute of Intergovernmental Relations, 1982), chapter II.
57. The propositions concerning the number of actors, contentious items, goals and resources, and strategies and tactics discussed in the previous section provide the basis for this statement. This point will be expanded on in section III below.
58. Interview with a former senior official, Federal-Provincial Relations Office, Ottawa, 9 May 1985. A small study group had been established under the chairmanship of the Deputy Minister of Justice, Don Thorson.
59. See The Task Force on Canadian Unity, *A Future Together, Observations and Recommendations* (Ottawa: Minister of Supply and Services, 1979), Appendix 1 and 2. The ostensible purpose of the Pépin-Robarts Commission, as it came to be called, was to provide the federal government with a sounding-board on public attitudes and a source of fresh ideas for its constitutional and intergovernmental actions. However, when the Commission finally reported in January 1979, several of its recommendations, notably on language policy, were viewed unfavourably by the Trudeau Government. Consequently, it had little direct effect on that federal government's strategy in constitutional negotiations.
60. Interview with a former senior official, Federal-Provincial Relations Office, Ottawa, 9 May 1985. The group was headed by Clerk of the Privy Council Gordon Robertson and Deputy Minister of Justice, Don Thorson.
61. Ibid.
62. Romanow et al., *Canada...Notwithstanding*, p. 16. According to Romanow, a common front of all ten provinces, led by Claude Morin, Quebec Minister of Intergovernmental Affairs, Lou Hyndman, Alberta Minister of Intergovernmental Affairs, and himself, was formed in July in opposition to the two-phase strategy of Bill C-60. Interview, Saskatoon, 7 May 1985.
63. See Peter Russell, *Leading Constitutional Decisions*, 3rd ed. (Ottawa: Carleton University Press, 1982), pp. 484-485.
64. A somewhat different interpretation is offered by one reviewer. He argues that there is continuity between Bill C-60 and the October-November 1978 First Ministers' Conference, since several of the 12 items that were on the agenda at this FMC were issues addressed by Bill C-60. Letter to the author, 22 April 1978.

65. Romanow et al., *Canada...Notwithstanding* p. 21. For a complete listing and detailed discussion of these items, see Romanow et al., chapter 2. Many of these items are traceable to the 1976 letter from Premier Lougheed in reply to Prime Minister Trudeau's initiative. See pp.17-18 above.
66. *Ibid.* As the authors point out, this Continuing Committee of Ministers on the Constitution (CCMC) was a revival of an earlier institution used in the period prior to the Victoria Charter negotiations.
67. The statement is based on propositions about the number of bargaining actors, the number of contentious issues and the salience of these issues to the bargaining actors presented in section II above. They will be discussed more fully in relation to this case in section IV above.
68. By devolutionary is meant tending to devolve power away from the centre and towards the regions or provinces. I do not mean by the statement in the text that I believe that the use of "best efforts drafts" is inherently or necessarily conducive to decentralization or devolution in intergovernmental bargaining, although the point is arguable. For some further discussion of this issue, see note 75 below.
69. See particularly Romanow et al., *Canada...Notwithstanding*, pp. 22-23.
70. *Ibid.*, p.23.
71. *Ibid.* Also interview, Saskatoon, 7 May 1985. Saskatchewan's major role was perhaps more anomalous, and was due in part to Romanow's co-chairmanship of the CCMC.
72. *Ibid.*, p. 23. Also interview, Saskatoon, 7 May 1985. This perception was also shared by a leading federal negotiator. Interview, Ottawa, 9 May 1985. Presumably, then, the private ministerial meetings had succeeded in their "group therapy" function by helping to create such informality and receptivity to compromise. According to the communications approach to bargaining discussed in section II above, such techniques are extremely valuable in the effort to achieve negotiating success. This point will be expanded on in section IV above.
73. *Ibid.*, p. 24ff.
74. *Ibid.*, p. 52.
75. There is a question as to whether the technique of "best efforts drafts" is inherently devolutionary in intergovernmental relations in Canada, due to a structure of bargaining consisting of one federal actor and ten provincial actors. According to such reasoning, a "best efforts" draft compromise is likely to be struck at some mid-point between a highly centralist position adopted by the federal government and a highly decentralist position adopted by the most autonomist province. The overall effect of an agreement based on such draft compromises would tend, therefore, to shift power away from the federal government and towards the provinces. From

the standpoint of the federal government, such possible shortcomings of this technique would have to be weighed against the benefits of its contribution to integrative solutions to bargaining.

76. Interview with a senior official, FPRO, Ottawa, 9 May 1985.
77. Quoted in Romanow et al., *Canada...Notwithstanding*, p. 53.
78. According to bargaining theory, electoral pressure and associated partisan conflict generally tend to operate against bargaining flexibility and ultimate negotiating success. This is because partisan considerations may reinforce or be used to justify attitudes of bargaining intransigence. However, in the case of the Trudeau federal government in the late 1970s, the public perception of it as rigidly centralist seems to have contributed to its decline in popularity in certain regions of the country such as Quebec and the West, and this was reflected in public opinion polls in the 1977-79 period. The desire to improve its standing in the polls may have contributed to a more compromising attitude in the 1978-79 constitutional negotiations.
79. Interview with a senior official, FPRO, Ottawa, 9 May 1985. At a later stage in the interview, the official contradicted himself by declaring, "The odd thing was, of course, that the 1978-79 exercise...was an exercise of very considerable ingenuity on the part of federal civil servants to try to appear to be giving a great deal while in reality giving sweet "fanny anny" (sic)." However, this may have been a defensive reaction to the charge that "I would have been regarded as a province-lover, because I was associated with the 1979 offers."
80. Interviews with three former senior federal government officials, Privy Council Office, Ottawa, 11 January 1984, Toronto, 19 January 1984, and Ottawa, 9 May 1985.
81. Romanow et al., *Canada...Notwithstanding*, p. 54.
82. *Ibid.*, p. 53.
83. For example, one senior federal government official explained, "Peter [Meekison---Alberta's Deputy Minister of Intergovernmental Affairs] and I were trying to work on potential compromises between the two extreme positions of Lougheed and Trudeau...but we were really saying to each other, we can do this, but our bosses aren't going to listen". Interview, Ottawa, 9 May 1985.
84. See Task Force on Canadian Unity, *A Future Together* (Ottawa: Minister of Supply and Services, 1979), chapter 7.
85. Interview with a former top official, FPRO, Ottawa, 12 January 1985. He identified the author as Bob Bryce. Others, however, have attributed it to Tommy Shoyama. Both were former Deputy Ministers of Finance. Another background paper on this matter was authored by the University of Toronto economist A.E. Safarian.

86. It may be argued that because this period under Clark contained only a preliminary review of constitutional issues which did not lead to a First Ministers' Conference, it does not constitute a distinct bargaining phase on its own. However, in my view, because the major federal actors had changed, the style of intergovernmental bargaining had altered, and the federal government's constitutional strategy seemed to be undergoing redefinition, it seems sensible to treat this period as a distinct one, at least for analytical purposes.
87. See McWhinney, *Quebec and the Constitution, 1960-1978*, pp. 82-84, and Romanow et al., *Canada...Notwithstanding*, p. 54. The discussion paper was entitled *The Constitution and National Unity*, and was intended to be one of a series of "blue papers" aimed at developing party policy on various issues.
88. Interview with a Conservative Party Senator specializing in constitutional matters during this period, Ottawa, 8 May 1985. He specifically identified off-shore resources, bilingualism in the air, and lotteries as items, however, on which some progress was made.
89. Romanow et al., *Canada...Notwithstanding*, p. 55.
90. Interview with a senior official, FPRO, Ottawa, 9 May 1985.
91. Romanow et al., p. 55. An exception was the charter of rights, in which the "best efforts" draft of February 1979 was considerably "scaled down" by eliminating equality rights and legal rights, and left open the question of entrenchment. This occurred at the Halifax meeting of the CCMC in October 1979. Interview with a senior official, Department of Justice, Ottawa, 7 December 1983.
92. Interview with a senior official, FPRO, Ottawa, 9 May 1985. In his view, the function of FPRO at that point was one of "damage control" on the issue. A rather different point of view on this agreement, however, was provided by a former member of the Peckford cabinet at the time. He claimed that the major obstacle to working out these details was the defeat of the Clark Government soon after. Interview, St. John's, Newfoundland, 10 July 1985.
93. Romanow et al., *Canada...Notwithstanding*, p. 56.
94. *Ibid.*, p. 55.
95. For a good discussion of the pros and cons of bilateral versus multilateral intergovernmental bargaining in Canada, see Kenneth McRoberts, "Unilateralism, Bilateralism and Multilateralism: Approaches to Canadian Federalism", in Richard Simeon, *Intergovernmental Relations*, esp. pp. 117-120.
96. Interview, Ottawa, 8 May 1985. See also Terms of Reference for the Task Force on the Renewal of the Federation, Ottawa, December 1979. This paper defined a set of broad principles and projected the publication of a

- Green Paper for the fall of 1980, which would have served as the basis for consultation in both federal and provincial parliaments and a planned First Ministers' Conference on the Constitution. According to Senator Tremblay, Prime Minister Clark spent several hours working on an early draft of the proposed Green Paper, and approved its contents in principle.
97. Trudeau did not spell out very clearly what kind of constitutional "third option" he had in mind. However, Claude Ryan and the provincial Liberal Party had produced a Beige Paper (*Livre beige*) in January 1980, which called for a number of significant revisions in the existing constitution. These included an entrenched Bill of Rights recognizing French and English as official languages in federal government institutions, broadening minority language rights in all provinces, including Quebec, and recognizing the aboriginal rights of the native peoples of Canada. It also proposed some significant institutional reforms such as the establishment of a Federal Council appointed by provincial governments to replace the existing Senate, with wide-ranging powers in intergovernmental relations. Finally, it recommended significant changes in the division of powers, in a decentralizing direction. See The Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation* (Montreal, 1980), and McWhinney, *Canada and the Constitution, 1979-1982*, pp.31-35. The overall effect of these proposals, then, was to create an expectation on the part of many Quebecers supporting the "No" side in the referendum that defeat of the sovereignty-association option of the P.Q. would still bring significant constitutional change.
98. According to a senior advisor of Chrétien, Trudeau himself retained overall responsibility in constitutional reform matters. Chrétien was the principal "executor" of his policy, and Michael Kirby, Secretary to the Cabinet for Federal-Provincial Relations, headed the strategy team in FPRO. This team included Roger Tassé, the Deputy Minister of Justice (who had co-equal status with Kirby), Fred Gibson, a senior Justice official, David Cameron, Kirby's assistant in FPRO, Eddy Goldenberg, a long-time aide to Jean Chrétien, Nick Gwyn, another FPRO official, Reeves Haggan, an official seconded from the Solicitor-General's Office, and several outsiders such as Pierre Genest, a Toronto lawyer, Michel Robert, a Montreal lawyer, Ronald Watts, Principal of Queen's University and a former Pépin-Robarts Commissioner, and legal technicians such as Barbara Reid, Fred Jordan and Barry Strayer. Interview, Ottawa, 5 December 1983. Others mentioned in subsequent interviews included Hershell Ezrin of the Canadian Unity Information Office, Torrance Wylie, a private consultant, and George Anderson of External Affairs.

99. Interview, Ottawa, 9 December 1983. According to Chrétien, some government members wanted an even smaller package, including patriation and an amending formula, but he rejected this option.
100. For an extensive discussion of this new strategy, which the author labels "defensive expansionism", see David Milne, *Tug of War* (Toronto: Lorimer & Co., 1986), pp. 27ff.
101. *Ibid.*, pp. 43ff.
102. There can be no doubt about Chrétien's sincere commitment to a negotiated multilateral agreement with the provinces at this juncture. For example, the "hawks" in the federal cabinet are alleged to have demanded the presence of John Roberts as a second federal minister in the summer CCMC meetings to ensure that Chrétien did not yield too much on the federal side of the negotiations. Interview with two former senior officials, FPRO, Ottawa, 7 December 1983. This incident illustrates the importance of personality factors in constitutional and intergovernmental negotiations.
103. Interviews with leading federal officials, Ottawa, 5 December 1983, Toronto, 21 June 1985. See also Milne, *The New Canadian Constitution*, chapters 2-3.
104. According to Kirby, "When I put the negotiation team together, what I did was sit down and do a matrix—these are the skills that I want and here is a whole range of people—and pick people so that the team was emotionally compatible, and they gave me as a group the set of skills that were needed." Interview, Toronto, 21 June 1985. The members of this strategy team are listed in note 98 above.
105. Interview with a former Ottawa official in the Privy Council Office who served with both men, Toronto, 12 January 1984.
106. In fact, Kirby himself, like Chrétien, actually favoured a multilateral negotiating strategy over the unilateral option at this juncture. This attitude was shared by most members of his team. Several members of the federal cabinet, including Trudeau, and some top federal officials, such as Pitfield, were generally viewed as more "hawkish" on this matter. Interviews with several former leading federal officials, Ottawa and Toronto, 1984-85.
107. Milne, *The New Canadian Constitution*, p. 47 and Sheppard and Valpy, *The National Deal*, p. 39. Chrétien's reason for bypassing Quebec is unclear. However, it probably was based on an initial assumption that the P.Q. Government, despite its referendum defeat, would be unwilling to cooperate in an effort to negotiate a reform of the existing federal structure. The assumption proved to be incorrect.

108. One item which was dropped was the monarchy. Others, such as the federal spending power, the declaratory power, and indirect taxation were incorporated into "powers over the economy".
109. See Ronald James Zukowsky, *Struggle over the Constitution from the Quebec Referendum to the Supreme Court* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1981), p. 37. Later, however, these labels were accepted and played a prominent role in shaping the entire summer and September negotiations.
110. Interview with a leading official, FPRO, Ottawa, 8 December 1983 and 12 January 1984. See also Milne, *Tug of War* Chapter II.
111. Interview, Toronto, 21 June 1985.
112. Interview with a senior FPRO official, Ottawa, 8 December 1983, and 12 January 1984.
113. *Ibid.* See also Kirby Memorandum (full citation in note 120 below), pp. 3-35.
114. The complexity of this negotiating structure can be contrasted with the much simpler bargaining structure established in the November 1981 conference. This seems to support our hypothesis about bargaining structures in section II above.
115. Zukowsky, *Struggle over the Constitution*, p. 39. He argues that the federal government kept the provinces off balance by maintaining an aura of uncertainty about its intention to resort to unilateral action. Also Kirby Memorandum, pp. 3-32.
116. Interview with a senior official, Department of Justice, Ottawa, 7 December 1983.
117. According to the Kirby Memorandum, "The role of Quebec [was] ambiguous. While it participated in discussions on all items, it [was] not on balance an effective defender of the interests of Quebec." (p.3) But a leading Quebec political actor explained that Quebec's unaggressive stance was due to its strategy during, the summer of 1980, of: 1) participating in negotiations but advancing nothing new in comparison to the traditional positions of Quebec, thereby re-establishing the credibility of Quebec after the referendum defeat, and 2) joining the bandwagon, namely giving automatic support to any province that advanced a position consistent with that of Quebec, in order to achieve a consensus among the provinces. In his view, this strategy succeeded. Interview, Quebec City, 16 April 1985 and by telephone, 23 May 1985.
118. See Romanow et al., pp. 90-91.
119. Interview with a former senior official, FPRO, Ottawa, 9 May 1985.
120. See Report to Cabinet on Constitutional Discussions, Summer 1980, and the Outlook for the First Ministers' Conference and Beyond, Ministers' Eyes Only, 30 August 1980, 64 pp. This document is referred to in the

paper as the Kirby Memorandum. The document was a product of several members of the Kirby team, and had not yet received the formal approval of the federal cabinet at the time it was leaked. Evidence arising from the subsequent investigation by the RCMP also suggests that it was not deliberately leaked. Hence one cannot view this leak as part of a concerted federal government strategy to undermine the September First Ministers' Conference, in order to open the way to unilateral federal government action on the constitution.

121. *Ibid.*, p.3.

122. *Ibid.*

123. *Ibid.* The Memorandum did attempt to define the Kirby team's strategy for achieving a negotiated agreement at the September First Ministers' Conference. It argued that "while the federal government *must* maintain its position that elements in one package cannot be bargained against elements in the other, it must also understand in terms of its own strategy that the more it is possible to reach agreement in the area of Powers and Institutions, the easier it will be ...for the provinces to accept the People's Package. Therefore the federal strategy must continue to demonstrate very clearly its interest in both packages...A deal must include something for everyone. (pp. 32-33). It concludes, "A strategy aimed at demonstrating flexibility and good will should achieve such a deal. If it does not, it will at least create the conditions appropriate for unilateral action, for the federal government will have demonstrated that a failure can only be blamed on the provinces." (p. 35). Until the last sentence, this strategy conformed closely to the model of integrative bargaining discussed in an earlier section of this paper. But the final sentence hints clearly at another motivation behind the summer strategy, namely creating a pretext for unilateral action on the People's Package.

124. See for example, the Kirby Memorandum, p. 60, in which it is stated, "The probability of an agreement is not high. Unilateral action is therefore a distinct possibility."

125. *Ibid.*, pp. 35-58.

126. Two senior officials in FPRO argue that the first ministers deliberately blocked the effort to have the reports of progress on the summer negotiations tabled and communicated in the open forum, in order to preserve their preeminent status. Interview, Ottawa, 7 December 1983. However, a more charitable interpretation is that "insufficient time had been spent on thinking about how to transfer the accumulated goodwill of the summer to the first ministers level." Interview with a senior official, FPRO, 12 January 1984. Specifically, several crucial procedural errors were made at the conference. For example, Premier Davis insisted that the opening speeches by the First Ministers be delivered in public; partially as a result,

these initial statements were not based on the "best efforts" drafts negotiated during the summer. Secondly, Prime Minister Trudeau's performance as chairman was weak, since he allowed the public speeches to drag on for several days before calling for a closed bargaining session. Communication to the author from Ronald Watts (12 December 1988), former Principal of Queen's University, who was a participant in the constitutional negotiations in the summer of 1980.

127. Romanow et al., *Canada...Notwithstanding*, pp. 97-98. For a somewhat more balanced account of these events, see Zukowsky, *Struggle over the Constitution*, p. 52.
128. *Ibid.*, p. 98. A more detailed and charitable description of these five days in September 1980 can be found in Zukowsky, *ibid.*, pp. 40ff.
129. Interviews with senior officials, FPRO, Ottawa, 5, 7, 8 December 1983.
130. Zukowsky, *ibid.*, p. 39 and Romanow et al., *Canada...Notwithstanding*, pp. 93-94. See however, the Kirby Memorandum, p. 35, which argues somewhat inconsistently that "the elements of a deal with almost all provinces on Powers and Institutions are present. Such a deal would include matters of importance to the provinces and yet would not mean any unpalatable concessions by the federal government. A deal on Powers and Institutions would at the same time, make it very easy for the provinces to accept the People's package and avert the threat of unilateral action." A centerpiece in such a deal would, in its view, have been a linkage between resources and economic union acceptable to the West. Other aspects would have included an interim solution for the Upper Chamber (desirable for British Columbia), a reformed Supreme Court (saleable in Quebec), some changes in jurisdiction over off-shore resources (acceptable to at least the three Maritime Provinces), and possibly some changes in communications. The argument here is not very convincing, as events in September were later to demonstrate.
131. It is nevertheless true that most members of the summer negotiating team were optimistic about the chances of reaching an agreement at the September First Ministers' Conference. This was reflected in a pool taken just before the September FMC by the members of the Kirby group on the number of the total of 12 items on which agreement would be reached. Most participants selected in the range of 4 to 7 items, and no one selected 0. Information provided in a communication from Ronald Watts, a former member of the Kirby group, 12 December 1988. In my view, however, there was no solid basis for this optimism, in light of the absence of consensus on any of the major bargaining items.
132. Zukowsky, *Struggle over the Constitution*, p. 55. A similar argument is presented in the Kirby Memorandum, p. 32.

133. Romanow et al., *Canada...Notwithstanding*, p. 102. Zukowsky, *ibid.*, p. 38, argues somewhat differently that Quebec's options were limited as a result of the referendum defeat. "Thus by the middle of summer, Quebec's role in the talks was no longer regarded with uncertainty." This view seems somewhat naive, although possibly representative of the feelings of several provinces at the time. It also supports the rationale which Quebec authorities have offered for its summer 1980 strategy (see note 117 above).
134. Zukowsky, *Struggle over the Constitution*, p.55.
135. Romanow et al. *Canada...Notwithstanding*, p. 103. A question remains as to whether it was the actual intention of the federal government to promote failure at the September 1980 First Ministers' Conference, in order to pave the way for its resort to unilateral action on the smaller People's Package. As indicated in notes 123 and 124 above, the Kirby Memorandum is somewhat ambiguous on this point (although it clearly considered failure a *likely* possibility). Most leading Ottawa actors in these negotiations also denied that the federal government was bargaining in bad faith. One senior official in FPRO was probably more candid when he mused,
- Perhaps the most interesting question that could be asked about the September meeting was whether it was the federal intention to create failure. Was there any possibility of their doing a deal? Would there have been any federal concessions in response to a genuine provincial move? To be honest, I'm not sure of the answer to that. It certainly looked as though the federal government was in there to force a disagreement and let the provinces hang themselves, to demonstrate to the public that an agreement was impossible. On the other hand, if that was the federal intention, I was told that it was not. I was told that if the provinces, after they get [sic] this kind of pressure, show any sign of movement...provided that it's sensible and reasonable, then we were prepared to make some concessions. The provinces played right into our hands by making no concessions whatsoever. (Interview, Ottawa, 9 May 1985).
136. Statement by the Prime Minister, Ottawa, 2 October 1980. See also *The Canadian Constitution, 1980*, Proposed Resolution respecting the Constitution of Canada (Ottawa, 1980). According to one senior Ottawa aide, Trudeau would have agreed to a smaller package excluding the charter of rights, but the federal cabinet and Liberal caucus convinced him to include the charter as well. Chrétien, on the other hand, wanted "a more substantive package". The explanation for this initial prime ministerial restraint, according to another senior FPRO official, is that the Prime Minister "had rules (sic) on the degree of unilateralism" he would practice. Interviews, Ottawa, 5 December 1983 and 12 January 1984.
137. According to a former top FPRO official,

The amending formula was developed, essentially as it was, a throw-back to the Victoria formula, with some changes. The big change was that if the "feds" and the provinces can't agree on a constitutional amendment, then you will have a national referendum. In retrospect, this turned out to be a brilliant strategic stroke...We supported it for two reasons, one strategic, and one intellectual or philosophical. Strategically, by proceeding unilaterally, we were using a card that could only be played once. We therefore asked whether it was possible to replace that card with another card that the "feds" could put into the new constitution, a new amending formula which would also give us the power to proceed unilaterally [in the future]. And the answer to that was "Yes, there is, but the only thing to do is to do what we are doing now, which is to...go over the premier's heads and appeal to the people."..The intellectual reason was that "if you assume that federal and provincial governments are both elected to represent the public interest, the public interest being a fuzzy, ill-defined concept...and if the Canadian populace elects two governments to represent the public interest, and if they fail to agree on what the public interest is, then why not ask the public what the public interest is? That is the ultimate democratic way to do it." (Interview, Toronto, 21 June 1985).

The utility of this proposed "tie-breaking" device as a potential strategic weapon of the federal government in future constitutional deadlocks was immense. It is not surprising that it was opposed so vociferously by the premiers (except for Premier Lévesque).

138. According to a senior Justice official, this initial charter was "weak", and designed primarily to accommodate the provinces and conform to the "best efforts" draft of the summer 1980. He had assumed that interest groups would later toughen it. Interview, Ottawa, December 1983. But a senior FPRO official views the Charter drafting process in a much more political way. A process of "logrolling" occurred in cabinet, in which "somebody said 'Look, we have to protect the anglophone minority in Quebec through education rights', so that the ..Canada clause had to go in. Then somebody said, 'Look we have to put something in on women's rights.' And suddenly you had politicians saying, 'Who are the special interest groups, or segments of society, in my area, that I can put in, and therefore get their support for this?' And that is how the Charter was constructed, in a four-hour cabinet meeting in September." Interview, Toronto, 21 June 1985.
139. According to a top Trudeau aide in the PMO, this strategy was largely designed to ride the crest of public approval while it lasted, and avoid the inevitable call from the public for a return to economic priorities. (Inter-

- view, Ottawa, 9 January 1984). It was also one of the three parliamentary options proposed in the Kirby Memorandum. (See pp. 49-50).
140. The proposed amendment eventually won formal endorsement by the federal Parliament and by the provinces, and was inserted into the 1982 Constitution Act as section 92A, The 1982 Constitutional Amendment on Resources. For a discussion of its meaning and implications, see J.Peter Meekison et al., *Origins and Meaning of Section 92A, The 1982 Constitutional Amendment on Resources* (Montreal: Institute for Research on Public Policy, 1985). This "deal" caused a deep split both within the federal NDP caucus and between it and some of its provincial counterparts, notably the NDP Government of Saskatchewan. A major criticism directed at Ed Broadbent, the NDP leader, was that he had not properly consulted his caucus before announcing his acceptance of the (modified) unilateral package. Interview with a federal NDP member who was a leading dissident on the issue, Ottawa, 9 January 1984. A proposal by the NDP for an amendment on native rights was also accepted later in the parliamentary constitutional committee.
 141. Sheppard and Valpy, *The National Deal*, p. 137. According to their calculation, 914 individuals and 294 groups representing ethnic and cultural, religious, ideological, linguistic and regional interests appeared before the special joint committee, which sat a total of 267 hours on 56 days. They note that "Much of the wheeling and dealing took place in the corridors and cloakrooms outside, where officials huddled to discuss drafting changes, and politicians negotiated feverishly with lobbyists...Out of a welter of one-upmanship and partisan politicking, the basic rights of Canadians were formulated." For a more critical evaluation of the impact of these groups and especially of their tendency to overrepresent the views of "small, permanent Toronto- or Ottawa-based executives", see McWhinney, *Canada and the Constitution, 1979-1982*, pp. 50-51.
 142. Romanow et al., *Canada...Notwithstanding*, p. 113 and Milne, *The New Canadian Constitution*, pp. 88-92. Among the important amendments to the fundamental freedoms guaranteed under the Charter, according to Milne, were the requirement that any limits on basic freedoms be "reasonable" rather than merely "lawful"; the addition of new rights such as protection against self-incrimination, the right to be informed of one's right of counsel; a right to trial by jury for major offenses; improved equality rights for the mentally and physically disabled; the right of citizens to seek remedies for the violation of their rights; and the right of courts to exclude evidence obtained in an unlawful manner. Amendments to the linguistic sections of the Charter included protection and public funding of minority language educational rights "where numbers warrant"; the extension of these rights to children of all Canadian citizens who

had received their primary schooling in this country in English or in French; and provision for the extension of minority language rights in provinces without the requirement of a constitutional amendment. Other changes included the protection of aboriginal rights (sections 25 and 33 of the Charter) and, as noted in the text, the granting to the provinces of the right to levy indirect taxes over natural resources and concurrent jurisdiction (with the federal Parliament) over interprovincial trade in resources (section 92A).

Most of the changes were initiated by the Conservatives, and were drawn from briefs and presentations by the various public interest groups. Chrétien, as the resolution's sponsor, pragmatically accepted these "concessions", because he personally supported them, and he was backed in this by the federal cabinet. Thus the "parliamentary committee took on its own dynamic." Banting and Simeon, *And No One Cheered* (Toronto: Methuen, 1983), p. 6.

143. Milne, *The New Canadian Constitution*, pp. 97-100. Also interview with a leading Conservative constitutional spokesman, Ottawa, 8 May 1985. The Conservatives managed to wrest this concession from the Liberal Government by resorting to delaying tactics in the parliamentary debate, thereby successfully blocking final House of Commons approval of the Constitutional Resolution until after the Newfoundland court had ruled unanimously against the legality of the resolution.
144. Milne, *ibid.*, pp. 95-97. Also interview with a former official, FPRO, who was in charge of federal government lobbying operations in London, 10 January 1984. Evidence of this lukewarm attitude by British authorities came particularly from the final report of the Select Committee on Foreign Affairs, headed by Lord Kershaw, which was set up with the explicit purpose of determining what role Britain should play in this matter. The Committee declared that the British Parliament should pass the resolution only if it reflected "the clearly expressed wishes of Canada as a federally structured whole." (Milne, *ibid.*, p. 97).
145. According to a leading FPRO official, a "deal" was worked out with Hugh Segal and Eddy Goodman, two close advisors of Premier Davis of Ontario, which included stronger police powers in the Charter and omission of a formal guarantee of language rights for Franco-Ontarians. New Brunswick "came on side the first night", after FPRO contact with Premier Hatfield and his chief constitutional aide, Barry Toole. Interview, Toronto, 21 June 1985.
146. Efforts were made in January 1981 to strike a "deal" with Premier Blakeney over a Senate veto of future constitutional amendments, but they eventually failed. The negotiations occurred over long-distance phone between Honolulu, Hawaii (where Blakeney was vacationing) and Ot-

tawa. According to an account by one leading FPRO official, "Blakeney's strategy was to say he couldn't reach an agreement with us because of the Senate. When the PM said, 'Fine, Allan, I will take the Senate on (if you join us)', Blakeney was suddenly left with having to find some other reason for not reaching an agreement." Interview, Toronto, 21 June 1985.

A rather different account was provided by Blakeney. According to him, the agreement failed because

The federal government bailed out in effect. Their negotiations with us were always strange, and I think they probably just believed we couldn't pull it off, and they were probably right...It was clear that the federal government would not give me any assurance that the package which we agreed upon was the one they were going to stick with. For example, they were going to make a deal with the Senate, and while they will say that they would have agreed with us and that they would fight the Senate, I simply didn't believe that. I believed that they would announce a deal and if we had decided to onload with them, we would have to offload later. (Interview, Regina, 6 May 1985.)

147. Milne, *The New Canadian Constitution*, pp. 95-97. The lobbying effort in Britain actually began as early as the fall of 1980, soon after the dissident provinces first met to plan their strategy against the unilateral federal government action. According to a leading Quebec government spokesman, it was the Quebec Government which initiated and led the provincial strategy of preventing Ottawa from winning over the British MPs. Its greater experience in the international aspects of intergovernmental affairs aided it in this regard. Interview, Quebec City, 16 April 1985. This view was confirmed in my interviews with other provincial authorities.
148. Saskatchewan's proposed compromise between the Albertan position in favour of opting out without fiscal compensation and Quebec's demand for opting out with full fiscal compensation was initially accepted by Quebec Deputy Minister of Intergovernmental Affairs Robert Normand, subject to ministerial approval. It called for financial compensation to provinces which opted out and had received two-thirds support of its legislature in this action. It was later rejected by Intergovernmental Affairs Minister Claude Morin on the grounds that it would give the opposition parties the right to block an amendment of this sort. The Quebec government position was subsequently endorsed by the "gang of eight". Telephone interviews with a leading Quebec government representative, 23 May 1985.
149. There has been strong disagreement between two leading provincial intergovernmental ministers, Claude Morin of Quebec and Roy Romanow of Saskatchewan, on the meaning of the April Accord and of the provincial

common front which struck it. According to Morin, the April Accord required that all signatories be consulted before any new initiative or compromise agreement could be negotiated. Romanow, on the other hand, believed that the accord was only a temporary tactical device, and could be abandoned by its adherents if an alternative agreement or compromise seemed within reach. Interviews, Quebec City, 16 April 1985 and Saskatoon, 7 May 1985. See also Romanow et al., *Canada...Notwithstanding*, where the common front is described as "a defensive alliance to block Ottawa. It was an affiliation of disparate personalities and widely divergent positions. Opposition to Ottawa was the unifying factor which kept this shaky and mistrustful group together." (p.132).

150. Interview with a senior official, FPRO, Ottawa, 10 January 1984.
151. For a detailed discussion of this judgment, see Peter Russell et al., *The Court and the Constitution*, especially chapter 1. The significance of this pronouncement for subsequent constitutional negotiations was profound, since it meant that to achieve a bargaining accord, it was now necessary merely to obtain the agreement of a substantial majority, and not all, of the provinces. The precise number of provinces needed to comprise this substantial majority (or "sufficient consent") was not spelled out by the Court.
152. There was some difference of opinion among leading federal actors on this question. Whereas Justice Minister Chrétien wanted to proceed unilaterally to Britain, Pitfield and Kirby preferred to conduct another round of negotiations with the provinces in order to strengthen the federal government's moral authority to implement its constitutional package. Thus, as two federal officials wryly put it, "The doves became the hawks and the hawks became the doves." Interview, Ottawa, 7 December 1983.

There was also some difference of opinion among those interviewed as to how crucial the Supreme Court decision was in producing another round of negotiations. For example, Chrétien argued that public opinion, not the courts, forced the politicians back to the bargaining table. Another senior Ottawa official regarded the Court decision as imposing a "moral obligation" on the federal government to negotiate at least one more time. Interviews, Ottawa, 9 December 1983 and 9 May 1985.
153. Meetings between British Columbia and federal officials had occurred in late August and early September in Vancouver and Victoria, well before the announcement of the Supreme Court decision. In them, the possibility of achieving a compromise between the Charter of Rights and the Vancouver amending formula was explored. See Sheppard and Valpy (1982), p. 248.
154. According to a leading Quebec government spokesman, Bennett hoped to play a national role as a mediator, rather than remain a mere spokesman

of the dissenting provinces. He therefore changed radically the tactics of his predecessor as chairman of the Premiers Conference, Premier Lyon of Manitoba, who was a fierce opponent of Trudeau. At the same time, the strategy of the federal government changed after the Supreme Court decision. It now sought to legitimate its position with the public and to detach the "soft provinces", Saskatchewan and British Columbia, from their alliance with the "gang of eight". Interview, Quebec City (by telephone) 23 May 1985.

155. These efforts at achieving compromise were made in Ontario at two levels, that of the Premier's Office (primarily by Hugh Segal, Davis' Principal Secretary) with Michael Kirby and the FPRO, and that of the Ministry of Intergovernmental Affairs with their counterparts in Intergovernmental Affairs in Saskatchewan and British Columbia. Interviews with leading Ontario officials, Toronto, 10 June, 4 July, and 16 July 1985.
156. Interviews with leading British Columbia and Ontario officials, Victoria, 9 May 1985 and Toronto, 10 June and 4 July 1985.
157. See Banting and Simeon, *And No One Cheered*, p. 8. Meekison and Romanow also point out that "The basis of the Constitutional Accord of 5 November 1981 was the acceptance of the provincial amending formula by the federal government and provincial acceptance of the federal government's Charter of Rights and Freedoms." They note that "Section 92A and natural resources were not singled out for discussion during the November conference because the First Ministers were concentrating on patriation, an amending formula, and a Charter of Rights and Freedoms. Section 92A, while not fully accommodating the provinces, did represent a step in that direction. But an amending formula, and the very significant protection [it] extended to proprietary rights over natural resources and the existing division of powers, were far more important." J. Peter Meekison and Roy J. Romanow, "Western Advocacy and Section 92A of the Constitution" in Meekison et al., *Origins and Meaning of Section 92A*, p. 28.

According to a leading federal political aide in the Prime Minister's Office, it had also already been decided at this point that the referendum idea would be dropped. Interview, Ottawa, 9 January 1984.

158. Interview with a leading official, FPRO, Toronto, 21 June 1985.
159. According to a top Quebec government representative, Quebec saw its stance on the proposed referendum as "instrumental for blocking the dissolution of the common front", since it believed that some response by the provincial group of eight was necessary to combat the federal government's effort to gain legitimacy for this proposal. Moreover, Quebec had proposed the idea of a referendum prior to Trudeau, and therefore was forced to endorse it as an alternative at the November conference in

- order to maintain its consistency. Its initial strategy had been to offer it as a replacement for the regional veto, which had hitherto blocked an agreement among the provinces on the amending formula. Interview, Quebec City (by telephone) 23 May 1985.
160. Interview with a leading official, Ministry of Intergovernmental Affairs, Ontario, 11 June 1985.
 161. According to a top federal government actor in the negotiations (who was opposed to its adoption), the federal government used provincial fear of the referendum device principally as a bargaining "weapon" against them. Interview, Ottawa, 9 December 1983. Another, who favoured it, argued that "Trudeau had goaded Lévesque into agreeing to the referendum device", and thereby "Lévesque himself caused the agreement... After all, it was Lévesque who abandoned the group of seven, not vice versa." Interview, Toronto, 25 June 1985.
 162. According to a former top official in FPRO, "The only people that think the 'kitchen meeting' was important were the three guys who were in it. Those of us who were involved through that night never even knew that meeting had taken place. I read about it in the media the next day." Interview, Toronto, 21 June 1985. It appears as if the same essential compromise had been achieved simultaneously through a number of different channels.
 163. Nathan Nurgitz and Hugh Segal, *No Small Measure, The Progressive Conservatives and the Constitution* (Ottawa: Deneau Publishers, n.d.), p. 114.
 164. According to one leading official source, after consultation with several leading members of his cabinet, Trudeau told Chrétien that "if you get the support of a majority of the provinces with a majority of the people, I will go along with the compromise...In the meantime, let me sleep on it." At 9:00 a.m. the next morning, after nine of the ten provinces had indicated their willingness to support the compromise, Trudeau accepted the deal. Interview, Ottawa, 9 December 1983.
 165. According to a senior Ottawa political aide, the process of obtaining provincial consent operated on a bilateral basis between two friendly provinces, rather than on a multilateral basis, because there were so many jealousies among the provinces. Interview, Ottawa, 5 December 1983. (See also note 177 below). Premier Lyon of Manitoba, who had left the conference to rejoin his election campaign, added his consent by telephone.

One of the key historical questions in the 1981 constitutional negotiations is why the Quebec delegation was not informed of the compromise the previous night. Several reasons have been offered such as its physical isolation (in Hull), and its betrayal of the tacit procedural rules accepted

- by "the gang of eight" during the debate over the referendum device. However, in my interviews, one explanation was most frequently offered, and seems to me to be the most convincing: most of Quebec's provincial allies accepted the negotiated compromise accord, but were convinced that they could never attain the P.Q. Government's assent to it. They therefore decided that for practical reasons, despite the expected political "fallout" from that province, it would be best to proceed without Quebec.
166. According to a leading Quebec political actor, although Quebec cited "technical details" (such as the absence of a fiscal compensation provision for all cost-sharing programs) as the reason for its rejection of the accord, "in reality it found the entire compromise objectionable". It was seen by the Quebec authorities "as a serious error by both the provinces and the federal government". Interview, Quebec City (by telephone), 23 May 1985.
167. The issue with respect to aboriginal or native peoples' rights concerned the dropping of section 34 of the Charter of Rights and Freedoms, guaranteeing the protection of aboriginal rights, in the November negotiations. After intensive lobbying primarily by the native groups, the clause was restored, although its wording was slightly modified. Premier Lougheed, the last premier to consent to this clause's restoration, insisted on adding the adjective "existing" to the earlier guarantee of rights. The issue with respect to women's rights concerned the removal of the application of the override clause to section 28, guaranteeing women's equality rights in the Charter. Again after intensive lobbying largely by women's groups across the country, the override was removed from section 28. Premier Blakeney was the last holdout on this issue, but he finally agreed to its removal when he was promised that the other premiers would drop their opposition to constitutional protection of aboriginal rights. For a detailed discussion of these issues, see Douglas E. Sanders, "The Indian Lobby", in Simeon and Banting, *And No One Cheered*, pp. 318-321, and Chaviva Hosek, "Women and the Constitutional Process" in Simeon and Banting, (eds.) *ibid.*, pp.291-295.

According to a leading federal actor, Chrétien also played an important role in these final negotiations by playing these provinces off against each other. He warned Saskatchewan's Allan Blakeney of the consequences of opposing women's rights "among your socialist friends". He cautioned Peter Lougheed, "I hope you don't allow the Indians to do to you what the women did to Allan." Interview, Ottawa, 9 December 1983.

168. Best efforts drafts were used in 1978-79 and again in the summer of 1980, with some success, although, as indicated above, there was no carryover of these drafts at the level of first ministers. The diplomatic tour was also

- used on occasion (e.g., by federal officials in 1976 and by a federal minister in 1980), with mixed results.
169. Morin, *Quebec versus Ottawa*, p. 69, refers to "a groundswell of opposition developing in Quebec", as had occurred at the time of the Fulton-Favreau formula negotiations.
 170. Members of this new generation of first ministers present at Victoria included Bill Davis (PC, Ontario), Robert Bourassa (Lib, Quebec), Gerald Regan (Lib, Nova Scotia), Richard Hatfield (PC, New Brunswick), and Ed Shreyer (NDP, Manitoba). Most had only been in office for a few months, and had little previous experience in such constitutional negotiations. Among the older generation of first ministers were W.A.C. Bennett (SC, British Columbia), Harry Strom (SC, Alberta), and Joey Smallwood (Lib, Newfoundland). Ross Thatcher (Lib, Saskatchewan) had just been defeated by Allan Blakeney, and did not attend. Alex Campbell (Lib, Prince Edward Island) was of the younger generation, but like Trudeau, had participated in these constitutional negotiations for several years. The partisan affiliations of these first ministers were also highly diverse, as one may note above.
 171. During this time Ontario sought merely to assuage the other provinces, while actually aligning itself increasingly with the federal government.
 172. The Western premiers had begun to meet regularly in the annual Western Premiers' Conference. The Maritime Provinces had regular contacts through the Maritime Premiers' Conference.
 173. Interview with a senior official in Intergovernmental Affairs, Government of Saskatchewan, Regina, 6 May 1985. See also Woolstencroft, *Organizing Intergovernmental Relations*, chapter IV.
 174. An anonymous reviewer has taken issue with this statement. He argues that on the whole the proliferation of ministries of intergovernmental affairs has facilitated intergovernmental negotiation and aided efforts at achieving constitutional agreement.
 175. Interview with a leading federal government actor, Ottawa, 9 December 1983, and a former top FPRO official, 9 May 1985.
 176. Sheppard and Valpy, *The New Deal*, argue somewhat differently that "While there was no love lost between [Lougheed] and Trudeau, colleagues of both have observed a curious respect, despite, or perhaps because of, their many tangles." (p.181).
 177. In his McGregor Lectures delivered at Queen's University in 1988, former Saskatchewan premier Allan Blakeney explained how these barriers created by personality were overcome in the negotiation of the November 1981 accord. A chain of persuasion by different individuals was established among the first ministers largely in relation to who trusted whom. The chain operated first between Trudeau and Davis, then Davis and

Blakeney (who didn't trust Trudeau), then Blakeney and Lougheed (who didn't trust Trudeau and Davis). I am grateful to Ronald Watts, former Principal of Queen's University, for communicating this example to me. See also note 165 above.

178. As we pointed out in section II above, unilateral actions in intergovernmental relations, like analogous actions in international or labour relations conflicts, can have a destabilizing and transforming effect on the bargaining process. They can act as "forcing mechanisms", compelling negotiating actors to abandon their previously fixed positions and accept compromises and new proposals for mutual benefit (i.e., integrative agreements).
179. See for example Imbeau, "Why Didn't all Dissenting Provinces...", p. 2, in which this calculus is implied.
180. The role played by the Supreme Court in the constitutional conflict of 1980-81 was essentially that of adjudicator and arbitrator. In some respects, however, it also played a role as a facilitating intermediary, not unlike that of the "third-party mediator". First, the Court communicated to each of the contending sides in the dispute that it had some legitimacy for its actions. It also signalled to the contending parties that they would be better off attempting to resolve the dispute by further direct negotiations between them. Finally, it helped to establish clearer ground rules for these negotiations, by declaring that an accord on the amending procedure merely required "sufficient consent" of the provinces, rather than unanimity.
181. Some of those interviewed on the federal government side pointed to this successful shift of the constitutional agenda as evidence of a final federal "victory". In my view, this underestimates the extent to which the federal government finally compromised on its positions on various items within the original package, such as the amending formula, the Charter override, and s. 92A.
182. For example, arguments of this sort have been used by some to justify the lack of public input into the Meech Lake Accord. For some suggestions on how one might reform this process to allow for more public input into the constitutional bargaining process in the future, see note 189 below.
183. Even those interviewed within the Quebec Government agree that there was no possibility of obtaining the consent of that government to the 1981 accord. It is possible, however, that the Quebec Liberal opposition might have supported the agreement under slightly altered conditions.
184. This is the position taken by the editors and most contributors in Banting and Simeon, *And No One Cheered*.
185. Such as the use of the notwithstanding clause to override individual rights protected by the Charter and the courts. An obvious example is the recent

- use of the override clause by the Quebec Government of Robert Bourassa to protect its legislation related to language on commercial signs (Bill 178).
186. For a description and analysis of the text of this accord, see The Report of the Special Joint Committee of the Senate and the House of Commons, *The 1987 Constitutional Accord* (Ottawa: Queen's Printer, 1987). For a useful discussion of the merits and shortcomings of both the substance and process of the Accord, see Katherine C. Swinton and Carol J. Rogerson, (eds.), *Competing Constitutional Visions: The Meech Lake Accord* (Toronto: Carswell, 1988) and Michael D. Behiels (ed.), *The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord* (Ottawa: University of Ottawa Press, 1989).
187. At the time of final revision of this paper (November 1989), this eventuality appears rather remote. It is unlikely that the Accord will be ratified by the legislatures of New Brunswick and Manitoba, the two holdouts, or fail to be rescinded by the most recent and strongest opponent of the agreement, Premier Clyde Wells of Newfoundland, without some fundamental changes. Until now, both the Prime Minister of Canada and of Quebec have opposed such amendments, primarily on the grounds that they would lead to a complete unravelling of the delicate compromise struck in the Accord.
188. It seems likely that the relatively small number of issues (five) under negotiation, and the relatively specific nature of those issues, facilitated the achievement of an agreement on 30 April 1987 at Meech Lake. The five conditions were originally proposed by Quebec and subsequently accepted by the other provinces and the federal government as the basis for discussion in an initial constitutional round designed to draw Quebec back into the Canadian constitutional fold. They were: 1) Quebec participation in the appointment of Supreme Court justices, 2) extension of Quebec participation in the selection and determination of numbers of immigrants settling in that province, as a guarantee of that province's cultural security, 3) restriction of the federal government's spending power in areas of provincial jurisdiction, 4) granting of a veto to Quebec on all constitutional amendments, and 5) the constitutional recognition of Quebec as a "distinct society". These items were negotiated *seriatim*, beginning with the easiest items (items 1 and 2). After substantive changes and compromises were negotiated, unanimous agreement was reached on the 5 items and a sixth item providing for a second round of negotiations on the Senate, fisheries, and other matters of mutual concern. The accord was achieved surprisingly quickly and easily, and the initial reaction from most political leaders and from the general public was largely positive. However, there was some negative reaction to the decision not to deal with the other contentious issues until a subsequent constitutional round.

189. In fact, it is this ratification process, required under the amending formula in the *1982 Constitution Act*, that has proven to be a far greater procedural obstacle for the Meech Lake Accord than the initial negotiations by the first ministers. It has formalized a second-level of negotiations among government heads and their constituents in constitutional policy-making in Canada, which may be viewed as Level II in a two-level linked bargaining game. This point will be amplified in a more extended future treatment of the Meech Lake Accord. See Robert D. Putnam, "Diplomacy and domestic politics: the logic of two-level games", *International Organization*, vol. 42, no. 3 (Summer, 1988), pp. 427-460.
190. The circumstances surrounding the holding of public hearings in the federal legislature in 1980-81 were somewhat unusual however. In this case the federal government had introduced a constitutional package unilaterally over strong provincial objections. It therefore agreed to allow public input in order to gain more legitimacy and public support for its actions. Moreover, it actually favoured many of the amendments proposed by the interested citizens and organized groups, but had decided not to include them in its original package for fear of further alienating some provinces.

There may be some lessons bearing on future constitutional negotiations that might be derived from a study of the Meech Lake bargaining process. It might be possible in the future to allow for some public input by providing for government or legislative consultation with their constituents on constitutional issues under consideration prior to the actual closed-door negotiations by the first ministers. Alternatively, there might be legislative hearings open to the public subsequent to an agreement in principle on a constitutional matter by the first ministers, but prior to final negotiation of the actual legal text of an accord. For example, in the case of the Meech Lake Accord, the Quebec National Assembly began its brief public hearings after the first ministers' negotiations and communiqué of 30 April 1987, but prior to adoption of the final text of the Accord, following an all-night bargaining session at the Langevin Block in Ottawa on 2-3 June 1987.