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The Death and Life of Constitutional Reform in Canada

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Introduction

The conference from which the papers and comments found in this volume were taken was held at Queen's University in April 1989. It was soon after the moment in the process of obtaining consents for the Constitutional Accord, 1987, that it first became evident that approval for the Accord was not likely. In the months between the Conference and the final failure of the Accord in June 1990, the fate of this constitutional revision rode up and down — Canada's constitutional reform became a cork on a sea of party conflicts, regional interests, language tensions and the politics of brinkmanship.

Nevertheless, wide-spread opposition to the Accord had found full voice by the time this conference was held. Unfortunately, although there were a number of respectable objections to the Meech Lake constitutional plan based on notions of appropriate constitutional structure, the swell of opposition came as a result of Quebec's decision not to adapt its language law to accord with the decision of the Supreme Court of Canada that French-only store signs violated freedom of expression of rights. In this way, the Meech Lake debate became a running commentary on Quebec within Confederation. Many of those who opposed the Meech Lake Accord at this conference did so on other grounds and those who approved offered justifications that were not only Quebec specific. However, constituted reality frequently trumps more subtle understandings of history. In the end, the failure of Meech Lake represented not so much a victory for national self-determination, or for reform that reflected broadly based regionalism, as it did the rejection of Quebec's claim for special political authorities.

Hence both versions of 1980s constitutional reform — constitutionalizing aboriginal rights and responding to Quebec's request for a different place in Confederation — ended in death. Is there hope for a new life for constitutional politics in Canada? The answer is unequivocally yes, if only because both past failures have enhanced the imperative for reform. The harder question is whether the reform will be attractive to those who seek a self-confident

self-determining and intact Canadian state. The answer here seems to be more depressing and hints of this are found throughout the papers and comments in this volume. So, too, are suggestions about how we can bring to life processes that both permit reform of our fundamental structure and conduce towards reconciliation within Canada. Needless to say, nobody foresees a recipe for certain success. What is more clearly seen is how obsolete some of our constitutional practices and constitutional ideas are.

These papers also underscore how the intelligibility of the old order has evaporated. Since it is the case that the collapse of intelligibility is the condition of tragedy we might be said to be drifting towards national tragedy. But the political life of a nation need not correspond to set dramatic forms. Failure of old ways induces in a concerned population a desire to create slowly and experimentally, new styles of mediation and accommodation. Canada is embarking on that course. The first months of the process of producing a new constitutional process have been marked by dramatic events of a quasi-constitutional nature. They have, however, not been marked by great success, nor have they vindicated the hope of those who saw a better Canada arising from the ashes of the Meech Lake Accord.

It is, however, early days as we struggle to re-create a politic for national expression; we hope that these papers — early attempts to address a truly serious problem — will be part of this constructive process.

Christopher N. Kendall

John D. Whyte

PART ONE

In the Middle of the Meech Era

Living and Partly Living

Roderick A. Macdonald¹

There is a well-known passage in T.S. Eliot's *Murder in the Cathedral* where Thomas à Becket, returning from seven years exile, admonishes a priest who criticizes the women of the chorus for referring again and again to the craven and apprehensive coda "Living and Partly Living." Becket's rebuke to the priest is mysterious:

Peace. And let them be, in their exaltation.
They speak better than they know and beyond your understanding.
They know and do not know, what it is to act or suffer.
They know or do not know, that action is suffering
And suffering is action. Neither does the agent suffer
Nor the patient act. But both are fixed
In an eternal action, an eternal patience.
To which all must consent that it may be willed
And which all must suffer that they may will it,
That the pattern may subsist, for the pattern is the action
And the suffering, that the wheel may turn and still
Be forever still.

The paradox suggested by Becket's invocation of *patior*, the defective Latin verb which we render inadequately in English by concepts such as patience, passion, suffering, to be a patient, and to suffer — is also the paradox of Canadian constitutional amendment. Seven years after the Charter we apprehend yet another constitutional moment just as Becket's return after seven

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years confronted the women of the chorus with their existential moment: to regain their faith or to go on "living and partly living."

No sooner had Becket arrived at Canterbury than he faced four tempters, each offering a reason to desist from his confrontation with Henry II. It is a measure of the transcendence of human and political conflict that these four same temptations currently afflict our constitutional politics, as they have afflicted attempts to reform the Canadian constitution since 1867 (or perhaps even 1774).

In the literary discussion of *Murder in the Cathedral*, the suggestion is that these four tempters are reflections of Becket's own personality. Those who know the play recognize that the first three tempters track the temptations of the wilderness that are recounted in Matthew 4:1-10. Becket's first temptation is the allure of his former sensuous existence, the life once lived heartily and now gone. How often we hear a call to harken back to the golden age, when all was well in the polity, when the key constitutional issues — federalism, language, regional inequality — were known, and our constitutional arrangements, albeit imperfect, were stable and accepted. How often we hear that through the Meech Lake Agreement we can recapture this "Arcadia before the *Charter*" so that Quebec may again feel a part of Canada. To which temptation Thomas responds curtly "in the life of one man, never the same time returns... Only the fool, fixed in his folly, may think he can turn the wheel on which he turns. ... The impossible is still temptation."

The second tempter offers Becket the seduction of power, of effective temporal power to build a good world and to keep order in a world that knows only secular order. To take power now in Canada is to reset the political order so as to disarm the centre, strengthen the regions and redistribute more justly the benefits of the national economy. Can our constitutional processes not find a way to palliate the sense of helplessness, of exclusion, and of powerlessness which nurtures the delusion that a Triple E Senate will balance both power and glory along the Ontario-Manitoba border? But Thomas knows that "real power is purchased at a price of a certain submission... those who put their faith in worldly order... but arrest disorder, make it fact, breed fatal disease, degrade what they exalt."

Becket's third temptation is the fascination of treachery, of betrayal, the inducement to corrupt power so as to shape a new coalition purchasing the present at the cost of the future. This is the politics of brokerage, reflected in the negotiation of self-interest as constitutional principle. This is the politics of elite accommodation and of entrenched groups — Pharisees and Sadducees — bartering in ignorance of our historical Samaritans — women and native Canadians — to entrench still further the cleavages of opportunism. Again Thomas parries the inveiglement by noting that "if the Archbishop cannot trust

the King, how can he trust these who work for the King's undoing? ... To make, then break, this thought has come before, the desperate exercise of failing power. Samson in Gaza did no more."

The fourth tempter, bearing Becket's last temptation, is not a reflection of one of the temptations of the wilderness. The temptation of martyrdom, of self-satisfaction and of pride knows only secular, not divine, victims; to seek to secure one's place in history, to place hope in earthly immortality, and to invoke the infinite as a reason for the present (we resonate with the discourse of constitutional reform here) is to succumb to the pride of a finite deal over the eternal patience of the subsisting pattern, where competing constitutional visions will not be pressed to resolution and where constitutions themselves will remain always incomplete. A final time Becket resists:

the last temptation is the greatest treason: to do the right deed for the wrong reason.
... for those who serve the greater cause make the cause serve them, still doing right: and striving with political men may make that cause political, not by what they do, but by why they are.

I suggest that the deeper lesson of Eliot's masterpiece lies in the four *apologia* of the knights who kill Becket. Ironically, these excuses offered by the knights mirror the arguments of the tempters. They remind us that we scholastics who seek to uncover, analyze, and gloss motive are also not free from motive. We are surrogate participants in this constitutional moment as our historical counterparts were agents of a martyrdom — historically necessary but spiritually insignificant.

The first knight, Fitz Urse (or Richard Simeon), is notionally only the chairman of the purgation, but he also defends the murder on the basis of the exigencies of process. There is no justification for politics aside from process, and from the need to gratify the hunger of the body politic with bread and circuses.

The second murderer, de Traci (or Bryan Schwartz), grounds his defence in the subordination of spiritual to temporal power. Our constitution in this vision comprises only its formal documents and their expression in institutions where officials alone have authority to censure private virtue and where political structures are intended to monopolize public discourse about the good.

The third knight, de Morville, (Andrew Petter et al.), would use the strength of an unholy alliance to make common cause with "the people" against "the throne." Here we find that the rhetoric of secular irresponsibility is wielded in the name of sacred purposes — equality and community — to undercut the quest for a constitutive practice that recognizes difference as a precondition of identity.

The last iconoclast, Brito, (is he Whyte or Macdonald?) defends the martyrdom with a curious claim: the murder of Becket is no more than a divinely ordained suicide by an overtaxed and unsound mind. We have burdened Canadian constitutionalism to the breaking point by asking its offices to do too much. States succumb, I suggest, not from external threats of extinction, but from the naïveté of those who would wield the conventions of legal power to resolve all political paradoxes.

Remaking a constitution today is no mean task, and I purposefully intend to pun the word mean since so much of our contemporary political discourse is Aristotelian in nature. To attempt to reconcile who we are and who we will become — all at once and forever — is to fall victim to self-deception. It is no surprise, then, that Despair is Becket's fifth temptation. But as Thomas' reaction to the combined voices of the four tempters suggests, only the requirement to be definite about who we are need be cast as vanity and illusion. The failure of explicit constitutional reform is itself no cause for despair. To make Meech, or Meech II, or any other "deal" the goal of constitutional politics, is to mistake action for sufferance, and is simply to go on "living and partly living."

Postscript

In selecting a work of English literature as the touchstone of this essay I do not want to be taken as claiming a special virtue for this language in constitutional discourse. I have also prepared a parallel version, built up from Jean Anouilh's exploration of the triumph of Joan of Arc — *L'alouette* — with its allegory of mission, abjuration, and finally martyrdom. And yet, in part to reinforce my point about language, identity and passion, this parallel French language version is not a translation. It is, rather, entitled "Une souffrance inutile."

Such Difficulties

*Richard Simeon*¹

I would like to just start with very general observations, not really about the constitution, but more generally about federalism at the present moment. My point is that we are in a very difficult moment for federalism in Canada and we can see very easily many more difficult moments ahead.

As Macdonald has suggested, this is the natural condition of modern countries in this complex world. However, we should focus on the Canadian dimensions of this condition. I think the conditions for further constitutional renewal whether of a gradual or a dramatic sort, and conditions for federal/provincial relations generally are going to be very hard. Many of us recently have argued that the classic preoccupations arising out of Canada's federal nature — our regional conflicts, our linguistic divisions, federal/provincial conflict — have been declining in significance or salience in recent years. The argument has been that the territorial or the federal agenda was being, or had been, displaced by a new agenda of individual rights — gender, multiculturalism, global economy, etc. — all of which were hostile to, and in a sense were displacing, our traditional and historic preoccupations.

The argument really is that Meech was too much about the old federalism agenda and, therefore, did not give enough recognition to the new agenda which was not a federal agenda at all, but an agenda focused on non-territorial issues and identities. Coming down from that into a little more concrete world, there has certainly been a diminution of regional, linguistic, and intergovernmental

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conflict in the past few years. I suppose, in that sense, at least to a limited degree, national reconciliation has been working and Meech Lake is one of its products.

But the history of the study of federalism is replete with failed predictions of the demise, or the displacement, of these historic federal and territorial concerns. My point is that those issues are back with a vengeance and it is our duty as a country to realize that there is no escaping those divisions and the obligation to work and rework the accommodations through time. With respect to language, for example, we now know that the relatively muted conflict of recent years did not mean at all that the issue had gone away, or was permanently submerged, much less that it had been resolved. We have been reminded starkly that no model for linguistic accommodation can command the majority of active support in this country. There may be no single model, maybe even no combination of models, around which one can rally committed support. Neither national bilingualism nor Quebec as a distinct society command that kind of legitimacy and, meanwhile, it seems to me that the demographic trends mean that the moment for francophones to entrench permanently their claim in any of these models may be fading fast.

On the regional front, too, it seems the prediction is for intensified conflict over the next few years. It seems to be inevitable. The global economic trends will exacerbate regional disparities. It is also inevitable, it seems to me, that deficits and financial restraints, the international rules of free trade, and so on, will reduce our ability to alleviate or to compensate for those kinds of differences. It seems to me that this kind of disaggregation and disintegration of the Canadian economy means that, even more than in the past, each of the Canadian regions will rise or fall economically essentially independently of all the others. That makes it exceptionally difficult to think what national monetary policy or national macroeconomic policy would even look like. The prospects are that Canada is in for very difficult times.

With respect to intergovernmental relations, the same fiscal difficulties will inevitably produce reductions in federal transfers and an accelerated tendency for each level of government to be trying to dump these problems onto the other levels. Fiscal federalism issues are back with us with a vengeance and, again, as the Ontario paper on constitutional powers and the Free Trade Agreement suggested, international economic agreements, the FTA and GATT, will inevitably greatly complicate relations among governments within Canada.

More generally, the model of collaborative federalism as a way of managing intergovernmental relations is going to be severely tested from two very different sides. On the one side there will be increasing challenges to the pattern of elite accommodation which that process represents and which has been so prominent in criticisms of Meech Lake. That kind of argument, that kind of challenge to policy-making through elite accommodation, is going to grow not

decline. That, again, makes these kinds of settlements much, much more difficult to achieve.

On the other hand, within the process itself, given the divergent regional interests and, given fiscal constraints, there is the danger that the collaborative model will become simply a prescription for deadlock, for mutual denial, and for what has been called "the joint decision trap." It will become very difficult to innovate, to change policies, and there will be a hugely strong bias towards maintaining things as they are.

Meech Lake exemplifies the ideal type of policy achieved through the collaborative model, but the difficulties it is in illustrate just how difficult it is to get that model to deliver — whether on the constitution or, I suspect, on most other major policy issues. The phenomenon that illustrates this is that we have concentrated a great deal of our recent constitutional change on the amending formula — for example, on assuring each province that it will be protected from the other provinces, or assuring provinces that they will be protected from national majorities. The result is that the way we try to build harmony is simply to make sure that the rules are such that no national government, no national community, nor any combination of provinces can take things away from a single province.

That may be an essential condition for getting along in this country, but I think we have to recognize that this is a very minimal kind of integration. It is not integration that is oriented towards finding common goals or common solutions. Much less is it oriented to our being able to find goals that transcend the interests of particular regions and communities. For all these reasons, some immediate and some of a more general sort, I think we are in for a rough period. The levels of federal/provincial/interregional conflict that we saw in the 1970s have not disappeared. We have simply had a brief respite from them. This, unfortunately, is the context in which we shall be conducting constitutional debates over the next decade.

Comments

David Cameron

I would like pick up on a point made by Richard Simeon. He mentioned the consensus model of change and how it can in fact prohibit, in this case, constitutional development; how it can lead to a kind of stasis in our political arrangements. He pointed to Meech Lake as perhaps the prototypical example of that model of decision making. I think it is and isn't. It is in the sense that you take the heads of government, put them in a room and seek an outcome that they all can live with and defend. There is a broader consensual question which involves the question of "how." The people in some sense have to be involved in constitutional arrangements, constitutional change (or, at the very least, the legislatures representing these peoples have to be involved). The consensus model has to be worked out in that context. I note the last point Simeon made — the fundamental idea has been protection against damage rather than working together to achieve something new. If public participation is in fact part of the culture that we share, and if we are looking to consensual change in the context of a population in various regions and on both sides of the language divide, it seems to me that we have a problem. It is far more difficult if you look to build a popular view, shared by the major constituencies across the country, for some form of constitutional change. Where do you find the consensus in that model? It seems to me there is another layer — at the popular level — which, depending on how you view the feelings of people in this country, could prohibit constitutional evolution. If you believe that there is a nation out there, struggling to express itself, then you could argue that that might in fact lead actively to certain kinds of constitutional reform. (But there they would be the reforms that the nation thought important, not necessarily what its specific leaders might at some point think important.)

Richard Simeon

It seems to me that one of the characteristics of the elite accommodation model and its principle justification (as opposed to elite accommodation being just for politicians acting as a kind of cartel in their own interest) is precisely that there is not mass consensus and, therefore, the only way you can get along together is by removing those things from popular debate which will reveal the extent of this difference. I think the other point about the damage control model is that it does embody a notion of consensus, albeit a very limited one. The notion is that one can agree that we won't go out and stab each other. That may be an important achievement. However, we should recognize what the implications of that achievement are, and whether that level of achievement makes it harder to move to another level of integration or consensus. It may be that the implication of that very limited consensus of protecting each region/province from the other is to say that the policies created in response to changes of local environment will take place largely at the provincial level because it will be very hard to achieve constructive consensus at the national level.

Rod Macdonald

One of the remarkable things about *Murder in the Cathedral*, is that it is the first modern play in which the chorus, the people, shows moral growth throughout. In most plays, the chorus maintains a moral posture that is detached from the action of the play and serves as a backdrop. In *Murder in the Cathedral* there is moral growth of the chorus as the play progresses. I suggest that one of the overlooked benefits of the Meech debate has simply been that until now, because of the process for ratification, there has never been an opportunity for ordinary non-political Canadians to participate and to feel that their voice is important in formal constitutional arrangements. Meech has stimulated more thought, more activity by the chorus and more possibility for moral growth and recognition of who we are in relation to other people than any other constitutional endeavour. I think that's one thing we cannot lose sight of regardless of what you think of the deal itself.

David Cameron

I think that the 1980-81 constitutional talks started that process. I think that the implementation of the *Charter of Rights* was absolutely critical in making Canadians interested in the constitution and in making them think about it as *their* constitution, not that of somebody in Ottawa.

Michael Behiels

I want to address the point of elite accommodation. If you look at the process since the middle of the 19th century you will see that that process did accomplish a degree of political stability. It also froze in place and perpetuated a lack of consensus. In other words, there was never a challenge put to the politicians to go out and work for a consensus that would force Canadians to break down their differences. Instead, they achieved it among a very small elite. Elite accommodation essentially perpetuated those traditional cleavages rather than broke them down. It has also, of course, denied access to other kinds of cleavages — social and class cleavages — which are out there, and which have to be addressed by the political system. I wonder if political scientists look at it from that point of view; that is, the point of view of perpetuation of cleavages rather than movement beyond them.

Richard Simeon

That is certainly one of the central dilemmas in the whole literature on elite accommodation, precisely that while it provides a kind of stability, it also institutionalizes and entrenches the very cleavages that it is attempting to manage. Clearly so much of the debate on Meech Lake is precisely that Meech Lake was about the set of cleavages that are institutionalized in that particular federal/provincial process. Meech Lake is to be condemned, not because it failed to work out an accommodation among them, but because it continued the entrenchment of old cleavages and failed to accommodate new interests that have not yet been institutionalized.

David Cameron

I think one significant development that we should not lose sight of when we are talking about the people, and how their interests are expressed in this country, is the fact that constitutional amendments will require the involvement of the eleven legislatures if Meech passes. That is particularly important in a number of jurisdictions. I think that is a way in which something other than organized interest groups expressing a rather narrow point of view can have their views expressed in a settled, open political process. You see some signs of that going on now, and I think that there must be a lot of elite accommodators in political office who are saying, "I can't do it again the way I did it last time"; not because of the organized interest groups (or not because of that exclusively) but because there is a legislature they have to deal with in a much more careful way than had been the case before.

Richard Simeon

Any suggestion that there is a decisive breaking point that changes constitutional politics dramatically is misleading. In fact, we have subtle shifts. It seems to me that from 1982 to the Meech Lake debate, there was a tremendous sense that the historic preoccupations of regionalism, etc. were behind us and that Canadian politics had to adjust to the very difficult and complex process of shifting onto another set of axes. In the 1950s, John Porter and others were talking about the shift from federalism to class politics. Now it is the shift from regional/territorial conflicts to gender and so on and so forth. Meech Lake was seen as a block to that, and that accounts for much of the criticism of it. The point I want to make is that that kind of displacement model is wrong. Those historic preoccupations always come back in slightly different form. I have seen this in the December 1988 Supreme Court decision on language, the reaction in Quebec, and in the expectations of where things are going in terms of regional development. I am not saying that those can be displaced, but the traditional federal/regional language agenda is still felt very, very strongly.

One way to think of Meech Lake is to ask what opportunities it opens in the future for increased consultation with people or interest groups. It seems to me that it will change the dynamic of annual conferences on the constitution for example. Perhaps interest groups can get organized before the problem in a manner in which they could not with Meech Lake; all popular consultation there has come after the Agreement. What is needed is consultation before so that when the first ministers sit down in a closed room they are fully informed as to the state of the public debate. Usually there is plenty of opportunity for any provincial or federal government interested in stimulating that kind of debate prior to hammering out the type of such a deal in Meech Lake.

Norman Spector

I too, want to suggest that there is a great deal more continuity between the 1981 and 1987 constitutional process. There is a tendency to recall part of the 1981 exercise, partly because of the intense experience surrounding Joint Parliamentary hearings in advance of the 5 Nov. resolution. But if you actually look at the contents of the package, it was much more a compromise between the people's agenda and the traditional territorial agenda. One can look at section 92A, relating to control over natural resources. One has been reminded recently of the "notwithstanding clause" which, if anything, is a compromise between the people's focus and the territorial focus. There are a number of other elements that I think, interestingly enough, were not themselves subject to the

public hearing process and therefore bear a greater similarity to the Meech process than we tend to recall.

There was also considerable debate (in 1981) as to whether the option of a referendum to activate the amending formula should have been included in the constitution. For whatever reason, the decision was taken not to go that way. Therefore, the country made a decision to have an amending formula that operates through legislatures. It was the 1981 package that entrenched the First Ministers' Conference on the Constitution in section 37 to deal with aboriginal rights because it acknowledged that the way to make the amending formula operate would involve first ministers at whatever stage of the process. (Of course, the 1982 constitution recognizes another process — under section 46 — which allows the amending formula to be inaugurated or to be initiated without a First Ministers' Conference.) Interestingly enough, however, the two processes that were entrenched, aboriginal constitutional reform, and the review of the Charter after 15 years, require First Ministers' Conferences to be convened. Accordingly, I see a lot more continuity between the debate that took place in 1981 and the debate that is taking place today.

PART TWO

Language

Language and Constitutional Change in Canada

*Michel Bastarache*¹

There is only one section in the original *Constitution Act* dealing with language; section 133. The text of this section was the result of a compromise reached by the Fathers of Confederation at the Quebec Conference of 1864; this compromise was later changed at the London Conference. Historians tell us that the attention given to this section and to the constitution of the Senate took up more time than did the division of powers. Section 133 was described in Quebec legal and historical literature as "La théorie du pacte."

This political agreement between the two founding nations did not directly influence the legal interpretation of the constitution, but it influenced constitutional custom in a fundamental way and formed the basis for the policy for bilingualism developed in the 1960s by the Federal Government. The incorporation of section 23 of the Manitoba Act in the constitution was also the result of an often difficult debate concerning the status of the French minority in that province as compared to the English minority in Quebec. There was a similar discussion again in 1905 when the provinces of Saskatchewan and Alberta were created. The historical element in these compromises was nevertheless the reflection of a social and political reality. Rights were recognized to francophones in the west at a time when they represented 50 percent of the white population and had just rebelled against local authorities who imposed a unilingual English Court process. Changes in the demographic equilibrium soon resulted in the denial of these rights. First, in 1890, Manitoba

1 Lang, Michener, Lash and Johnston, Ottawa, Ontario.

abolished all rights of the francophones; as of 1895 all the rights recognized under the *Northwest Territories Act of 1886* were also ignored elsewhere in the west. Reaffirmed by the Supreme Court of Canada in 1988, the provinces of Alberta and Saskatchewan moved rapidly to abolish these rights again.

Consistent efforts have been made during the 1970s and 1980s to redefine the basis of the 1867 pact. The basis of these efforts was to develop strong participation by francophones from Quebec within federal institutions, by creating conditions under which the mobility of Canadians speaking both official languages would be enhanced and by affirming the presence of linguistic minorities in all provinces. The federal government, in particular, saw the concentration of linguistic groups as a menace to Canadian unity. Looking at the demographic trends, it is nevertheless easy to see that more and more French Canadians live in a majority setting, the same being true with regard to English Canadians.

When measuring the success of the federal policy, we have to take these situations into consideration. The measures that were put in place by the federal government were, first and foremost, the development of educational opportunities for official language minorities, the development of opportunities for all Canadians to learn a second language, the transformation of the federal public service, assistance to official language minorities, and finally, the enhancement of language rights themselves in the Charter. All of these efforts were, however, made in an environment where rapid social and political transformations were taking place. One government after another were forced to draw a distinction between language and culture and to favour bilingualism within a multicultural society.

Bilingualism imposed itself as a political solution to the problem of separatism. I do not believe that it was really accepted in various provinces as a solution to local problems, be they social or political. Even within the federal institutions, resistance to bilingualism remained rampant because of the inability of the federal government to convince the public and part of the civil service itself that bilingualism was both necessary and feasible. This is probably why the progress achieved is very fragile and the latent opposition to all further enhancement of bilingualism within federal and provincial institutions has from time to time surfaced.

Since 1986, there have been some important developments favouring bilingualism. Parliament adopted a new *Official Languages Act*, which is very progressive, as well as amendments to the *Criminal Code* to ensure to all persons access to a trial in their own language. The federal government has imposed bilingualism on the Yukon, after having done so with regard to the Northwest Territories in 1984. Ontario has guaranteed certain rights to its francophone minority in the areas of justice and in provincial services. New Brunswick and Prince Edward Island have just adopted new official language

policies and Quebec has voted to guarantee the right to social services in English for its minority.

In spite of this progress, the same period has been marked by some important rejections. The Supreme Court having decided that language rights derived from section 110 of the *Northwest Territories Act* in Saskatchewan and Alberta are still present, both these provinces decided to abolish them. The Supreme Court having decided that those parts of Bill 101 dealing with the language of commercial advertising were unconstitutional, Quebec chose to use the notwithstanding clause to evade its constitutional obligations in that area. In New Brunswick, the very strong resistance to the modernization of the *Official Languages Act* has brought all government efforts to an end. Mr. McKenna has said that he is not going to introduce any new amendments to the New Brunswick *Official Languages Act*. In the area of school rights, section 23 of the *Canadian Charter of Rights and Freedoms* will not be implemented without most provincial governments having been brought before the courts.

With regard to the language issue, two forces now seem to be present; the first nourished by the national unity policy and federal financing, the second nourished by the sentiment that the national crisis over languages is resorbed and that bilingualism is a failure. This failure can be explained in different ways: some will argue that the concentration of francophones and anglophones is stronger than ever and that Quebec itself has officially rejected any form of bilingualism; others will argue that the impact of bilingualism is minimal and that the costs are unbearable.

These two views have led to distinct approaches concerning constitutional reform and language. For those who have espoused the philosophy of the Trudeau government, Canada should not renounce the idea of a country progressing towards the equality of its official languages. For those who believe that the French fact will remain only if Quebec can develop as a unilingual society, the Meech Lake Accord is a better option. Under this Accord, Quebec is recognized as a distinct and French society within a Canadian and English society. Francophones outside Quebec have argued that the Accord attempts to reconcile contradictory principles by affirming the role of legislatures to protect Canadian duality while favouring the development of a distinct unilingual society in Quebec. They also argue that the distinct society of Quebec is not really compatible with the principle of multiculturalism.

There is certainly, in my view, a very strong ambiguity surrounding the Accord and its purpose, one which has led many persons to suggest that if the Accord is approved, further protections for official language minorities would have to be incorporated into the constitution. No one has indicated what these protections might be or suggested the way to get around the opposition of Quebec to any further limitation of its powers over language. Basically, however, the new guarantees will not help clarify the definition of duality. Is

the Accord a recognition of the political duality of Quebec and Canada or a reflection of the cultural duality between French and English speaking Canadians?

Considering what has been said, is it really possible to discuss future developments with regard to language protection in the constitution without first resolving the fundamental issue of duality? Is Quebec a key player in the development of the French fact in Canada, or is it present in Ottawa only to protect its territorial interests and to obtain a greater measure of autonomy in order to realize the distinct society that it wants to be as unilingual?

I have often been asked how it is possible that some francophones outside Quebec have supported Bill 178 in Quebec. To understand this, I think one must remember that the implicit parallel made between official language minorities in Quebec and outside Quebec in the 1982 *Constitution Act* was never really accepted by francophones outside Quebec or within Quebec. Two majorities and two minorities in need of protection are described in the constitution, while, for francophones outside Quebec, it is very clear that French is the only language that is in any danger in Canada and that this language is endangered everywhere in Canada. The role of the governments described in the Meech Lake Accord seems unreal because there is no prior affirmation that the real threat to be met is the one facing the French fact in all of Canada.

Francophones outside Quebec have also been tremendously disturbed by the very restrictive interpretation of sections 16 to 20 of the *Constitution Act* given by the Supreme Court in 1986 and the lack of interest of English Canada in this question. I believe that many francophone associations just wanted to say, in December of 1988, that they recognized that French is the only language facing any kind of danger in Canada and that Quebec has the duty to protect the French language in Quebec at any price because there is not constitutional protection available for French in Quebec and no commitment of Canada as a nation to protect the French fact.

I further believe that the governments in this country had a very bad reading of the political context with regard to languages when they came to approve the Meech Lake Accord in 1987. This is probably best demonstrated by their naive faith in public opinion when Ottawa introduced the new *Official Languages Act* last year. Many government officials believed that the language debate was generally over and that Quebec and Ottawa could accommodate each other, without really considering the personal involvement of francophones outside Quebec or the general feeling of many anglophones with regard to further developments in the area of language protection in Canada.

Now, as always throughout Canadian history, language issues are divisive and cannot be dealt with insensitively. Any new attempt to revise present constitutional protections will present great difficulties, as with any political compromise.

Language and the State: Is Official Bilingualism Under Attack?

*Michael Behlens*¹

The key question here is, does the language issue, triggered by the Supreme Court of Canada's Bill 101 decision, underscore a profound national disunity. My long and short answer to this question is yes. There has been a re-emergence of the language question all across the country and I think we had better look at it very, very carefully and begin to address it in a precipitous fashion before it gets out of hand. The decision of the Supreme Court and Bourassa's response is merely one of many symptoms of the wide-spread malaise and even rejection of state meddling in the field of language policy and regulation.

At the national level there is a growing conflict between the vision presented in the *Official Languages Act*, Bill C-72, which is a statute and can be changed by any subsequent legislature, and the territorial vision of language promotion and advancement outlined in the Meech Lake Accord. The government, in effect, has been following a dual track strategy here, trying to appease all people on all sides. I think that this has created a considerable amount of confusion among the general public and among the educated public also which has been reflected in the reactions to Bill C-72 at hearings and wide-spread reactions to the Meech Lake Accord at all levels — before the Joint Committee, before the Senate, before the Ontario Constitutional Committee, and before the committee in New Brunswick. I am sure the same thing will occur in Manitoba and probably would have occurred in any other province had they held public hearings. You can see it, of course, in the reaction of organizations like APEC,

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CORE, the Confederation of Regions Party, the Western Canada Concept, and others.

Whether you go to the Maritimes or whether you go to western Canada, to parts of northern Ontario, or parts of Quebec, I think that there is a generalized state of confusion in the public's imagination about the question of language and the state.

The consensus that had been developing around the bilingual and multicultural policies, and I might add that it was a fragile consensus, is now being eroded very quickly and is being criticized by individuals and groups from all regions and from all classes and occupations. Colleagues of mine whom I have known for many, many years and who have never mentioned anything about language or about bilingualism are now throwing up their hands and saying "What the hell is it all about? I don't want to hear about it any more. I've had enough of it." They are talking about wanting to go back to two unilingual communities.

Twenty years of application of the *Official Languages Act* has indeed brought great changes in the federal institutions and operations of government for the better. As a student I came to Ottawa in 1964. As a Russian Canadian I was brought up by the francophone working community and educated by that community. I had learnt some French and I was struck by the unilingual nature of our Capital. I was struck by the unilingual nature of the University of Ottawa. All of this has changed and changed for the better. The whole city has changed. Its ambience has changed; attitudes have changed in the whole region, and there has been significant improvement in the opportunities for French-speaking Canadians to participate in the national government. A very little, quiet revolution of sorts has taken place at that level; a significant one. Nonetheless the application of the *Official Languages Act* has brought to the attention of Canadian society the cost to them and to their families and children in terms of occupational mobility. Here again, my experience of living in Nova Scotia and in the Annapolis Valley for 11 years has reinforced this on a daily basis. I have taught young men and young women and tried to, for example, develop a bilingual capacity in them. Of course, as you know, in the Maritimes most educated Maritimers have to seek jobs elsewhere in the country. They cannot all be absorbed in the region. And these young students did not have the background that allows them to become effectively bilingual in four or five years of university. They felt personally at a distinct disadvantage and they are angry. Quietly angry, as most Maritimers are, but nevertheless genuinely angry and frustrated.

Their ability to move into the military, to move into the RCMP, and to move into other areas was being slowly but inevitably eroded and the same sorts of frustrations have emerged now in other parts of the country. In the west, British Columbia, and northern Ontario, where families and their children do not have access to immersion facilities they come out against the language requirements

in occupations in the public and private sectors. This is, I feel, beginning to create a widespread degree of social unhappiness.

Many Canadians simply do not have access to French immersion or competent French education and find that career choices in private and public institutions are being restricted. There is a growing awareness of this and that is why organizations like APEC and CORE are gaining support from both the elderly and young people. I can see the two groups coming together as they did on Parliament Hill recently when I was there watching the premiers coming for the First Ministers' Conference. It was a very unnerving experience standing there and being associated with that group by the press. I have tried to talk to them, tried to understand the nature of their grievances, and tried to see what it is that they are concerned about. It is a very confused concern.

I can speak to this personally. My children in Nova Scotia did not have any opportunity to have French language immersion at all. Despite the presence in the Annapolis Valley of parents who were French, over a period of ten years the Nova Scotia government proved to be very, very difficult to deal with. Even more difficult were the Acadians of New Brunswick. When you establish a bilingual infrastructure, and not all of our citizens pursue full secondary education or have the ability to become bilingual and to function in a bilingual setting, it does create resentments and confusion and this will bring the policy under criticism.

Despite support from Ottawa in Charter protection, francophone minorities in fact have had great difficulty in gaining the cooperation of their respective provincial governments, as in the provinces of Manitoba, Alberta and Saskatchewan. I know quite well the situation in Alberta. The President of the Francophone Association of Alberta is an old colleague of mine from classical college days at College St. Jean in Edmonton. He is fighting tooth and nail for the best legal support that he can get, but it has been very, very difficult indeed. Ontario and the Ontario government is moving slowly, cautiously, almost like molasses in the middle of a Canadian winter. It has been a cold winter in parts of northern Ontario, slowing it down even more and there will be a serious problem, I am told when speaking to franco-Ontarians and to government people, of finding sufficient numbers of fluently bilingual people to fill those positions for services in the French language. That is why it is all the more important that students now coming out of the immersion program can continue immersion education at the post-secondary level and be available for those jobs. There will not be enough franco-Ontarians around to fill them, at least in the short run, so they are going to have to be filled by bilingual Canadians from all parts of the country.

In New Brunswick as well, the rise of extremist groups has forced the most powerful government in Canada to become unwilling to deal with the issue. In Nova Scotia, there has also been the recent decision of the Nova Scotia Court

of Appeal. Going across the country, these problems are intimidating. Once you get the state involved in education and language it creates a whole new set of problems.

I just want to make a few comments here about the Quebec state and language. There has been a long tradition there of involvement of the state by nationalist organizations and the church on the whole question of language. Ever since the conquest, vigilance has been the predominant word for survival. Organizations have always watched carefully the whole question on the use of language, especially in education. The debate over the question "Do francophones in Quebec have an equal right to bilingual education immediately from their entrance into Kindergarten?" goes back a long, long way. It resurfaced in the 1930s and 1940s and 1950s.

There is another debate emerging in the francophone society about that, and the government of course is going to take it very firmly in hand and say "No, they do not have that right," and set the curriculum. There will be no instruction in the English language until grade four or five and even then it will not be required. In some schools the teaching of the English language leaves much to be desired as is of course the case of the French language in many schools across the country. Therefore, the question is "Do you have by the emphasis on state policies in Quebec, the creation there and preservation there of an essentially unilingual mass population whose occupational mobility will then be influenced by that reality?" Jobs will not be found in the Province of Quebec by francophones and if they have to move they immediately run into serious problems unless of course they can very quickly achieve a working level of efficiency in the other language. So language will remain, for a very long time, at the very heart of the debate in Canada.

Institutionalization of state involvement, of course, took enormous strides in the 1960s. Bill 63, Bill 22, and Bill 1 quickly led to Bill 101, the Charter of the French language, now amended again by Bill 178. The emphasis on regulating language in public institutions in Quebec has been largely successful and of great benefit to that society. Personally, I was, from the outset, a great supporter of that kind of legislation, though not in the exact way in which it was done, and the kinds of regulations that were implemented and which still are being implemented by sometimes overly vicious officials and bureaucrats who do not often take into account the sensitivities of individuals and groups. It would be more difficult for the Quebec state to impose a policy of coercion in the private sector. Of course you well know, starting with Bill 101 and the changes in Bill 101, how the government did back down and develop a policy of cooperation with the private sector.

On the sign issue, they decided to become more coercive because to them it was symbolic. They wanted the "visage français de Québec" to appear clearly to North America and to Canada. To them symbolism was crucial, as it is crucial

in many societies. Symbols are very important and they have tremendous power but they also have certain limits and can be damaging, so one has to learn how far to go in terms of pushing the principle of symbols.

The Supreme Court has set out two criteria that have to be met for a law to override the Charter by using the reasonable limits argument. That is, the social objective must be sufficiently important and the means to achieve that social objective must also be reasonable and proportionate. Having set those two rules, the Supreme Court decided that section 58 and 69 of Bill 101 met the social objectives test but not the means test because they were not proportionate to the social objectives.

Exclusivity of French language was not acceptable to the Supreme Court but a predominate display of the French language was accepted. The question is rather vague and it is there that the government and the bureaucrats decided to play with that and to determine or define predominance as French only outside with a modicum of bilingualism inside. Bourassa could now say things were such that bilingualism will only apply to small companies and will not apply to chain stores so there would be very, very limited application of bilingualism inside. Then, of course, what happens when legislation is very vague and you leave it up to the officials to regulate? They can change regulations at the drop of a hat and extend them and multiply them however they wish.

Confusion will remain and the battle will be over those questions of symbols. You know where that can lead. It is rare to allow an accommodation in a battle of symbols. Symbols are very emotional by their very nature. They are not very amenable to being resolved at a rational level.

We need to rebuild a social contract in Quebec. Everyone is talking about that these days. In fact Robert Bourassa pays only lip service to that social peace in that social contract. Prime Minister Mulroney and Lowell Murray bend over backward to accommodate Quebec's political elites in the Meech Lake Accord only to be poked in the eye or, to some extent perhaps, kicked in the groin by Bourassa's Bill 178.

Well, where does all this leave us? How can this emerging crisis over language, which is spread throughout the country, and is, in my mind, both broader and deeper than it was in the early 1960s, be dealt with?

Perhaps I am influenced by André Laurendeau, whom I have studied carefully for the past twenty years. Canada confronted the economic crisis of the early 1980s with the Macdonald Commission on the economy. Free trade was the Commission's recommendation. That is now being implemented. Where it is going to go no one can tell. There are many pitfalls and obstacles in front of us. In my humble estimation it is now time for another royal commission on the issue of the state and the regulation of language and the future of linguistic minorities in this country.

First, the Laurendeau Commission was never finalized. Because Laurendeau died, the final report was never written. There was no consensus within the Commission and because there was no consensus they decided to drop the constitutional dimension of the Commission's work. I think the country was poorer for that. We had not had a thorough debate about all the alternatives. That debate, in fact, has continually been put aside. We need to assess the gains and applaud ourselves for what we have accomplished. We need to analyze the new problems and some of the old problems that have not been addressed. We need to propose, that is the Commission would need to propose, a series of practical recommendations that could be constitutionalized in perhaps a revised Meech Lake Accord.

What I am suggesting is that we hold off. We should not become precipitous. When it comes to constitutional matters, like most historians, I am cautious. Do not touch it if it works.

It is also high time for a second commission on language and multiculturalism in the province of Quebec. The Gendron Commission, as you well know, did marvellous work, an incredible amount of good research that has helped successive governments in Quebec move on a very explosive issue. We may not all like the way in which they moved but without all that research I think that it would have been far more difficult for both Bourassa and the P.Q. to have moved in this area.

There was a lot of criticism and I think quite valid criticism, for example, about the nature of the research of the B & B Commission in the 1960s. The country was simply not ready at that time, did not have sufficient talent in universities, to do the kind of job that the commissioners wanted to do so the nature of the research was sometimes quite soft and rather inadequate. I think we now have the resources all across the country to do a much, much better job. I think that it is high time that we moved in that direction. While Bourassa has recently rejected the idea of another commission on language in Quebec, saying that the time is not appropriate, I think it is. It is a question that has to be addressed openly in order to lance the abscess, to get on with some practical solutions that can be, if necessary, constitutional.

Comments

Ralph Heintzman

The history of linguistic relations in this country is one of conflict. It has been from the start, and I imagine that it will always be. For me, the interesting thing is not that there is conflict, which one would expect in a society or societies where there is more than one language, but what the outcome of those conflicts has been over time. On that score, the record is rather positive, at least until recent times. Michel Bastarache referred to the genesis of section 133. It is easy to imagine, and for a long time it was accepted as historical fact, that Canada started with some kind of consensus about rights and language and the relations between peoples, and that this somehow broke down over time as a result of minority conflicts in the west and elsewhere, and that somehow Quebec retreated to a reserve and gave up its interest in the rest of the country. The facts are otherwise. Language rights have grown in this country in a strangely serendipitous way, and largely as a result of conflict. It was not envisaged at the Quebec conference, that section 133 would have the strength that it now does. That was a result of the London conference and largely a result of the insistence of the English minority in Quebec that provisions for protection for English in the new province of Quebec be strengthened. French Canadians at that point had not been demanding similar rights; certainly not for rights outside Quebec and not even in the proposed new federal government. Nevertheless rights having been insisted on for the English minority in Quebec, the same protection was given to French rights in Ottawa.

This principle was then extended to the west in a variety of ways which gave rise to all sorts of conflicts, the results of which were rather paradoxical. First of all from the Quebec point of view, a society which on the whole had tended to think of itself as being limited to the old boundaries of Lower Canada, these conflicts enacted a growing sense of involvement with and attachment to those

francophone communities outside the province. Ultimately, Henri Bourassa developed a whole historical theory to justify this. He invented an historical myth to explain language rights rather than seeing that in fact the French Canadians own conception of the country and things had evolved over a period of time as a result of those conflicts.

The change in English Canada is far more recent and dramatic though it too has been going on over time; it is not entirely a result of conflicts since 1960. The changes in English Canadian mentality since 1960 (and I am not just talking about elites but about the population at large) have been very dramatic as a result of those conflicts. If you look at an opinion survey, rather than what the leaders of particular groups say, or particular disaffected parties, there has been an enormous and gradual acceptance of the notion of linguistic justice as an operating principle in Canadian society. I think that it's essential to note that the Canadian historical record indicates that it is important not to get distracted by current conflict, and to see that conflict has often produced paradoxical and fruitful outcomes.

Michel Bastarache

I just want to respond to Heintzman's surprising affirmation that the results of conflict have been positive. If one looks at history, the denial of rights for francophone minorities for 100 years in Canada has produced an assimilation of half of the French language population outside Quebec. I do not know how that can be seen as positive. However, I agree that what is positive, is the recognition that language rights should be recognized and enhanced in a formal way — that there has been a recognition of those rights. But even if you look at recent history, section 23 of the *Constitution Act*, which provides really the only means for the survival of francophone minorities outside Quebec, is not respected in eight provinces out of ten. Now, is that really a positive development? We may have the recognition in the constitution for the financing and development of schools for the minority, but the rights are not being respected. As a consequence, I think that you have got to distinguish between the formal equality of the constitution, and the actual impact on the community, before this kind of affirmation can be made.

Eric Maldoff

The current debates, particularly as they touch Quebec, can be looked at as debates about politics and power. Those are structural and institutionalized types of debates and would probably go on even if Quebec was a unilingual English province. You would still have debate between Quebec and Ottawa

because provinces debate with the federal government and those kinds of tensions do exist. It is just that language adds another element over which the debate can take place. There is also the aspect of people's interests, which is often ignored, and which is of serious concern to me, particularly when there is the view that, "Well, perhaps we'll back off and not view this as too serious a situation." The people of Quebec see themselves genuinely in a minority situation in the North American context. They feel like a minority and there is a very profound concern widely held among Quebecers about the survival of their community and the survival of their culture. It is not a theoretical thing and it is not a guilt trip being laid on English Canada. It is a very profound and genuine feeling that the general community has struggled for survival for 300 years or more. These sentiments are passed on from generation to generation and are very much part of the family, and the culture, of Quebec. I do not think any of us will deny that the world has changed dramatically during the last quarter century. With the advent of technology and a number of other phenomena, society has changed and the way society functions has changed. One of those changes has been in the demography of the province of Quebec. In the Quebec political tradition, having 25 percent of the Canadian population has been very important for maintaining political clout in Canada. One of the reasons political clout was important was to maintain language and culture. Quebec has always seen that threshold as vital. With the lowest birth rate in the western world (there is only one community with a lower birth rate and that is the English-speaking community in Quebec) Quebec has become very alarmed about maintaining its demographic strength in Canada. That puts it in a dilemma because women are not going to agree to have more children. Consequently, the burden really is placed on immigration. The problem with immigration is that there was a belief that if you let in immigrants and if you forced all the immigrants into French schools, they would become French Canadians. Instead, they have all been forced into French schools and are now they are trilingual. They speak their mother tongue and they speak French. They can function in French and they are going to learn English because they came to North America. So what has happened is that there is this third force which has emerged in Quebec, that does not carry the genes, does not carry the culture, and does not carry the history, the baggage, the values and the fights. If you let in immigrants, you dilute the culture. So why does Quebec let them in in the first place? This is the argument. If you close the doors you maintain the purity of the culture but you lose the demographic weight and then you lose in any event. That is the dilemma.

There is also the problem of high technology in the North American context, which is English. The pressure for success in high-tech domains means that you have got to be able to function in English in the international context. There is also the pressure of mass communication and culture, particularly from the

United States. French children are now singing English songs, listening to English radio, buying English discs, etc. I am not passing judgement on whether this is good or bad. This is the phenomena that has happened. There is a globalization of economics and a feeling in Quebec that it wants to be a player in the international world economic scene. To do that, we must all speak English. Now we may all say that is reality, but it is creating enormous angst. It is serious and that is why a judgement like the Supreme Court of Canada's decision in December 1988 can ignite the cycle of insanity. Moderate people who normally just do not want to be bothered with this debate actually pick sides because it is touching their very notion of survival.

How does this all tie into our discussion today? I think that, first of all, we are dealing with an immediate problem that is going to grow progressively more acute. Canada has to understand how serious that problem is and understand the political clout that Quebec currently has in shaping national politics as was evidenced in the last national election. That is one reality that we are going to have to face. The other is, that Canadians outside Quebec do not recognize this profound concern of 25 percent of the Canadian population. Canada has washed its hands of the problem to the extent that it has said "Go home, go back to Quebec; and we shall give you full authority to do whatever you want there, it's fine with us." The problem is that this reaction is not supportive given the nature of the crisis that French Quebec is facing. It is not a position that makes space for French in Canada or francophones in Canada.

We hear about French language immersion programs outside Quebec, but the question is: Why are these people learning French? My sense is that it is not out of any great affinity to the French fact in Canada. It is an economic reality that if you want to be upwardly mobile you must speak French. These are factors that are out there, and that are understood in Quebec. What is much more important to me about the constitution is the statement of values that is contained in it. Meech Lake began to have its effect the day all the first ministers signed it, the day they agreed to the words "a distinct society" as opposed to the distinctive character of Quebec. They agreed to something that has real meaning in Quebec. Those two phrases have different meanings. The minute it was agreed by the first ministers that it was the role of the government in Quebec to preserve and promote the distinct identity of Quebec, a 30-year catch phrase in Quebec that has real meaning was endorsed by all of Canada and given legitimacy. That catch phrase will be relevant every time there is a conflict between Ottawa and Quebec. Quebec will always insist that it is the responsibility of the Quebec government to act. This policy is beginning to have its effect. I think we are at a moment where discussions about a Royal Commission or other forms of discussion about where we are going in the country is absolutely imperative. Meech Lake has put in place a statement of values that will colour any further discussion for the future.

Bert Brown

With regards to the question about language, I would like to say that I think that what is really underscored is the difference between what Canada really is and what we'd like it to be. I think virtually everybody here, and a lot of people in all of the provinces of Canada would really like Canada to be bilingual. I think we would like to be cosmopolitan enough to be bilingual. But I think Mr. Maldoff came up with two of the realities that I call realities of Canadian politics. The first one to me is the fact that in order to be elected in this country, regardless of what party, not the one necessarily in power now but any federal party, you have to cater to a majority in two provinces. And to get re-elected you have to bend over backwards to that same majority. The second reality is that language cannot be legislated. That is why in Alberta and Saskatchewan you saw the reaction that you saw when there was some fear that bilingualism might actually be legislated in those two provinces. The reaction of the governments was very fast and very swift. And in Quebec it was equally fast when they thought that they might not be able to preserve unilingualism. Those are also realities. I think that if we are going to go ahead with constitutional reform in Canada we have got to accept those realities even though we really would like to see this country totally bilingual. In order to go ahead now with reform you may have to accept the fact that you can promote bilingualism in western and Maritime Canada, but you cannot legislate it. And at the same time, you can try to promote bilingualism in Quebec, but you must legislate.

PART THREE

Regional and Social Interests

Regionalism and the Constitution

*Allan Blakeney*¹

I think that it is useful to recall that Canadians have, consciously or unconsciously, adopted a different route to nationhood, different than that of the United States, since we always compare ourselves to the United States. It has been one that has allowed each region to develop its own sense of identity before pressing for any particular sense of national identity. We have rarely used any extraordinary measures to engender a public or popular sense of nationhood; we have not used the strong symbols of flags and constitutions and the like and as a result, we are at a stage in national development where people still feel very strong regional loyalties. I recall Angus MacLean saying at a federal/provincial conference that he considered himself a Maritimer first, a Canadian second; this is a man who was a federal cabinet minister. I heard on the radio today someone from Newfoundland saying, "Oh yes, we have been Canadians now for 40 years, but I still think of myself as a Newfoundlander first." I am sure I would get the same reaction from a Quebecois and an Albertan as well. We have not troubled ourselves about whether or not we had a strong sense of national identity.

We approached multiculturalism in a similar way. We have said that we will all be better Canadians if we have a firm sense of our own cultural roots. Therefore, we can safely encourage the preservation and enrichment of cultural roots in the belief that in the fullness of time, 50 or 100 years hence, they will meld into something we can call a Canadian culture.

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In my judgement, at least, regional differences are less sharp, both within the two solitudes, the Quebec/English dichotomy, and in the heartland/hinterland dichotomy, than they were 10, 20 or 30 years ago. We have achieved much of this by the informal changes in our constitution, which have been really quite remarkable since World War II; the whole development of a nation-wide social policy, some of it by formal constitutional change, like pensions and unemployment insurance, but much of it informally by the use of the spending power; the whole litany of hospitalization and medical care, Canada assistance plans, and equalization. These are major changes in the way in which Canada operates and all of those are unifying; all serve to create some sense of national identity. I think that this is illustrated by the fact that when Canadians go abroad they frequently speak in terms of having these national medicare plans, etc. as part of their sense of being Canadians.

There is certainly, to move closer to home, a much greater awareness of constitutional issues now. This is partly because of discussions that took place prior to the 1982 constitutional changes and partly because of the discussions surrounding Meech Lake. This is going to continue because there have been some structural changes. We have already alluded to the fact that the 1982 settlement requires that further changes involve formal consents by all legislatures, as opposed to informal consents by Cabinets, and this legitimates public discussion in a way that was not true prior to 1982. It seems to me that if Meech Lake had not been the subject of an elite accommodation, to use the words of earlier speakers, at Ottawa, with all parties being in favour of it, then the full impact of the 1982 changes would have been much more obvious. If one party had opposed Meech Lake then the level of public discussion around legislative approval all across Canada would have been much sharper. And because, except for perhaps in Ontario, political discussion tends to focus around the debates in the provincial legislatures rather than the House of Commons debates, we would have seen a much broader discussion of the impact of Meech Lake. The corollary of that is that if we have other proposals that do not have all party support we can expect them to be the subject of much more public discussion than has previously been the case with respect to constitutional change.

I turn now to the question asked by John Whyte — what are the concerns that drive regional demands for national restructuring? The concerns are the same old ones and one or two new ones. The same old ones, the ones we have heard mentioned, are the concern in Quebec about the preservation of the Quebec nation and culture, and the concern that the hinterland has about their perceived inferior place in the Canadian federation. I will confine myself to the latter branch because we have already examined concerns of Quebec about preserving its distinct society. The hinterland concerns are the same as they were before. The concentration of economic power in central Canada is con-

tinuing; economic power is more concentrated than it was five or ten years ago. We used to have three banks in western Canada, but we now in effect have none. The two Alberta banks are gone and the B.C. bank is now owned by a business in Hong Kong. We had a big Canadian oil company, Dome, which is now operated out of Chicago. We had a string of trust companies that gave us some sense of being in command of our financial destiny, but they are by and large biting the dust — Northwest Trust, Pioneer and the rest. Latterly Principal Trust — a very considerable financial empire — has collapsed. There is concern in some parts of western Canada about the impact of free trade on agriculture, an industry that perceives itself as, at least in the world as presently structured, in need of a great deal of governmental support since agriculture everywhere else received assistance. There is right now a concern that the prosperity in central Canada is producing an interest-rate policy that is contrary to the interests of western Canada and the hinterland generally. So there are the old arguments about the concentration of economic power.

Similarly, there are arguments about the concentration of political power. This is not quite as acute as it was; at least there is some representation from the west, some strong voices from Alberta in the federal cabinet, but many see this as likely to be transitory. There is concern about the new emphasis on bilingualism. This has already been articulated. Clearly, people in the hinterland, people west of Winnipeg and east of Quebec City, believe that they will never be a senior federal public servant, perhaps cannot be prime minister, unless they are fluently bilingual, and this is not really open to them. If you think of the political leaders across Canada and you ask yourself, if to be prime minister you have to be fluently bilingual, and not simply effectively bilingual as Mr. Broadbent is, think of how many political leaders in Canada fall into that category. You will find practically none in B.C., Alberta, Saskatchewan, or Manitoba and practically none in Nova Scotia, Prince Edward Island, or Newfoundland. It is not surprising that this suggestion, therefore, would engender some feeling that somehow we are being shut out. Any answer that suggests, "Well, it's their fault" is not acceptable. That definition of full Canadian citizenship is simply not accepted. Whether it should be or not I am not now debating. I am simply stating as a fact that it is not accepted.

What response comes forth from the hinterland? Well, you see it in the Meech Lake arguments; more power for provincial governments is sought. This has real danger, dangers for regional equity; dangers, I believe, for the economic well-being of Canada, which requires a strong federal government, at least in economic areas. The other thrust is for more power for the regions at the centre to translate the Canadian form of government into a federal form of government with a second chamber that is effective and equal. I doubt that anyone really worries whether it is elected or not, but you have to say that you are in favour of its election in order to make it a popular cause. I believe that the concerns of

the regions would be met by a second chamber like the German one, where the second chamber is appointed by the "provincial" governments, but I am not expecting everyone to agree with that. The real thrusts are for effective and equal, or approximately equal, representation.

We have to realize that one fundamental thing has happened in Canada because of 1982. Perhaps the largest change is that Canadian thinking has been changed from the regional nature of Canada to the provincial nature of Canada. Prior to 1982 we always talked about Canada as being four regions; we were proposing to have an amending formula that gave equality to the regions and we were going to have a Senate with each region represented by a stated number of Senators. The great triumph of the Alberta negotiators was that they almost destroyed that conception of Canada. We now have an amending formula that is now not based upon regions. All of these old ones, the Victoria Charter formula and the proposals of the Canadian Bar Association, the Pepin-Robarts Report, or the Ontario Committee Report — all of those proposals that were based on regional representation are now behind us. And no one thinks that they can be revived. Mind you, in the course of so doing we have lost the veto for Quebec, which was going to be a region. That, to a large extent, precipitated Meech.

A similar situation has occurred with respect to Senate membership. Previously we all talked about it being regional and now we are talking about it being provincial. If you come from Alberta, you speak about equal as meaning equal representation for each province. Those changes are now finding their way into our constitutional thinking and they are part of the effort of the "hinterland" to defend against the power, economic and political, of our central government.

The Two Despotisms in Canada's Constitutional Process

*Lorna Marsden*¹

You have all heard before about the claims of various groups that they have been excluded from the Canadian constitutional process. You are going to hear it again. I do not purport to speak for such groups but in meetings, papers, and in testimony before the Committee of the Whole in the Senate of Canada groups who feel excluded have had much to say about the need to accommodate their interests.

When I talk about the groups who have been, or are being, excluded, I mean those groups that Professor Alan Cairns has described as having a "sense of outrage" which is "constitutionally significant" and, as well, having a sense of their constitutional existence. One can go on proliferating the number of groups that have been excluded from the constitution but let me talk about those that I think have a sense of constitutional existence that is increasing rather than declining.

The first are the aboriginal peoples of Canada, who were present in the debate in the early 1980s but who are no longer there. This case has been put very eloquently in front of the Senate Committee by Louis "Smokey" Bruyere, President of the Native Council of Canada (2 December 1989) and Mark Gordon, President of the Makivik Corporation. In his testimony (16 December 1987), Mr. Gordon detailed the exclusions of his people (the Inuit of northern Quebec) from family law, property law, criminal law, and language and education laws. I will not read you the details of his testimony except to say that he

1 Senate of Canada.

described his people as having been put into a "sort of legal twilight zone when we are dealing with our basic rights" (p. 2463).

One of the best lines ever delivered on this matter was delivered in the gala after the signing of the constitution in 1982 by Dave Broadfoot, the notorious Member for Kicking Horse Pass, who was describing the qualities of Canada, a land — as he said — of shining lakes and glorious mountains, of other exceptional qualities which he listed, and of "two founding peoples — four if you count French and English." Broadfoot captured in that twist the blindness to the rights of aboriginal peoples among Canadians of European heritage that seems to be the basis from which the sense of outrage — that is unparalleled among any of the other groups — arises. Put simply, the callousness with which their concerns are being treated at the present time is absolutely unacceptable to all the rest of us in excluded groups and, I assume, to most others not from excluded groups.

The second group with this sense of constitutional existence and exclusion is what might be called the "multiculturalism group." This group worries, and with good reason, about what they regard as a dangerous statement in the Meech Lake Accord referring to the bicultural, as opposed to multicultural, nature of the country. This well-founded concern must be addressed.

To appreciate this worry, you have to realize that those of us who are excluded see those who are not (the majority of people, including those represented in Parliament) as people who do not need the protection of the constitution. The majority involved in constitution-making have sociological protection. A constitutional protection is needed when the morals and wisdom of the people break down and that is what those in the group I am labelling "multicultural" fear in section 2 of the Accord. "Section 2 can be taken," in the words of Emilio Binavince of the Canadian Ethnocultural Council, "as a fresh and original granting of power which did not previously exist in the *Constitution Act of 1867*. In the hands of the wrong government that can be taken...to justify the limitations of liberty in this country in the name, very often mistakenly, of the survival of one culture or for the purity of another culture." (Senate Debates, 27 January 1988, p. 2564).

Let me make reference next to the concerns of women, which have been raided in constitutional changes for many generations. First, I would like to briefly comment on the processes of constitutional reform that very severely repress women. To start with, you have denied women's basic legitimacy in the constitutional process. That is, objections raised by women or our representatives are not taken as legitimate concerns. Our concerns have been "pooh-poohed" in this debate. One could quote chapter and verse from the way in which this has been handled in the debates in Parliament alone. I will illustrate that in a moment.

Next, there is a deliberate distortion of the concerns of women. Women are expected to speak with one voice. We are told that we must choose to speak as women or as Quebecers — we cannot be both. Men, on the other hand, can combine their gender status and any other number of statuses available in public debate. Yet we are told time and again that we must not. The way this usually occurs is to first pit women's interests against some other major group's interests. In 1978 when Mr. Trudeau, at the end of a constitutional conference, offered, without any notice and with no consultation with women's groups, to move divorce from the federal to the provincial level of jurisdiction, he set women against the provinces. Women had to fight a very hard battle to preserve the federal jurisdiction. Our concerns with divorce, property, child custody, and so on were simply not understood (see Mary Eberts, *Submission to the Ontario Select Committee on Constitutional Reform*, 4 February 1988).

In the 1981-82 debates women were pitted against native peoples; one could either support native people or women but certainly not both. It seemed all too easy to ignore the concerns of native women. In the Meech Lake and Langevin Agreements and the subsequent public debate, women have been pitted against Quebec. We are labelled for "women" or for "Quebec"; no nuances are allowed. So when I claim that we are being denied legitimacy I mean that the issues we raise and our single or collective voices are simply not heard. We have heard senior public servants who were involved say that they simply never thought about women's concerns when they met in the Langevin block. We are over half the population. We have raised constitutional questions since at least the turn of the century. This blindness is simply outrageous.

Having outlined the groups who have a sense of constitutional identity, let me come to the main point, which is to point to two forms of what I call "despotism" in this country that are wrong and need changing. The first despotism is best illustrated by a story making the rounds about Margaret Thatcher who, after a very late Cabinet meeting in London, went out to dinner at a local restaurant with the members of her Cabinet. A great fuss was made but finally they were all seated and the maitre d' asked Mrs. Thatcher what she would have to eat. "I'll have steak" she responded. "Oh yes, madam, and what about the vegetables?" asks the waiter. "They'll have steak too." she replies. This may be a shorthand way of referring to the arguments made by Professor Albert Breton in his excellent dissenting statement in the third volume of the Macdonald Commission Report. In it, he condemns executive federalism and analyses its underlying arrogance and abandonment of democratic processes in our type of parliamentary system. In executive federalism, we the people are the vegetables. It is not possible to summarize Breton's eloquent argument here, but we are often told by the first ministers and others involved in the small group at constitutional meetings that executive federalism is justified because they are elected people. This is questionable. They are elected by a first-past-the-post

system that ignores minority opinions (unlike various forms of proportional representation). They are nominated to run for office by a system subject to all sorts of influences. It is true that being elected carries one type of legitimacy but not nearly enough for premiers and the prime minister to make the constitutional changes they are proposing to make now and in the future. Executive federalism limits the checks and balances of the competitive aspects of the system that should be there, as Breton points out, because the premiers decide before, not after, the public debate.

In other words, there is a legitimate role for the executive federal gang to meet, produce, and implement constitutional changes but not before we have had at least parliamentary and legislative debate. In Breton's analysis, executive federalism degenerates into connivance, which seems a very appropriate description of what we have seen recently. So this type of despotism in constitutional change emanates from executive federalism as it currently works.

The second despotism may be described, to distinguish it from the Executive Federal Gang, as the Club of Despots. This can be best illustrated by the breathtakingly naive and paternalistic letter that Gordon Robertson wrote to the *Globe and Mail* of 25 March 1989 in reply to an article by Ramsey Cook on Meech Lake. In it, Robertson said, basically, that he was at the constitutional meetings that led to the deal. The people should trust him as it is all right to make a deal. Ergo, we have to have the Accord.

This argument will not do. It might have done in the past but we are not quite so authoritarian now. Despite the use of genteel language to try to smooth over what is going on and disguise secret decision-making, in the eyes of a majority of people who have thought about it, the idea of a small inside group of unrepresentative politicians and officials making constitutional decisions is not legitimate and not a sound basis for changing the country.

You may argue that it is unfair to call executive federalism and the "father knows best" attitude of the constitutional club despotism. But, as perceived from those of us outside, that is precisely how they appear. The problem is that there is very little trust in the process or the players in constitutional reform at present. Recent public opinion polls show major doubts about the Meech Lake Accord among Canadians in most parts of the country, but I suggest that there are even greater doubts about the process of constitutional change generally. I agree with those who have said that the evolution of the Meech Lake ideas is absolutely essential, but in an atmosphere of outrage and mistrust with a majority of Canadians in constitutionally aware but excluded groups what should we do next?

We have had a number of proposals. Some people, such as Al Johnson, suggest that the premiers and the prime minister should make proposals for change that should be debated in each legislature. On the basis of such parliamentary input, decisions should then be taken by the first ministers. We

should institutionalize this as our process of constitutional reform. There has been a proposal for a standing committee in the House of Commons on constitutional reform. Some have even proposed that a reformed Senate take on this role. I suppose all such suggestions are good to examine, but to those members of excluded groups it does not sound very convincing unless the composition of the legislatures, the Senate or the House is changed. Not seeing ourselves reflected in the composition of those bodies, not finding our voices heard as witnesses, and being treated with an ill-disguised sexism in the current round, we have little faith. Changing the composition of all those bodies is going to take too long.

Some have proposed other means such as people's assemblies or constitutional assemblies. These were widely debated before 1981. Indeed, one of the federal proposals in 1980-81 concerned introducing a referendum as part of the constitutional amending formula, but this was rejected. Perhaps the amending formula is the place that excluded groups should focus attention as a means of becoming included. Popular movements exist and will continue to ensure that the current methods of constitutional change — the two despotisms — do not succeed.

The experience of women has been that our issues are never taken into consideration unless we form popular movements and make a great public fuss. From the first "Persons Reference" forward this has always been the case. I predict that a variety of protest groups will become much more sophisticated in attempts to ensure that excluded groups are heard and are influential. I hope that such groups remain non-violent.

The basis for such widespread public protest is well described in Alan Cairns' distinction between the "government's constitution" and the "people's constitution." In testimony to the Senate on 10 February 1988, he put it this way:

An even more profound change is taking place at the citizen base of the constitutional order. Yesterday's deference to governing elites in constitutional matters had been replaced by a resentment when citizens, who think of themselves as constitutional actors, are defined as spectators by governments. In the eyes of many of the group elites for whom this psychological change is most pronounced, and who see their fate as affected by constitutional change, the Constitution is no longer an affair of governments. (p. 2741).

Comments

Norman Spector

I would like to just go through some history to touch on what I think is common in something that Mr. Blakeney and Senator Marsden said. It is interesting that all the elements of both a regional and social nature were in fact on previous constitutional agendas. To begin with Mr. Blakeney's point on Senate reform, you will recall that between 1976 and 1987 the only province that was interested in Senate reform was British Columbia. Alberta opposed it. Mr. Lougheed opposed reforming the Senate and, in fact, the model that Mr. Blakeney suggested, the German model, was the model that British Columbia put forward. You will recall that that fell off the table in the 1981-82 round with western provinces in particular having other agendas. They were agendas that were more or less satisfied, in terms of the amending formula, by section 92A, and by the "notwithstanding clause," etc.

Similarly, with the groups that Senator Marsden refers to there is an interesting history. In the 1980 round the proposal was for a comprehensive preamble. There was a federal proposal for a comprehensive preamble that would recognize the place and role of the aboriginal people of Canada, our multicultural heritage, Quebec's distinctiveness and linguistic duality.

What happened was that in 1981, half of that agenda was entrenched, not with the preamble, but in the text of the constitution and in the Charter, in specific terms, in sections 25 and 27.

Furthermore, there was progress made in the substantive sense about aboriginal rights outside the Charter, in section 35. And so, in many ways what we are dealing with is a sequence problem. There is a problem of incomplete reform having taken place over the years.

Mr. Trudeau, in 1977, two months after the Parti Québécois was elected, spoke about recognizing the collective aspects of rights, rights of language and

region. There was also a great tension particularly over collective aboriginal rights. If you look at the White Paper in 1969, which was premised on individual rights and was condemned as being assimilationist for that reason, the evolution from 1969 to 1981-82 when the collective aspects of those rights were entrenched, is significant.

So, however all this turns out, it is important to go back and look at the record and see what has and has not been achieved, and to see the connection between constitutional changes over the years.

John Roberts

I want to take issue with Norman Spector. It is somewhat selective to argue, if I understand his argument correctly, that what we are now seeing is simply the completion of an incompleting project begun in 1981-82. Clearly, there are some areas where that may be true. There are significant ways in which the more recent proposals did take a different direction from that of the federal government in 1981-82.

At that time the federal position was that there could not be, with the exception of section 92A, increases in provincial jurisdiction, that there should not be situations of different jurisdictional responsibilities. If there was to be a discussion of increased or changed provincial responsibility, the federal government had purposes which it wished to pursue, particularly with respect to powers over the economy that would enhance its constitutional jurisdiction.

The thrust of Meech Lake is not a natural consequence of that position. As well, the Trudeau government essentially felt that language and other issues should be dealt with on the basis of individual rights. What they hoped to do was to transform the protection of those things from a collective basis to individual rights, whereas Meech Lake clearly envisages the protection of those interests through collective rights enforced by legislative responsibility.

The third area in which it seems to me that this is not a natural follow-up to 1981 and 1982 is the very different way in which public participation took place at that time. In 1981-82 public participation took place through the Joint Committee, which had a surprisingly significant impact on government and which took place before the form of the constitution was finalized. That participation was effective in achieving changes in the constitutional accord. What we see this time, is a public discussion that has been hamstrung by the fact that it has taken place *after* the *de facto* proposal was presented. In a way, it affirms non-change.

While there is certainly some kind of natural continuation in the kind of preoccupations and concerns that exist, the problems are immutable and the areas of discussion will continue. I think it is somewhat selective to argue that

all that has happened is a natural progression. This is a change at the cross roads; not simply a progression along the way.

Doug Brown

I want to comment that most of what seems to be wrong with Meech Lake (i.e., the sin of omission, in that both executive federalism was employed and the Canadian public was excluded) is now somehow trying to be resolved in New Brunswick and Manitoba by hearings after the fact, rather than before subscription to the Accord. Minorities' concerns that were left out of Meech Lake, in terms of native rights, women's rights, and language rights are now trying to be included in the parallel accord. The groups have now met with and talked to the three political leaders in Manitoba within the last 30 days. A note of optimism I think is that it may be that if we can put six people together in this country with enough statesmanship to promote a parallel accord, we may in fact get Meech Lake and get the concerns of minority rights on the agenda.

Norman Spector

Just a short response to John Roberts. My argument was not that Meech Lake represents the natural fulfilment of the 1981 process. With respect to what you said about collective rights, here is what Mr. Trudeau said two months after the election of the P.Q. before the Quebec Chamber of Commerce and repeated in the House of Commons, the day after the Referendum was won, "As for the Constitution I have only one prerequisite, respect for the rights of men and women, respect for human rights and probably respect for the collective aspect of these human rights. I am thinking here of language and of the rights of the region." On the question of process, you are right in that there clearly was an intense process prior to the 5 Nov. 5 1981 meeting.

What is interesting is that some of the most controversial aspects of the 1982 round were never subjected to public hearings. For example, the amending formula that was condemned as leading to a checker board Canada had certainly not been a subject of public consensus and process. The "notwithstanding clause," the "balkanization" of language rights that arises by having New Brunswick opt in to sections 16 to 20, and not Ontario and any other provinces, was not the subject of a public hearing process. Thus, it is clear that 1981 and 1982 had this tension between the people's process and the trade-offs that took place behind closed doors on the night of 4th and 5th November 1981.

Peter Leslie

I want to add that in 1981 the bulk of public participation occurred at the time that it did precisely because it was at that time a unilateral federal initiative. It was at the moment at which the discussion had broken down and Mr. Trudeau had said that the federal government would proceed without the support of provincial governments. That point was thrown into the public arena in an attempt to generate public support. The public had not been involved before, and was not involved again after the unilateral period was over.

PART FOUR

*Outside the Text:
Reviving Federalism*

Reflections from Meech Lake

Tom Courchene¹

As I understand my intended role, it is to use Meech as a springboard to dive into related waters. Actually, if there is a unifying thread in the comments it relates to Quebec, not to Meech. In any event, the ensuing discussion will touch upon Meech, current policy in Quebec, the Free Trade Agreement and the whole process of globalization. Finally, to the extent that there is a lesson in what I have to say, it pertains to English Canada, not to Quebec.

Meech as Process

The Charter has, in Alan Cairn's terms, "democratized" the constitution whereas Meech, via the amending formula, has thrust it back into the realm of executive federalism. This is bound to generate substantial concern in many quarters. However, it is going a bit far to assert that Meech is necessarily a bad deal because, paraphrasing Deborah Coyne, it was hammered out by 11 men playing poker with the fortunes of ordinary Canadians. Presumably, this is to be contrasted with 1981, when ten men bargained around the table while the eleventh, Lévesque, was actually playing poker in Hull. Somehow the argument is that in terms of process, while 1981-82 is appropriate Meech Lake is not, in spite of the fact that the Meech process follows that spelled out in the *Constitution Act, 1982*. More importantly, we are still involved in the Meech process, and a betting person would presumably argue that the cards are currently

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stacked against ratification. If Meech fails, will the anti-Meech group claim that the process worked well?

Quebec's Distinctiveness

I believe that English Canadians have almost to a person failed to understand what Meech Lake is about. It is not about gender equality. It is not about aboriginal peoples. It is not about the broad socio-cultural aspects of Canada. Rather, it is about Quebec's ability to carve its own economic and, perhaps, socio-economic future within the nation, and I include language here as an essential instrument of Quebec's economic desires.

Quebec's distinctiveness on the policy front is becoming more and more obvious. It utilizes its personal income tax system a) to integrate the negative and positive sides of taxation, i.e., to mount an earnings-tested guaranteed annual income based on family size, b) to transfer very substantial sums to children, sums that increase substantially with the number of children, c) to channel personal savings in a wide range of "strategic" areas, where these investments are tax-sheltered via alternative variants of its stock savings plan. On the business side a) it has legitimated very significant tax benefits relating to enhancing Montreal's role as an international financial centre, b) it is actively utilizing the Caisse de dépôt and SGF as equity and financing instruments for encouraging strategic (Quebec-based) investments, c) as will be elaborated below, it is challenging Ottawa across the entire financial institution spectrum, d) it has "redefined" a credit union to enable such an organization to raise equity capital, and on and on. In my view, it is this ability to manoeuvre across the broad policy front that the "distinct society" was intended to protect — protect in the sense that some of these initiatives might run afoul of the Constitution-Charter if the Justices adopted a pure "internal common market" vision of the country. It is well-known, for example, that the QSSP represents a fragmentation of the internal capital market. And there are rumblings afoot that Ottawa may want to implement a national securities commission that would presumably usurp existing provincial powers in this area. Indeed, when asked by the Commons-Senate Special Joint Committee to define "distinct society," *la fédération des femmes du Québec* fell back on the Beige Paper definition that ran along similar lines — municipal and provincial institutions, volunteer organizations, the network of social and health-care services, savings and loan institutions, etc. In other words, the entire economic or socio-economic fabric of the province.

In return for enshrining the distinct society as an interpretive clause, Quebec did an about face on the spending power. Its traditional demand that Ottawa abandon the spending power was converted into the provision whereby Ottawa

had the right to walk into any area of exclusive provincial jurisdiction and effectively take it over via a new shared-cost program. For their part, the provinces had the right to opt out with "reasonable compensation" provided that they implemented a program "compatible with national objectives." Outside Quebec, this clause is almost universally viewed as decentralizing, i.e., giving away the store, as it were. Within Quebec, the opposite is the case — many nationalists view it as transferring excessive powers to Ottawa, particularly when opting out has long been a well-established tradition for Quebec. Indeed, between the Meech and Langevin version, Quebec had section 106(2) inserted into the Agreement ("Nothing in this section extends the legislative powers of the Parliament of Canada or the legislatures of the provinces") to pacify those elements in Quebec that viewed the potential transfer of power under section 106(1) as unacceptable. My own view has always been that the spending power is centralizing, *not* decentralizing.

However, while the rest of Canada is wrestling with what Meech Lake may or may not imply, Quebec has moved well beyond Meech. There are two points to make here. The first is that the mere fact that Meech and Langevin were signed by the eleven first ministers has, of and by itself, changed the role of Quebec within Canada. Quebec began to assert its policy muscle with substantially more confidence. The second point is conceptually distinct, although certainly related in the minds of English Canadians. This is that the Mulroney Tories have effectively allowed the provinces a relatively free hand in the policy arena. The net result has been that whatever the distinct society clause may imply, Quebec is now acting as if it has an enormous degree of policy freedom. For those that were concerned that Meech Lake would give Quebec too much power, the truth is that Quebec is already flexing its policy muscle consistent with the widest possible interpretation of what the "distinct society" clause could deliver. Future federal governments may attempt to roll back some of Quebec's new powers, but possession of 90 percent of ownership...? Indeed, one can go further. Now that the FTA is here (thanks to Quebec!), Quebec in effect has sovereignty association, albeit within a federal framework. This is the new reality that Canadians must recognize. Prior to addressing the implications that flow from this, it may be instructive to document some of this by focusing on the financial institution area.

Quebec Inc.

In the fall of 1986 the Bank of Nova Scotia announced that it was incorporating a new securities firm in Montreal in response to the open regulatory framework in Quebec. Almost immediately, Ontario and Ottawa followed suit, even though Ontario, and perhaps even Ottawa, initially had no intention of striking down

Canada's equivalent of Glass-Steagall. In the view of many, this seriously hampered Canada's bargaining stance in the ongoing FTA negotiations since U.S. firms were effectively given access to the Canadian securities market without a reciprocal commitment.

In terms of financial intermediaries, as distinct from market intermediaries (the securities pillar), the story, still unfolding, is very similar. Ottawa's announced policy (the "Blue Paper") is to ensure that large financial institutions are both widely held and free from commercial links. Quebec, and most of the other provinces, felt differently and proceeded to allow open ownership of those financial intermediaries in their jurisdictions (insurance and trust companies). Thus far the provinces appear to be winning, particularly if the recent purchase of Montreal Trust by BCE is allowed to stand.

As part of Ottawa's preference for widely held financial institutions, mutual insurance companies were obvious winners, since by definition they are widely held. However, at this point Quebec was well along the route of encouraging "de-mutualization" and allowing mutuals to form downstream holding companies. The end result was that the Laurentian Group became the first financial conglomerate to operate in all four pillars. The only other institution effectively operating in all pillars is the Desjardins movement. Both are the result of the more flexible regulatory environment in Quebec. My best guess is that Ottawa will eventually cave in to Quebec in most of these policy areas.

The events in early 1989 are even more interesting. Because of the FTA and the fact that firms domiciled in Canada can now access the U.S. market, our assets are undervalued and we are in the midst of a takeover/merger wave. Of particular relevance for present purposes is the fact that Consolidated Bathurst was bought out by Stone Containers of Chicago. In order to ensure that this not be repeated, Quebec launched its "financial links" policy. Henceforth, financial institutions will be allowed, and indeed encouraged, to acquire commercial companies. Already, the Caisse de dépôt, the Desjardins group, and the large Quebec mutuals have fallen on side, with likely cooperation from the National Bank and other Quebec corporations. All told, the potential assets of this group approach \$200 billion. This is the European universal bank model, or Japan Inc., as the section heading indicates. One cannot take over Volkswagen because it is controlled by Deutschebank and one cannot take over Deutschebank. This may or may not make good economic sense. What is clear, however, is that Quebec is once again forging new directions. Ottawa has not yet got its "commercial links" policy straight. Now it is faced with the issue of "financial links." My best guess is that this Quebec initiative may well prove to be the most significant industrial policy shift in the postwar period. Moreover, it is unlikely that Ottawa will interfere.

Implications

This has been a rather long detour in order to make a simple point: Quebec knows where it wants to go and it is enacting policies towards this end. English Canadians are deceiving themselves if they think otherwise. It may or may not be good economics to move towards Quebec Inc. (i.e., financial-commercial conglomerates) but this is a separate issue. What appears to be clear, however, is that Quebec, at least under the Mulroney Tories, is essentially unconstrained in its exercise of power and influence. To my mind, this casts Meech Lake in a very different light. Ironically enough, in this climate ratifying Meech Lake might well put constraints on Quebec. If Meech Lake fails, not only will Quebec feel free to use the notwithstanding clause with impunity but it will provide plenty of further fodder for Quebec to feel justified in flexing its legislative muscle.

This brings me to my final point about Quebec. Most, if not all, of what this province has been doing recently has not been directed in any way against the rest of Canada. Rather, Quebec is focusing outward to the world economy and innovating so as to position itself as favourably as it can in the globalizing world. From Quebec's standpoint, particularly from its economic/industrial standpoint, there is much to gain if English Canada rejects Meech and then proceeds to spend the next ten years focusing inward trying to accommodate Quebec, while Quebec is determinedly focusing outward. Indeed, although Bourassa cannot admit it publicly, the failure of Meech is probably a desirable outcome for Quebec. Under Mulroney, at least, it now has all the policy flexibility that even the most favourable interpretation of Meech would bestow on the province. Why go through with Meech and transfer substantial new authority to Ottawa under the spending power provision? Thus, while it may be difficult to predict how the failure of Meech will play politically within Quebec, it would appear that in the federation Quebec will be well served by having the rest of Canada feeling that it still "owes" something to the province.

Globalization

Now that I have broached the concept of globalization, I want to elaborate a bit on its implications. It seems to me that there are going to be three big winners from globalization — multinationals, individuals, and cities. The multinational aspect is obvious. Indeed, with free trade pacts like the FTA the multinationals can, if they wish, retreat to being "transnationals" and serve markets from their home base. Citizens also gain because they now have access, via the telecomputational aspect of globalization, to a dramatic increase in information (and, therefore, power) which in turn will make it much more difficult for

government at any level to impose regulations that impinge on their use of this information (power). Cities may well be the most significant winners. Much of the communications revolution is taking place in the world's great cities. As a result of globalization, little has changed in the relationship between Ottawa and Bonn, for example. But much has changed in the Toronto-Frankfurt relationship. The forces that are driving Vancouver, Toronto, and Montreal are, I suspect, very different from those driving Kamloops, Kingston, and Sherbrooke. Relatedly, cities are emerging as an increasingly powerful force in the system and our federation has yet to grapple with just where they fit in, economically and politically.

Federalism and the Future

I would like to conclude with a few thoughts on where the federation is heading. The last section focused briefly on the emerging role of cities. Implicit in the discussion is that the role of the federal government is going to decline, at least relatively. Indeed, if trading blocs are the way of the future, then some federal powers (nation-state powers) will be transferred upward to the trading bloc. This is clearly the way that the Europeans are headed and it applies to the FTA as well. Within Canada, I also think that some power will devolve to the provinces, particularly if, as a result of budget trimming, Ottawa also trims its transfers to the provinces. The provinces have only two polar ways to react — maintain existing program levels and increase their taxation (which is decentralizing) or hold taxes and attempt to rationalize their expenditures (which will likely mean a real change in the way that certain programs are conceived and delivered, again potentially decentralizing or at least in the direction of reducing harmony in programs across provinces). Without Meech Lake in place there appears to be little that Ottawa can do to preserve the present nature of national programs, short of ensuring things like transferability and portability across the various provincial programs. Even Meech Lake may be of little help here because use of the spending power to generate national shared-cost programs presumes that Ottawa has access to a pool of funds.

Two other areas may turn into challenges. The first relates to the tremendous emphasis on multiculturalism. I assume that these measures are, in part at least, triggered by bilingualism and biculturalism. I assume further that one reason why Canadians are so high on multiculturalism is that in the current timeframe it is a "centralizing" activity. Ottawa, not the provinces, is the focal point for much of the impetus and funding for multiculturalism. However, let us age our federation a quarter of a century or so. It is not difficult to imagine that the west coast will be fully integrated into the Pacific Rim and perhaps even populated substantially by peoples of Pacific Rim origin. At that point it is likely that the

multicultural interests will vest provincially. In other words, while multicultural activities may now vest in Ottawa, a few decades down the way we may well be encouraging several "distinct societies" whose rights we shall have ensured earlier. Personally, I welcome this and one could even go further — Canada may well emerge as one of the first true confederal nations. I do find it intriguing, however, that English Canadian "centralists" are embarking on a course that will virtually guarantee rather dramatic decentralization.

My final comment relates to the proposed Triple E Senate. We already have one — the First Ministers' Conference! It is equal, effective, and, essentially, elected. Moreover, while it fits somewhat awkwardly into a parliamentary system, it is probably more compatible with responsible government than the Triple E version proposed by the west. Indeed, it works *because* of, not in spite of, responsible government. President Bush and the 50 governors can sit down and hatch any scheme that they wish. But unless they can deliver their respective legislatures (responsible government), it is a meaningless exercise. Thus, the real question with respect to Senate reform is not whether we need a Triple E Senate, but whether we need two of them.

National Integration Without the Meech Lake Accord

*Kelth G. Banting*¹

Canada appears to be approaching a constitutional impasse. The political headlines make it clear that the Meech Lake Accord is unlikely to be ratified in its present form. Three provincial governments are opposed to it. At the national level, the support of the Liberal and New Democratic parties is eroding, and may well be qualified substantially during the up-coming leadership campaigns. In addition, the public remains unenthusiastic about the Accord. Some provincial opponents talk of negotiations leading to revisions of the Accord or to a parallel agreement, but such a package would be enormously difficult to put together.

Failure to ratify the Accord would not lead to future constitutional successes. A new "Quebec round" would be a non-starter, since the Quebec government could not accept less, and several provinces are unwilling to offer as much. The prospects for progress on other constitutional issues would also be dimmed. Quebec is unlikely to participate in a process designed to further the goals of provinces that had rejected its own agenda. Moreover, the daunting problems of achieving reform under the new amending formula would be highlighted for all to see.

The omens are reasonably clear. After a generation of constitutional controversy, we seem to have exhausted our capacity for constitutional choice. Political energies may not abandon constitutional politics, but the prospects for success seem dim.

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It is clearly time to reflect on the prospects for national reconciliation if the Meech Lake Accord fails. Some might advise us not to worry. The regional and linguistic tensions that gave rise to the constitutional debate in the first place are also fading, they suggest, being displaced by other lines of political division such as gender, age and sexual preference. With the rise of a rights-conscious society and the political excitement generated by the Charter, they continue, our ancient territorial divisions will soon seem like childish habits that we have finally outgrown. Such a scenario is unlikely, however. Although the Charter will undoubtedly be the focus of much of our political attention over the next decade or more, regional and linguistic divisions are too deeply embedded in Canadian life to dissipate easily. During the last couple of years, the F-18 contract, language policy in Quebec, and the regional implications of federal expenditure cuts have all generated as much political intensity as the politics of reproductive choice.

If we assume that our regional conflicts will endure, the question becomes whether there are other responses to problems that we have hitherto debated in constitutional terms. Are there alternative mechanisms, processes or policies on which we can rely to reduce such divisions? Or, if such conflicts cannot be reduced, are there instruments through which we can at least manage them more effectively than we have done in the past?

These questions can be explored by examining three possibilities for conflict management: informal constitutional adjustment, national political parties, and the emerging patterns of public policy.

Informal constitutional change: Convention and practice are essential components of the constitution, as the Supreme Court reminded us forcefully in the *Patriation* reference, and the evolution of convention has long been an important instrument of political reform. After all, the first big step in the march towards democratic government in Canada — the granting of responsible government in the 1840s — was implemented through dispatches and practice rather than elaborate constitutional documents.

In light of this, one possibility would be to adopt elements of the Meech Lake Accord as political and administrative practice. Not all of the Accord requires formal constitutional change. The federal government has already adopted the procedures agreed on at Meech Lake for appointments to the Senate, and this approach could be extended to the Supreme Court. Federal authorities could also announce that they consider themselves bound by the provisions concerning the spending power, immigration and conferences of first ministers. To use an American analogy, if the Congress refuses to ratify a Strategic Arms Limitation Treaty, you simply live by the SALT rules anyway.

This basic approach to reform could conceivably be extended beyond Meech Lake to the broader constitutional agenda. An elected Senate could be phased

in — albeit slowly — through administrative action. The prime minister would simply have to agree to appoint only individuals elected to the position.

Such commitments would have no legal force, of course, and might be renounced by a successor government. If not repudiated reasonably promptly, however, they would begin the process of hardening into something closer to convention, thereby raising the political costs involved in their rupture at a later date.

Nevertheless, there are major weaknesses to the strategy of informal constitutional change, and even a federal government committed to the Accord might well hold back. Such action would be contentious. On one side, critics of the Accord in English Canada would hardly be pleased by an attempt to salvage parts of an agreement that they had fought with so much passion. On the other side, there might be few gains within Quebec. Without the distinct society clause and the change in the amending formula, both of which require formal constitutional amendment, an informal commitment to other parts of the Accord might seem a very pale reflection of the spirit of Meech Lake. Moreover, the Accord was a package deal, in which the federal government gained important advantages, such as Quebec's endorsement of the constitution and the entrenchment of the federal spending power. Perhaps prudent federal authorities should resist giving away bargaining chips that their successors might need sometime in the next century.

Informal progress on Senate reform has similar limitations, even beyond the current prime minister's rejection of Alberta's proposal to elect its nominees for Senate appointment. Informal action could only produce a "double E" Senate, one that is elected and effective. Alberta's "triple E" model, with equal representation from each province, would require formal constitutional change; and without something much closer to equal representation, the real aspirations inherent in proposals for Senate reform would go unfulfilled.

While informal constitutional changes may smooth a few rough spots in our national political discourse, the basic strategy seems to be a rather weak reed on which to place significant hopes for national integration.

National political parties: Recent constitutional conflict has focused primarily on changes to the formal structures of the state. There are other important institutions that shape our political life, however, and foremost among them are our political parties. During the 1960s and 1970s much faith was placed in reform of the party system as a means of enhancing national unity. Canada lacks national political parties that represent the interests of all regions of the country, the lament ran. If the Liberals are in power, the west is not at the cabinet table; if the Conservatives are in power, Quebec is out in the cold. As a result, the argument continued, political parties cannot act as national brokers, forging accommodations among regional interests and building a nation-wide consensus as a basis for federal policy. On the basis of this analysis, political

scientists and others devoted considerable time and ink to proposing — often in exquisite detail — reforms to our electoral and representative systems in the hope of encouraging the emergence of a national party system. None of their ideas was adopted.

Despite this, Canada has been governed since 1984 by a national political party with impressive representation from all regions of the country. What is striking, however, is how little we think of this party organization as an instrument of national accommodation. The Meech Lake Accord did not emerge from the inner recesses of the Conservative party. It was negotiated through conventional federal-provincial channels, and its contents probably came as much a surprise to government backbenchers and many Cabinet members as to other Canadians. Admittedly, strong representation of both Quebecers and westerners in the same Tory caucus has helped sustain government solidarity on the issue. The contrast with the open divisions in Tory ranks during debates over official bilingualism in the late 1960s and 1970s is revealing. Nevertheless, it is hard to claim that the Accord flowed from the presence of a national party in Ottawa.

Nor has the emergence of a national party muted the intensity of regional conflicts, or made their management more effective. In fact, the controversy over the F-18 contract, the embarrassed silence in Ottawa over the use of the override on the language issue in Quebec, and the reaction to federal economic policies suggest regional politics as normal.

Public policy: Are the emerging patterns of public policy likely to mute regional conflicts? Is there some new "National Policy" that would command pervasive support coast to coast and reconcile our historic animosities? Probably not. The agenda of national unity that dominated the 1970s has given way to the agenda of international economic adjustment in the 1980s, and the policy implications of the shift do not augur well for interregional harmony. The Free Trade Agreement does not constitute a national mission. It may, as the Macdonald Commission suggests, remove some historic grievances over tariffs and related policies, but it is not the basis of a collective, national enterprise. Indeed, if anything, our regional economies may diverge more as a consequence; certainly many critics insist that there is a tension between the liberalization of the economy and our collective capacity to sustain a national community.

Nor is there much to be found elsewhere in the government's policy arsenal. Fiscal policy in an era of deficit reduction is not an instrument of conflict resolution; it is a source of renewed conflict. And monetary policy is stimulating traditional regional rivalries. Not much help there.

Concluding reflections: If our capacity for constitutional choice is eroding, we should not expect to find ready substitutes in informal constitutional changes, national political parties, or the emerging patterns of public policy.

We will be where we have long been: muddling through with an institutional framework poorly designed for managing the conflicts inherent in our regional and linguistic complexity. The hope for a less divisive Canada, which inspired the constitutional debate of the last generation, will remain unrealized.

Failure in our constitutional endeavours and the lack of substitutes will ensure that great weight continues to fall on our processes of executive federalism. Those who would like to see Canada move away from government by federal-provincial conference towards a more open model of politics will not achieve their goal by killing the Meech Lake Accord. The pressures on inter-governmental bargaining would grow, and first ministers would have to meet more often, not less, at Meech Lake and other familiar haunts.

Outside the Text: Reviving Federalism

*Nick Baxter-Moore*¹

In part I am picking up from where Keith Banting left off, but I am rather more pessimistic about the possibilities of "muddling through." I am not sure whether we will manage to muddle through some of the crises that will confront Canada in the next decade or two.

I should perhaps preface my comments by admitting my biases. I speak as an unashamed centralist who sees a strong national (i.e., federal) government as a prime guarantor of national unity and minority rights and as a principle aid to national social progress in Canada too. This is not to say that the provinces have not been innovators in social change, but many of our most important social programs are based largely on the federal government and the federal spending power that has ensured that those programs would be available to citizens right across the country with at least some kind of national standard of service delivery.

The evolution of Canadian federalism from 1867 until 1982 demonstrated that, while the federal constitution may circumscribe the bounds of legitimate political activity, it was nonetheless consistent with the variety of different forms of federalism or different visions of the Canadian community. In a large part because of its spending power, the federal government was able to transcend formal constitutional limitations to enter into, or share in, areas of provincial jurisdiction and to develop many social and economic development programs that serve to integrate the Canadian community. In only a very few

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cases, for example the unemployment insurance amendment, was formal constitutional amendment required in order to effect these national programs. But, in recent years we have witnessed the emergence of a number of decentralizing forces that, I believe, mediate against the pursuit of this vision of a strongly centralized, federal-government-dominated model of federalism.

First, the ultimate irony perhaps is that in one sense the 1984 general election gave Canada the kind of government for which we centralists have been crying out for years — i.e., “Let us have a government which has support right across the country, which can claim legitimacy from all regions of the country, to pursue a national vision of Canada.” I think, unfortunately, that the Mulroney government has tended to work largely in the opposite direction, towards strengthening decentralizing forces that were already at work. Admittedly, not all forces that have come into play since 1984 have necessarily been within the control of the Conservative government: we might mention the entrenchment of the “notwithstanding” clause in the 1982 *Constitution Act* as one such decentralizing factor. But certain other developments mentioned below are, clearly, the products of the current administration.

Second, we have the Meech Lake Accord. (I welcome the confidence, by the way, with which other speakers have assumed that Meech Lake is dead, and I hope that they are right; I am less sure about this.) Meech Lake does indeed give formal recognition to the federal spending power, but at the same time establishes some limits on it, especially with respect to the opting-out clauses which, I think, will ensure that there will be some regional variations in any new federal programs. The government’s problem with its current day-care proposals perhaps illustrates this.² But I believe that, even if the Meech Lake Accord does die, we are likely to see “the spirit of Meech Lake” (i.e., a *de facto* unanimity requirement) carried on in constitutional discussions and this will continue to affect fiscal federalism as well as other federal-provincial negotiations.

Third, the Free Trade Agreement again is a decentralizing force to the extent that it does place limits on the power of the federal government, especially with regard to energy policy, for example, and foreign investment policy. I will not enter into speculation on whether it will destroy the fabric of our existing social programs; I think that we heard enough of that during the election campaign. But, on the other hand, the FTA may act as some kind of brake on the development of new social programs; it will at least be an inhibiting factor.

The Free Trade Agreement, of course, is a response to the globalization of the economy, but economic globalization and the movement towards supra-national and international business have been associated with regional tensions

2 The federal government’s day-care proposals were subsequently put on indefinite hold in the 1989 budget speech.

in many other societies, particularly Western Europe. The development of the European Community has been accompanied by a resurgence of regional identity and regional political movements in the United Kingdom, for example, following its accession to the Community; and this pattern has also been evident in other Western European nations. While the FTA is not the Treaty of Rome, it is a response to the same kind of economic pressures, and may well have similar political repercussions.

Fourth, deficits and restraint in both levels of government will further undermine the ability of the federal government to ensure that universal social programs are maintained at standard levels across the country. Moreover, the same pressures are also creating problems for those few provincial governments that are desperately trying to maintain these standards themselves. (Those of us who are in the education field know all about that.)

Finally, I think that many of these factors reflect a wider drift towards what we might call a neo-conservative, or market, orientation for governments and among the interest groups which influence the government. Once again, I believe that a restoration of market forces could lead to increased regional tensions, as regional economies will develop at different rates, and further that it will also inhibit the federal government's ability or willingness to intervene in order to standardize or maintain patterns of regional development.

Thus, when these factors are taken together, I am afraid that my conclusion is rather more pessimistic than Keith Banting's. We may be able to "muddle through," but I fear that it will be muddling through with an ever-increasing degree of regional tension and perhaps a loss of faith in the federal government (or even Canada) among many provincial or regional communities. Hence, we may well see an increasing withdrawal within each of those regional/provincial societies that will lessen the sense of the "Canadian community" and thereby seriously weaken Canadian federalism.

Comments

Tom Courchene

David Cameron has asked what the effect of the Free Trade Agreement will be on Quebec. My view is this. Without free trade, Quebec was absolutely dead. The province could not get very many more people and the people it had were going to leave. Quebec and the west had lost national industries to Ontario, and therefore had to go to a market that is bigger. Those regions could not develop an industry independent of those markets. I think that on an economic scale if we do not globalize we are going to find out that eventually the greater challenge to the nation is having a standard of living less than it could be, rather than populating it with people of different nations. In the year 2000 when we will have double the population, we shall still be a nation that is more generous to each other and the regions than are the Americans. And Quebec will still be the essential force for bilingualism, but we will move to territorial bilingualism rather than making it national because of the pressure of another 20 million additional Canadians, most of them will not be French.

Scott Fairley

At another conference on the constitution, the Free Trade Agreement came up for discussion. I asked a partner from a large downtown Montreal law firm why the Free Trade Agreement gave him so much comfort since he is opening himself up to the great maw of the United States. He said the Free Trade Agreement is the greatest thing to happen to Quebec precisely because at long last the province can totally forget about Toronto and deal with New York directly. The general perception is that, at least, for the purposes of his business

interests in the community he was serving, the east-west paradigm is no longer relevant for Quebec and they are able to jettison it.

Norman Spector

I think that is a widely held view in Quebec, and I suspect the person that you were talking to might even have been a federalist. I think we should consider that argument in the context of those who say that in light of the Free Trade Agreement the country cannot afford Meech Lake, an argument that has been made since the federal election. Jacques Parizeau's optimal outcome of the current debate was that free trade would go through and that Meech Lake would fail. Parizeau is a very intelligent man. He understands historical forces, understands economic determinants and what the economy does to institutions, particularly political institutions. I think it is worth reflecting seriously on the four cell matrix of alternative outcomes from the point of view of the east-west axis and the north-south axis.

John Roberts

I do not understand why it is that Meech Lake, if it goes through, is going to act as some sort of straight jacket for Quebec. I raise the question: What is Meech Lake going to prevent Quebec from doing that it otherwise would want to do? The second question is: Why is Keith Banting so pessimistic about the consequences of Meech Lake failing? It seems to me that one can make a case that what we really need in constitutional terms is a nice period of benign neglect. The changes of 1981-82 were very significant and have not been entirely digested. It is worse to let things evolve than force a constitutional resolution when the consensus for it is simply not there. I do not think the consensus for Meech Lake is there. Quebecers do not care very much about Meech Lake. Certainly in the last federal election people were not coming to the doors and saying "I am so worried about Meech Lake. What is your position on it." There will be a reaction in Quebec if Meech Lake is not passed, but in terms of the relationship between the federal government and the provinces there will be a continuing struggle about fiscal arrangements. There will be a continuing struggle over jurisdictional coverage. There is nothing particularly startling, nothing particularly new about that, and I have not heard anything to indicate why the degree of the problem is so great that the constitutional response is the essential response to it. The constitutional response seems to me to be the one that follows the evolution of a national consensus, not one that provokes or creates it.

Keith Banting

Why did we have a constitutional debate over the last 20 years? From the early 1960s to the mid-1980s, this country wrestled with a constitutional debate that often was described as a crisis. There was a broad consensus that our institutional structures were not adequate to manage effectively the regional and linguistic divisions of the country. This culminated in the referendum of Quebec and a set of constitutional changes in 1981-82. However one defines those constitutional changes, I would argue that you cannot claim they were a direct response to a fundamental proposition that our existing institutions do not manage regional and linguistic tensions well. They are desirable on many other counts but they are not mechanisms that allow the country to handle linguistic and regional tensions. What your position then becomes is that there is no need to respond institutionally to the regional and linguistic tensions in this country through constitutional changes. The constitutional structure of this country is fine. The fact that we have not changed it is fine. And we will manage those tensions the way we have managed them historically in the past and that is fine. My sense is that we probably could do better. We probably could find institutions that more effectively manage the linguistic and regional tensions that have been an enduring part of this country's history. We fail to do that if Meech Lake fails and the debate over reform of the Senate is therefore blocked. We will thus not change our institutional structure.

I think that this conflict would probably continue in the way it has in the past; doing a second class job of managing our regional and linguistic tensions. If second best is good enough then I think your position is fine.

Nick Baxter-Moore

I think that we now have, if you like, a Meech Lake syndrome governing intergovernmental relations in this country. I see the failure of Meech Lake as being much preferable to the institutionalization of Meech Lake because I think that really is a recipe for future constitutional impasse. Keith Banting says, for example, that if Meech Lake fails now the debate over Senate reform is blocked. I think that Meech Lake was guaranteed to block the debate over Senate reform because no provincial premier is, in the short term, going to give up the patronage package that has just been acquired. And it will take them a few years before they realize that they are perhaps getting one Senate position every four or five years to fill anyway and that this patronage was not such a good deal after all. Then maybe they will go back to the table on Senate reform. But I think Meech Lake is going to block Senate reform. I think it is going to block a number of major constitutional areas including aboriginal rights and land

claims. I am optimistic that if Meech Lake fails Canada will have avoided a serious constitutional impasse. If Meech Lake fails, we will perhaps be given the opportunity to start again.

Eric Maldoff

We keep hearing that if Meech Lake fails further constitutional reform will be blocked. There is something in the way that is stated that seems to imply that there is a present agenda upon which Canadians have reached a consensus. But, when I listen to Mr. Blakeney, who identified some of the concerns that exist including the concentration of economic power, concentration of political power and concern for the emphasis on bilingualism, I believe that those are not going to be readily solved by some new round of constitutional negotiation. I can understand that there may be people who feel that you should counteract some of these things through a Triple E Senate, but the fundamental question is: "Does anybody give a damn about this concentration and have Canadians developed the consensus that they want to go in some other direction?" The concentration of economic and political power is the result of where the population is and where the economic base is. Those are major forces that have to be counteracted by more than a piece of paper, by more than a signature of 11 people or a number of legislatures. It would take a tremendous act of national and political ability. It comes down to asking the very basic question of do we want to have a nation called Canada and, if so, why and what are the things we want that country to be able to achieve. It seems to me that at the moment we are stumbling along with constitutional reform over fundamentally important notions without having a very clear idea of why we are doing it and where we are going to go with it. I think it is legitimate to put forward the Free Trade Agreement and the Meech Lake Accord together and ask where to point Canada, but aside from one conference last year that had that debate I have not heard a great deal on that question.

Hugh Thorburn

I want to comment on Tom Courchene's point on the implications of globalization and the free trade agreements, and the sort of changes that are occurring throughout the whole world, as well as in Canada. If you combine these changes with the tendencies of our federal government you are creating a condition where the market is going to play a bigger role. It is going to mean, therefore, that we will be forced to adopt some changes in our economic structure that will make us more concerned about the questions of competitiveness. I think, for instance, of equalization, which is now in the constitution. I think of the

Unemployment Insurance Plan and the whole regime of transfers. Are we moving in a direction where the re-structured country will not be able to afford these things and we will have to get away from policies that encourage people to remain unemployed or underemployed in different parts of the country rather than moving to places where they might be more employed and even happier? It seems to me that this is cutting at the whole root of the Canadian tradition of defending the right of the provinces to maintain their communities and populations as they have been. I think that if these economic winds continue to blow, then we may see the country being forced to make changes simply because of global economic forces in the world that we have to respond to.

Tom Courchene

I think that is right, but the point that I would make is that the goal in this new era is to change our instruments. We can no longer use the price of oil to allocate rents across the system. We can certainly still use the tax transfer era. If there is another big oil price fight I can guarantee that Canadians will take some money from elsewhere and give it to the rest, but they will not be able to do that through pricing any more. They will use the tax transfer system, which we should have used the last time around anyway. I do not really think that this has to change the nature of our goals or what it is to be a Canadian. What globalizing requires is simply a change in the instruments that we use. There are a lot of instruments. We just have to be more consensus-oriented. We can still achieve the same goals.

Orysla Lennie

I am taken with Keith's comments, particularly the comments about informal changes in constitutional practice, and his comment that he does not think this will be effective. I think a dimension that he does not cover is that informal changes might in themselves be effective in stimulating constitutional change. And I take the Senate proposal as an example. To take the Alberta proposal, it is true that from it we might get two Es, elected and effective, but not equal. If you take it that far, I would assume that at least the federal government would want to get to the negotiation table pretty quickly to deal with the whole package. It occurs to me that sometimes you may have a legal recognition or a constitutional recognition like the equality of provinces that might not necessarily be politically recognized. The 1982 talks recognized the equality of provinces through the amending formula. In Meech Lake we have the equality of provinces in the preamble and in further provisions like the spending power, immigration, appointment to the Supreme Court and the Senate. But how

effective would this be? To what extent can real provincial equality be achieved if equality isn't considered politically legitimate? And I question whether the notion of provincial equality has the same political legitimacy in central Canada as it does in the peripheries.

Allan Blakeney

I have a comment on what Keith Banting was saying about the "national party." Without this national party, Meech Lake would not have got off the ground. There would have been no possibility of getting some of the hinterland provinces to agree to Meech Lake unless Mulroney had had the majority he had. There are no grounds for support for anything like Meech Lake in some provinces. I do not think that there would have been a prayer without Mulroney's national party.

I also want to take issue with the suggestion that we have had a long period of constitutional crises. We have had a long period of constitutional deadlock but I do not think there was any perception of crisis until the P.Q. was elected in 1976. My predecessor used to say, "If Saskatchewan people are wrestling with a hundred problems, then the Constitution is number 101." I think he was right, at least until the P.Q. were elected. I think that after the Referendum and after the 1980 federal election we could have put the whole thing to bed and just gone on as we had for good or ill. Mr. Trudeau, by unilateral action in the fall of 1980, created a crisis for practical and sufficient reasons — I am not quarrelling with that particular tactic but that's what was done and the 1981-82 solution dealt with that, got patriation, got an amending formula, got a Charter that includes section 33 and that is a really significant — not giant — but significant step forward. I think Meech Lake is by and large *not* a step forward. I do not think we are going to solve our problems in Canada unless we admit that Quebec is a distinct society, (we do not need Meech Lake to do that) and do that without suggesting that every jurisdictional power that Quebec has must also be given to the other provinces. I know that it is heresy to go back to special status, but all we are doing is playing with words if we do not hit on it. We know that that is a fact. I do not share Tom Courchene's view, if it is his view, that it is too late for an act of the federalist government to recreate a national economy even under the Free Trade Agreement. Benefits are not something that God creates — they are government policy, and if you can create you can uncreate, and if they are uncreated and the federal government had some money, then the spending power would mean something and a significant number of things could happen. The fact that financial institutions were left to the provinces was not something that happened through free trade. It happened because that was the policy of the federal government, and need not have been the policy of the

federal government. The federal government could decide what they wanted to do with the financial institutions. They decided to leave the field to Ontario and Quebec. That can be reversed.

I think if Meech Lake fails we will in fact have to go back to the drawing board, have to acknowledge the special status of Quebec. The right federal government can recreate a national economy, somewhat different, but one that will obviously acknowledge Quebec's somewhat separate position, not very much in the economic area, but significant in other areas. We can, on that basis, recreate what Trudeau and others started to do by having a single economy with a special nod to Quebec and a varied social and cultural policy. I do not think that is impossible. I think it will not be a system that in fact will be made more difficult by Meech Lake. It is more difficult because of the Free Trade Agreement, but even with those elements, it seems to me well within the range of possibility.

Allan Alexandroff

I guess that I have two brief comments, one reflecting a kind of pessimistic note from listening to the panel and one more optimistic. The pessimistic note is a concern about the effect on politics of the failure of Meech Lake largely driven by those who have control in Quebec, and what will arise because of the rejection of Meech Lake on the kind of political interplay in Quebec as it is used against the rest of Canada. Constitutional change or not, it would seem to me that we still have a real capacity for national economic policy-making. What we have seen I think, and not just with this government but prior governments is a real failure of leadership, a failure of national policy-making, whether the constitution changes or not. You certainly do not see a national economic policy of any significant sort. My one concern, as stated by Tom Courchene is the increasing importance of market. It does seem to me that if you look at those states, those nations that have been most successful, they have been successful because of their ability to plan, and their ability to organize. This is not simply a market function. It is not simply a question of a free market. We can look to all sorts of examples around the world for that. The question then becomes: How do we plan; How do we organize given the decentralization that is occurring?

Tom Courchene

Most of the major things that are divisive in this country have come from federal government policies. I really do not believe this notion that when Ottawa does something it is always in the national interest, and when the provinces do

something they are making things difficult. I think the provinces can act in the national interest. The securities industry is an example. We have a very efficient securities market without federal power. We rely too much on the healing power of the federal government. We are going to have to give a lot more power to the provinces and a lot more power to the people. But that means a balanced presence is going to have to be there. We are going to have to move towards negative income tax. We are going to have to treat Canadians equally. We can do this and still treat them quite generously. All our social goals can be there. They just have to have different instruments that don't run counter to what the world is telling us must be happening.

Strangely enough, the only province that even knows where it wants to go is Quebec. Let us not mess ourselves up by having another ten-year constitutional fight. Let the rest of Canada get its act together.

PART FIVE

*Reforming the Text:
Making a Deal that Works*

The Public in Constitutional Reform

*David Cameron*¹

The subject for this session formally is "Reforming the Text: Making a Deal that Works." I took some trouble to verify that the text that we were talking about was in fact the constitution understood globally and not Meech Lake as, given my role with the Ontario government, the notion that I would stand before you and talk about a deal that works would hardly be appropriate and I have been assured that, in fact, we are thinking much more broadly about constitutional process.

The first comment that I want to make is that as a general principle, it will do us no harm if we reach a point where we have a little relaxation from constitutional reform and constitutional discussion. Unlike some here, I think that it would be a very unfortunate way to get there by not passing Meech Lake, but I think as a general proposition we are in danger of contracting constitutionalitis. It seems that each effort at constitutional reform, whether it fails or succeeds, spawns the next stage and I sometimes have the feeling that we are in danger of being hooked on this. People seem increasingly inclined to think that if you have a problem then you change the constitution, but my conception of the document is that it should be pretty durable. It is, in my definition, fundamental to the country; it should reflect a pretty broadly based consensus and should not in principle be changed all that often. There may be periods when there is a significant rhythm of change, but in principle as the country goes on from generation to generation I would not have expected, especially in a country as stable as this one, that one would be mucking around with the

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constitution continually. Yet I get the impression that we are moving down that path and I think that all of us sitting around this table should be conscious of the notion of some kind of discipline in the way that some kind of constitutional issues are brought to the surface and asserted to be constitutional, because I think that there are many ways of skinning the cat. I do not share the gloomy view of some of the speakers in the last session that if we do not get constitutional stuff done we will really be in a second-best situation. I think that there are all sorts of problems that really do not call for constitutional change and that need as much attention as some of the ones that perhaps do.

The other point that I want to make is a quiet, hesitant defence of executive federalism. I have a feeling that what we are facing is beginning to look like some kind of elicited practice carried on by federalists behind closed doors. They are consenting adults but the difficulty is that there are millions of others who also should be consenting adults in the process. I do not think, however, that the real problem is executive federalism. The real issue that we are confronting is how do you find the ways in which you can reconcile the leadership that you would have to have out of a representative political process with a different kind, and I think a larger amount, of public, legislative, popular, and interest group participation in decision-making. That seems to me to be the issue the country is wrestling with and has been wrestling with since the 1982 round of constitutional discussions. That certainly was the case with respect to Ontario as it dealt with the Meech Lake Accord and as the Meech Lake Accord was brought through the legislature.

I thought that it might be worthwhile just making a couple of comments about that process. It is far from finished but there are some legislative and governmental commitments that are going to have to be addressed. One of the puzzles that we are looking at in the government now is: "How do you think through a process that is consistent with the likely way in which constitutional issues will arise that allows the Premier to do his job and the legislature to do its job and the interested Ontarians to participate appropriately?" One of the things that happened was that a Select Committee of the Legislature was struck, as I think most of you know. I will make just three comments on that process. The first is that we produced a very creative, interesting report. Second is that it was fascinating to see how the members of the legislature who remained in the Committee became more committed to Meech Lake as the hearings progressed despite the fact that upwards of 80 percent or more of the submissions and the people who came before the Committee were against Meech Lake or against specific aspects of Meech Lake. This is quite interesting, though some might say that the party whips were on and they had no choice. It was a much more substantial and significant process than that. There was, in fact, a *crise de conscience* about Meech Lake and the role that it might perform as the hearings went on.

That brings me to the third point I wish to make about the Select Committee. It seems to me that there was a species of political education going on as the provincial legislators outside Quebec have traditionally not had to occupy themselves in substantial detail on constitutional matters. Those who participated in that Committee were invited to attend to matters of national significance and to assess their position and their parties' positions in the light of that national project and some of the overall pressures, many of which they were not feeling, certainly not in their constituencies and, in many cases, not in any active way in their daily lives. What happened is that people began wrestling with the document, the Meech Lake text, because they had to deal with this. This led to people coming in front of the legislators; dialogue ensued and they became more and more involved in national issues and developed their own positions with respect to the issue.

What happened out of that process, apart from the passage of the Meech Lake Accord, was that there were several commitments for the future made by the government. One was that there would be established a Standing Committee on Constitutional and Inter-Governmental Affairs. Another was that there would be an annual report to the legislature on intergovernmental matters and constitutional issues with a debate in the legislature. Also, there was a commitment on the part of the government to hold a public conference, which we are really looking at as a number of conferences on constitutional matters that would involve the interested public in some fashion.

What you have in that list is a series of commitments that the Government of Ontario made with respect to how it will view the constitutional reform process in the future. It has not yet established what precisely the process will be and how the various parts will fit in together as that is not an easy task. It is an important thing if you look at the Meech Lake process, that there has been a lesson learned by the Ontario government with respect to public participation and in any consideration of how one deals with the passage of Meech, with ancillary parallel accords, and with amendments of Meech, etc. The position of the Ontario government is pretty clear. The Select Committee Report, which it accepted, contained a series of recommendations that then had the imprint of a committee process and discussion in the legislature and approval by the government and by the parties. Those are things that I think the government is in a position, in principle, to proceed with.

Other issues that come forward, I think, are going to have to face a kind of process, or at least the items in this process that I have discussed, and I would be very surprised if the Government of Ontario would view itself as able to say "nay" or "yeah" in any authoritative and definitive sense to a proposal falling outside the framework of the Select Committee recommendations without the involvement of the legislature and without some provision for public influence prior to making a final commitment.

My hope is that if we navigate Meech, and it remains to be seen whether it is successful, we have our constitutional business a little less often in the future. I think that there are some items that are clearly high on the agenda and need attention but I hope that as a matter of practice we can move to the stage where we are spending less of our national time and attention on constitutional issues. I also hope, that we will be proceeding on a case by case basis rather than on the package basis as in 1982 and certainly with Meech Lake this time around. Clearly I also hope that we will as a country work on developing a more open and participatory process for the constitutional process so that we can avoid some of the problems that we have got into this time around.

But, assuming that we do navigate Meech Lake successfully, my personal prediction is that my first two wishes will not be fulfilled. In other words, we will not do it less often nor will we do it piece by piece. I think that it is more likely that we will be working to achieve the third one; a more open and public process of discussion.

The Making of a Constitution

*Robert Hawkins*¹

The topic of this session, "Reforming the Text: Making a Deal that Works" looks like an invitation for me to share with you my personal recipe for textual constitutional reform. However, I will resist the temptation. We in Canada have been in the constitutional reform business for so long that we are in danger of forgetting what the exercise is all about. I want to use my time to appeal to your sense of constitutionalism. Before we tinker with the constitution, we ought to have a clear understanding of what constitutes an appropriate constitutional text, and what does not.

There are three elements to consider. First, what is special about the content of constitutional amendment? Can we put anything we want in the constitution? Second, what is special about the timing of constitutional amendment? Can we change the constitution whenever we want? Third, what is special about the procedure of constitutional amendment? Can we proceed however we want to gather together the consents required by the constitution's amending formula? As I consider these three elements, you might relate them to the current constitutional debate in Canada. Ask yourself about the appropriateness of the present constitutional dialogue given the constraint imposed by a mature sense of constitutionalism.

First, what is appropriate in terms of the content of constitutional amendment? I do not think that just anything will do. When you write a constitutional amendment, you write the constitution. In order to write the constitution you

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have to have a clear idea of what a constitution is. Laurence Tribe's definition of a constitution, although formulated in the American context, has general appeal:²

The Constitution serves both as a blueprint for government operations and as an authoritative statement of the nation's most important and enduring values. ... [It is] an evolving repository of the nation's core political ideas ...

This definition contains several ideas about what constitutes appropriate constitutional content. A constitution is an "authoritative statement." A statement cannot be authoritative unless it is reasonably clear. Everyone who has ever tried to negotiate an agreement knows that it will never be all clear. "Weasel words" are the stuff of agreement. However, "weasel words" cannot expand to take over a whole text without the text itself becoming weasily. The constitution must mean something. When you amend a constitution, it is not appropriate to say, "we are going to take a chance; we are going to opt for 'a pig in a poke'."

A constitution is an "evolving repository." Constitutionalism is evolutionism, not revolutionism. It is change within a context of stability. Constitutional content cannot ratchet back and forth, every decade, between diametrically opposing visions of the country.

A constitution sets out, "the nation's core political ideas"; it enshrines, "important and enduring values." The text must capture the common ground. Appropriate amendment must, to borrow Dellinger's term, reflect a, "contemporary consensus."³

Pierre Trudeau added a further textual standard. Appropriate constitutional proposals must be demonstrably superior to the content already achieved so as not to undermine that content. Presumably this means that new proposals must more clearly reflect a new emerging consensus than the words that had gone before. For Trudeau, free citizens should be cautious about change:⁴

... men who are free — and who are anxious to remain so — do not lightly undermine the constitutional framework of a democratic country. They only approach it 'with fear and trembling'. For this reason, among others, I have personally resisted what, if it has not become a mania, might be termed a fashion of constitutional iconoclasm. At a time when every last trooper believed he had a new constitution in his bags, I quite willingly classed myself among those who began by asking questions: asking what new society would be replacing the old;

2 Laurence H. Tribe, "A Constitution We Are Amending: In Defense of a Restrained Judicial Role," 97 Harv. L. Rev. (1983/84), pp. 441-2.

3 Walter Dellinger, "The Legitimacy of Constitutional Change: Rethinking the Amendment Process," 97 Harv. L. Rev. (1983/84), p. 388.

4 Pierre E. Trudeau, *Federalism and the French Canadians* (Toronto: MacMillan, 1968), pp. 52-3.

asking whether the new legal norms would ensure the same degree of peace, of liberty, and of prosperity as the old.

Second, what is appropriate in terms of the timing of constitutional amendment? Change is not just for any time. The frequency of amendment cannot be determined by the frequency of elections. It should be reserved for times when it is absolutely necessary. It is a measure of last resort. Why would I say that? It is a question of tolerance, of protection from the mob. Former President Giamatti of Yale, addressing my graduating law class, expressed concern about the threat to pluralism of opinion posed by the then prevailing "new morality" fad. His words have application in the context of the discussion here:⁵

We must insist that the principles of the Constitution be applied through the courts and resist the desire that the Constitution be endlessly amended.

It is equally a question of the stability of the social order. If the constitution is constantly changing, the ability of citizens to rely on it is undermined and the constitution ceases to command allegiance. Trudeau explained this as follows:⁶

Essentially, a constitution is designed to last a long time. Legal authority derives entirely from it; and if it is binding only for a short period it is not binding at all. A citizen — to say nothing of a power group — will not feel obliged to respect laws or governments he considers unfavourable to him if he thinks that they can easily be replaced: if the rules of the constitutional game are to be changed in any case, why not right away? A country where this mentality is prevalent oscillates between revolution and dictatorship. France, once it had started down the slippery path, gave itself eighteen constitutions in 180 years.

It is also a question of common sense. If we amend our constitution every time a new idea beckons, we will never get used to any text. We will not have the time to discover the richness of the existing order or the possibilities for making it work. We need time, and the pressure of new circumstances, to test what we have before we chase off after something new.

Third, what is appropriate in terms of the procedure used in amending the constitution? Here I am interested in going beyond the strict requirements of any particular constitutional amending formula. I am interested in the spirit in which the constitutional reform process is engaged. It is not enough simply that the requisite majorities be obtained; it matters how those consents are marshalled.

We have some recent guidance in Canada on this point. In the *Patriation Reference* (1981), the Supreme Court of Canada recognized a convention which

5 A. Bartlett Giamatti, The Baccalaureate Address to the Class of 1981 (New Haven: 1981)

6 Op. Cit., Trudeau, pp. 42-3.

required the federal government to obtain a "substantial degree" or "substantial measure" of provincial consent before requesting that the United Kingdom amend the *British North America Act, 1867*.⁷ Beyond this formula, however, it took a conjuncture of three different activities to create a legitimate procedure for marshalling the consents required in 1982. First, there was a mobilization of the national will. This meant that all of our major governing institutions, Parliament, the provincial legislatures, federal-provincial conferences, the governmental bureaucracies and the courts, as well as the public, by presentations to the Special Joint Committee of the Senate and House of Commons and by the efforts of various broad based lobby groups, were involved. A mobilization of the national will speaks to the level of public participation required for fashioning a legitimate amendment. Such participation is inevitably messy, but it is appropriately so, given that constitution building demands consensus building.

Second, in 1981-82, the process of constitutional change was characterized by an open debate about the matters in issue. That debate, when it involves constitution writing, must be pitched at the level of fundamental principles.

Third, because this is a federal system, the appropriate procedure in 1981-82 included a negotiation between the constituent elements of the federation. The negotiators in such negotiations cannot act on behalf of themselves or their own personal agenda. In the context of constitution writing, the negotiations must be conducted without ulterior motive and in the interest of the constituencies represented by the negotiators.

I have suggested that an appropriate constitutional amending process will involve considerations of content, timing and procedure. Is the Meech Lake effort at amendment marked by a proper sense of constitutionalism? I would have to answer, "No." I would have to answer "no" in terms of content; nothing in the constitutional ideas that surround it commands anything like a contemporary consensus. The notion of a "distinct society" is so unclear as to be unable to command consensus. With respect to the Senate, even if there was a consensus around the idea that it should be "equal, elected and effective," there is no consensus on what it is to be effective at. With respect to the judiciary, no one has convincingly put forward the case that formal provincial involvement in the nomination of Supreme Court of Canada Justices will produce more or better justice.

I would have to say "no" in terms of timing. I do not think Canada is in a "high political moment," to use a term borrowed from Professor Bruce Ackerman. We have just had a major constitutional event in this country, the implications of which are still being worked out. The country is not currently in a unity crisis, nor is the shape of the next such crisis foreseeable. There is no

⁷ *Re Resolution to Amend the Constitution* [1981] 1 S.C.R. 753, 905.

broadly based cry for constitutional reform except, possibly, among a few politicians. Economic prosperity, particularly as it relates to free trade, preoccupies Quebec. To be sure, the issue of language is important, but it is far from clear that that issue requires constitutional amendment to achieve the balance that is so illusive. Nor is it clear that constitutional amendment is being demanded by Quebec citizens as a way of dealing with the language question.

I would also have to say "no" in terms of procedure. Professor Bryan Schwartz, in his clear and witty book, *Fathoming Meech Lake*, provides the reason:⁸

Constitutional reform should proceed in a manner that is deliberate, open and democratic. The 1987 constitutional process has violated all of these standards. First ministers proceeded with reckless haste. They conducted their meetings in private and have kept the drafts secret. They failed to adequately consult their cabinets, their caucuses, their legislatures — and the people.

Where does that leave us in terms of present efforts at reforming our constitutional text? For a time at least, we should leave the text alone. We cannot yet know what, if any, additional textual reform is necessary and, in any event, current efforts at reform in no way meet the demands of constitutionalism appropriate to the reform undertaking. We should give the existing text a chance.

Does this mean that our system is doomed to crack under its own imperfections? Am I suggesting that we simply give up in the face of a difficult challenge? I do not think so, for two reasons. First, reform comes in many guises. Because we have recently become so used to reaching for the constitutional quill, we tend to forget that our institutions can be made to, and do, adapt without a word of textual change. In the past we have relied on a kind of "evolving federalism" to throw up quasi-constitutional solutions to fundamental problems. Shared-cost programs, opting-out agreements, federal-provincial conferences, and Official Languages Acts all provide examples. That process continues. Provinces are being consulted in a more systematic, even if informal, way on major judicial appointments. I think it is a good thing that we are slowly working towards a new way of appointing Senators. If Alberta manages to elect a Senator, I cannot imagine a Canadian prime minister saying "no" to that person's nomination. Who would ever take the Senatorial vacancy if their nomination meant that someone elected to the post was being shoved aside? I am not worried that the system will break, therefore, because there is sufficient play within our existing institutions to permit the healthy kind of experimentation that should be preliminary to any textual amendment of the constitution.

8 Bryan Schwartz, *Fathoming Meech Lake* (Winnipeg: Legal Research Institute of the University of Manitoba, 1987), p. 1.

There is a second reason why the absence of textual change does not leave me despondent. We have talked little today of the work of the Supreme Court of Canada in coming to grips with the 1982 constitutional amendments. That work has been impressive. The Court is in the process of developing a method for making those amendments operational. What do I think that method is? There is a common thread running through the *Patriation Reference (1981)*,⁹ the 1988 *Morgentaler*¹⁰ decision and the 1988 decision on *Quebec's Bill 101*.¹¹ In each of these cases the Court refused to impose a definitive solution. Instead, it defined the boundaries of permissible legislative action and passed the problem back to the legislators. In the *1981 Reference*, no effort was made to define the need for provincial consent to constitutional change beyond affirming the requirement of a substantial degree of consent. In the *Morgentaler* case, existing procedure and restrictions for access to abortion were held to be inadequate. The reasons for this inadequacy suggested guidelines within which legislators could work out a valid detailed law. In the *Bill 101* case, no attempt was made to dictate rules on language usage other than to provide two guidelines. One would permit the preservation of "le visage français" de Québec; the other would require that any commercial language regulation be such as to permit individuals to make "informed economic choices."

In each of these cases, the Court was content to define the boundaries of workable compromise, but to leave the actual compromise to others. Consonant with its position as a non-democratic body, the Court limited its role to giving legislators the room needed to harmonize conflicting social values. The emergence of an actual compromise was left to elected representatives. What we see is the Court as catalyst where the catalytic agent is a kind of institutional dialogue with the legislators. This is a method that offers promise for harmonizing competing values. It is a method that deserves further exploration rather than being cut off with yet more constitutional change.

The title of our discussion was "Reforming the Text: Making a Deal that Works." From what I have said, it will be apparent that I do not feel it is necessary to make another deal in order to achieve what we want to achieve. Nor am I persuaded that current reform efforts have been undertaken with an appropriate sense of constitutionalism. Perhaps we have the title for this topic wrong. Instead of talking about, "making a deal that works," perhaps we could better consider, "working the deal we made."

9 Op. Cit.

10 *R. v. Morgentaler* [1988] 1 S.C.R. 30.

11 *Ford v. Quebec (Attorney General)* [1988] 2 S.C.R. 712.

Comments

Ron Watts

Taking some of the things that Robert Hawkins has said and relating them as well to some points that were made earlier, I want to suggest that we are in a situation where Canadians are going to be falling into what seems to me has become a Canadian disease in constitution making.

This morning some of the speakers talked about the trouble we have had trying to redefine ourselves each time we amend the constitution. Lorna Marsden talked about the problems of all the groups that were excluded in the discussion over Meech Lake. And we have just been talking now, or Robert Hawkins has, about the way in which each major amendment has to be seen as a constitutional event. I have to suggest that that is exactly the Canadian disease. We make too much of the importance of constitutional amendments and assume that each time we amend the Constitution we are, in effect, totally revising the whole constitution, and have to see ourselves redefining Canada in the process.

Here I would like to suggest that some other federations, and I am thinking here particularly of Switzerland, provide us with a good example of the danger in this process. The Swiss, in their wisdom, invented two amendment procedures, one that they described as the total revision of the constitution and the other that they described as the partial revision of the constitution. It is fascinating to note that since adopting that division, in spite of efforts, and they have been trying for the last 20 years to achieve a total revision, they have never succeeded.

It is also instructive to note, however, that although they were willing to go about making partial revisions, they have made 88 over the last century. I think this provides us with a lesson of the danger of putting too much weight on the activity of constitutional amendment or waiting until there are crises or major events to make it into a big task.

This is where I align myself with David Cameron in arguing that it is important, and I think time, that we look more towards constitutional amendment on a piece by piece basis rather than trying each time we do it to make it into an overall, total revision of our own identity and our constitution.

Peter Milliken

I heard speakers this morning and this afternoon speak of the problems of constitutional change in terms of executive federalism, elite accommodation, provincial representation in the Senate and the problems associated with that, and how a Senator is chosen and so on, and the growth of lobby groups and the fact that they feel excluded from the decision-making process because the decisions were made elsewhere. I go back to a problem that I think we face as legislators, and that is the lack of ability of legislatures to reflect the diversity of views in the country. It was alluded to only briefly when discussing the failure of national parties to provide an alternative or choice, if you want, on Meech Lake. But it seems to me that it is endemic in many more fields of constitutional change because of party discipline and the straight jacket that imposes. And I do not point only to the House of Commons but also the provincial legislature.

It seems to me that the problem with executive federalism, if there is indeed a problem, is that the eleven men who sit down and make a deal to change our constitution go into the legislatures knowing that they have a majority in that legislature. The only reason that Meech Lake is running into difficulties is that elections have intervened since the date of the signing of the documents.

If the premier or prime minister of each province knows that when he goes back, his majority is going to back him in every case, then clearly we have changed the constitution by reason of the acts of those men who sit down in that room together. I think that is what is causing the lack of legitimacy and the lack of feeling of legitimacy in the process. If we could somehow remove the restrictions of party discipline so that members of the legislatures and the federal legislatures could speak out and voice their concerns, their regional concerns, the provincial concerns, the linguistic concerns, or whatever they might be, it seems to me that Canadians would feel that their views were more accurately represented. I think that diversity of views does lie among the membership of the legislatures of this country and it seems to me that if we are interested in reform, and serious constitutional reform, pushing the governments to declare free votes on more issues would, in effect, break part of the deadlock that we find ourselves in as a result of the negotiations that go on at different levels of government. I am referring particularly to the federal-provincial conferences. I am just wondering who the people are who will create this pressure. Members of Parliament can, but it seems to me that there are other

people who must do that too, because the fact that the debate may go on in a party caucus does not lead to a feeling of confidence among the general population that their views have been accurately or thoroughly represented.

Scott Fairley

I want to pick up on a point that Bert Brown expressed earlier in relation to Meech Lake. He said that in his view, the sins of Meech Lake were ones of omission. I would like to suggest that perhaps it is precisely the other way around and that the folly of Meech Lake (here I am speaking not about its essential purpose, but this great convoluted text that we are trying to puzzle through) is one of commission, and that is the same problem that we had with the reform package in 1981 that left what everybody referred to as an "unfinished agenda." And, indeed, we can go all the way back to 1867 where we started with the *British North America Act*. I think these processes reflect not a constitution, but essentially an ongoing committee on statutory revision that runs slightly amok. If we trace it back to 1867 we can see why that happened. We started out with a statute and not a constitution, and we are still treating it that way. That is, each generation of reformers is concerned with getting its own agenda through; that is, getting the complete package. It's like the *Income Tax Act*. Last year's loopholes are this year's amendments. As a result, we go on an endless merry-go-round. It is being treated not as an organic document for the Canadian polity but just a series of fingers in the dike.

Eric Maldoff

The question we have been asked is: "where are we going?" One comment I would like to make is that I do not think by definition that we have to deal with the constitution in a crisis, or outside a crisis. I think you have to deal with it at an appropriate moment in time. It concerns me that people feel that after the Referendum of 1980 there was no crisis, because I can guarantee to all of you that had there not been some delivery on the promise of renewed federalism (it has been debated whether 1982 was, or was not that) — had there not been some action on that level, there would have been one hell of a crisis in this country. I would also suggest to you that the great motivation in Quebec back in the period around the Referendum, and what attracted people, was not the debate as to the division of powers in sections 91 and 92. The average Canadian certainly had not the slightest idea of what was in the *British North America Act*. If you asked them on any sort of survey — "which is federal which is provincial?" — you would not get much of an answer.

I spoke earlier in terms of the type of challenges that Quebec is facing as a society. I think that those challenges were present, not as acutely, but certainly present, in the early '80s. I still do not think that Canada has made any sort of adequate response to these challenges. I think politicians may have come to a political agreement among themselves in Meech Lake that satisfies politicians, but I do not think that it has done a great deal to address the underlying concerns that exist within Quebec in terms of the type of support people have to get from the Canadian nation. If we look at Meech Lake, it is essentially structural; it is political and it belongs to politicians. I can assure you there will be another list in another few years, and we will have another crisis if we define crisis as politicians presenting lists that other politicians disagree with. I have heard a number of comments throughout the day, and I want to tell you it is quite common in Quebec today to hear talk about Canada being essentially an economic deal. Mr. Blakeney made a reference to that effect, Mr. Courchene I think even thought worse than that, and saw that it is not even an economic deal. I am not sure what it is, but the notion of Canada as an economic deal is a question that really requires some very, very careful examination. I am not sure Canadians fully accept that idea. I think we have to think that one through carefully. The thing about economic deals is that the next time a good deal comes along, somebody's going to take it. The Free Trade Agreement is not a bad deal for Quebec in terms of access to important markets. So if all we are saying is that the attraction for Quebec to Canada is the economic deal, there is a pretty good offer on the table right now. You see a lot of editorials in Quebec that are speaking very much in those kind of terms. I come back again to the question of the constitution as a reflection of fundamental values, and I think we better ask ourselves what those values are and where we want to go with the country.