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**REFLECTIONS  
RÉFLEXIONS**

**Constitutional  
Commentaries:  
An Assessment of the  
1991 Federal Proposals**

**Edited by  
Douglas Brown,  
Robert Young and  
Dwight Herperger**



**Institute of  
Intergovernmental  
Relations**

**Queen's University  
Kingston, Ontario  
Canada K7L 3N6**



THE UNIVERSITY OF CHICAGO  
DIVISION OF THE PHYSICAL SCIENCES  
DEPARTMENT OF CHEMISTRY

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## Reflections/Réflexions

*Reflections/Réflexions* is a publications series of the Institute of Intergovernmental Relations. Contributions present the personal thoughts and arguments of their authors on a variety of subjects having to do with federalism and intergovernmental relations. The series is intended to place new ideas into the public forum, where they will be open to challenge and rebuttal.

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*Reflections/Réflexions* est une collection de l'Institut des relations intergouvernementales. Les articles publiés sont l'oeuvre d'auteurs dont les points de vue ou les thèses abordent divers sujets touchant le fédéralisme et les relations intergouvernementales. Cette collection se propose de livrer à l'opinion publique de nouveaux motifs de réflexion pouvant prêter au débat de fond, voire à la polémique.

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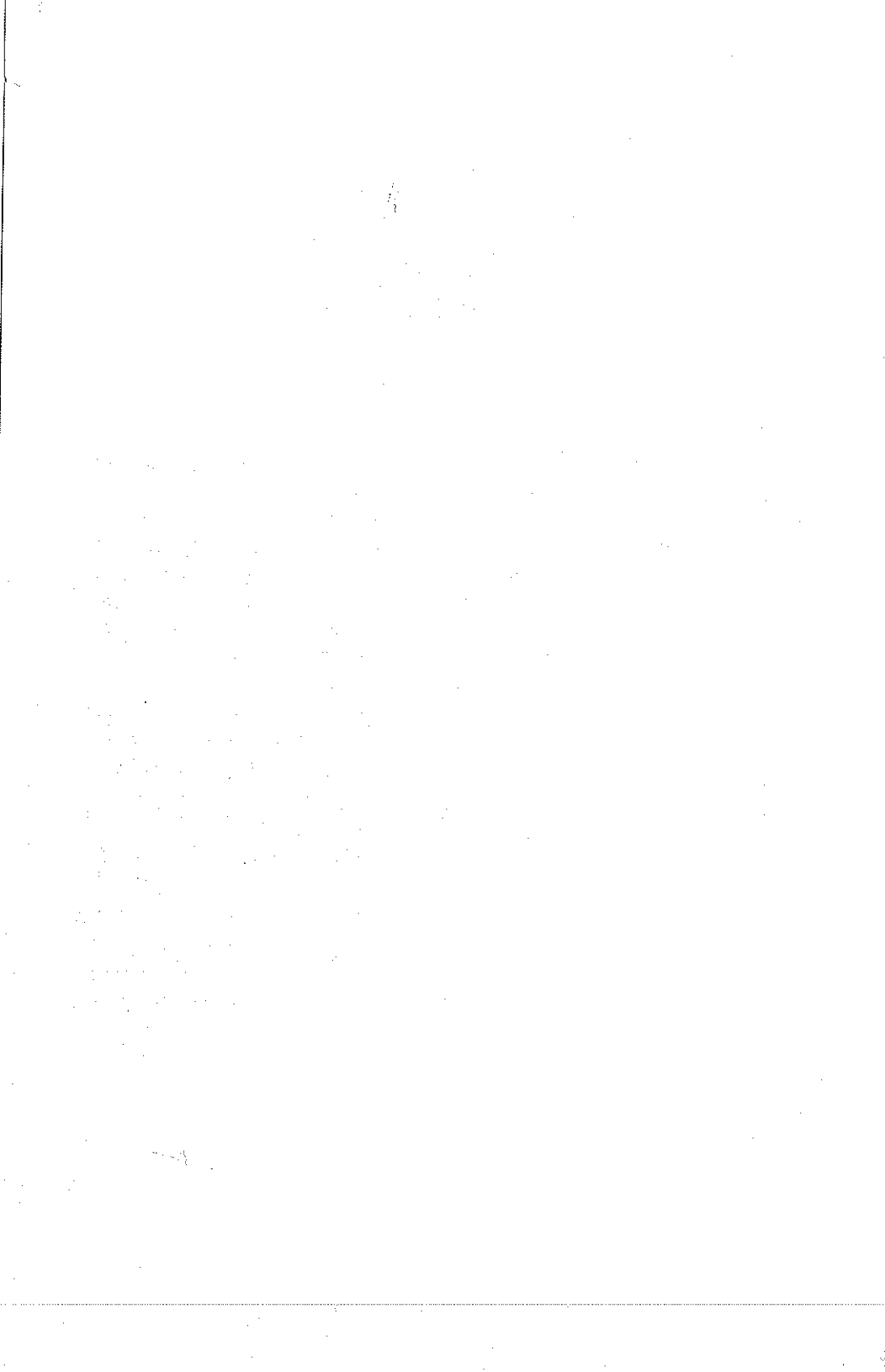
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*Douglas Brown  
Robert Young  
Dwight Herperger*





# Introduction

Douglas Brown  
traduit par Daniel Bonin

Ce volume rassemble les actes d'un colloque organisé par l'Institut des relations intergouvernementales, et tenu sur le campus de Queen's University à Kingston le 30 novembre 1991. L'événement, baptisé sobrement "Conférence sur les propositions constitutionnelles fédérales", avait pour objectif d'offrir des analyses politiques et juridiques des propositions esquissées par le Gouvernement du Canada, en septembre 1991, dans son document *Bâtir ensemble l'avenir du Canada*. Ce colloque fut planifié de concert avec un autre colloque tenu le 29 novembre 1991 par le John Deutsch Institute for the Study of Economic Policy, lequel portait sur les aspects économiques des propositions fédérales. (Les actes du colloque du John Deutsch Institute intitulé *Economic Aspects of the Federal Government's Proposals* feront aussi l'objet, en janvier 1992, d'une publication, sous la direction conjointe de Robin Boadway et Douglas Purvis).

On consultera les actes du colloque de l'Institut en tenant compte de l'évolution constante du contexte constitutionnel. Comme telles, les propositions fédérales ont été conçues pour être remplacées par une série de propositions révisées, probablement vers la fin mars ou le début avril 1992, à la suite du rapport du Comité mixte spécial du Sénat et de la Chambre des communes sur le renouvellement du Canada à la fin de février. Au terme de ce processus, il est loisible de penser que les propositions de réforme constitutionnelle pourraient même être peaufinées après coup dans le cadre d'une consultation et d'une négociation fédérale-provinciale, ainsi qu'entre les partis au Parlement fédéral; auquel cas, lesdites propositions pourraient faire l'objet d'une approbation finale par la population, par l'entremise d'un référendum ou d'élections générales.

Nul doute que la situation actuelle, sur le plan constitutionnel, s'avère des plus critiques. De fait, la fédération canadienne vit pour l'heure son instant de vérité, et elle joue au surplus son existence au moment même où le pays

s'apprête à "célébrer" son 125<sup>e</sup> anniversaire de naissance. Même si les Canadiens sont encore hantés par l'épisode Meech, et que l'on est confronté à une opinion publique acrimonieuse, ainsi qu'à maints acteurs ou groupes aux idées bien arrêtées, il n'est pas interdit d'envisager malgré tout, en bout de ligne, un résultat positif (entendu ici en terme de renouvellement du partenariat fédéral). Cependant, la possibilité de changement ne durera pas éternellement.

Ce colloque se voulait un forum pour une analyse pertinente des propositions fédérales. Nous formions le voeu que les discussions qui s'y tiendraient soient fécondes et constructives. Nous voulions aussi nous assurer que les vues exprimées par les participants à cette occasion reflétassent, en microcosme, le pluralisme d'opinions qui caractérise le débat actuel au pays. Agir autrement eut été déraisonnable: les propositions fédérales doivent, en effet, se frotter à l'opinion publique canadienne et, comme prévu, les participants au colloque profitèrent au maximum de cette occasion pour vérifier la solidité de leurs arguments. Si on se fie aux divers points de vues exposés au cours du colloque, il ne fait aucun doute selon nous que la réussite de l'entreprise constitutionnelle sera directement proportionnelle à l'ouverture politique et au compromis dont feront preuve les parties en cause. En publiant les actes de ce colloque, nous poursuivons essentiellement deux objectifs: d'abord, favoriser, pour un plus grand public, une compréhension accrue des difficultés de la tâche à accomplir sur le plan constitutionnel; puis, dégager ensuite quelques pistes utiles pouvant mener à la conclusion d'une entente.

Près de 90 participants assistèrent au colloque (on consultera la liste en annexe de ce volume): 40 participants provenaient du milieu universitaire, 30 représentaient les gouvernements provinciaux et fédéral, et finalement une vingtaine d'autres émanaient des milieux autochtone, des affaires, des médias, ainsi que d'autres organisations indépendantes. Les échanges entre participants se déroulèrent dans le cadre de trois séances.

La première séance, intitulée "Les aspects centralisateurs et décentralisateurs des propositions fédérales", aborda la question clé de l'équilibre des pouvoirs au sein du système fédéral. De façon concrète, on y discuta la manière dont les propositions fédérales traitaient: a) des revendications du Québec — notamment — en faveur d'une plus grande décentralisation; b) du désir de certaines provinces de maintenir l'union économique ou encore les normes nationales dans les programmes sociaux. David Milne présenta durant cette séance un survol très utile des modèles de centralisation et de décentralisation, de symétrie et d'asymétrie, contenus dans les propositions fédérales. Tout compte fait, Milne constate à la fois une part de centralisation et de décentralisation dans ces propositions, mais sans y déceler toutefois le transfert massif de compétences aux provinces comme plusieurs le prévoyaient. Certaines propositions telles celles relatives, qui au Conseil de la Fédération, et qui à l'article 91A visant à promouvoir l'union économique, se trouvent être à mi-chemin,

selon Milne, entre les deux tendances précédentes. Les propositions fédérales ne vont pas jusqu'à garantir, formellement, des compétences de type asymétrique au profit du Québec; en revanche, elles recommandent qu'on fasse plus de place à des arrangements souples, du genre de ceux préconisés dans la proposition sur la délégation de pouvoirs législatifs, proposition qui pourrait éventuellement rebondir selon Milne.

Le conférencier suivant, Tom Courchene, fit valoir que plusieurs des propositions fédérales, à l'instar d'autres changements importants de nature économique et politique, peuvent comporter, simultanément, un caractère centralisateur et décentralisateur (comme, par exemple, la *Charte canadienne des droits et libertés* et l'*Accord de libre-échange entre le Canada et les États-Unis*). Courchene poursuit en insistant pour l'essentiel sur les propositions fédérales relatives à l'union économique. S'il souscrit au principe d'une décentralisation des pouvoirs vers les provinces, conjuguée à une bonification de l'union économique, Courchene propose par ailleurs que les tribunaux ne puissent, dans un premier temps, statuer sur l'élimination des barrières commerciales interprovinciales (telle que proposée dans les modifications à l'article 121 de la *Loi constitutionnelle de 1867*). Il recommande plutôt qu'on laisse d'abord à une institution intergouvernementale le soin de réaliser une entente sur cette question, le renvoi aux tribunaux ne devant survenir ici qu'en dernier ressort. Finalement, Courchene endosse le concept de société distincte en tant que mesure, à tout le moins symbolique, visant à reconnaître les efforts considérables déployés par le Québec pour faire face au phénomène de la mondialisation des marchés, tout en tenant compte de son particularisme culturel, c'est-à-dire sa capacité de pouvoir maintenir son niveau de vie nord-américain en français.

David Elton passa en revue, pour sa part, les nombreuses propositions ayant trait à la réforme institutionnelle. La plupart d'entre elles lui apparaissent ni centralisatrices ni décentralisatrices, mais plutôt "fédératrices" en ce qu'elles cherchent à équilibrer les forces centripètes et centrifuges de la fédération. Les propositions de nature institutionnelle se caractérisent, selon Elton, par leur contenu à la fois symbolique et fonctionnel. Au surplus, Elton fait observer que celles se rapportant précisément à la Chambre des communes, pour devenir opérationnelles, ne nécessitent pas à la vérité une modification à la constitution mais bien un changement d'attitude sur le plan politique. Les propositions fédérales relatives au Sénat ne passent pas, selon lui, l'épreuve de l'"efficacité"; il propose donc, entre autres choses, que le Sénat se voie confier des pouvoirs spécifiques afin d'intervenir sur les questions économiques et fiscales, hormis lors du vote des projets de loi de crédits. La discussion au cours de cette séance amena les participants tantôt à formuler des suggestions précises, tantôt à manifester certaines inquiétudes eu égard à ce dossier; entre autres interventions, signalons notamment: 1) la crainte chez certains que la délégation de

pouvoirs législatifs ne se traduise par une procédure de modification de la Constitution, à caractère bilatéral, débouchant sur des compétences accrues au Québec; 2) l'idée que les propositions fédérales promeuvent avant tout la "co-responsabilité" fédérale-provinciale; 3) le souhait que l'article 91A, tel que proposé, consacre un "partage" de compétences entre les deux paliers de gouvernement plutôt que l'autorité exclusive d'Ottawa; 4) l'opinion que le Sénat pourrait demeurer efficace, en conservant le pouvoir de suspendre l'adoption d'une loi.

La deuxième séance porta sur les "droits et les valeurs prônés dans les propositions fédérales". Charles Taylor amorça le débat en établissant une distinction entre, d'une part, la notion traditionnelle d'égalité et de non-discrimination assimilée ici à un "refus de la différence", puis, d'autre part, le concept plus récent d'égalité, défini pour sa part comme une "reconnaissance de la différence". C'est ce dernier concept qui fonde la revendication du Québec d'être reconnu comme société distincte, et qui anime les peuples autochtones dans leur quête d'une reconnaissance analogue. Du fait que de telles reconnaissances s'avèrent incompatibles avec certains droits de la Charte canadienne se fondant sur le refus de la différence, il importe, selon Taylor, que le Canada explore de nouvelles pistes afin de composer avec toute la gamme de nos différences ou de nos traits divers.

A un autre registre, Reg Whitaker est d'avis que le processus et l'ordre du jour constitutionnels ont été littéralement "détournés" par le gouvernement conservateur fédéral. D'après lui, l'opération gagnerait grandement en légitimité si on recourait à la formule de l'assemblée constituante, plutôt qu'aux consultations "vaines" des derniers mois dont le but consiste à concocter un menu constitutionnel déjà décidé à l'avance. Whitaker juge particulièrement troublante l'obstruction pratiquée par le caucus québécois des Conservateurs à l'égard des tentatives visant à offrir au reste du Canada une occasion de se prononcer sur le plan constitutionnel — soit un référendum à l'échelle nationale — dès l'instant où il est prévu que le Québec tiendra pareille consultation de son côté. Quant à la substance du débat, Whitaker fait observer que l'ordre du jour sur la table se révèle, très largement, d'inspiration "tory" du fait des propositions sur l'union économique, de la référence aux droits de propriété et au Conseil de la Fédération, et en raison de l'absence d'une charte sociale.

Troisième panéliste durant cette séance, Craig Scott aura abordé la question de la charte sociale, laquelle, affirme-t-il, n'apparaît pas vraiment dans les propositions fédérales, à l'exception d'un engagement évident envers le principe du partage national. Le document de travail sur une éventuelle charte sociale canadienne préparé par le gouvernement de l'Ontario fournit un très bon point de départ à ce propos; par contre, selon Scott, le document ontarien accorde trop d'importance à la dichotomie — artificielle — qui existerait entre des droits "négatifs" et "positifs". La constitution devrait non seulement refléter

les valeurs sociales, mais aussi promouvoir les droits des moins nantis sur le plan économique et social. Scott propose trois grandes options pour la réalisation de ces deux objectifs: premièrement, instaurer une vaste "union sociale" fondée sur le Pacte des Nations-Unies relatif aux droits économiques, sociaux, et culturels, et au sein de laquelle les tribunaux et les assemblées législatives assumeraient un rôle de vérification; en second lieu, créer un certain nombre de droits fondamentaux qui feraient l'objet d'une application plus stricte par les tribunaux; finalement renforcer l'article 36 de la *Loi constitutionnelle de 1982* de façon à s'assurer que toutes les provinces puissent offrir des normes nationales en ce qui à trait aux programmes sociaux.

A la suite de ces exposés, les échanges portèrent principalement sur des questions spécifiques touchant le rôle des tribunaux par opposition à celui des assemblées législatives tel qu'envisagé par une charte sociale éventuelle. A ce chapitre, Scott propose que les tribunaux assument un rôle limité mais néanmoins significatif au regard des questions économiques et sociales. Parmi les autres sujets abordés durant la discussion, signalons la question de la représentation des citoyens du Québec ou des Autochtones dans le cas où les gouvernements représentant leurs intérêts détiendraient certaines compétences qui feraient défaut aux autres provinces ou gouvernements. Autrement dit, de quelle façon les députés du Québec, ou encore les députés représentant des électeurs amérindiens, devraient-ils voter eu égard à des questions qui concernent le reste du pays et non une communauté distincte? D'autres participants soulevèrent la question des droits individuels et des droits des minorités, que des communautés imbuës de droits différents pourraient être enclin éventuellement à supprimer.

Au cours de la dernière séance, on se pencha sur les chances d'une "entente possible" au chapitre constitutionnel, à la lumière du contexte politique actuel. L'exposé de Patrick Monahan mit de l'avant un certain nombre de propositions indiquant en quoi devrait consister un processus capable de conduire à un renouvellement de la constitution fédérale. Selon Monahan, le Québec tiendra un référendum sur la souveraineté à moins qu'une entente n'ait lieu entre le Québec, le gouvernement fédéral et la plupart des autres provinces. La Conférence des Premiers ministres, qui serait accompagnée de séances de négociations à huis-clos, constitue, pour le panéliste, la seule manière de conclure un accord. Cependant, Monahan précise qu'un tel scénario positif ne suffirait pas pour conférer à l'opération une légitimité à grande échelle. En fait, même dans l'éventualité d'une entente entre les parties impliquées dans cette ronde de négociations, Monahan croit que l'on devrait organiser un référendum pan-national, sous les auspices conjoints des gouvernements fédéral et provinciaux.

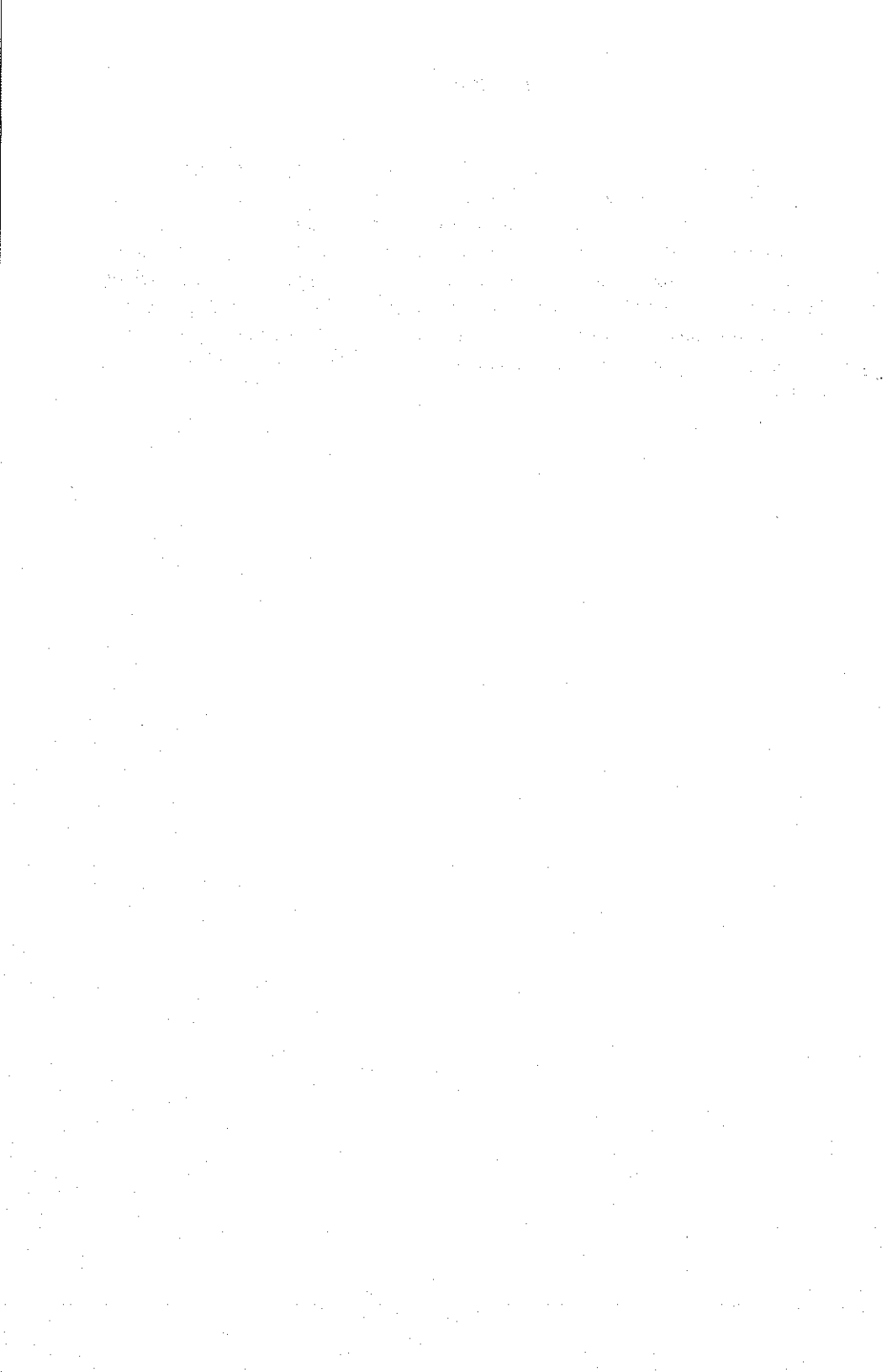
Partisane du réalisme, Donna Greschner fit part de ses idées sur la façon d'en arriver à une "entente" qui serait couronnée de succès, à défaut d'obtenir un

résultat parfait. D'après elle, la "démocratie représentative" jouit encore d'une légitimité significative au sein de la population canadienne: condition suffisante dès lors pour convoquer une Conférence des Premiers ministres dont l'objectif viserait à la signature d'une entente constitutionnelle et partant, à éviter d'avoir recours à un référendum pan-national. Or, selon Greschner, nonobstant l'indifférence politique qui caractérise dans son ensemble le public canadien, celui-ci pourrait toujours rejeter ultimement n'importe quelle série de mesures fédérales qui lui seraient présentées. Greschner prévoit l'adoption d'un "package" minimum qui comprendrait: une clause de société distincte insérée dans la Charte, le transfert de certaines compétences vers le Québec (peut-être par l'entremise de pouvoirs législatifs délégués), la reconnaissance du droit des Autochtones à l'autonomie gouvernementale, et quelques dispositions relatives à la réforme du Sénat.

Le dernier conférencier, André Blais, offrit un panorama des grands traits de l'opinion publique par rapport au présent débat. Il perçoit les propositions fédérales comme un geste audacieux visant, d'une part, à plaire au Québec avec la clause de la société distincte, à défaut de lui accorder une décentralisation significative de compétences; d'autre part, Ottawa fait aussi le pari de satisfaire les demandes du reste du Canada avec des propositions touchant la réforme du Sénat et l'union économique. Blais prédit que l'opinion publique québécoise appuiera les offres fédérales si certains aspects de l'union économique sont atténués. En revanche, il craint qu'une campagne référendaire pan-canadienne ne donne lieu à une certaine hostilité contre le Québec avec pour résultat, un rejet subséquent des propositions fédérales par les Québécois.

Au cours de la discussion fertile et animée qui suivit cette troisième et dernière séance, moult participants firent part d'observations pénétrantes sur le rôle du Québec dans les négociations intergouvernementales, le recours au référendum, ainsi que sur les conditions préalables à une "entente minimale". Quelqu'un émit l'idée que le problème qui se pose au Québec, advenant sa participation éventuelle à une Conférence des Premiers ministres, pourrait en définitive être résolu en offrant à cette province un siège d'observateur. La plupart des intervenants convinrent qu'un référendum pan-national comporte un pari très risqué. Une autre option consisterait à tenir un référendum spécifique pour le "reste du Canada", ou bien encore une série de référendums provinciaux; par ailleurs, l'opinion des votants est sujette à varier selon qu'on leur demande de voter en tant que citoyens de leur province, du reste du Canada, ou du Canada dans son ensemble. Le résultat d'un éventuel référendum dans le reste du Canada pourrait consacrer l'offre liant le gouvernement fédéral et les autres provinces que le Québec compte recevoir. Dans le cas d'une entente minimale, il est peu probable que l'Ontario endosse des propositions qui ne feraient aucunement mention d'une charte sociale.

En résumé, le colloque aura permis un examen large et diversifié des propositions fédérales. Mais, en définitive, la plupart des participants n'étaient pas sans réaliser l'importance historique du présent épisode constitutionnel. Le colloque leur fournit l'occasion de mettre de l'avant d'utiles suggestions sur la manière de réviser et de bonifier les propositions fédérales. Il appartient désormais à l'ensemble des Canadiens de jauger individuellement le processus de renouvellement constitutionnel, et partant d'y prendre part de façon active, si l'on souhaite conclure, de manière satisfaisante, l'impasse constitutionnelle actuelle.





# Introduction

*Douglas Brown*

This book is a record of the proceedings of a one-day conference organized by the Institute of Intergovernmental Relations held on 30 November 1991 on the campus of Queen's University in Kingston, Ontario. The event was simply titled "Conference on the Federal Constitutional Proposals" and was designed to provide political and legal analysis of the proposals outlined by the Government of Canada in its September 1991 document *Shaping Canada's Future Together: Proposals*. Our conference was organized to coincide with a conference held by the John Deutsch Institute for Economic Analysis, on economic aspects of the proposals, on 29 November. (A companion volume of the Deutsch Institute conference proceedings, *Economic Aspects of the Federal Government's Constitutional Proposals*, edited by Robin Boadway and Douglas Purvis, is also being published for release in January 1992.)

These proceedings are designed for use within a fleeting constitutional moment. The federal proposals as such were planned to be superseded by a revised set of proposals, probably by late March or early April 1992, following the report of the Special Joint Committee of the Parliament of Canada at the end of February. Following this process, the constitutional reform proposals are likely to be even further refined as a result of intergovernmental and parliamentary negotiation and consultation, and they may receive final approval by the public in the form of referenda or elections.

This is a brief moment, then, but it is nonetheless a critical one. Indeed it may be the moment of truth for the continuation of the Canadian federation established in 1867. The recriminations and regrets of the Meech Lake Accord episode continue to affect us. We are also burdened with a difficult and fractious public mood and many entrenched positions. Despite these obstacles there is a clear opportunity for a successful outcome (success defined as a renewal of the federal partnership). However, the window of opportunity is not open indefinitely.

Our conference was held to allow for informed analysis of the federal proposals. We hoped the discussion would be productive and constructive. At the same time we wanted to ensure that the speakers and other participants at the conference reflected a wide range of perspectives and positions in the current debate. To do otherwise would have been unrealistic: the proposals must survive in the hard world of Canadian public opinion, and our participants certainly tested their robustness. After hearing from a broad spectrum of views illustrated in these proceedings we have no illusions that success in this venture will come without open political dialogue and compromise, or that it will come at all. But, by making these proceedings available to a wider audience we hope to promote a greater understanding of the difficult nature of the task as well as to indicate where some of the more fruitful avenues for settlement may lie.

There were approximately 90 participants at the conference (a list of participants is included as an appendix to this book), of whom 40 were university academics, 30 were officials with federal and provincial governments, and 20 were drawn from the media, business, aboriginal and other independent organizations. The discussions were held in three sessions.

The first session, entitled "Centralization and Decentralization in the Federal Proposals," dealt with the key issue of balance within the federal system and how these proposals address competing demands from Quebec and elsewhere for greater decentralization, and the need of some provinces and interests for maintaining the economic union or national standards in social programs. David Milne provides a very useful overview of the patterns of centralization and decentralization, and of symmetry and asymmetry, in the federal proposals. On balance he finds elements of both centralization and decentralization, but much less wholesale transfer of power to the provinces than many expected. Some proposals, such as those for the Council of the Federation and the proposed section 91A to promote the economic union, are, in his view, midway between these two trends. The proposals do not recommend formal asymmetrical powers for Quebec, but provide much room for flexible arrangements — including what he called the "sleeper" proposal for legislative delegation.

Tom Courchene commented that many of the federal proposals, like other significant economic and political changes, can be both centralizing and decentralizing at the same time (e.g., the Charter and the Free Trade Agreement). He goes on to focus primarily on the economic union proposals. He agreed with the basic premise to offset the transfer of jurisdiction to the provinces with measures to improve the economic union, but sides with other critics in suggesting that the courts not be given an immediate authority to remove internal barriers to trade (as in the proposed amendments to section 121 of the *Constitution Act, 1867*). Rather he recommends that an intergovernmental institution be given the chance to reach agreement first, with the courts used as the last resort. Finally, Courchene endorses the concept of distinct society as

being at least symbolic of a broad-ranging effort by Quebec to respond to globalization in its own way, i.e., the ability to earn a North American standard of living in French.

David Elton reviewed the several proposals relating to institutional reform. He finds most of them to be neither centralizing or decentralizing, but rather to be "federalizing," by which he means attempting to balance centripetal and centrifugal forces in the federation. The institutional proposals have both symbolic and functional content, and those related to the House of Commons mainly depend on changes in political behaviour, not the constitution, in order to take place. The Senate proposals, in his view, do not come nearly close enough to meeting the "effectiveness" test, and he suggested among other things that the Senate be granted powers to deliberate on economic and fiscal matters, short of voting on Supply bills.

The discussion from the floor in the first session provided a number of specific suggestions and concerns, including whether the legislative delegation would not amount to a bilateral amending formula to give Quebec more powers, that the federal proposals are better viewed as promoting federal-provincial "co-responsibility," that the proposed section 91A might be better cast as a "shared" rather than exclusive federal power, and that the Senate could still be effective even with only the power to suspend the passage of legislation.

The second session dealt with "Rights and Values in the Federal Proposals." Charles Taylor led off with a discussion of the distinctions between the older concept of equality and non-discrimination as being "difference-blind," and a more recent concept that equality requires "difference recognition." The latter concept is what drives Quebec's desire to be recognized as a distinct society and the aboriginal peoples' desires for similar recognition. While such recognitions will clash with some of the Charter rights based on difference blindness, Canada ought to pioneer methods to deal with our varying levels of difference or diversity, in his view.

Reg Whitaker's comments dealt with his perception that both the constitutional process and the agenda have been hijacked by the federal Conservative government. In his view a more legitimate result would emerge from a constituent assembly, not the phony consultations of recent months designed to cook a preordained constitutional recipe. In particular he finds disturbing the Quebec caucus' blocking of attempts to provide to the rest-of-Canada what Quebec already intends — a popular consultation through a national referendum. On the substance of the debate he points to a predominant "Tory" agenda including property rights, the economic union proposals, the Council of the Federation and the lack of a social charter.

The third speaker in this session was Craig Scott who addressed the issue of a social charter, which he contends was not really included in the federal proposals, despite an apparent commitment to the principle of sharing. The

Ontario discussion paper on the issue provides a better starting point in his view, but overemphasizes a false dichotomy between "negative" and "positive" rights. The constitution should both reflect social values and also promote the rights of the economically and socially disadvantaged. He proposes three sets of options for achieving these two objectives: a broad "social union" based on the United Nations International Covenant of Social, Economic and Cultural Rights in which the courts and legislatures would play a monitoring role; a set of justiciable basic rights, more fully enforced by the courts; and a strengthened section 36 (*Constitution Act, 1982*) to ensure that all provinces have the ability to provide minimum standards for social programs.

The discussion following these presentations dwelt in part on specific questions regarding the role of the courts versus the legislatures in a proposed social charter. In addressing these questions, Craig Scott put forward his views of a limited but entrenched role for the courts in social and economic matters. Other issues included the question of representation of the citizens of Quebec or of aboriginals if their governments have powers that other provinces or governments do not. How or whether do Quebec MPs, or members of Parliament representing aboriginal constituents, vote in matters that apply to the rest of the country but not to a differentiated community? Others raised the issue of minority and individual rights which communities with different rights might suppress.

The final session dealt with "closing the deal," or the art of the possible in the current political context. Patrick Monahan's presentation turned on a number of propositions which define both the necessary and desirable elements of a process to achieve a renewed federal constitution. In his view Quebec will hold a referendum on sovereignty unless there is an agreement in place between Quebec, the federal government and most of the other provinces. A First Ministers' Conference, including closed negotiating sessions, is the only way to achieve such an agreement in his view, but it would not be sufficient to provide widespread legitimacy to the result. The latter would require a national referendum established under joint federal-provincial auspices.

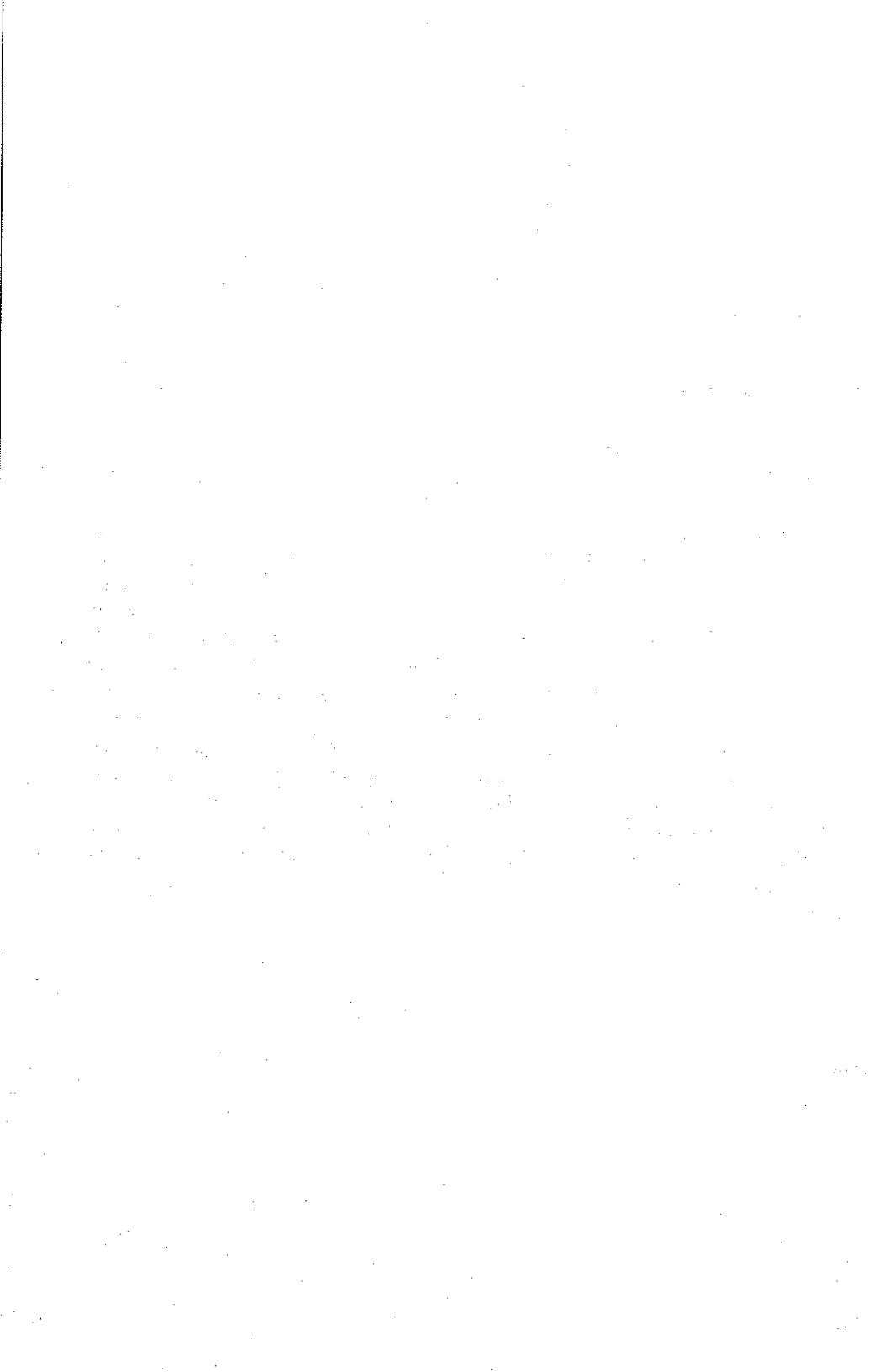
Donna Greschner provided what she termed a "cynic's comments" on what will produce a successful "deal" if not an ideal result. There is still, in her view, sufficient support for representative democracy to allow a First Ministers' Conference to reach agreement, and to avoid a national referendum. The public is generally apathetic, but could be aroused to reject any package. She predicts a minimal package including a distinct society clause in the Charter, the transfer of some powers to Quebec (possibly through the use of delegation), the recognition of the aboriginal right to self-government and some movement on Senate reform.

The last of the speakers, André Blais, provided an overview of the parameters of public opinion in the current debate. He views the federal proposals as a bold

move to appeal to Quebec with the distinct society clause rather than significant decentralization, and to provide Senate reform and the economic union to meet the demands of the rest-of-Canada. He predicts that Quebec public opinion will support the package if some aspects of the economic union proposals are toned down. The real danger in his view emerges during a national referendum campaign where anti-Quebec sentiment could lead Quebecers to reject a reform package.

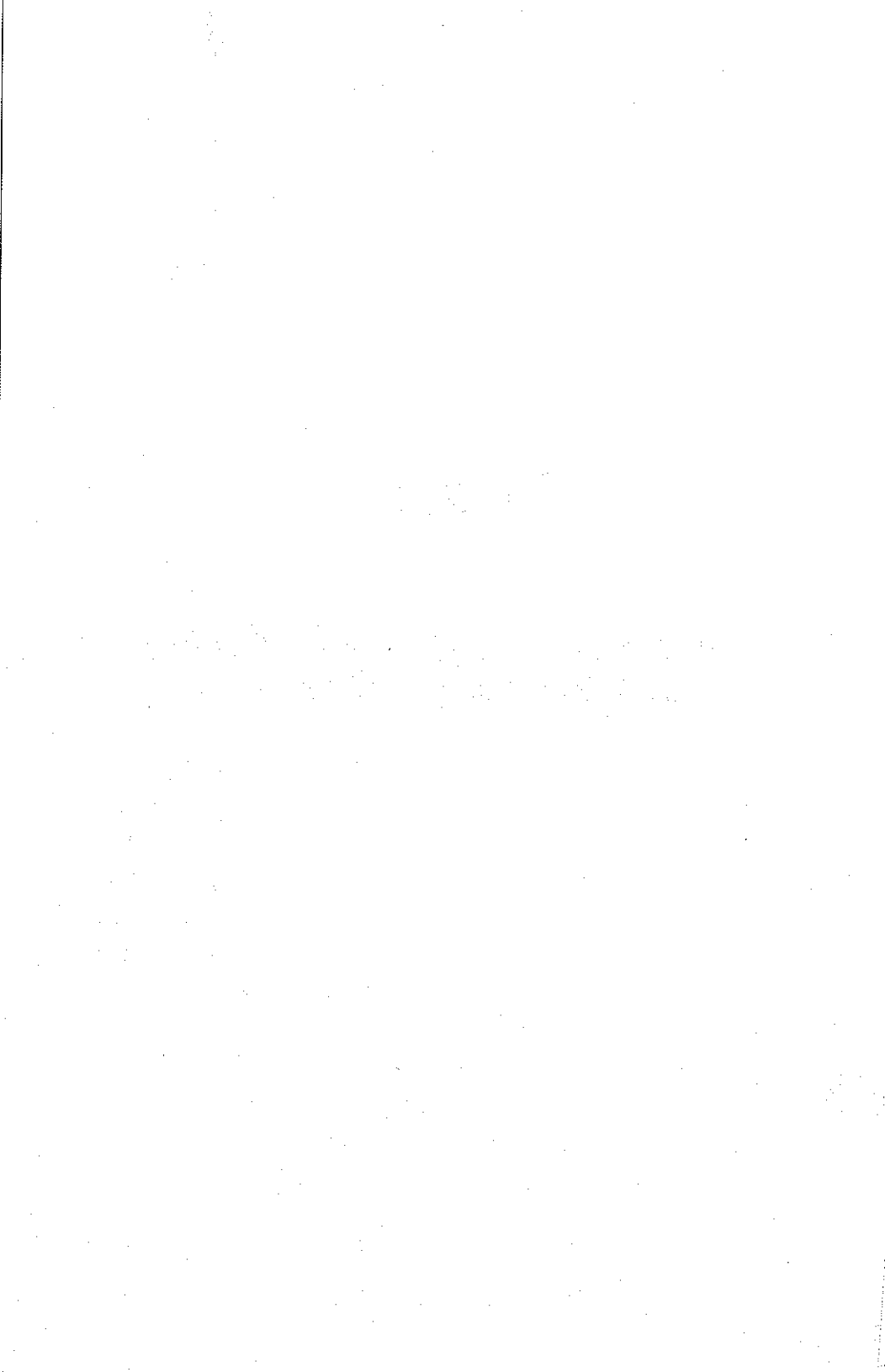
In the lengthy and animated discussion period of this last session, there were a number of insightful comments on Quebec's role in intergovernmental negotiations, the use of referenda, and the prerequisites of a "minimal deal." It was suggested that the issue of Quebec attending a First Ministers' Conference could be avoided until the last minute, and then finessed by offering observer status. It was generally recognized that a national referendum would entail a high stakes gamble. One alternative could be a "rest-of-Canada" referendum or a series of provincial referenda, although the voters' preferences might change depending on whether they are asked to vote as citizens of their province, of the rest-of-Canada (ROC) or of Canada as a whole. A ROC referendum could constitute the binding offer Quebec is seeking. As for a minimal deal, Ontario would be unlikely to approve of a package without some kind of social charter.

In summary, the conference covered a broad range of assessments of the federal proposals. On balance, however, most participants were seized by the significance of the constitutional moment and used the conference as an opportunity to put forward useful suggestions on how to revise and improve the federal proposals. It will be incumbent upon many more Canadians to take the effort to make their own assessments and provide their own input to the process of constitutional renewal if we are to achieve a stable and lasting resolution to our constitutional impasse.



# Session I

## *Centralization and Decentralization in the Federal Proposals*





## A Summary Overview

David Milne

There are at least two reasons why Canadians ought to approach this topic with caution. The first is that, although tracking constitutional proposals from the perspective of centralization and decentralization has by now become virtually a knee-jerk or instinctive response for Canadians — and I have certainly done my share of it — there is good reason to question its appropriateness. On the one hand, it makes constitutional politics take on the character of a superficial zero-sum, “winners-losers” governmental game. And if political scientist Alan Cairns is right, such a government-centred federalism is hardly the chief preoccupation of the Canadian people who look to the constitution in much broader terms; calculating the power ledger of federal and provincial governments is, if not offensive, at least peripheral to their sense of the constitution as a basis for a wider constitutive community.<sup>1</sup> Certainly, identifying and measuring the centralizing or decentralizing of power is not in itself likely to help us answer what kind of community we want, what principles we wish to live by, or even whether proposed constitutional arrangements are in fact functional. For that reason, I suspect that the people of other federations would find Canadians’ preoccupation with tracking the centralization-decentralization scorecard quite excessive.

The second reason for caution in this kind of exercise is that it is, in fact, analytically treacherous. There are no agreed standards for what we mean by centralization or decentralization, nor agreed criteria to define, to measure, and to aggregate indices of the same. Economist Richard Bird some time ago reminded us, for example, of the appalling dangers faced by people who try to track centralization and decentralization with public finance data: it is doubtless

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1 See, for example, “Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake,” in Douglas E. Williams (ed.), *Disruptions: Constitutional Struggles from the Charter to Meech Lake* (Toronto: McClelland and Stewart, 1991), pp. 108-38.

not much better with measurement games over constitutional proposals.<sup>2</sup> The subject is elusive, hard to categorize, and even harder to measure. Moreover, matters become even more complicated when proposals may not yield any evident direction at all, or even worse, when the same subject may yield *both* centralizing and decentralizing dimensions simultaneously. As we will see, this situation is neither unique nor fanciful. Finally, we cannot even count on an analytically neutral definer. More often than not, those who speak in terms of centralization and decentralization have vested interests in doing so: their agenda is ideologically loaded.

These caveats having been said, however, the task remains: how to present a schema that will allow us to get our minds around the subject of centralization and decentralization in the federal proposals? In the following figures, I have attempted to tackle that task in a comprehensive fashion and to indicate the grounds upon which particular items might be judged to be centralizing or decentralizing, or some combination of both. Thus a general snapshot of the federal proposals can be had, even if an aggregate and definitive tally has been studiously avoided. In the first two figures, in addition to the centralization-decentralization index, patterns of symmetry and asymmetry in the federal proposals have also been identified, along with an indication of whether proposed items require a constitutional amendment.

Let us begin with Figures 1A and 1B. First, what are my criteria for centralization or decentralization? There are, as you will see, in fact two categories for centralization:

- a straightforward C label where an item can be shown to confer a new power upon the federal Parliament such as with the proposed section 91A or where intrastate<sup>3</sup> versions of institutional reform are proposed that do not yield any additional powers to the provinces; and
- a C<sup>u</sup> label where the centralization does not confer any direct new legislative powers or control upon Parliament, but where authoritative Canada-wide uniform standards arise, especially from Supreme Court adjudication of Charter provisions or the economic union principles under the proposed section 121.

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2 See Richard M. Bird, *Financing Canadian Government: A Quantitative Overview* (Toronto: Canadian Tax Foundation, 1979), pp. 56-68; and Richard M. Bird, "Federal Finance in Comparative Perspective," in Thomas J. Courchene et al. (eds.), *Ottawa and the Provinces: The Distribution of Money and Power*, Vol. 1 (Toronto: Ontario Economic Council, 1985), pp. 137-78. For an interesting discussion of the problems from a constitutional perspective, see Peter Leslie, *Federal State, National Economy* (Toronto: University of Toronto Press, 1987), chapters 4, 6, and 7.

3 Editor's Note: "Intrastate" refers to processes and institutions in federal systems that deal with federation-wide representation or coordination within central institutions.

C<sup>u</sup> provisions may even lead to the Supreme Court striking down more federal than provincial laws. Yet, there would still be Canada-wide standards defined and enforced by a judicial hierarchy with the Supreme Court at its apex — itself a powerful centre-defending national institution. This centralizing categorization asks readers to consider seriously the proposition that the judiciary is, after all, a branch of government.

And what of decentralization? Here a D label in the figure can mean any of the following:

- a new exclusive provincial legislative power such as labour market training;
- limitation of federal powers over the provinces in areas such as the declaratory power or spending power;
- interstate<sup>4</sup> institutional reform that does build provincial decision making into central institutions such as the proposal for provincial nomination for supreme court justices or voting in the proposed Council of the Federation;
- decentralizing federal powers to provinces or limiting federal intrusions through administrative agreements; and
- even the devolution of federal powers over aboriginal peoples contained in the proposals for aboriginal self-government.

And finally, the label “C/D” indicates those proposals that may have a simultaneous centralizing/decentralizing effect.

## Rights and Values, Institutions and the Economy

With these preliminaries completed, what patterns are revealed in the first column of Figure 1A, that looks at centralization and decentralization in three areas: rights and values, institutions and the economy? With respect to rights and values, there are two broadly centralizing items that certainly counterbalance any of the decentralizing and asymmetrical effects of the aboriginal and distinct society clauses. One is the broadly unifying symbolism of the Canada clause, but the more important is the property rights provision. Here, and with the economic union item, there is a C<sup>u</sup> designation to indicate that these are matters where significant centralization can be expected through judicial review. In fact, even with the possible occasional legislative application of a section 33 override, property rights would certainly capture for judicial scrutiny

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4 Editor's Note: "Interstate" refers to processes and institutions in federal systems that deal with relations among constituent orders of government.

a very wide range of legislative subject matter at both federal and provincial levels.

For that reason, there will be substantial concern over the potentially broad scope of judicial centralization contained here. Moreover, since these provisions touch on some of the most sensitive social and economic legislation — including possibly environmental regulation, pitting private economic power in the name of individual rights against legislation defending the broader public purpose — they are ideologically charged. Both the left and the right can be expected to be activated, with the Supreme Court's ultimate decision-making power increasingly called into question in a democratic Canada. All of this should be distinctly reminiscent of the early debates a decade ago over the appropriate balance of power between legislatures on the one hand and courts on the other with respect to the proposed Charter of Rights and Freedoms.

In the institutional section in the middle of Figure 1A, there appears to be a nice balance between a centralizing version of institutional reform in the proposed new Senate and a decentralizing reform in the proposed procedures for Supreme Court appointments. Apart from the logic of this balance itself, there is good reason to think that Ottawa has got this part of its institutional reform agenda right: direct provincial involvement in the nomination of judges where they will subsequently be ruling on the scope of provincial legislative powers; and avoidance of provincial government involvement in the structuring of the federal Houses of Parliament where only the question of exclusive federal law making arises. Here, by opting for direct election of senators, Ottawa has sought to sensitize Parliament to the regions in its law making, while at the same time avoiding remote control of the second federal House by provincial capitals. By opting for the creation of other elected advocates who can speak for the regions at the centre, Ottawa has undercut the premiers as exclusive defenders of provincial interests.

More interesting, however, are the unique centralizing/decentralizing items here, and elsewhere in the package. In the institutional section, the proposed Council of the Federation, in exercising powers set out under the economic union section (e.g., section 91A), reveals evidence of *both* centralization and decentralization. Although it has been hard for cyclopean critics — with eyes alert to potential threats in one direction only — to see the double pattern here, it is plain enough to those who can view the proposal from both vantage points. Hence, despite all the fire and noise over the proposed section 91A, especially in Quebec, there is more to this proposal than the apparent assertion of a new exclusive federal power to make law in relation to the "efficient functioning of the economic union" or of federal threats to "harmonize provincial budgets with Canada's monetary policy."

Here, for example, is an outright federal offer to involve provinces formally in voting on proposed federal laws over the economic union and over the use

of the federal spending power; these have long been provincial objectives, especially pertinent if a return to federal unilateralism à la Trudeau is to be blocked for good. In assessing this proposal, it would doubtless be worthwhile for Quebec to review the provincial Liberal Party's own Beige Paper of 1980 to see that something of this nature had, in fact, been among the Quebec Liberal constitutional objectives at that time. Moreover, even a cursory review of the proposal would show that provinces are unlikely to be much threatened by section 91A, in the light of the high level of provincial consent that would be required for its use, and in the light of the proposed opt-out that will doubtless become permanent if the proposal is to have any life at all.

Further study of section 91A would also show that the federal government may have itself seriously blundered in advancing this proposal. First, despite the claim made in the federal package that section 91A is an "exclusive" federal power, it appears to be nothing of the sort. Unlike every other head of power in the current section 91 of the *Constitution Act, 1867*, Parliament's capacity to make laws in relation to "any matter that it declares to be for the efficient functioning of the economic union" is hamstrung from the very start by the requirement that seven provinces representing 50 percent of the population validate any such law. This can hardly be described as exercising an "exclusive" federal power. Hence, the proposal is improperly described and improperly placed in section 91 of the existing constitution.

Given the broad language of the proposed section 91A and its placement, Ottawa may also be risking the free exercise of its other genuinely exclusive economic powers under section 91. Despite the fact that the proposed new section 91A begins with the declaration that it shall not "alter any other authority of the Parliament to make laws," there is considerable political and legal risk that section 91A may well spill over or impinge upon the exclusive federal powers over trade and commerce and other economic powers. Who, for example, will not lay odds that provinces will not demand that proposed federal initiatives under trade and commerce be treated as "matters of the efficient functioning of the economic union" requiring their substantial consent? And how would Ottawa over the long run maintain politically any such distinction to the satisfaction of the other federation partners? For that matter, how long will it be before the courts are asked to distinguish laws in relation to trade and commerce from those "for the efficient functioning of the economic union" — the former a truly exclusive area of federal jurisdiction, the latter a power with no real force unless it wins very substantial provincial consent. The saving grace from a legal point of view may be that section 91A is declaratory in nature, and the courts may refuse to entertain challenges of this kind where Parliament has not been explicit that it is acting on this ground. But the political risks are certainly real.

It is therefore important to look at this provision in its true double-sided nature and not fall victim to one-eyed accounts. The Council of the Federation proposal matches similar concepts in the 1980 Quebec Liberal Beige Paper, the recommendations of Mel Smith in his recent report for the British Columbia government, and political scientist Peter Leslie's background study on the European Community as a political model for Canada.<sup>5</sup> Its necessarily double-edged nature follows as a matter of course in all of these studies. As Peter Leslie has put it:

Fulfilment of the purposes of economic and political union in Canada requires collaborative action engaging both the federal government and the provinces. "Negative integration" cannot be achieved by the provinces acting alone and federal powers are inadequate to achieve "positive integration" without the involvement and support of provincial governments. *Coordinate and co-responsible orders of government, not coordinate and independent ones are called for.*<sup>6</sup>

Similarly, the Beige Paper argues:

It is now imperative to invent an institution which will allow the provinces, which have become senior governments, to participate directly in the government of the federation itself, and to verify or influence, as the case may be, the federal government's actions in matters where consultation between the two levels of government is vital to the health of the federation.<sup>7</sup>

It is worth underlining too, as is indicated in the second column of Figure 1A, that Quebec and Ontario exercise unusual leverage on such decision making through the Council of the Federation by virtue of the 50 percent population requirement (i.e., the same decision rule as the general amending formula of section 38 of the *Constitution Act, 1982*). This consequence follows unavoidably from the prior decision to use the amendment formula logic for validation of federal law under section 91A. The question arises whether the consent of Ontario and Quebec would have been forthcoming on shared-cost programs such as Medicare were these provisions in place at that time. This asymmetry in blocking power is higher than that in the European Community where no two states can so dominate. Given that we are likely to see more frequent use of section 91A in policy than we are of amendment of the constitution, serious rethinking of the wisdom of requiring this level of consent would seem to be in order. Certainly, first ministers did reconsider the use of the federal spending

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5 See The Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation* (Montreal: Quebec Liberal Party, 1980); Melvin H. Smith, *The Renewal of the Federation: A British Columbia Perspective* (Victoria: Ministry of the Provincial Secretary, 1991); and Peter Leslie, *The European Community, A Political Model for Canada?* (Ottawa: Minister of Supply and Services, 1991).

6 Leslie, *The European Community*, p. 44.

7 See *A New Canadian Federation*, p. 52.

power at Meech Lake, leading them at that time to reject this amendment-level threshold of consent for spending power matters.

In the second column on symmetry-asymmetry in Figure 1A, the evidence suggests that most items are symmetrical. Wherever they are not, except for opting out, the chief cause for asymmetry arises from the status of Ontario or Quebec under the amending formula, representation in the Senate, or in Supreme Court nominations. As for the question of amendment procedures, only three items — Commons reform, Bank of Canada reform, and fiscal harmonization — do not appear to require constitutional amendment to be acted upon, but rather can be achieved through changes to federal legislation or by other routes.

## The Division of Powers

The pattern is quite different in the division of powers in Figure 1B. Here, the provisions are almost all decentralizing, although both legislative delegation and streamlining items can lead to movement in the other direction. However, measured against the scale of decentralizing change considered necessary less than a year ago by many analysts, this is by no means a radical decentralizing program.<sup>8</sup> The only straightforward and unqualified acceptance of exclusive provincial legislative authority in the package extends to labour market training. Here, despite the fact that many provinces have no wish to assume the jurisdiction and will not do so without express fiscal compensation and despite the fact that Quebec could be successfully accommodated in ways that would not bind other provinces, Ottawa has proposed to impose Quebec's nationalism upon the other provinces.

On immigration, the provision does nothing more than rationalize the status quo, whereas on culture, the same technique of an administrative agreement is proposed to deal with issues that will be of most interest to the province of Quebec. On broadcasting, the consultation process in this area is a long way from the wish list of most provinces over many years, and is well short of the recommendations respecting broadcasting advanced by the Macdonald Royal Commission in 1985.

On the other hand, the proposal for legislative delegation constitutes a real sleeper in the package — offering the possibility of major transfers of legislative jurisdiction to Quebec and possibly other provinces from Parliament in subsequent years. The proposal is vague and short on detail, but as it stands it

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8 See, for example, the arguments of specialists in the collection by Ronald L. Watts and Douglas M. Brown (eds.), *Options for a New Canada* (Toronto: University of Toronto Press, 1991.)

would offer provinces a better chance to win their decentralizing objectives indirectly than would have been possible through the amendment route. It is also a supremely asymmetrical device that could, and probably would, be used selectively to cut side deals with provinces that are the most persistent in their demand on federal powers, while leaving in place Ottawa's powers with more docile provinces. While I have accepted the argument of Ottawa that this provision can proceed under the rules of the general 7/50 formula, it should be noted that there are arguments that this provision amounts to an amendment of the amending formula and would therefore require unanimity. Whatever the legal answer, there can be little doubt that this may be the route by which a more substantial devolution of powers to Quebec might be accomplished.

Decentralizing too are the various provisions that seek to curtail or eliminate certain unilateral federal powers affecting the provinces. The general limitation of the federal spending power in new social programs is one example, while limitation of the scope of the federal spending power over certain existing subjects in proposal no. 24 is another. Gone altogether is the federal declaratory power — a much stronger resolution of this perennial issue than requiring the exercise of this power to be made subject to a high level of provincial consent. On the other hand, the offer of a divided federal-provincial residual power appears to be mostly cosmetic, since the offer to the provinces extends only to "non-national" matters not listed in the division of powers — a power that the provinces arguably already have by virtue of section 92(16) (*Constitution Act, 1867*), namely the power to legislate over all matters of a purely private or local nature in the province.

Perhaps a more compelling way to illustrate that the decentralizing program is not that extensive would be to compare the federal proposals to traditional Quebec Liberal demands over the last decade or more. For that purpose, Figure 2 compares the federal response rate to issues raised by the Allaire Report, the 1985 pre-Meech demands, and the Beige paper.<sup>9</sup> This figure shows that only about half of the issues raised by the Allaire Report are even addressed in the federal proposal, while those that do command a response, more often than not, are a far cry from what was demanded. The Meech Lake agenda has also not been met in this federal proposal: two items (a Quebec veto and entrenchment of the Supreme Court) are not included among the 28 recommendations because of the requirement to secure unanimous consent; a third, the distinct society, has been watered down to be made more palatable to English-speaking Canada. Only the additional amendment-level threshold for initiating new programs under the federal spending power constitutes a "Meech-plus." However, the

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9 I wish to extend my sincere thanks to Dwight Herperger of the Institute of Intergovernmental Relations at Queen's University for his preparation of these figures.



Beige Paper does much better in securing virtually a two-thirds response rate in the federal proposal, with eight items fully accepted, including the most innovative in the Council of the Federation.

Figure 3 summarizes many of the significant matters that have been left out of the federal proposal and indicates, where possible, the reasons for their omission. This list is worth pondering. The decision to include nothing that might require unanimous consent of all provinces took at least four items out of the package: the amending formula; entrenchment of the Supreme Court; language provisions; and the federal unilateral powers of reservation and disallowance. The retention of the latter as part of the prerogatives of the Queen and her representatives is hugely ironic, given the fact that these are among the most neocolonial features of the Canadian constitution. Lack of response to both a proposed social charter and to Quebec demands over social policy is also highly revealing. It would appear that Ottawa is not only reluctant to cede ground to the provinces in the highly visible area of social policy, but is also cool or non-committal on probably the most popular "peoples-based" item in this constitutional round. All of this suggests that much remains for the next phase of federal planning, with more fighting, negotiations and ideological posturing to come.

Not only does this package not yield to radical calls for decentralization, but it also clearly rejects any notion of special legislative status for Quebec. The views of critics such as Alan Cairns who argued earlier this year that nothing less than special status was required for a resolution to the crisis have not been accepted.<sup>10</sup> Instead, the reliance upon symmetry of form, building on a notion of formal equality of provinces, has triumphed. At the same time, the formal symmetry cannot disguise the fact that these provisions permit and even encourage asymmetrical applications as a means of resolving the clashing nationalisms of Quebec and rest-of-Canada. No device is likely to do so more than the proposal for legislative delegation, a route that the Cabinet Unity Committee appears to have preferred to concurrency with provincial paramountcy (CPP).<sup>11</sup> While the delegation route, once in place, is likely to be an easier way to effect such changes, it also may encourage more side deals than would a "concurrency with provincial paramountcy" (CPP) approach.

Finally, it is worth underlining that the current federal proposals reveal an unresolved tension between adherence to two often incompatible views of

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10 Alan Cairns, "Constitutional Change and the Three Equalities," in Watts and Brown (eds.), *Options for a New Canada*, pp. 77-102.

11 My own argument for concurrency with provincial paramountcy can be found in "Equality or Asymmetry: Why Choose?" in *Options for a New Canada*, pp. 285-308. Legislative delegation had been recommended by the Beaudoin-Edwards Committee, among others.

federalism. The first — the collaborative model reflected in proposals such as the Council of the Federation — openly admits the inevitability of intergovernmental overlap and entanglement requiring shared decision making and co-responsibility over the economy and social policy. The other — the exclusive watertight compartment theory of federalism reflected in the provisions for streamlining and voluntary redefinition of roles in recommendations no. 24 and no. 26 of the federal proposals — the CPP model — argue for a disentanglement approach over the division of powers. In this respect, as in so much else in this set of federal proposals, the image is Janus-faced. Sorting out the apparent rationale and politics will no doubt occupy Canadians for some years to come.

Figure 1A  
Centralization-Decentralization in the Federal Proposals:  
Rights and Values, Institutions and the Economy

ITEM	C/C <sup>1</sup> /D <sup>1</sup>	S/A <sup>2</sup>	GAINA <sup>3</sup>	REMARKS
Rights and Values Property (proposal #1) Notwithstanding (#1) Distinct Society (#2) Duality (#2) Aboriginal (#4, 6) Canada Clause (#7)	C <sup>1</sup>	S S A S A S/A	GA GA GA GA GA GA	C <sup>1</sup> = Substantial Canada-wide uniformity of law under Supreme Court. A= Sensitizes courts in application of charter norms to Quebec. A= Asymmetrical for citizens and for negotiated outcomes. C <sup>1</sup> = Broadly unifying clause with some asymmetrical elements.
Institutions Commons (#8) Senate (#9, 10) Supreme Court (#12) Council of Federation (#28)	C D C/D	A A S/A	NA GA GA GA	Moderate reform without referenda, recall, fixed terms, etc. C= <i>Intrastate</i> version of Senate reform; A= "equitable, not equal" representation, aboriginal seats, double majority voting. D= <i>Interstate</i> reform with provincial and territorial nomination of justices; A= Quebec alone proposing 3 civil law justices. C= New central institution under federal leadership; provinces exercise formal powers in decision making (collaborative). S= Equal provincial representation; A= Ontario and Quebec blocking powers.
Economy Econ. Union (s. 121) (#14) Econ. Mgmt. (s. 91A) (#15) Harmonization of Fiscal Policy (#16) Bank Reform (#17)	C <sup>1</sup> C/D C/D	S S/A S/A S	GA GA NA NA	C <sup>1</sup> = One economic space under uniform rules set by Supreme Court. C/D= New federal power but its exercise depends upon substantial provincial consent; S= except for Ontario-Quebec blocking powers and opt-outs. Collaborative mechanism as above. Provides for mild regional inputs to "sensitize" Bank.

<sup>1</sup> C= centralized; C<sup>1</sup>= Canada-wide uniform standards or unifying provisions; D= decentralized.

<sup>2</sup> S= symmetrical; A= asymmetrical.

<sup>3</sup> GA= amendment by general amendment procedure required under s. 38; NA= no amendment is required.

**Figure 1B**  
**Centralization-Decentralization in the Federal Proposals:**  
**Division of Powers**

ITEM	C/C/D <sup>1</sup>	S/A <sup>2</sup>	GAINA <sup>3</sup>	REMARKS
Training (proposal #18)	D	S	GA	D= To be made an exclusive provincial power under section 92. S/A= Administrative agreement provides formal symmetry while permitting asymmetrical outcomes that would be entrenched.
Immigration (#19)	D	S/A	NA	
Culture (#20)	D	S/A	NA	S/A= Administrative agreement provides formal symmetry while permitting asymmetrical outcomes that might be entrenched. Better consultation and sensitizing to regional/provincial concerns.
Broadcasting (#21)	D	S	NA	D= Transfer of residual "non-national matters" to provinces. D= Elimination of power is a stronger measure than requiring 7/50 provincial consent.
Residual (#22)	D	S	GA	
Declaratory (#23)	D	S	GA	D= Substantial provincial consent required; S/A= symmetrical form but 50% population rule and opt-outs permit asymmetry. Either centralizing or decentralizing; S/A= symmetrical form that can be freely used as asymmetrical device.
Spending Power (#27)	D	S/A	GA	
Legislative Delegation (#25)	D or C	S/A	GA	Multilateral agreements (that might or might not be subsequently reflected in new constitutional provisions) that aim to limit or define more precisely the federal role and use of the spending power in these normally provincial areas of jurisdiction. Streamlining could take centralizing or decentralizing direction, though decentralizing appears more likely.
Recognizing Provincial Jurisdiction (#24): forestry, mining, recreation, housing, municipal affairs	D	S	NA	
Streamlining (#26): drug prosecutions, wildlife conservation, soil and water conservation, transp. of dangerous goods, financial sector regulation, aspects of bankruptcy law, unfair trade practices, inspection programs, ferry services, small craft, harbours	D or C	S or A	NA	

Figure 2  
 Proposals for Constitutional Reform:  
 A Comparison of Quebec Liberal Party Reports  
 With the Federal Government 1991

	Reports			
	Beige Paper 1980	Mastering Our Future 1985	Allaire Report 1991	Federal Government 1991
General Principles				
Residual Power	P		P	FP
Legislative Delegation	yes*		abolish	yes
Declaratory	abolish			abolish
Peace Order and Good Govt.	abolish			F
Emergency Powers	F <sup>1</sup>			F
Reservation and Disallowance	abolish	abolish		
Institutions				
Senate	abolish			
Intergovernmental Council	yes			reform
Supreme Court	entrench <sup>2</sup>	entrench <sup>3</sup>	abolish	yes

Legend:  
 F = federal power  
 P = provincial power  
 C = concurrent power (paramountcy noted as superscript)  
 \* = as identified but with limitations  
 S\* = "streamlining" proposal to reduce overlap between governments  
 A\* = proposed "agreements" to define role of each level of government

1 = require consultation with affected provinces  
 2 = provincial role in ratifying nominations to the bench  
 3 = provincial role in selection of justices

Figure 2 (continued)

	Beige Paper 1980	Mastering Our Future 1985	Allaire Report 1991	Federal Government 1991
International Relations				
Foreign Policy	F	FP <sup>1</sup>	FP	
International Relations	F <sup>2</sup>			
Treaty Implementation	FC	C	FP	FP <sup>A</sup>
Immigration				
Functioning of the Economic Union	entrench			entrench
Factor mobility	F		P	
Trade and Commerce	F		P	
Regional Development	F		FP	S* <sup>3</sup>
Financial Institutions	FP		FP	S* <sup>4</sup>
Bankruptcy (commercial/personal)	F/P		FP	
Transportation	FP		FP	
Telecommunications	F		FP	
Postal Services	FP		P	FP <sup>5</sup>
Broadcasting				
Finance and Fiscal Relations	C			
Taxation	F		FP	
Equalization	F <sup>6</sup>	F <sup>7</sup>	F	
Spending Power			abolish	F <sup>6</sup>

Legend:

- F = federal power
  - P = provincial power
  - C = concurrent power (paramountcy noted as superscript)
  - \* = as identified but with limitations
  - S\* = "streamlining" proposal to reduce overlap between governments
  - A\* = proposed "agreements" to define role of each level of government
- 1 = recognition of a Quebec role, especially in relation to "la Francophonie"
- 2 = requires provincial consent in areas affecting provincial jurisdiction
- 3 = streamlining refers to "some aspects of financial sector regulation"
- 4 = streamlining refers to "some aspects of bankruptcy law"
- 5 = proposed provincial involvement limited to consultation and nomination of regional commissioners of CRTC
- 6 = subject to approval of two-thirds of the provinces through vote of an intergovernmental council; opt-out with fiscal compensation
- 7 = subject to provincial consent similar to the general amending formula

Figure 2 (continued)

		Reports			
		Beige Paper 1980	Mastering Our Future 1985	Allaire Report 1991	Federal Government 1991
<b>Resources and Environment</b>					
Agriculture		FCP		P	
Fisheries				FP	FP <sup>1</sup>
Natural Resources		P		P	
Energy		P		P	
Nuclear Energy		C <sup>f</sup>			
Environment		FP <sup>2</sup>		P	S* <sup>3</sup>
<b>Social Affairs and Labour</b>					
Education		P		P	
Research and Development		P		P	
Health		P		P	
Public Health/Sanitation		P/PF*			
Social Services		P		P	
Family Policy		P		P	
Labour Relations		P*			
Unemployment Insurance		P		P	
Labour Market Training		P	P	P	P
Income Security		FP			
Income Redistribution		FP			

Legend:

F = federal power

P = provincial power

C = concurrent power (paramountcy noted as superscript)

\* = as identified but with limitations

S\* = "streamlining" proposal to reduce overlap between governments

A\* = proposed "agreements" to define role of each level of government in this jurisdiction

1 = proposal to recognize exclusive provincial jurisdiction over forestry

and mining

2 = primarily principal responsibility but with four exceptions

3 = "streamlining" recommended for wildlife conservation and protection,

transportation of dangerous goods, and soil and water conservation

Figure 2 (continued)

	Beige Paper 1980	Mastering Our Future 1985	Allaire 1991 Report	Federal Government 1991
Law and Security				
Justice	C		FP	S*1
Court Administration	FP			
Marriage and Divorce		P	P	
Public Security	P			
Other Matters				
Language			P	
Culture	FP		P	FP <sup>A</sup>
Municipal Affairs	P		P	P
Housing	P		P	P
Aboriginal Affairs			FP	
Recreation and Sports			P	P
Tourism			P	P

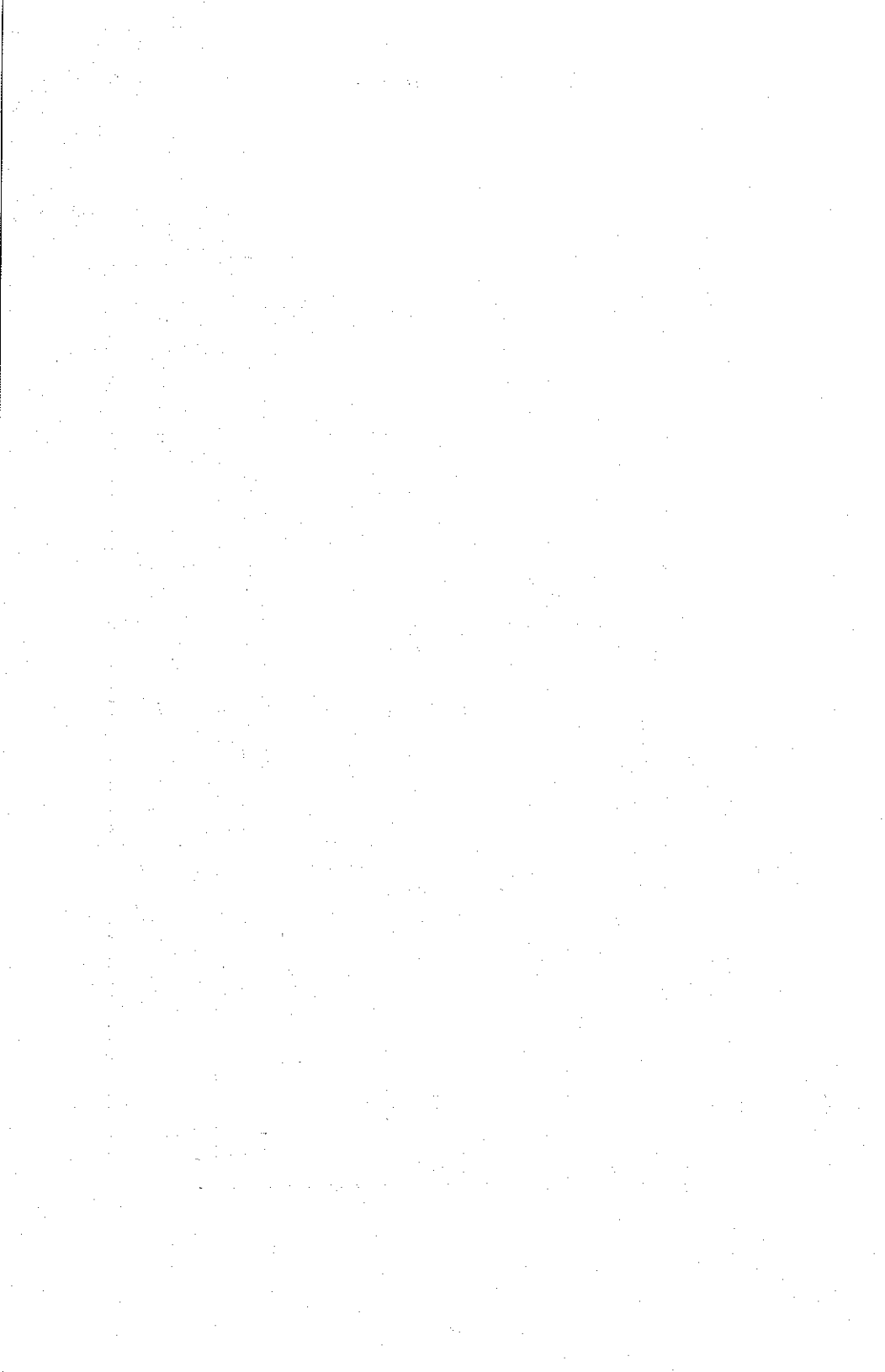
Legend:

- F = federal power
  - P = provincial power
  - C = concurrent power (paramountcy noted as superscript)
  - = as identified but with limitations
  - S\* = "streamlining" proposal to reduce overlap between governments
  - A\* = proposed "agreements" to define role of government in this jurisdiction
- 1 = "streamlining" recommended for drug prosecutions



Figure 3  
Constitutional Items Left Out of the Federal Proposals

ITEM	REMARKS
Amending Formula (proposal #13)	Although supportive of a Quebec veto, Ottawa plans no immediate action unless the difficulties of securing unanimous consent can be overcome.
Supreme Court (#12)	Similarly, entrenching the court and its composition (especially 3 justices named by Quebec), would proceed in this round only if unanimous consent was assured.
Language	Language jurisdiction and bilingualism policy have been deliberately left out (except indirectly through the distinct society and duality clauses) because of the unanimity requirement for such changes and probably because of the extreme sensitivity of the subject.
Social Charter/Social Policy	A social charter has been excluded from the current package, together with any consideration of measures for securing and stabilizing the system of fiscal transfers. The federal government has also not proposed any major jurisdictional transfers in social policy to Quebec.
Equality of Provinces	This principle, so vital to regional interests and present in the preamble to the 1987 Meech Lake Accord, is not expressed in the package, particularly not in the Canada Clause.
Disallowance & Reservation	Frequently cited for abolition in scores of reports, disallowance and reservation are left out of the current package because of the requirement of unanimous consent for such changes.
Post-secondary Education	Despite persistent federal interest in the interrelationship of this subject and the economy, and despite the protection provided provinces to opt out with compensation, this item does not directly appear in the package. Moreover, exclusive jurisdiction over labour market training is ceded to the provinces. Of the new items, only the management of the economic union power (requiring substantial provincial consent for its exercise complete with opt-outs) provides a possibility of federal involvement in the setting of skills standards.
Unemployment Insurance	Unemployment insurance was omitted from the package due to a prior bilateral agreement that had Quebec recognize federal jurisdiction on the one hand, while Ottawa would cede (via an administrative agreement) control over certain areas of UI to Quebec on the other.
Environment & Other Matters	Apart from incidental references to this subject under streamlining, the division of powers over the environment does not appear in the package. There are also other omissions of note -- particularly the question of provincial involvement in the implementation of treaties where the subject matter falls into provincial jurisdiction.



# The Economic Union and Other Aspects of the Federal Proposals

*Thomas J. Courchene*

My assigned task is to comment on some economic aspects of the federal constitutional proposals and within this to focus on the centralization/decentralization implications. A secondary role was to bring to this conference some of the ideas emanating from the companion John Deutsch Conference yesterday which focused on the economic underpinnings of the federal proposals. This assignment has suddenly grown more difficult with David Milne's tabular *tour d'horizon* of the proposals in terms of how they relate to (a) decentralization/centralization, (b) symmetry/asymmetry and (c) procedure (namely, the nature of required constitutional amendment if any). I do not wish to rework this ground nor will I spend much time on the institution of the Senate (covered by David Elton) although some comments on the interaction between the Senate and the Council of the Federation may be in order.

Sandwiched, therefore, by the two David's and their papers, the way appears open to do my own thing, as it were. I shall proceed by a series of bullets, or short comments, often not fully substantiated in order to bring my own perspective to the general issue of centralization versus decentralization.

## General Comments

1. At the most general level, there is a growing recognition that our fixation on centralization versus decentralization may be more confounding than illuminating. Three examples come to mind, apart from those entries in Milne's table that have both a C (centralizing) and a D (decentralizing) attached to them. The first relates to the introduction of the Quebec personal income tax in the 1950s. This can be viewed as an "opting out" of sorts, an option open to all provinces. Alternatively, it could fall under what Milne and I have called "concurrency with provincial paramountcy (CPP)" — all provinces have the right to strike

their own PITs (personal-income-taxation regimes). But how does one classify this on the centralization/decentralization spectrum? For Quebec, it is presumably decentralizing since they can now go their own way on their portion of the PIT. For the rest-of-Canada (ROC), however, this can be viewed as centralizing — with Quebec out of the fold the rest of us have modelled at the same time the most harmonized and the most shared personal income taxation of any federation. Indeed, it is typically viewed as a model for federal systems. Thus, it is *both* centralizing and decentralizing. More to the point, this sort of opting out may well be a solution rather than a problem, since it accommodates the preferences of all parties of the federation. In other words, it is “federalizing.”

The second example relates to the Charter. It is decentralizing in the sense that it restricts the manoeuvrability of both levels of government and transfers powers, via the courts, to citizens. But it is centralizing in the Alan Cairns sense that these are national, not provincial, rights adjudicated by national institutions.<sup>1</sup> Again, centralization/decentralization is not a particularly useful filter for viewing this development. Rather, it is best viewed as an exciting experiment in terms of grafting a checks-and-balances approach onto a parliamentary system, with the notwithstanding clause as a potential safety valve to preserve some degree of parliamentary supremacy.

The third example is the Canada-United States Free Trade Agreement (FTA). The FTA is decentralizing (with respect to *all* governments) because it relies on markets and markets are inherently decentralizing. It is also decentralizing in the more traditional sense that the federal government is bound by things like government purchasing preferences and financial regulation whereas the provincial governments are not so bound. Reality is changing all of this. Multilateral trade negotiations are pressing for the removal of dairy quotas and provincial wine and beer preferences, while the United States under the FTA has led to a frontal attack on Quebec Hydro and its subsidized electricity for firms such as Norsk Hydro. Issues related to centralization/decentralization simply do not capture what is happening. In the present case, the issue is the nature of the global trading environment and its evolution and whether we are in or out, not whether this new regime might be centralizing.

To be sure, this first point is hardly a “bullet,” given the elaboration, but it serves to emphasize that we are being buffeted by internal and external shocks which cannot be forced into the artificial centralization/decentralization construct. Having said this, I shall likely violate my own admonitions in terms of some of the following points.

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1 See for example, Alan C. Cairns, “The Politics of Constitutional Renewal in Canada,” in Douglas E. Williams (ed.), *Disruptions: Constitutional Struggles from the Charter to Meech Lake* (Toronto: McClelland and Stewart, 1991) pp. 66-107.

2. Globalization is altering the traditional nation state. In my own research, I have emphasized the transition from multinational corporations (which are subject to host-country constraints) to transnational corporations (which are not, whether under the national treatment provision of the FTA or the "single passport" concept of Europe 1992). This transition is forcing national governments to resort to supra-national structures such as the EC (European Community) and the FTA as well as international regulatory regimes like the Bank for International Settlement rules for financial institution capital adequacy (which now have more than a dozen national signatories).

Globalization and in particular the telecomputational revolution is devolving power to citizens. Moreover, the process of globalization is, for the present at least, spreading across nation states via international cities, *not* national governments. These international cities (Toronto, Montreal and Vancouver for Canada) may be "constitutionless," but they are eclipsing provincial governments in terms of centres of growth, innovation and even culture. This is not a uniquely Canadian problem. But the message is that in the face of these changes one cannot look at Canada solely in terms of the old-style *internal* conceptions.

3. Globalization or economic integration is creating problems for the welfare state everywhere. As human capital investment becomes more important relative to physical capital investment, social policy merges with economic policy. Yet the European Community is having a very difficult time implementing a pan-European social policy, in spite of the fact that all nations have signed on to the European "social charter." Phrased differently, it will probably take decades for Europe to achieve the transferability of social policies that we have achieved in Canada. But we too are struggling with integrating our social contract not only within our renewing of federalism but also within an integrated North America. The issue essentially becomes one of how to maintain an east-west social contract in the face of North American and, progressively, north-south economic integration. Europe is facing much the same problem and, contrary to Canadian views on the subject, my experience from my various trips to the European Commission in Brussels is that they are still at square zero.

Now that I have broached some aspects of Canadiana, I want to turn to some particular Canadian challenges.

## Canadian Observations

4. Within Canada, traditional east-west economic integration is progressively giving way to north-south economic integration or, in British Columbia's case, to south and Pacific Rim integration.

5. Related to this last point, what binds us together east-west will increasingly be a social policy or values "railway" rather than an economic policy "railway."

6. The traditional east-west transfer system is increasingly difficult to sustain in the face of north-south economic integration. This is especially the case for place-prosperity transfers which may, under FTA-type integration, no longer end up back in Ontario but rather in North Carolina or California.

7. Our social policy railway is being undermined because of the unwinding of, or at least the uncertainty with respect to, the federal-provincial transfer system. Whether this is entirely deficit driven or whether this is philosophically driven I will leave to others to decide. The clear consequence is that the have-not provinces will be reeling for the foreseeable future (and some *have* provinces as well). One reaction to this is, of course, the call for a "social charter." More on this later.

8. Canada is a unique federation. Soon, we may be the world's largest federation, depending on the way that events unfold in the USSR and in Russia (which is also a federation of sorts). We are far more diverse, spatially, than is the American federation. Moreover, our provinces have much different desires and capabilities in terms of relying on their own provincial governments to deliver social and economic policy. On this score, Quebecers turn to the National Assembly for economic direction far more than Ontarians turn to Queen's Park. This may be changing now, but the Ontario business community probably remains fearful and would prefer to cast its lot with the federal government. Alberta is probably an important focal point for policy in the energy sector. I do not know enough of British Columbia to render a meaningful assessment, but I would guess that the B.C. government will progressively play an increasingly important role in the socio-economic-cultural future of the province, since the federal government, dominated as it is by Ontario and Quebec, is unlikely to be as sensitive to B.C. needs as would be the B.C. government, particularly as they relate to full integration with the Pacific Rim.

9. This brings me to the new-found principle of our federation — symmetry. Historically, the provinces were never symmetrical in their powers, as David Milne has pointed out in a recent publication.<sup>2</sup> More to the point, with different economic interests, with different capabilities defined by size and scale, and with different traditions in terms of the role of provincial governments in the economic sphere, symmetry cannot make any economic or even political sense as Canada and its provinces wrestle with maintaining (or regaining) a competitive edge in the emerging global order. I do not want to speak for David Milne, but it is the case that both he and I have argued strenuously for "concurrency

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2 See David Milne, "Equality or Asymmetry: Why Choose?" in Ronald L. Watts and Douglas M. Brown (eds.), *Options for a New Canada* (Toronto: University of Toronto Press, 1991), pp. 285-307.

with provincial paramountcy" (CPP). In my case, it was clearly my intention to allow provinces who had the need and capacity to undertake greater responsibilities than other provinces. I think that both of us would agree that in terms of the various powers "transferred" exclusively to the provinces in the federal proposals, it would have been far more appropriate to place these under CPP, since some provinces may well prefer to have Ottawa continue to legislate on their behalf.

With all of this as backdrop, let me now turn to the federal proposals focusing initially on those relating to the economic union.

## The Federal Proposals

### *The Economic Union Proposals*

10. In terms of the economic union provisions, there is, I think, close to universal support for the proposition that Canada needs both "negative integration" (what governments cannot do in terms of barriers) and "positive integration" (what governments ought to do in terms of enhancing the internal markets). In this context section 121 can be viewed as focusing on negative integration and section 91A on positive integration.<sup>3</sup> More generally, measures to preserve and promote the economic union are the *quid pro quo* for a devolution of powers.

11. Nonetheless, my personal evaluation of these economic union proposals is that they are unacceptable to Quebec and (I suspect) to many other provinces as well. The problem in part is that they do not bind Ottawa. The proposed section 121(3)a which exempts regional development initiatives effectively means that Ottawa cannot be bound since almost everything Ottawa does on the spatial front can fall under the regional development umbrella. And by definition, section 91A cannot bind Ottawa since it is a federal power. The economists in the companion conference held on 29 November generally reacted negatively to this *de facto* exemption since, in spite of supporting both negative and positive integration, they noted that in terms of the economic costs of barriers the available research indicated that federal barriers (regional aspects of Unemployment Insurance (UI), transportation policy, tariffs, and initiatives such as the National Energy Program) were among the more costly of various impediments to the economic union.

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3 Refers to proposed sections 91A and amendments to section 121, of the *Constitution Act, 1867*.

12. Section 91A presents special problems. The two extreme points of view here are (a) that the declaratory process would work well with the result that there is a gradual cumulation of federal powers under 91A; or (b) that blocking coalitions would emerge (e.g., Ontario/Quebec or the four Atlantic provinces) and section 91A would become totally ineffective. This latter scenario is a problem because there *is* a need for more positive integration in the economic union. The former is the aspect that really concerns Quebec because, in effect, it would *lose its veto* on changes to the division of powers. Suppose, for example, that under 91A Parliament declared that for the efficient functioning of the economic union all insurance companies should be federally chartered. At present, most medium or large insurance companies charter either with Ottawa or with Quebec, so that this may not be an important issue to the other provinces. Should this initiative achieve the support of seven provinces with 50 percent of the population (the 7/50 rule for short), then the division of powers will have changed dramatically, at least from Quebec's standpoint. It could be countered that Ottawa has no intention to move in these areas and that in any event Quebec could opt out, at least temporarily. However, the federal government did mention concern over the regulation of the securities industry in its discussion of section 91A, and many of the financial institutions outside Quebec favour a greater federal regulatory role, so that such initiatives are well within the realm of possibility. Thus, one version of the challenge posed by all of this (or at least my version of the challenge) is to design a set of arrangements that can incorporate both positive and negative integration and which are at the same time relatively neutral with respect to the division of powers.

13. The economists in the companion conference on 29 November were very innovative in terms of redesigning the economic union proposals.<sup>4</sup> Douglas Purvis effectively turned section 91A on its head. In his view, the Council of the Federation should play the role as initiator and once the 7/50 requirements are met, Parliament and/or the relevant provinces would then pass the legislation. To stem the division of powers concern, the wording of 91A(1) would be altered to delete "exclusively" and "declares" (or at least have Council rather than Parliament declare) and the section could be renumbered to say, section 95A, (i.e., the concurrent powers section of the constitution).

Richard Harris' concerns had to do, among other things, with the fact that assessing the costs of barriers is very complex, so that some version of a trade tribunal or dispute-resolution mechanism could be contemplated. In particular,

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4 See published proceedings in R. Boadway and D. Purvis (eds.), *Economic Aspects of the Federal Government's Constitutional Proposals* (Kingston: John Deutsch Institute for the Study of Economic Policy, 1991).



opting out should only be allowed if the opting out province can demonstrate injury *and* that such opting out does not harm others.

Michael Trebilcock and Robert Howse built on the Harris notion and proposed a permanent federal-provincial commission on the economic union. This would be a committee of experts and would report to the Senate to enhance its accountability. The committee would issue "directives" (à la Europe) which, if ratified by the Senate, would become part of section 121, which would then be interpreted by the courts. Presumably all of this could be done within an expanded constitutional text for section 121.

14. To these three proposals, I want to add a fourth, drawn from a 1984 article by Richard Simeon.<sup>5</sup> The feature of the Simeon proposal is that it would by-pass the courts entirely. Among the reasons that Simeon musters to support this approach is that "judicial decision may short-circuit the process of negotiation between competing but legitimate interests"<sup>6</sup> and:

By their nature, judicial decisions are black and white, yes or no. The Courts cannot and should not make positive proposals. Hence, judicial enforcement cannot ensure compromise and trade-offs; it is ill-suited to weighing "the bads" of barriers and "the goods" of other goals (p. 371).

Somewhat modified, his 1984 proposition for a new section 121 was:

121.1 Neither Canada nor any province shall by law or practice affect the movement throughout Canada of persons, goods, services, or capital in such a manner as unduly to impede the operation of the Canadian economic union or to discriminate on the basis of province or territory of origin of such goods, persons, services or capital.

.2 Legislation or practices undertaken by the legislature of any province or by Parliament which are deemed by any other legislature or by Parliament to violate in its pith and substance subsection (1) of this section shall be adjudicated in the following manner:

a) A federal-provincial Committee on Economic Affairs is hereby constituted.

b) It shall be the function of this Committee to:

i. engage in a continuing review of the operation of the common market and of policies which affect it.

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5 Richard Simeon, "Some Observations on the 'Powers Over the Economy,'" in D.W. Conklin (ed.), *A Separate Personal Income Tax for Ontario: Background Studies* (Toronto: Ontario Economic Council, 1984), pp. 365-80.

6 *Ibid.*, p. 371.

- ii. Actions deemed by any government to violate subsection (1) and which are not resolved by discussion in a reasonable period may be appealed to the Committee for a formal ruling.
  - iii. If a majority of the Committee, consisting of the representatives of the Government of Canada and the representatives of a majority of the provinces [formula could vary], so agree, then the act or practice in question shall be declared *ultra vires* and invalid, and shall not be subject to further appeal to the courts.
- c) The Committee will meet from time to time as its members decide, or when formal appeal is initiated.<sup>7</sup>

In his discussion of the formula, Simeon noted that it could be extended to adjudicate claims or complaints from citizens and firms. Moreover, the federal-provincial committee could be instructed under, say, section 121(2)d to engage in both positive integration and in developing a "code of economic conduct." Finally, I prefer the wording of Simeon's 121(1) to the comparable section of the federal proposals.

Together, these proposals represent a rich menu of alternatives for sorting out the economic union provisions. It is probably too early in the consultative process to foreclose any of these options, since what will turn out to be appropriate for the economic union proposals may not be independent of what is decided elsewhere in the overall package. For example, a decision to soft-pedal the role of the Council of the Federation and to run with a powerful Senate might tilt the economic union mechanism towards a Senate reporting framework as well.

15. One further word on the economic union. Because the proposed sections 91A and 121(3) have come under fire, the economic union issue has assumed a rather high profile. This tends to mask the fact that we Canadians have a very effective internal economic union. In terms of the portability of "national" social programs, the lack of out-of-province tuition fees, the harmonization of the tax system (at least until the GST), and the efficiency of our branch banking system we are well ahead of the Americans. Moreover, the existing sections 121 and 91(2) would likely be read more expansively by the courts.

### *Intergovernmental Decision-making*

16. The focus on whether the proposals are centralizing or decentralizing is somewhat beside the point since the major new decision-making institution, the Council of the Federation, is really designed to manage the *interdependence* of governments. What is intriguing is the very substantial freight that this Council

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7 Ibid., p. 376.

of the Federation is designed to carry — economic union, fiscal coordination, harmonization of fiscal and monetary policy, new shared-cost programs, and conditional transfers (fiscal federalism). What will be exempt, particularly given the ability of the economic union to touch upon all policy areas? Thus, it is not only a matter of sorting out how the Council will mesh with the Senate, but also it is a matter of sorting out the impact on the legislatures at both levels of government. As the Europeans integrate, they are devoting considerable attention to the so-called “democracy deficit.” We appear to be rushing headlong in this direction as well. We need to pay more attention to the Council not only in terms of its impact on our parliamentary institutions but also on the very nature of a federal system itself. There is a limited amount an economist can say about this, except to flag the issue for the political scientists and constitutional lawyers.

### *Social Charter*

17. In my view the bulk of the changes in the distribution of powers (proposals 18 through 26) are not in the same league as sections 121 and 91A in terms of deal-makers or deal-breakers. Admittedly, the assignment of training to the provinces is very peculiar, particularly since our history with provincial training initiatives leaves so much to be desired. As David Milne notes, this area should have fallen under CPP. Alternatively, perhaps some provinces will toss this back to Ottawa via recommendation 25 (legislative delegation). It is possible that the combination of the surrender of the declaratory power (recommendation 23), the transfer of residual power (22) and legislative delegation (25) can result in a significant cumulative impact on the distribution of powers towards the provinces. But, this would require that the legislative delegation goes from Ottawa to the provinces — accommodating Quebec by citing the justification of a distinct society is the example that is frequently advanced. However, power may also be transferred upward through legislative delegation (as noted in the training example above). This is particularly the case given that nowhere is there any mention that money will be transferred downward with these powers. This feature I like!

18. While these may not be among the keys that will make or break the deal, there is one omitted area that has this potential — the social charter. I think that it is a fair comment that the vast majority of economists are against a justiciable social charter. Part of this has to do with the fact that the Charter tends to be a litany of entitlements quite independent of the necessity for integrating social policy with economic policy. While I too would vote against a justiciable charter, I also believe that there has to be some recognition of our “social policy railway” in any renewal of our federation. From my perspective, the difficulty will arise because many of the social charter advocates have in mind some

version of the Charter of Rights and Freedoms. The problem here is that the policies that make up the composite of the social charter are by and large provincial policies whereas implicitly, if not explicitly, social charter activists are calling on Ottawa to guarantee these social rights. But Canada is not a unitary state and these are, in general, not Ottawa's areas of jurisdiction. Rather a commitment to a social compact or a social contract (but *not* a social charter) belongs in section 36, which gives life to interregional and provincial equity concerns and represents the way in which Canadians have implemented their welfare state. However, Ottawa may have its own ideas here. A long-standing concern has been the lack of accountability and lack of viability of the system of transfers to the provinces. One often-mentioned alternative is to eventually scrap EPF (Established Programs Financing) and CAP (Canada Assistance Plan) and to replace them with a combination of direct grants to citizens (an enlarged child tax credit is the latest rumour) and an enhanced equalization program. This will probably not be well received by the provinces, particularly the have provinces, so that some of these social policy concerns are likely going to surface whether or not we have a social charter or social contract as part of a renewed federation.

### *Distinct Society*

19. I want to conclude with a few comments on the distinct society clause as it relates to the division of powers. This, too, is a potential deal-breaker and it appears to be playing as poorly in ROC as the economic union provisions are playing in Quebec. I have only two comments. The first is that I have always viewed the distinct society clause as relating to much more than language and culture — specifically, to that constellation of socio-economic policies that would allow Quebecers to earn a North American living standard operating in French. Enshrining the distinct society clause in the Charter does not help much for this broader vision. But its position in the Canada clause might.

20. A European perspective may be appropriate here. As part of Europe 1992 and, more recently, as part of the Economic and Monetary Union Treaty signed at Maastricht, the EC member states have committed themselves to tolerate all manner and kind of distinct societies. Collective rights (and freedoms) to protect and promote culture and language in the member states is an obvious example. More important is the tolerance for alternative forms of economic and socio-economic organization. The German universal bank model (where commercial banks have effective control of much of the real-side enterprises) will exist side-by-side with the individualistic British tradition (no mixing of the banking and commercial sectors). In other words, the underlying societal and economic philosophy of one pluralistic nation with respect to how one structures an economy and society is not imposed on the manner in which another

pluralistic nation decides to organize its economy and socio-cultural order. In my view, we need to import this degree of tolerance and mutual recognition and respect within Canada.

In an important sense, this is what the distinct society is all about — for Quebec to free itself from the value system imposed on it as a result of the 1982 amendments. We Canadians recognize that Quebec's approach to several social policy areas is ahead of that in most other provinces. We also recognize that in terms of the role of women in the workforce and in management positions Quebec is also ahead of most provinces. Yet, when it comes to the issue of whether Quebec and Quebecers have the right to create their own balance between individual and collective rights in the areas of culture and language and the economy, we appear intent on imposing our value system on them. For its part, Quebec has no desire to influence where ROC might wish to carve out this balance. But the reverse is not true and herein lies the problem. As I noted in *The Community of the Canadas*, there may be a tragic irony to all of this. "English Canadians are utilizing an American and Americanizing instrument (the Charter) to rend the nation which, in turn, will leave them at the mercy of the Americans!"<sup>8</sup> If the concern is that special powers for Quebec could filter over and affect ROC, then why not include a comfort clause to the effect that the distinct society clause would have no effect on ROC Canadians, although I think this is already implicit. Placed in this context, the distinct society clause is not about centralization or decentralization or even symmetry for that matter.

21. Nonetheless, my best guess is that Canadians will balk when it comes to the distinct society clause. I argued earlier that Quebec has already effectively done so with respect to the economic union provisions. However, I am very optimistic that among the various economic union alternatives proffered earlier are compromises that will satisfy Quebec and ROC alike.

Where is the alternative in case the distinct society falters? As far as I can see there is no fallback position. Let me suggest that a devolution of powers with respect to "demolinguistics" (language, culture, immigration, communications, etc.) but along CPP lines may be one alternative. In part, this embodies territorial bilingualism along Pepin-Robarts lines or along the Swiss approach, although official bilingualism would still apply to federal agencies and institutions. There are literally hundreds of areas where Newfoundland, say, has the right to exercise the same powers as Quebec but chooses not to (e.g., provincial police force, pension plans, income taxation, the Caisse de dépôt, securities regulation, introducing a stock market, a deposit insurance that has paramountcy over CIDC within Quebec, and a host of others), so that the likelihood

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8. Thomas J. Courchene, *The Community of the Canadas*, Reflections no. 8, (Kingston: Institute of Intergovernmental Relations, 1991), p. 9.

is that Newfoundland would not decide to exercise any new powers either. Nor would most of the provinces. Thus, this would maintain the "equality of provinces" or symmetry at the level of principle but it would in practice end up being asymmetrical, as is the case with so many programs and policies today.

## "Federalizing" Central Institutions

David Elton

Of the 28 proposals in the federal government's constitutional proposals *Shaping Canada's Future Together: Proposals* there are eight proposals that deal with institutional reform to the House of Commons (no. 8), the Senate (nos. 9, 10, 11) the Supreme Court (no. 12), the Bank of Canada (no. 17), and a new national institution called the Council of the Federation (no. 28). The Government of Canada also chose to include a proposal dealing with constitutional amendment (no. 13) in the section titled institutions. This paper deals with each of the five institutions and the amending formula and assesses them on the basis of four criteria:

- whether the proposal is centralizing, decentralizing, or federalizing;
- whether the proposal is symbolic or functional;
- whether the proposal is complete/specific or incomplete/vague
- whether the proposal requires constitutional change or could be accomplished through more informally mandated changes in behaviour on the part of political actors.

Each of these four dimensions are discussed below, and a summary assessment is provided in Figure 1. In addition, both the House of Commons reform proposal and those dealing with the powers of a reformed Senate are assessed in greater detail.

### Centralizing, Decentralizing, and Federalizing Tendencies

An assessment of Ottawa's proposals on the basis of their tendency to decentralize or centralize the Canadian political system is useful, but left in those terms it obliges one to treat these two concepts as exclusive and exhaustive categories, when in reality they are better treated as end points on a continuum.

If by centralization one means the tendency to strengthen the national government's ability to make and/or control public policy, and by decentralization one means the ability of provincial governments to make and/or control public policy, it is clear that proposals that seek to strengthen both governments simultaneously or to facilitate their cooperation must be placed in the centre of the continuum. Indeed, it is this middle point that is critical to federalism, constituting the fulcrum on which a federal system balances. A proposal cannot really be described simply as being either centralizing or decentralizing, but rather must be assessed in terms of its contribution to the balance between centripetal and centrifugal forces within the federal system. As indicated in Figure 1, it is my opinion that five of the six federal proposals dealing with institutions seek to "federalize" the Canadian political system, and one seeks to decentralize the system.

## Symbolic and Functional Dimensions

In Figure 1 the proposals dealing with each of the six institutions are identified as being symbolic or functional. Of course, it is not only possible, but even desirable for proposed constitutional changes to be both functional (i.e., intended to make the political system work more efficiently) and symbolic (i.e., intended to generate positive feelings towards the political system). In my view three of the institutional reform proposals are primarily symbolic, and three are primarily functional. The House of Commons, Senate and Bank of Canada proposals are identified as being symbolic because the changes recommended seek more to placate public concerns about the way these institutions operate than to fundamentally change the way the institutions operate within the overall framework of the governing process. Since the proposals emanate from a federal government that appears to be quite comfortable with the existing institutional structures, the symbolic nature of these changes should not surprise anyone.

Given that the Senate reform proposals are by far the most detailed of these proposals, and that the "powers" of the Senate are the key to understanding the functional aspects of the proposals, a more detailed discussion of this proposal is addressed below.

## Complete/Specific or Incomplete/Vague?

The completeness and/or specificity of the proposals varies considerably. The institutional proposals regarding the Supreme Court, the amending formula, the Bank of Canada, and the Council of the Federation are both complete and specific. In each case these proposals provide enough detail and content to



represent a coherent proposal that could (with appropriate drafting) be operationalized, and enough information that we can see precisely what their impact would be. At the other end of the continuum one finds the House of Commons proposals, which are so vague and incomplete that "proposal" seems to be a rather generous label. Within the flow of high-sounding generalities, there is no specificity and no clear context — a wide variety of concrete plans, from the most superficial to the most revolutionary, could be realistically presented as fulfilling such a "commitment." The proposals dealing with Senate reform can be placed somewhere in the middle of this continuum: basic principles regarding election, representation and legislative powers are indicated, but without enough detail to create reliable expectations of what a reformed Senate would look like in practice.

## Constitutional or Behavioural Changes

While the proposals address many of the central governing institutions, there is room for doubt as to whether their accomplishment requires constitutional changes, or whether they could be accomplished through changes in the behaviour of electors, legislators, or members of political executives. (Even for some items where constitutionalization is possible, it is not always clear that it would be desirable.) Indeed, all but one of the proposed changes could be realized without formal constitutional change, and several would not even require legislative change. Take, for example, the proposals to give MPs more free votes. Whether or not a vote is free is almost entirely a question of front-bench (that is, Cabinet or Shadow Cabinet) discretion largely unfettered by constitutional or statutory requirements, and a more critical approach to designations of confidence questions on the part of individual MPs would of itself oblige government to approach the matter more flexibly.

## The House of Commons

Proposal 8, which deals with reform of the House of Commons reads as follows:

*The Government of Canada commits itself to a process of further parliamentary reform to give individual MPs more free votes and to reduce the application of votes of confidence.*

This proposal is neither "centralizing, decentralizing, or federalist" in nature. Nor is it a constitutional issue. It has to do with the behaviour of MPs and their party leaders, and the degree of give and take that governs that interaction.

Given the amount of time, energy, and thought that has been expended on parliamentary reform, this proposal is disturbingly vague and superficial.

Nothing in this fuzzy paragraph requires formal constitutional change, or legislative change, or even any changes to the rules of the House of Commons. It simply requires a commitment on the part of party leaders, house whips, and — not only most important, but actually sufficient in itself — a commitment on the part of individual members of Parliament to exercise their rights and responsibilities as representatives of the people that elected them.

Too often the blame for lack of parliamentary reform is placed at the feet of the party leader and the party whip. Individual members of Parliament are often depicted as pawns in a chess game played by the party leaders or his delegate the party whip. But the chains are made of paper, and the whip has only a limited sting. Every member of Parliament has the formal independence to choose a course of action bounded by lock-step obedience on the one hand and crossing the floor on the other. Obedience is not legally mandated; it is the product of conscious decision, a deliberate choice to follow rather than to reject the advice, recommendations, or threats of the party leader, the party whip, or fellow party members.

This “formal” independence is mentioned to remind us that the real problems with parliament rest with the individual member of Parliament’s mindset and learned role behaviour. Most of the problems bedeviling Canada’s parliamentary system would vanish in a single day if a solid bloc of government backbenchers decided that they had had enough, that on a wider range of issues they would follow the wishes of their constituents or their own consciences rather than toe the party line. This would of course require that members of Parliament place their constituents wishes and/or their own consciences before their concern over ostracization, diminished career opportunities, and their chances at reelection. That is: it would require that members of Parliament on a regular basis overcome the human tendencies to use undue influence on one another, to minimize risk and maximize rewards. This is not a small project, but it has nothing to do with changes to the constitution.

The experience of the past hundred years indicates that the foregoing is wishful thinking. Members of Parliament are as human as the rest of us, worried about social acceptance and their careers, reluctant to challenge the way things are done and the powerful people who like them done that way. The federal government’s proposals seem to assume that the only way to effectively change human behaviour is to change the formal rules that provide the parameters of acceptable behaviour, but we face something of a paradox: since the formal rules are wide open and it is the practice that is constrained, any rules describing the way we want MPs to behave are liable to be *more* restrictive than the rules now in place.

Reforms have, of course, been suggested that would in theory have a major impact. For example, the Reform Party, which places a great deal of emphasis upon parliamentary reform, sees benefit in requiring a formal vote of want of

confidence rather than allowing the government the discretion to declare any vote a vote of confidence. An alternative would require a constructive vote of confidence: a government could not be defeated unless the same vote designated who would form a new government.

But theory is one thing, practical reality another. Most students of parliamentary reform agree that a simple change in the conventions surrounding votes of confidence would not in itself significantly change the House of Commons — hence the attraction of the idea of a formal constitutional change prohibiting the discretionary designation of votes of confidence. A constitutional amendment of this nature would be very difficult to draft. For example, one could define the circumstances under which a government could be pushed into an election much more easily than one could prevent them from choosing to jump. And, of course it is possible that even formal constitutional guidelines would not change day-to-day behaviour at all, and MPs would ignore the unlocked door in order to follow the party whip.

## Senate Reform

The real meat and potatoes of the proposals on institutional reforms deal with reforming Canada's Senate. These proposals are based upon demands that are over one hundred years old. The reason they are present in this set of proposals at this time is because these demands have become central to a possible resolution to Canada's constitutional impasse. Clearly Senate reform is, in 1991, as key to reform of Canada's political system as any other aspect of this proposal package. Without an acceptable Senate reform package as a key component of constitutional reform, it has become very unlikely that any constitutional changes will be ratified, either by the requisite number of provincial legislatures, or by voters in a referendum.

Given that there is still widespread misconceptions regarding the overall purpose of Senate reform, let me begin by insisting that it is neither centralizing nor decentralizing. Its primary objective is to provide a functional federal institution. Some advocates of Senate reform think of it as decentralizing because it limits the initiative of the national government; others think of it as centralizing because it channels regional representation through a national institution (the Senate) rather than provincial institutions (the premiers), while others will identify it as a centralizing force. This is inevitable; indeed, the litmus test for a truly federal institution might well be such a split between those who think it a decentralizing force, and those who think it is centralizing.

Senate reform does not seek to strengthen the power of provincial governments. If anything, Senate reform will diminish the ability of provincial governments to act as sole legitimate spokespersons for their citizens. Nor does Senate reform seek to weaken the federal government (so long as we think of

this in any terms more inclusive than the present prime minister and Cabinet). It is intended to increase the legitimacy of national legislative output and activities by providing identifiable spokespeople from each province within the national government, within the national policy process.

In sum, Senate reform seeks to strengthen the federal government by ensuring that national legislation reflects the regional realities of Canada — neither central nor provincial, but “federal.”

Over the past decade there have been numerous detailed proposals for Senate reform. Not all of the proposals have been as itemized as others, but each have provided enough detail to permit an overall comparison of the kind of Senate proposed. Figure 2 provides a summary graph that compares the current federal government proposal with earlier proposals prepared by the federal government, a royal commission, various nongovernment organizations, and the functional federal systems of four other western democratic countries. Thus the reader can evaluate the methodology utilized in generating this figure. The 13 “questions” used to assess these proposals and federal systems are listed in Figure 3 along with the values allocated to the answer provided in each proposal.<sup>1</sup>

Figure 2 points out that all the proposals coming from Ottawa in the last two decades cluster in the “marginal” zone. They recommend a Senate that is marginally stronger than the present upper chamber, but still sharply constrained in its capacity to check the power and initiative of a national government catering to a national majority that is at odds with regional aspirations and concerns. It is thus clear that while the federal proposals call for an elected Senate, with equitable representation of provinces, and effective powers, it is not the kind of “triple-E” Senate that many Senate reform advocates have in mind. The federal proposals are thus shown in Figure 1 to be primarily symbolic because the powers of the Senate outlined in the proposals are very limited, particularly with regards to the scope of the Senate’s legislative capabilities.

The proposals suggest that the reformed Senate “*would have no legislative role in relation to appropriation bills and measures to raise funds including borrowing authorities.*” Notwithstanding this statement federal Constitutional Affairs Minister Joe Clark has argued that his reformed Senate could have been able to stop the 1980 National Energy Program (NEP) or the 1990 Goods and Services Tax (GST). Both of these observations contradict the above statement. Both the NEP and GST bills were measures to raise funds. Thus while the minister is portraying the Senate reform package as one that would create an

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1 A more complete discussion of this graphic can be found in Peter McCormick, David Elton, “Measuring Senate Effectiveness,” in *Western Perspective* (Edmonton: Canada West Foundation, 1992).

"effective" Senate, in reality the proposals as written would not yield these results.

An analysis of the legislation presented to Parliament in the past year regarding appropriation and money bills is even more revealing than Clark's two highly symbolic examples. Figure 4 provides an overview of the 26 major pieces of regionally relevant legislation dealt with in the 1990-91 session of Parliament. Twenty-four of the 26 pieces of legislation are formally appropriation or money bills and were therefore "Senate proofed" (i.e., the reformed Senate as proposed by the federal government would not have dealt with 24 of the 26 bills).

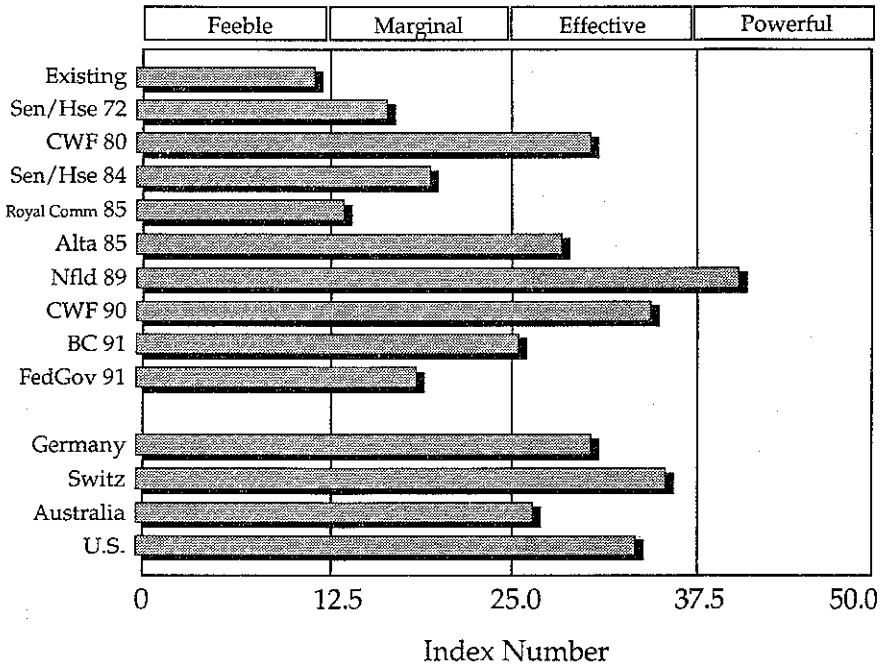
## Conclusion

The eight proposals dealing with institutional reform address many of the changes that students of Canada's political system have advocated over the past several decades. The content of these proposals fall far short of the kind of fundamental reform that many think is necessary. Many of the reforms proposed could be dealt with through changes in behaviour on the part of the politically relevant actors (i.e., members of Parliament, the Cabinet, political parties), without changing the constitution. Others, such as Senate reform, will require a fundamental rewriting of the constitution. Whether the political will exists to undertake to first improve the proposals, and second to actually implement both the behavioural and constitutional changes needed is something that remains to be determined by the parliamentary committee charged with improving the proposals, the cabinet that will review the committee's report, the first ministers, and ultimately the public.

**Figure 1**  
**Assessing the Federal Proposals**

	<i>Centralizing/ Decentralizing</i>	<i>Functional/ Symbolic</i>	<i>Complete/ Specific or Incomplete/ Vague</i>	<i>Constitutional Change or Behavioural Change</i>
<b>House of Commons</b>	Federal	Symbolic	Incomplete/ Vague	Behavioural Change
<b>Senate</b>	Federal	Symbolic	Incomplete/ Vague	Constitutional Change
<b>Supreme Court</b>	Federal	Functional	Complete/ Specific	Behavioural Change
<b>Constitution Amendment Formula</b>	Decentralizing	Functional	Complete/ Specific	Behavioural Change
<b>Bank of Canada</b>	Federal	Symbolic	Complete/ Specific	Behavioural Change
<b>Council of Federation</b>	Federal	Functional	Complete/ Specific	Behavioural Change

**Figure 2**  
**Effectiveness Index**  
**Senate Reform Proposals 1972 to present**



\*The criteria used to generate this figure is found in Figure 3. The proposals assessed are as follows: (1) the existing unreformed Senate of Canada; (2) the 1972 Senate/House Joint Committee report; (3) *Regional Representation*, Canada West Foundation Task Force 1980; (4) the 1984 Senate/House Committee Report; (5) 1985 Macdonald Royal Commission Report; (6) 1985 Alberta Legislature Committee Report; (7) 1989 Newfoundland Government submission to the First Ministers' Conference; (8) 1990 "Blueprint For Senate Reform," Canada West Foundation; (9) 1991 Mel Smith, *British Columbia Perspective*; (10) 1991, *Shaping Canada's Future Together*.

**Figure 3**  
**Senate Effectiveness Index**  
**Criteria, Categories, Values**

**A. Powers**

1. Senate powers regarding normal legislation
  - 0 no powers
  - 1 suspensive veto/limited time
  - 2 simple override
  - 3 unusual override/ joint session
  - 4 veto or amend/ conciliation committee
2. Senate power regarding money bills
  - 0 no power
  - 2 suspensive veto/limited time
  - 3 simple override
  - 4 unusual override/ joint session
  - 5 full veto (accept or reject)
  - 6 veto or amend/ conciliation committee
3. Senate role on ratifying appointments
  - 0 no ratification power
  - 2 ratify some national appointments
  - 4 ratify full range of appointments
4. Senate role on constitutional amendments
  - 0 no role on amendments
  - 2 suspensive veto/ definite length
  - 4 full veto
5. Senate role of language/ culture legislation
  - 0 no special role
  - 2 double majority with suspensive veto
  - 4 double majority with full veto
6. Can Senate introduce money bills?
  - 0 no
  - 4 yes
7. Can Senate defeat government/ force election?
  - 0 no
  - 4 yes

**B. Structure**

8. How is Senate selected?
  - 0 appointed/ national government
  - 3 appointed/ provincial governments
  - 4 elected at time of federal general election/ all
  - 5 federal general election/ some OR provincial general election
  - 6 stand alone elections
9. Basis of representation in Senate
  - 0 not at all equal/ population basis
  - 3 modified population basis
  - 6 equal

**C. Organization**

10. Caucus structure
  - 0 party
  - 2 regional/ all-party
11. presiding officer(s)
  - 0 government appointed
  - 1 elected Speaker
  - 2 Speaker + regionalized executive committee

**D. Other**

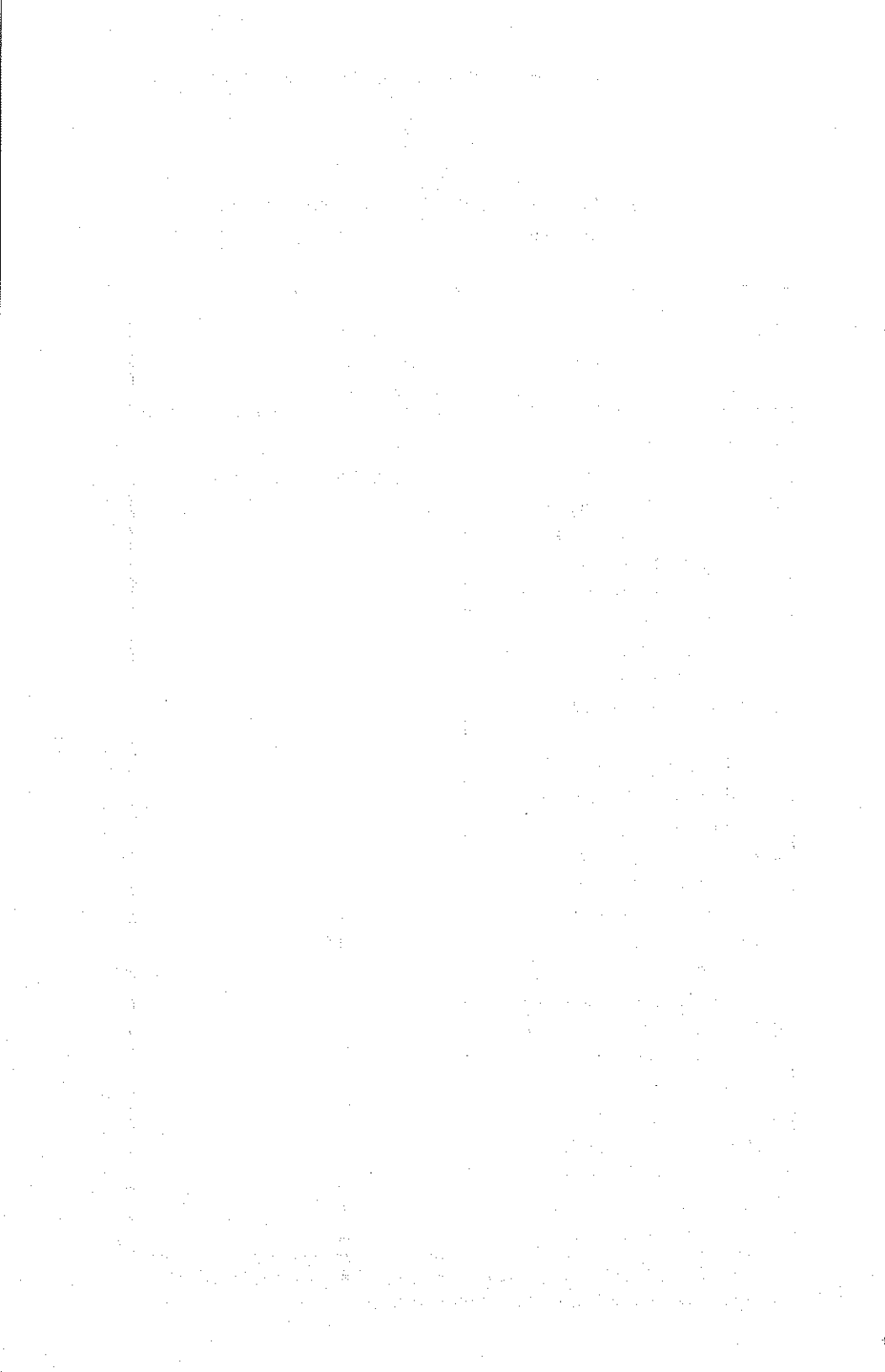
12. Senators in Cabinet?
  - 0 yes
  - 2 no
13. same parties in Senate & Commons/ joint caucuses
  - 0 yes
  - 2 no



**Figure 4**  
**Regionally Relevant Legislation**  
**Thirty-fourth Parliament, Second Session (1990-91)**

"Money Bills" * (would not be considered by Senate under federal proposals)	Non-"Money Bills" (would be considered by Senate in federal proposals)
C-3 Establish Dept. of Industry, Science & Technology C-15 Plant Breeders' Rights C-16 Canadian Space Agency C-18 Department of Multi- Culturalism & Citizenship C-34 Canadian Centre for Management Development C-40 Act respecting Broadcasting C-48 Crop Insurance Act C-56 Small Business Loan Act C-62 Goods and Services Tax C-69 Restraint of Government Expenditure C-70 Appropriations Act #5 C-71 Appropriations Act #1 C-72 Canadian Polar Commission C-75 Appropriations Act #2 C-77 Amend Immigration Act C-84 Privatization of PetroCan C-93 Bretton Woods & Related Agreements (IMF, etc.) C-94 Appropriations Act # 3 C-97 Borrowing Authority C-98 Income protection for Agricultural producers C-99 Appropriations Act #4 C-100 Appropriations Act #1	C-39 Application of federal & provincial law offshore C-74 Amend Fisheries Act

\*Money bills defined as those requiring royal recommendation, House of Commons Order Papers, Thirty - fourth Parliament.



## Session I

# Summary of Discussion

The lively discussion of these three contributions was led off by Rob Howse (Law, University of Toronto). Generally critical of some aspects of the proposals from a centralist perspective, he agreed with David Milne that there could well be "leakage" between the current economic powers of the federal government and the new powers under the proposed sections 121 and 91A. In particular, new initiatives by Ottawa might come to be interpreted as falling within the range of the "national interest" or "common market" provisions of these sections, such that the provinces would claim they required provincial approval under the 7/50 rule. In this case, the breadth of these grounds for federal action would, paradoxically, lead to a reduction in the scope for the exercise of Ottawa's existing powers.

Howse also argued that the proposals contained within them a change to the existing amending formulae. This lies in the proposal (no. 25) concerning legislative delegation. Although the vagueness of the language in *Shaping Canada's Future Together: Proposals* makes interpretation and prediction uncertain, it might well be that delegation is a way to produce a permanent change in the distribution of powers. In this respect it would represent an amendment to the amendment process; hence, it would require the unanimous agreement of the federal government and the provinces. Yet the proposals as written supposedly contain nothing requiring more consensus than that represented by the agreement of Ottawa and of seven provincial governments representing 50 percent of the population. Here, in Howse's view, the federal government might be proceeding in an unconstitutional manner.

Richard Schultz (Political Science, McGill) took up a more general theme. He argued that the centralization-decentralization dimension failed to capture the true nature of some of the most important federal proposals. The direction of the proposals about maintaining the common market, the spending power, and the harmonization of economic policies was neither towards increasing Ottawa's power nor towards buttressing the constitutional capacity of the provincial governments. Instead these represented moves in the direction of

co-responsibility, towards a new sharing of authority. This was the real innovation in the federal proposals, and the old zero-sum language of centralization and decentralization could not appropriately be applied to these elements, nor could it capture the dynamics of the proposed Council of the Federation.

On the issue of interprovincial barriers, Schultz also argued that Ottawa currently has the power to eliminate many of them. An historical example is the regulation of trucking, where the federal government left the provinces free to legislate. Any barriers to the economic union that have resulted are ultimately the responsibility not of the provincial governments but of Ottawa, which could rescind at any time the latitude it has afforded the provinces. Pursuing this theme further, Schultz maintained that delegation could be a useful and flexible mechanism in the Canadian federation. It should, however, be reversible, so that the larger national interest could prevail when provincial policies created conflict or waste, and so that the provinces could recover local control and realize the virtues of responding to local preferences when Ottawa had mis-exercised powers delegated to it by them.

At this point a senior federal official rose to contest several of David Elton's interpretations of the proposals for Senate reform. He admitted readily that the proposals required clarification and amendment. Nevertheless, he stated that the bottom line on the Senate's effectiveness was that it should not be a confidence chamber. Maintaining the principle that the government is responsible to the House of Commons was the overriding consideration in defining the Senate's powers. As a corollary, the Senate would not be able to refuse "Supply" by blocking authority for expenditure and borrowing. Despite this fundamental principle, the reformed Senate would be a powerful body. It would have the capability to stop or hold up major legislation such as the National Energy Program.

In this intervention, the official also took up a point about the effect of the distinct society clause on the distribution of powers. This was raised by Tom Courchene and, more pointedly, during the preceding day's discussion, by Albert Breton (Economics, University of Toronto). Breton had argued that new powers might be demanded by Quebec, and conferred upon it, through invoking the new distinct society clause in conjunction with section 43 of the *Constitution Act, 1982*. This section permits bilateral agreements between Ottawa and one or more provinces in matters including language and borders. The suggestion made was that powers in areas like social policy, which are remote from language or culture or civil law, could be transferred to Quebec under the cloak of the language provisions of section 43. The federal official pointed out that this would not be supported by the courts because section 31 of the Charter expressly states that nothing in the Charter changes the distribution of legislative powers. In general, then, fears of over-delegation to the provinces, and

especially to Quebec, under this or other parts of the proposals were exaggerated.

Consideration of the Senate was continued by Patrick Monahan (Law, Osgoode Hall). He suggested that David Elton had made a conceptual error in his assessment of the powers of the proposed reformed Senate. In essence, Monahan claimed that the functions of the Senate and the House of Commons were different. The House is to embody the principle of representation by population and majority rule, while the Senate is to provide for regional representation, and each of these is centrally concerned with different policy matters. Hence it is inappropriate to measure the effectiveness of the Senate by comparing its capabilities, implicitly or explicitly, with the powers of the House. Rather than the type of comprehensive evaluation performed by Elton, one should isolate those areas of policy where regional representation is important and assess how effective the Senate is likely to be within this more limited realm: this is what should really count for those concerned with providing a strong peripheral voice in national policy making.

Donna Greschner (Law, Saskatchewan) made several comments. First, she queried why the federal powers of reservation and disallowance were not addressed in the reform proposals. Since they have not been used for over 40 years, the federal government would lose little by their repeal. Or does the federal government intend to revive them as big items in Ottawa's constitutional tool chest of powers? Second, she wondered whether Senate reform would continue to be as important a demand as it has been in the west now that the New Democratic Party has taken power in British Columbia and Saskatchewan; it seemed probable to her that these new governments would be less pre-occupied with securing a triple-E Senate than were their predecessors or the current government of Alberta. If this were the case, then the four-province coalition which had been strong enough to get Senate reform by its capacity to block any other proposals would no longer be in place. Finally, she asked Tom Courchene what amendments to the economic powers (sections 121 and 91A) would, in his view, be sufficient to win Quebec's approval of the proposals.

Tone Careless (Attorney-General, Ontario) raised three questions: (1) would not the federal proposal for "interdelegation" of powers require unanimous agreement because it could be interpreted as bringing about permanent change to the division of powers and hence be a new amending formula; (2) could there really be an expansion of provincial powers under the combination of a distinct society clause and section 43 since any transfers to Quebec would affect all provinces and be outside the ambit of section 43 provisions; and (3) would a reformed Senate, now more regionally sensitive, be compliant in handing off special powers to Quebec, even assuming that the Commons, caucus and Cabinet were.

Robert Groves (Native Council of Canada) intervened to discuss the position of aboriginal peoples, and to ask where panelists thought they fit into the debate about centralization and decentralization in the federal proposals.

Next, Bert Brown (Canadian Committee for a Triple-E Senate) took the floor to argue for a powerful reformed Senate. In contrast to the views of Monahan and the federal official, he claimed that regional representation in federal policy making was vitally important, and that it should be exercised in every area of policy. The Senate, therefore, should have the power to vote on money bills, and it should be effective enough to provide a check on simple majoritarianism whatever the policy at issue. He claimed as well that the alliance of western premiers in favour of triple-E reform continues to be in place, despite the doubts of Donna Greschner: this is not a matter of the political complexion of the provincial governments, but of the real interests of the western provinces. Moreover, governments in the west had made commitments to their electorates to fight for Senate reform, and given that public opinion in the region supported substantial changes to the Senate, new premiers would find it difficult to back away from established provincial positions.

Next, Gordon Robertson (Clerk of the Privy Council, retired) took up the theme raised by Rick Schultz. He disagreed with David Milne's categorization of the proposals on the economic union as representing a new federal power. This was the common interpretation, but it was misleading. The whole point of the proposals about the economic union is that Ottawa can act only with substantial provincial consent. As such, the new section 91A does not constitute a federal power but rather a whole new class of powers — "shared powers." These powers are not exclusive powers; neither are they concurrent powers: they are powers that can only be exercised jointly. Therefore, Robertson felt, they should not have been included with the existing heads of federal jurisdiction. Instead, the new section 91A should have been placed in the constitution after those sections allocating concurrent powers. That is, section 91A would more appropriately be proposed as a new section 95A (coming after the areas of concurrent jurisdiction), in order to signal clearly that a new kind of power, one neither central nor provincial, was being created.

Robertson also dealt with the question of the effectiveness of the Senate. He suggested that the convention that the upper house should not be empowered to refuse appropriation ("Supply") bills could be upheld at the same time that the Senate preserved its capacity to reject other important legislation. All that would be required is a mechanism to split legislation, so that elements of a measure that concerned Supply would receive the consideration of the House alone, while substantive elements would require the approval of both the House and the Senate. An alternative would be to distinguish between appropriation bills, which would not require Senate approval, and substantive bills with a spending element, which would. The essential point was that the Senate should

not be able to strangle a government by denying appropriation bills, as had been done in Australia in 1973.

Reacting to some of the above comments, Tom Courchene noted that the proposal to transfer section 91A to section 95A is an alternative to the earlier options he mentioned in that it attempted to implement the economic vision without affecting the formal division of powers. In response to Donna Greschner's question, then, the amendments necessary to secure Quebec's acceptance of the proposals would include some watering-down of the "declaratory" aspects of section 91A, as well as a limitation on the power of Ottawa to embark on policies for "positive integration" of the economic union. The "negative integration" components of the new section 121, or at least, section 121(1) and 121(2), were far less objectionable to Quebec.

David Elton took up the issue of approving constitutional amendments through referenda in the western provinces. There was no doubt in his mind that despite the changes in government, referenda would be held in each of those provinces. British Columbia was committed by legislation to consult the citizenry on proposed amendments, and the other three governments were bound to do so by statements in principle to perform such consultations. As well, Manitoba has legislation in place that requires public hearings, as is well known by all who followed the dénouement of Meech Lake.

But Elton addressed most of his remarks to Senate reform. He recognized the problems that could occur were the responsibility of the Cabinet divided between the House of Commons and the Senate. He proposed some solutions to the problems that commentators had raised. First, he argued that the reformed Senate should indeed consider all legislation. Were large chunks of government business to be exempt from its purview, the Senate could hardly become effective. However, in order to preserve the basic principles of responsible government and majority rule, the House must prevail in the end. The Senate should therefore possess the power to suspend and delay all legislation, but not to defeat it. There should be some exceptions, he argued, and these could take the form of over-rides requiring extraordinary majorities. One possibility is that defeat of a Bill that had passed the Commons would require a majority vote among Senators representing seven provinces with 50 percent of the population. Another mechanism would see the Senate empowered to block any legislation unless overridden by a vote of, say, 60 percent of members of the House of Commons. Along with such mechanisms, suggested Elton, there should be a constitutional prohibition against Senators becoming members of the government. There should be no Senator in the Cabinet. This would preserve the principle of a government being responsible to the House; at the same time, it would help ensure the independence of the Senate while symbolically asserting its primary function of regional representation.

David Milne responded systematically to the questions put to him. On the matter of reservation and disallowance, he suggested half in jest that the existing provisions had not been put on the table because they provide Ottawa with the most effective possible tools to enforce the Free Trade Agreement with the United States. More seriously, he argued that this part of the constitution involved prerogative power of the Crown, so that amending it would require the unanimous consent of Ottawa and the provinces. The federal proposals, of course, had been tailored to avoid requiring any consensus beyond the 7/50 level.

As for the suggestion that the proposal concerning delegation might involve an amendment to the amending formula and therefore unanimity, Milne argued that this simply was not the case so long as the delegation was not permanent. If the provinces (or Ottawa) could retract or recuperate delegated powers, then the delegation would not involve a genuine transfer of jurisdiction and no amendment would have taken place. Hence the proposed amendment does only require 7/50 provincial consent.

Finally, on the issue of the new economic powers, Milne entirely agreed with Gordon Robertson that they represented a move towards co-responsibility for the management of the economic union. This is an innovation. Moreover, insofar as "leakage" might occur, so that the requirement of substantial provincial consent could spread into areas where the federal government now exercises unquestioned authority, Ottawa is risking its current autonomy in economic policy making by making the new offer of co-responsibility in managing the economic union.



## Session II

*Rights and Values  
in the Federal Proposals*

## The Politics of Recognition<sup>1</sup>

Charles Taylor

I would like to begin my remarks by talking about value issues in terms of the issue of equality — how that is understood and the different ways it is understood. The issue of equality is central in all Western societies now. I am using equality in the sense perhaps better put as non-discrimination, and the problem is that it is going through a big mutation in the way it is understood. We have to see our future in the light of that mutation because these things wash over our shores too.

A basic demand on a Western liberal society is, non-discrimination. Put another way, there should not be first- and second-class citizens. The development of charters of rights, beginning in the United States perhaps in the aftermath of the Civil War, has shifted the centre of gravity from a narrow sense of individual rights protection. We know our rights without due process and so on to be issues of non-discrimination: that is, whether different classes of citizens are treated differently. These play a very important role. In the older model of non-discrimination, the basic principle was that measures put forward in order to protect this value were based on the notion of difference blindness, i.e., the idea that laws or provisions or rights or burdens and so on, apply to people without regard to differences in race, sex, religion, and so on.

In the later twentieth century it now seems that the demand for equality has predictably mutated. Building on the earlier demand for equality and building in a sense on some notion of non-discrimination, there is a new idea abroad based on what I want to call the *politics of recognition*. This is the notion that in order for people to function effectively in their full scope as what they are in their particular identities, they need to be recognized in those identities by the society surrounding them. In the United States, this is called the politics of multiculturalism — a demand for a recognition of different groups,

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1 Editor's Note: The following is an edited transcript of remarks delivered at the conference.

non-hegemonic groups, groups that do not belong to the original mainstream, but recognizing them precisely in the difference of their identity. In other words, their particularly different culture has to be given some kind of recognition and valorization. For example, curricula in mainly black public schools in the United States are meant to be filled with a certain content, Afro-American content, resulting in a measure in which the state is essentially being asked to back the recognition of a particular culture in its particularity.

This second wave of the demand for recognition cuts across the first wave in a very obvious way in that most people who belong to the earlier way of thinking, i.e., believe in *difference blindness*, are very often deeply offended by these demands for specific *difference recognition*, and think it is a betrayal of difference blindness. On the other hand, people who demand difference recognition claim that the old rules of difference blindness are themselves the hegemonic expression of Anglo-Saxon culture or male culture or Western, North American culture, or whatever. These different notions of what non-discrimination mean are now in our Canadian political process. Because they are very different, we have reached a terrible impasse over them.

In the Canadian political process, you can discern four types of demand for recognition of difference, two of which are easily containable within the old difference blindness principles and two that are not. The two that are containable within the difference blindness type structure demand that we identify certain groups as part of the composition of our society. So, Canadian multiculturalism as mentioned in the Charter fits into that construct. There is no specific recognition of the value of any particular culture, but rather the recognition that there is this kind of cultural difference and that it is part of Canadian society. That is easy to fit into a different blindness structure of rights. The second kind is where you have the polity as a whole, through a Charter of Rights or perhaps another way, endorsing certain issues that are raised by people. An example is the issue of women's equality that is also incorporated in our Charter and is easily containable within difference blindness principles.

However, there are two kinds of demands that are not so easily containable. The first is the demand for the recognition of a particular culture in its own value, as in the American schools curricula example. This is a public valorization of some particular culture. Another, the fourth of the modalities I am discussing here, occurs where the demand for recognition takes the form of a demand for some kind of special status, some collective political status, in the self-governance of a community. And, of course, we have this in the Canadian scene in spades. This exists in two modalities, in a Quebec modality and in the aboriginal modality. In the demands of these two groups, there are great overlaps and parallels which have been pointed out by Ovide Mercredi and others, and inadequately recognized, by present leaders in Quebec.

citizens together and that gives a unique common sense to what Canadian citizenship means. Thus, you build a place for this kind of individual diversity very clearly within a structure of difference blindness provisions.

It is held by many that a special status for governments representing communities breaks from this tradition in the two ways that I mentioned. First, it may break from it because the very common difference blindness principles as enshrined in the Charter might get modified and modulated, and that would mean that there was no real common citizenship. Or it may be breached by the fact that the Government of Quebec, which seems on a parallel with other provincial governments, might have special responsibilities, and that would breach in some sense equality across the country in the sense of a common citizenship.

The alternative view, to which I adhere, is that you could put the case for equality *and* difference, that is the recognition of difference in equality, in quite other terms which endorse this kind of special status or distinct society provision. This could be accomplished by pointing out that the needs of different communities are different. For example, the need to be different of an Italian or a Ukrainian living in Edmonton or Toronto is easily contained in the provisions of a general Charter allowing multiculturalism. The need to be different of either a Quebec society or an aboriginal society requires something different, i.e., certain self-governing powers. If you think of the recognition of differences taking account of the different kinds of differences and of the needs that they create, then there is not something abnormal or unacceptable in modulating your conception of what recognizing difference is.

The same point can be made even more clearly in regard to special governmental powers, particularly the application of the Charter of Rights. It comes down to the understanding of equality, and on this point I draw attention to Aristotle's conception of proportionate equality. The whole point of the distinct society clause in Quebec is that it defines a task that the Quebec government, unlike any other provincial government, has to face: that is, the task of maintaining the promotion of a society which, while in some respects is surviving and flourishing, is nevertheless under pressure in North America. In light of having this special task, distinct society does not breach the principle of proportionate equality, i.e., taking account of difference of task to think that they might have different functions. The idea of coding this difference of function as inequality ignores the fact that there are special burdens. As a matter of fact, a reading of our history reveals a great generosity in understanding the special tasks of different parts of the country and different societies in the whole way that different provinces were admitted to Confederation. We did not have this kind of very steam-roller, uniformizing logic which has somehow got into our political bloodstream in the last 20 years; if so, we would not have founded

Why, if it is clear that the demand for special recognition of a culture fits with difficulty in the difference blindness principle, does the demand for special status do so? It does so, at least it appears to do so, in two regards, and this is evident in the Canadian constitution embroglio very clearly emerging. In fact the present proposals reflect this sorting out to a large extent. First of all, the demand affects the application of the Charter in the recognition of there being something different in Quebec, a distinct society. This recognition is in the form of my fourth modality, since the recognition is that this society, through its government, has a distinct task to protect and promote such a right. So we are talking about a distinct task that is attributed to a community and its government and its governmental organs different from what other groups with their governmental organs in the society have to face. The issue is: Does this set of tasks entail perhaps a different applicability of the Charter of Rights in Quebec to elsewhere? From a reading of the current proposals, it would appear that there is some answer in the affirmative — the proposals would build into the Charter of Rights this understanding that there might be some difference.

The second place where special status runs against a reading in Canada of what difference blindness ought to mean is when it comes to the power of provinces. This has been less salient in the current federal proposals than in the Meech Lake proposals because insofar as it might affect fine tuning of the attribution of powers, the "distinct society" clause is now relegated to the Canada clause preamble and so on. Therefore, it may seem to have less effect on the future decisions of the division of powers. I am not sure if it really does this, but nonetheless it is widely believed to do so. In any event, there has to be some relevance to what powers are attributed, be it only by delegation, etc. The notion of distinct society has some meaning in that domain as well.

All of this runs against a certain model of difference blindness widely held in the rest of the country. At this point I want to mention what powers that notion of difference blindness, which is resistant to Quebec.<sup>2</sup> The very deep anguish that a lot of people in Canada feel is: "What the hell holds the society together?" This anguish is expressed on one level by people worried about decentralization, but it is also fundamentally expressed at the level of whatever binds us together. There is a model of what binds us together based on the difference blindness principle that you can have any kind of diversity you want on the level of personal cultural differences or personal cultural identification in different groups. But as long as you have a difference blindness set of public provisions, a charter and so on, that is the point of unity and that makes us all

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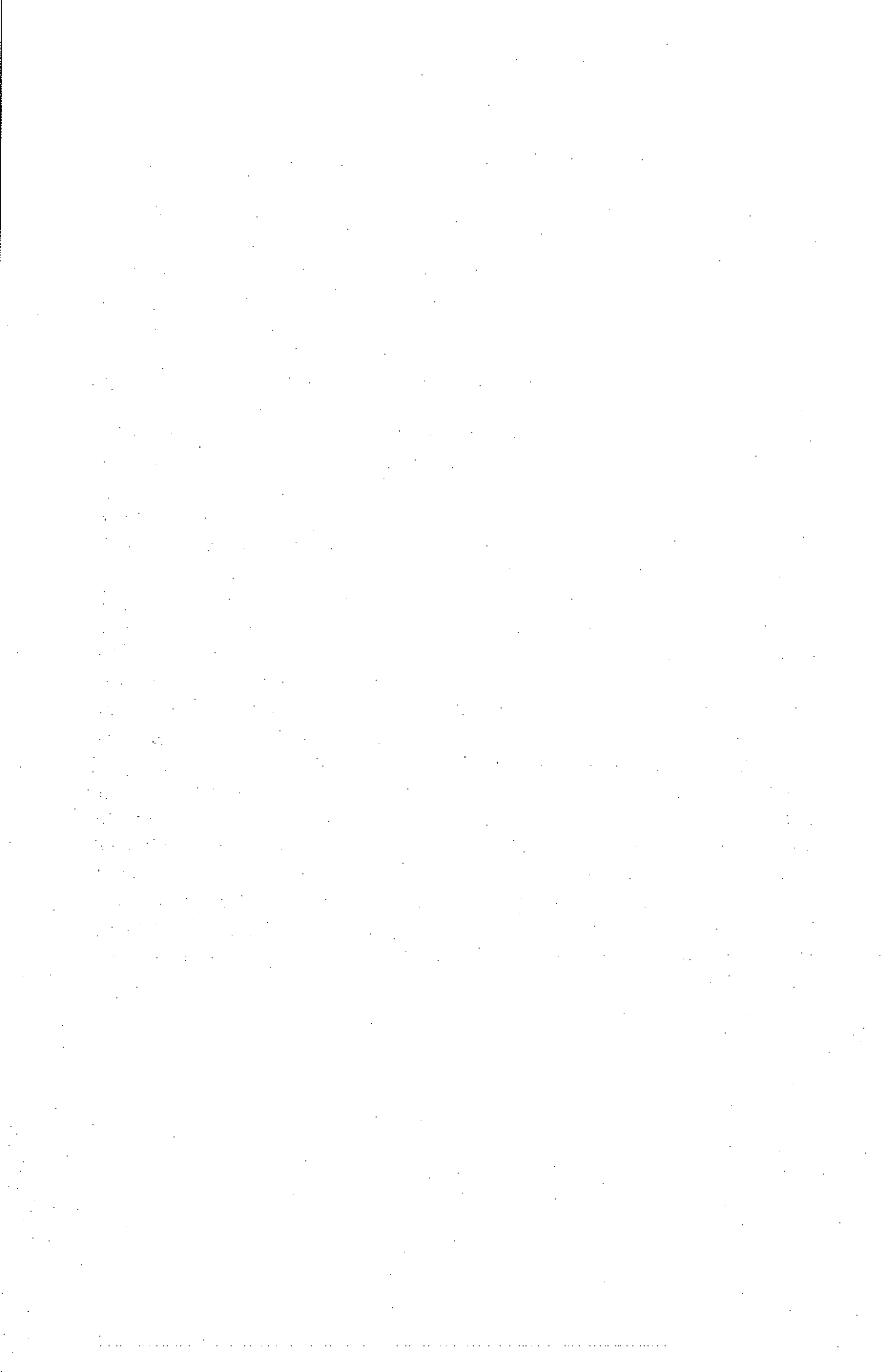
2 On this point, see Alan C. Cairns, "Ritual, Taboo, and Bias in Constitutional Controversies in Canada, or Constitutional Talk Canadian Style," in Douglas E. Williams (ed.), *Disruptions: Constitutional Struggles from the Charter to Meech Lake* (Toronto: McClelland and Stewart, 1991).

this country in the first place. Thus, there is a way of reading equality that allows for this.

Nevertheless, I understand why people are worried about this because it involves a conception of diversity in at least two dimensions now. It is no longer simply the individual diversity of citizens identified with different cultures within a common frame of the Charter of Rights. A second dimension is the diversity of different sub-societies, some of which will have self-governing powers that others do not have. This makes a lot of people nervous.

What holds us together if we allow these different kinds of diversity? There are really two points to be made in this respect. First, the way modern societies are developing, we are just not going to be able to maintain this single level of diversity. That is not the way modern society is moving. Rather, societies are getting culturally more and more diverse, and we are going to face even the American-type problem of multiculturalism in one year or two. So the dream that we can keep this tight little system of individual rights and personal culture is just that, a dream. We have to face some greater degrees of diversity.

Second, there are things that after all do pull us together. Society can be pulled together by the fact that it has certain political goals in common which it has managed successfully to pull off, and we have a number to look to. For example, we have a reasoned civilized society, self-governing with a degree of citizen alienation not as great as in many other polities, thanks to the decentralization of our federal system. We also have a certain blend of social rights and individual rights. Incidentally, I am in favour of some kind of social charter as long as it is not in the Charter of Rights and Freedoms and we can keep the judges out of it. I am very much in favour of this as a statement of what we are about. But we also could consider ourselves to have achieved a collective success if we can pioneer a policy that recognizes different dimensions of diversity which, as I say, is going to be the problem of the twenty-first century. So there are a lot of things in this second option that could hold us together if we were not so obsessed with hanging onto a model which I believe in any case will be thrown aside by history.



## A Hijacked Process

*Reg Whitaker*

I am about to be a skunk at the garden party. Most participants at this conference have been discussing the relative merits of different aspects of the federal proposals. I think that the entire process is doomed — and that it ought to be doomed.

I recall a cartoon that pointedly illustrates the current dilemma of the federal constitutional proposals. Two motorists from the city, lost in the country, have stopped to ask a farmer for directions. The latter laconically replies: "Now if I was trying to get *there*, I wouldn't start from *here*." The federal government is trying the get *there*, but it is *here*, and the farmer is right.

Let me, in this brief discussion, play the role of the farmer. The federal proposals are experiencing considerable, perhaps terminal, difficulty. This is not surprising; indeed it was predictable. It was predictable because of the very values that were embedded in the federal approach. In the face of a genuinely national crisis — one that in its deepest sense touches the foundations of membership in the community, on *democratic citizenship* in its fullest sense — the Tories chose to adopt a partisan, ideological approach conceived primarily as self-serving in a rather narrow, if not petty, sense. This partisanship can be seen in both the *process* and the *content*. In what follows, I will concentrate especially on process, since others here have focused on content.

### Process

The lesson of the Meech Lake process was supposed to be that elite accommodation had failed to deliver, and that wider participation was required for constitutional change to have any legitimacy. Many, myself included, have suggested that some form of constituent assembly would have been the best beginning, followed by a regionally-based national referendum on the results. There are a number of reasons for this suggestion, which I will not reiterate



once again here, since this advice was rejected by Beaudoin-Edwards and Clark-Mulroney.<sup>1</sup> What I want to emphasize is what was lost by the choice of an alternative route. Instead of a broadly representative deliberative body assigned a specific task, agenda and timetable, bearing a heavy responsibility for finding solutions for the country's common future, the government chose instead to pursue a manipulative, sometimes farcical, and ultimately self-destructing parody of democratic consultation.

The Spicer Forum<sup>2</sup> was little more than a cross-country bitch fest, an extended open-line show where people were invited to blow off steam. With no agenda and no promise of anything concrete to result at the other end, is it surprising that the Spicer Report is incoherent, indicating little more substantive than generalized discontent? This gave the government the opportunity to mendaciously assert that they had "listened." Then Beaudoin-Edwards held more hearings, after which the Tory majority simply took what it wanted, threw out what it did not want, and presented the government with *carte blanche*. Cross-country one-on-one "consultations" with the premiers ensured that they would never get together in a group to develop a collective position. At the same time there were real consultations behind closed doors with the Business Council on National Issues (BCNI), which the Tories find so much more congenial than the premiers or the people. Then the prime minister, like Moses come down from the mountain, delivered his tablets to Parliament. The Dobbie-Castonguay-Beaudoin Committee<sup>3</sup> began its inglorious career to once again "consult" the people, the agenda being firmly set by the government itself. Is it any wonder that in some cases, no one showed up?

As a democratic exercise, this entire process constitutes a parody, one caught most poignantly if inadvertently in the television ad the government began running before it was forced by criticism to shrink its "PR" budget: an authoritative salesman's voice informs the Canadian people that "you are *watching* history unfold." Democracy as spectator sport: turn on the TV and watch history unravel.

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1 "Beaudoin-Edwards" refers to the Special Joint Committee of Parliament co-chaired by Senator Gerald Beaudoin and M.P. Jim Edwards. The Committee's mandate was to report on the process for amending the constitution. It completed its report in June 1991. "Clark-Mulroney" refers to the 1991 federal proposals released in September 1991.

2 Refers to the Citizen's Forum on Canada's Future led by Keith Spicer. It produced its report in July 1991.

3 Refers to the Special Joint Committee of Parliament established in September 1991 to review the federal constitutional proposals, named for its co-chairs, Senator Claude Castonguay, and MP Dorothy Dobbie. Senator Gerald Beaudoin replaced Castonguay as chairman in late November 1991.

A constituent assembly, like democracy itself, is an open-ended process. In advocating a constituent assembly, I do not know how or what it would turn out. But a representative democratic process will produce a result which, good or bad, is bound to be more legitimate than one cooked up behind closed doors and then run past a series of fraudulent "consultations." One of the biggest losers in the Tory process are the groups seeking public recognition or valorization of their differences, as well as their demand for equality.<sup>4</sup> Take the case of women. Largely excluded from the Meech Lake process, women's groups reacted, not too surprisingly, with suspicion. Sometimes this was unfortunately blown into exaggerated conspiracy theories about how the distinct society clause, to take one famous instance, was a plot to abridge women's rights — an assertion rejected by Quebec women's groups and subsequently repudiated by the National Action Committee in relation to the present proposals.

The point is that when government systematically excludes effective representation from some groups, they act like outsiders. And the very form of (ersatz) public consultation encourages irresponsible criticism. Each group attempts to present its own case in the strongest and most uncompromising terms: if they do not, who else will? The result is a cacophony of one-sided and often contradictory voices, from which the government can walk away shrugging its shoulders. A constituent assembly, on the other hand, would have the advantage of setting different groups to deliberate together under a common responsibility.

The latter was not to be. The Tories, despite their unenviable status as the most unpopular governing party in the Western World, chose to hijack the process for the narrowest of partisan motives. Never has a government with so few political resources attempted such an ambitious political coup. And never has the reach so exceeded the grasp.

I assume that the thinking behind their strategy — and I do them the honour of assuming something like a game plan — must have been to come up with something minimally acceptable to Quebec, or at the very least to Premier Bourassa. With such a plan in hand they could then go to the premiers with a *fait accompli*: "this is it, it's our way or the highway." This time around, Newfoundland Premier Clyde Wells (presumably Elijah Harper is written right out of this script) would really be on the spot. Unlike Meech Lake, this time it would not be *conjecture* that Quebec would leave if the deal were not ratified. Saying "no" this time would be tantamount to saying no to Canada as we know it. Dare I suggest this might be called the "rolling the dice" strategy? Thus the Tories could claim a monopoly on national unity. I can even suggest the slogan for re-election in 1992-93: "MULRONEY OR CHAOS."

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4 See comments by Charles Taylor in previous chapter.

Clearly this has not worked. One major reason is the federal government-Quebec connection. Bourassa's refusal post-Meech to participate in multilateral talks seems at first glance to enhance the pretensions of Ottawa. Only the federal government will be listened to in Quebec, hence the Feds must take over the process. If neither first ministers' conferences nor constituent assemblies can be called without Quebec, and if Quebec's participation is believed to be essential, then Quebec has preempted alternative processes. But if the federal government has failed to produce a set of proposals that are indeed acceptable in Quebec, then this becomes a very large trap into which all the players will fall. At this point it seems unlikely that the federal government has indeed pulled a Quebec rabbit out of its hat. Even if Bourassa would very much like to go along with Ottawa, there is certainly no guarantee that he can persuade his more nationalist supporters, or the influential nationalist intelligentsia. The memory of Victoria in 1971 is proof of Bourassa's notorious inability to confront the latter when opinion has gelled.

But let us linger for a moment with the perhaps dubious assumption that Bourassa's backbone can be stiffened to accept the watered-down distinct society clause, along with enhanced federal powers for an economic union and a reformed Senate with diminished Quebec representation. The referendum legislation passed by the Quebec National Assembly states explicitly that no federalist deal can be deemed acceptable that has not already received the prior approval of the provinces. Perhaps the allegedly subtle mind of Robert Bourassa understands how a process that necessarily shunts the premiers to the margins can be likely to gain their unanimous approval, all within a time frame so short that, in political scientist Léon Dion's felicitous phrase, it amounts to a "knife at English Canada's throat"? I can't.

It is obviously the case that the premiers must be integral to the process from the start. As the Quebec legislation recognizes, any deal will have to include their signatures to be valid. And the premiers' participation and consent cannot be separated from the participation and consent of the people whom they represent, as Meech Lake taught.

There is a second aspect to the Ottawa-Quebec connection, one that may prove fatal to the process. The Quebec caucus of the federal Conservative party is holding the government, and thus the country, hostage. The televised scene of the Quebec Tories smirking and congratulating themselves behind Joe Clark's back after forcing him to back down so humiliatingly from his national referendum proposal vividly demonstrates the problem. This will, I predict, prove to be a very damaging image. The Quebec Tories seemed to be saying that "we (as Quebecers) will hold a referendum to determine our fate, but as federal MPs we will use our power to ensure that you people in the rest of Canada will be denied a democratic voice in your constitution." This is simply unacceptable in English Canada. The process thus represents a hijacking within

a hijacking. First, the Tories take it away from the provinces and the people, then the hijackers are themselves hijacked by some of their own number.

What all this suggests is that we should have faced up some time ago to the necessity of initiating a process without Quebec, for a time at least. Why not, in any event? Quebec has already developed its own distinctive position, through instruments like the Bélanger-Campeau Commission (a sort of constituent assembly combining elected politicians and extra-parliamentary "social delegates") and the Allaire Report. English Canadian advice was neither sought nor welcomed. It would be a logical next step for the rest-of-Canada to formulate its position without Quebec, and then, and only then, to enter into serious negotiations with Quebec. The latter should approve this method, since it would be better designed to provide a clear answer to Quebec's question. Instead we are at an impasse, with the clock ticking away on Bourassa's referendum bomb.

## Content

While I do not wish to overrationalize a process which, as a political scientist, I am all too aware is often anything but rational, I do think that it can be argued with confidence that the tendency of these proposals (not without admixture here and there of contradictory elements) is to constitutionalize a right-wing Tory economic agenda. The following four elements seem to bear out this thrust:

1. The inclusion of property rights in the Charter which could have the effect of greatly strengthening the capacity of business to exploit workers and pollute the environment, while greatly weakening the capacity of the public sector to regulate the private sector and to enact effective social programs.
2. The refusal of the federal government to include a social charter, while at the same time including property rights, bears a clear ideological message.
3. The plans for the economic union suggest above all the intention, not to centralize or decentralize (with all deference to that rather antiquated debate), but to reduce the role of the public sector, federal or provincial, and to widen the scope of market forces in shaping the basic decisions about Canadian life. For instance, provincial programs such as employment equity which have as their object the reduction of income disparities within provincial boundaries could be ruled a barrier to the free movement of goods, capital and people. The government proposes to institutionalize monetarism through the *Bank of Canada Act* — although this would be legislated rather than constitutionally entrenched. Finally, it should be

noted that the economic union is not balanced by any equivalent concept of a social union.

4. Although an elected Senate is proposed, this is countered by the proposal for an unelected Council of the Federation which seems to resemble the democratically unaccountable bureaucratic institutions of the European Community, and suggests the same "democracy deficit" widely noted in Europe.

All in all, is it entirely fanciful to suggest that, given the watering down of the distinct society clause from the Meech Lake Accord and the ten-year "transition" period suggested for processing the claims of native peoples for their inherent right to self-government, the Tory strategy is to displace the national questions onto the field of class politics? Ironically, this was an old constitutional position of the sectarian Left. Now that the latter is largely defunct, the enthusiasm for fostering class conflict as a diversion from the national question seems to have been picked up by the Right, which happens to be in power in Ottawa. This is perhaps not lacking in calculation of the potential effects on the debate in Quebec. The Tories may be trying to appeal over the heads of the political class to the business class. "You wanted free trade with the U.S.," they might be heard saying to Quebec business, "and we delivered it for you. Now we are offering you free trade within the northern half of the continent as well." Throw in a distinct society clause, and some devolution of powers to the provinces, and might there not be the makings of a deal acceptable to enough Quebec businessmen to make it fly with Quebec City? Perhaps, but there are, as usual, contradictions.

Big business (e.g., Power Corporation's Paul Desmarais et al.) with significant Canadian interests outside Quebec will no doubt be pleased with this package. But the smaller and medium francophone business class which has benefitted most from nationalism may be far less enthusiastic. They have been the main objects of attention of the web of government protections and incentives known as "Quebec Inc." Although Quebec Inc. would perhaps be threatened under the sovereigntists' preferred economic option of an independent Quebec within a North American Free Trade Agreement, the economic union proposals would offer an equal threat under federalism. Thus it is hardly surprising that Quebec business opinion on the proposals should be mixed, at best. Class politics may not displace nationalism after all.

The Tories have been nothing if not persistent in their efforts to constitutionalize their economic agenda. The Canada-U.S. Free Trade Agreement (FTA) was described by Ronald Reagan as the "economic constitution for North America." The Conservatives succeeded through the FTA in entrenching aspects of their program in an international treaty which in effect stands beyond the reach of successor governments to reverse the thrust — short of abrogating the treaty as a whole. Take for instance the case of energy policy. Not content

simply with dismantling the hated Liberals' National Energy Program (NEP) when they came into office in 1984, they succeeded through the energy provisions of the FTA in making certain that no future government of a different ideological stripe could ever enact another NEP, or anything remotely like it. The point here is not the wisdom of the particular policy in question, but rather the fundamental democratic principle that governments elected by the people should be able to initiate policies appropriately tuned to public preferences. When a particular policy is cast in steel it resists democratic accountability of governments to the people. I think that the economic union proposals follow this pattern, casting a particular ideological/partisan vision in constitutional steel and thus removing it from democratic control.

Let me make myself clear on this point. I am not suggesting that some other ideological agenda than this should be constitutionalized. I am suggesting that no ideological agendas should be constitutionalized. When a particular agenda is placed on the table in such a blatant manner, however, an unfortunate process is set in motion. Those who dislike or are suspicious of the agenda advanced, propose counter-agendas to balance what they see as threats. Thus we have a social charter put on the table to counter property rights, a social union to counter the economic union. Thus ideological and partisan considerations become firmly fixed at the very centre of the constitutional process, and attention is increasingly diverted from the fundamental problems that gave rise to the constitutional question in the first place. With growing complexity, confusion and paralysis result.

## Conclusion

The federal initiatives represent a double hijacking: first, a hijacking of both process and content by the Tories for partisan and ideological reasons, followed by the hijacking of the Tories themselves by their Quebec caucus. If we want to get *there* (i.e., a resolution of the basic national or community conflicts about how Canada is to be constituted), we just can't start from *here*. Bad enough to be hijacked, but even worse is to find ourselves in the hands of hijackers who are incompetent to fly the plane.

The first part of the document discusses the importance of maintaining accurate records. It emphasizes that proper record-keeping is essential for ensuring the integrity and reliability of the data collected. This section also outlines the various methods used to collect and analyze the data, highlighting the challenges faced during the process.

In the second part, the authors present the results of their study. They provide a detailed analysis of the data, showing the trends and patterns observed. The findings indicate that there is a significant correlation between the variables studied, which supports the hypothesis of the research. The authors also discuss the implications of these results for future research and practical applications.

The final part of the document concludes the study and offers some recommendations for further research. The authors suggest that future studies should focus on exploring the underlying mechanisms of the observed correlations. They also provide a list of references for the sources used in the study, ensuring that the work is properly cited and accessible to other researchers in the field.

## Social Values Projected and Protected: A Brief Appraisal of the Federal and Ontario Government Proposals

*Craig Scott*

The purpose of my presentation is to inject into the debate some discussion of a possible constitutionalized "social charter," such as that put on the table by Ontario's recent discussion paper. As the title of my comments suggests, I feel it is important to think in terms both of the images a constitution normatively projects and of how it institutionally protects its normative vision. I will address the question of the projection of values less extensively, thanks to the preceding presentation by Charles Taylor. Instead, I will approach the constitutionalization of norms and institutions mostly from the vantage point of means of protection.

That being said, I would like to add a few points that I think complement what Charles Taylor had to say. Both documents, the current federal proposals and the Ontario social charter discussion paper, are very much steeped in the notion of constitutions as fundamentally declaratory and constitutive of whom we are. The idea of "shared values" permeates both documents. We should take this choice of language seriously. Both the federal and Ontario documents are laced with a rhetoric of belonging, of membership, of full participation in Canadian society. In short, to go back to what Charles Taylor was saying, there seems to be a concern with equal citizenship — citizenship being understood more metaphorically, I hope, than literally.

There is, of course, a snowball effect created by the way in which the governments have conceived and presented their proposals and points for discussion. By this I mean that there is a dynamic at work for all Canadians, based on their different (and often overlapping and cross-cutting) sites of identity, to wish to see themselves in a renewed constitutional text. This is



Charles Taylor's "politics of recognition," which I think we must realize is of crucial importance for understanding how it is that minimalist approaches to constitutional change face serious hurdles. One implication of constitutional rhetoric of inclusion or recognition is that failure to achieve constitutional recognition is unlikely to be a neutral event for those who are excluded. In any society where the constitution tends to be an authoritative source of discourse, constitutional silence speaks loudly about the place in society at large of those whose values or self-understandings are not given recognition. In light of this problem of negative constitutional space for those for whom the constitution has none of the features of a mirror, it is fair to ask, as a kind of test, how well the two proposals deliver on the premise and promise of all-inclusiveness with respect to those who find themselves socially and economically marginalized in Canadian society.

At the outset, I should state that the federal government proposals fare badly on this test. The Ontario discussion paper fares much better. However, while I will endorse some options raised in the Ontario paper (notably, the role a new institution of the federation could play), I will argue that, in its range of options, Ontario does not take social and economic exclusion seriously enough. Specifically, it falls short by not discussing the potential "prodding" role that the courts could play with respect to a social charter. This results from a too-hasty endorsement of a negative rights vision of justiciable constitutional rights and a related overly-rigid conceptualization of the separation of powers. Indeed, I detected at times what might be called a "high policy" approach in the document. From the outset, when we are presented with the philosophical starting-point of social *policy* values as the metaphorical railway that now binds Canadians together, there is a tendency to think in terms of a relatively abstract value which Canadians place on a cluster of collective goods known as social programs. The dominant conception is one of persons as units of policy rather than of persons with individual needs and entitlements. In short, while the Ontario document laudably seeks to protect an aspect of Canada's heritage that scarcely finds mention in the federal proposals, there is something lost in the failure to probe fully the possibilities of thinking of social policy in terms of the social rights of citizenship.

I have already indicated that both the projection and the protection of values in the constitution are important. They are also related in obvious ways. Notably, the lack of protection can affect the status of the values that one is seeking to project. Especially in a society that, since 1982, increasingly (for better or worse) looks to the courts to protect us *from* the state, the lack of some corresponding judicial role for claims *upon* society through the medium of the state risks marginalizing those unprotected values. Even though the current Charter explicitly and implicitly contains some positive rights, it is hard to deny that the vision projected upon social and political debate by the privileging of

current Charter rights is very much that of "negative liberty." Short of de-constitutionalizing rights discourse entirely and returning to pre-Charter politics, the question must be asked whether it is not important to create a parallel constitutional priority for social rights reflecting the positive dimension of liberty — unless one is willing to argue that values have no constitutive influence on political and social discourse when those values are expressed in terms of justiciable constitutional rights.

I do not consider myself a Charter-phile, but I believe that we can grant a role to the judiciary without resigning ourselves to a resultant sterilization of moral and political discourse or to the much-feared "Americanizing" of our politics. Charles Taylor ended his comments with the plea to keep the courts out of any constitutional changes. I very much sympathize with the sources of this plea. It would seem related to the work he has done which distinguishes the "litigious" from the "participatory" strains in our culture. However, I tend to think that this dichotomy approaches being a false dichotomy, or, at least, is nowhere near a full dichotomy. I do not have the time to elaborate on this contention, about which I have written at length elsewhere, except to say that we should be willing to see a much more fluid role for both litigation and the courts in a broader social dialogue.

## The Federal Proposals

The federal proposals do not take seriously social values in the way I am talking about them. The ambitious and controversial economic union proposals are not accompanied by proposals for a parallel social union. There are extensive fetters on the spending power, with serious consequences for the federal ability to promote our common citizenship through nationally-supported social programs. Another indication of the general drift of the proposals is the proposed withdrawal from legislative jurisdiction over workforce training and housing, with ambiguous implications for the spending power in these areas.

Indeed, for all the evocative discussion of inclusion and exclusion in the federal background paper entitled *Shared Values: The Canadian Identity*, the proposals themselves essentially limit the projection of these inclusive values to the shopping-list symbolism of the proposed "Canada clause" — apart, of course, from the separate and crucial treatment of recognition of Quebec as a distinct society and of aboriginal peoples' (to-be-negotiated) right to self-government. In the proposed Canada clause, we do admittedly find "a commitment to the well-being of all Canadians," a phrase similar to that found in current section 36(1)(a) of the *Constitution Act, 1982*. In the same Canada clause, we see a "commitment to fairness, openness and full participation in Canada's citizenship by all people without regard to race, color, creed, physical or mental disability, or cultural background," a laudable principle that is

nonetheless notable for its failure to even hint that social and economic status compromises the ideal of full participation. Poverty is not treated as the pervasive feature of Canadian reality that it is, but is lost in a sea of euphemisms ("well-being") or economic, even trickle-down, thinking. Thus it is that the focus of the economic union proposals is on creating wealth and a more prosperous future, which will (it is contended) thereby ensure economic security and well-being. The one area in which redistribution is explicitly discussed is through a somewhat ambiguous reassertion of the section 36 provisions under which the federal government "will maintain its ability" (p. 27) to help Canadians share their wealth.

Finally, mention must be made of the *Proposals'* discussion of the current Charter of Rights and Freedoms. There is a long paragraph that discusses the resonance of current Charter equality rights among Canadians. The tone of the commentary could lead a casual reader to believe that all that is necessary to remedy discriminatory "social, political and legal disadvantage" already exists in the form of section 15 of the Charter. Suddenly, the right to property is parachuted in as a proposed addition to the current Charter. I cannot think of a better word than "parachuted," for there is no justification of any weight offered for this proposal. The entire discussion in the *Proposals* reads as follows (at p. 3):

The Government of Canada reaffirms unequivocally its support for rights guaranteed in the Charter. However, the Charter does not guarantee a right to property. It is, therefore, the view of the Government of Canada that the *Canadian Charter of Rights and Freedoms* should be amended to guarantee property rights.

One also seeks in vain for any further argument or justification in the federal background paper, which, in a section entitled "A Mutually Supportive Society," merely throws in two one-sentence references to the rights of property as being something Canadians value. In that same section we see sentences, even paragraphs, describing social programs in Canada and the values Canadians place on them as uniting them east to west. We find the following statement (p. 21):

We believe that all Canadians are *entitled*, as Canadians, to basic services regardless, of where they live in the country. ... Canadians generally want to ensure that their fellow citizens and their families are cared for when they fall on hard times. (emphasis added)

Yet, despite the heavy balance of attention being directed to social entitlements in the background paper's discussion, it is the right to property that suddenly drops in out of the blue in the proposals themselves. Given this disparity of attention in the discussion of fundamental values in Canada, it is quite ironic that property rights can be used to reinforce existing advantage. It takes very

little imagination to see that these rights have the potential to be invoked not simply as a defensive tool by the corporate sector faced with governmental regulation but also actually to undermine social programs and entitlements. I am not suggesting that we should see the federal property right proposal and the Ontario social charter proposal as somehow the antithesis of each other, such as to set up a potential one-for-one cancellation of the two proposals. However, property rights are indicative of a very different set of concerns than those that animate the social charter idea and are also a potential threat to the social charter, whether or not the social charter is itself constitutionalized in terms of individual rights.

## The Ontario Proposals

There are a couple of motivating concerns in the Ontario proposals. One of these is harmonization. The harmonization concern is driven by the fear of the "race to the bottom" that could follow from economic union and an intra-Canadian free trade competition. There is also a separate concern with optimization of protection based on a vision of national citizenship and worries about Ottawa's retreat from previous levels of cost sharing for various social programs. The language of "national standards" is the reference point for optimization which, however, is to go only as far as is compatible with legitimate diversity in the federation. This counterpoint allows for differences in social programs and levels of social entitlement across the country above any floor provided by national standards.

Interspersed in the document are references to the courts. The idea is expressed at one point that "whenever appropriate" they would have a "central enforcement role." Appropriateness tends to follow a negative rights paradigm, explicitly so in a few places. However, it is also clear that the Ontario document also sees features of existing programs, notably in health and education, to have the potential to be expressed in a constitutional document in negative rights terms. I think that this is important, for it implicitly, perhaps only unconsciously, taps into a stream of thinking known as "baseline analysis." In brief, the idea is that our baseline for analysis in Canada in 1991 is not some fictional or notional state of nature, but is rather a social state that binds us together in a community of mutual responsibility. In the Ontario document, there is a discussion of various options for drafting the norms to be contained in a social charter, among which the following statements are made (pp. 14-19):

[S]ome national norms and standards in social policy, such as portability or universality can be expressed as negative rights enforceable by the courts .... [W]e may choose to be even more specific [than earlier suggested options], especially in the case of programs which are well developed and where public expectations and consensus are well-defined. In the case of health care and primary and

secondary education, a clause could entrench the principles that these should be provided equally to all, and be publicly administered. Depending on the precise wording, some elements of this option could be enforced by the courts.

The document is not as explicit as it could be with respect to how its negative rights conception and our existing social programs interact. But implicit is the notion that there is much in the Canadian social state that we could consider as givens, derogation from which would amount to an interference with entrenched guarantees, or in other words, as violations of negative rights.

The foregoing ties into another way of thinking about the thrust of the Ontario document. Throughout the document, I think that there are at least two approaches implicitly at work. One approach might be called the preservation project. This is close to how, in 1982, most conceived of the current Charter, that is to say, a statement of who we were, what we had achieved, and what rights reflected fundamental values enjoyed in Canada in 1982. This might be thought of as "first order constitutionalism." It relates to the above-discussed notion of negative social rights, notably in the areas of health and education, as being possible first order constitutional values which we can now contemplate entrenching. At this level, the message seems to be that there would be no major problem in seeking to secure some constitutional protection for some fundamental features of the social state in Canada.

A second approach could be called the change-promoting project, which also implicitly receives some attention in the document. This would entail a constitutional commitment about who we would like to be, the values we cherish at some deep level but which are far from realized, and the values we would therefore like to be under pressure to take seriously as a society. One might think in terms of "second order constitutionalism." We are not there yet; we know that it will be slightly painful to get there; but we want some prodding at a constitutional level. In fact, the current Charter does contain elements of this kind of change-promoting, or second order, vision. Some of the changes made to drafts of the Charter — especially sections 7, 15 and 28 — reflect a certain intention at the time that the document was not only concerned with the status quo. Of course, even the most preservationist of rights can grow with interpretation and changes in understandings, and take on more radical overtones, such that there is no firm line between first and second order constitutionalism. Nonetheless, it does make broad sense to think in terms of first and second order constitutionalization of values, for this will have a lot to say about the relative degree of inclusion of various sectors of any society to which a constitution pertains. Entrenching social programs (whether or not expressed as claimable rights) is not an inherently radical enterprise. A social charter can be accomplished in a way that is highly "middle-class," and which is only partly informed by the needs and plight of those who experience the marginalization of poverty.

This is where so-called positive rights come into play. I am using "positive rights" here as short-hand for rights with respect to which our progress as a society to date is seriously inadequate, and potentially getting worse, such as in the areas of shelter and housing, food and nutrition. This lack of progress is all tied to serious poverty in this country. Social security, and the resulting ability to command financial resources to provide for one's own food and housing needs, would therefore be one area that must be conceptualized in tandem with deprivation of basic necessities of life. With respect to second order constitutionalism and the tendency to associate it with the notion of positive rights, the final point I would make at this stage of exposition is that the Ontario document has an interesting discussion of the role a reformed Senate or other institution of the federation could play. The prime concern would be to enhance participation by creating what could be called a constitutional spotlight on matters of social policy and social entitlement.

## Options

I would like now to discuss some options in as cooperative a spirit as possible, especially given that I have detected at this conference a consensus that the idea of a social charter is fundamental, at least if the federal reforms proposed for the national economic framework are adopted. We are therefore talking about what norms and what institutions we wish to see in the document that will do justice to this consensus. I should say that I would endorse the approach of the Ontario document when it suggests that we should think in terms of layers of protection, and not in terms of mutually exclusive alternatives.

The very first point of purchase is obviously the notion of "directive principles" (a term taken from the Irish and Indian constitutions) that place non-justiciable obligations on government. In section 36 of the constitution, we already have such statements in quite general terms with respect to the kinds of values under discussion here. In essence, the federal government's proposed Canada clause follows this approach of non-justiciable general principles, although it might be given greater interpretive weight given its apparent status as a preambular clause. The Ontario discussion paper also suggests the possibility of something similar, either as a general clause mentioning various social responsibilities of governments or as an expanded and more specific section 36. If this were as far as the social charter proposal were to go, I would add only that we should at least express its provisions in terms of rights or entitlements and not use the disempowering language of governmental responsibility and collective goods. However, in my view, such a statement of non-justiciable rights would still be an insufficient response to the consensus on the need for a social charter.

Beyond this very general symbolic approach, there are perhaps three conceptions around which we can organize the constitutionalization of social charter norms and institutions.<sup>1</sup> The first conception involves a social union parallel to the federal proposed economic union. The social union concept of the social charter would be jointly driven by a harmonization concern and some degree of optimization based on the notion of national standards and the overriding theme of national citizenship. The second conception or angle is an entitlement or basic social rights perspective. I will argue that we should be willing to discuss some subjective constitutional rights that can involve courts and administrative tribunals, without dismissing out of hand this layer of protection because we have preconceived and rigid ideas about courts or justiciable rights. The third conception, very much tied to the first two, is the intergovernmental equalization obligation as well as the capacity of the federal government to exercise its spending power (and to be bound by formal commitments and legitimate expectations generated once Ottawa has begun to spend in an area). I will only address the first two conceptions; although it represents a crucial layer for any social charter, I will not be discussing the third conception.

*1. A Social Union.* I now come to an excellent aspect of the Ontario options. This is the suggestion of a possible reformed Senate which would be an institution of the Canadian federation, not of the federal government, with implementation of the social charter being one of its functions. The Ontario discussion paper reads in part (p. 24):

[W]hatever institution is developed to implement the charter, it would have to be open and allow for significant public consultation and input. It may be required, for example, to hold public hearings, submit public reports, or to establish panels of members of the public to comment on specific issues .... In addition to broad public participation by individuals and groups, the creation of a non-governmental review mechanism also could be considered. For example, the social charter could include a provision that a public forum, made up of lay persons and/or experts in social policy, will periodically review the progress governments have made in promoting national standards.

I would like to emphasize that this approach is very much in line with that being taken at the international level, for instance in the monitoring by the U.N. Committee on Economic, Social and Cultural Rights under the International Covenant on Economic, Social and Cultural Rights, to which Canada is party.

The idea at work in this approach is that a process that genuinely provides for the participation of affected groups (notably groups that are the most vulnerable and disadvantaged in society) can prod governments and society at

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1 I owe this categorization to a conversation some time ago with my colleague Robert Howse.

large to take substantive commitments seriously. We might want to think in terms of a constitutionalized time table and procedural conditions for the kind of process discussed by the Ontario government. In this way, a constitutional spotlight will shine at least at periodic intervals on disadvantaged persons (and groups representing them) who can mobilize to inject a critical voice into the evaluation by the institution of the federation of social charter commitments. There could also be a constitutional obligation for governments to involve affected sectors of society in preparing reports to the institution of the federation, and to require copies to be submitted to representative groups so that criticisms could be annexed thereto before being submitted for scrutiny. It would also be desirable that hearings be periodically required and designed so as to hear the views of persons who feel that their social rights have not been met; then, the process of scrutiny can benefit from a kind of sharpening of focus that generalized discussion of policy cannot accomplish on its own.

The procedures of any institution of the federation should have some correspondence to those being developed or recommended by the fledgling U.N. Committee. We should strive for a symbiotic relationship between international and constitutional scrutiny of Canada's social rights obligations. I would add that the courts' role would be a limited but important one, namely that of interpreting and policing the process. If constitutional obligations regarding the process were not respected, there would be justiciable violations of the constitution.

The social union idea could be taken even further, although this would very much push the limits of the concern with legitimate provincial diversity mentioned in the introduction, and would depend on how the economic union proposal evolves. With respect to the latter, there have been suggestions that an economic commission could be created for the federation which would issue directives to enhance the functioning of the economic union. These directives would then be subject to ratification by a democratic and representative institution of the federation such as a reformed Senate. There is perhaps the potential for a parallel social commission whose directives would presumably be geared to harmonization and would also have some element of optimization by way of the notion of national standards. Presumably, as with the European Community on which this model is based, courts would be permitted, indeed required, to enforce the ratified directives.

*2. Justiciable Basic Entitlements.* What role could we envisage for the courts apart from policing the process or enforcing the directives discussed above? At minimum, there are three effects that a social charter should have on adjudication, effects which should be made explicit in the charter. First of all, social rights should be phrased as the basis for legal standing of individuals and groups to hold governments to their statutory and intergovernmental commitments in the social rights field. This would reflect the most fundamental of "rule of law"



premises, that governments, too, are bound by the law and, in this context, cannot undertake commitments that are not enforceable. Second, social rights must serve as an authoritative reference point for statutory interpretation and, in particular, for the kinds of interpretive presumptions that courts develop as to how broadly or narrowly statutory provisions should be construed. The presence of constitutional social rights would require, for instance, ambiguities to be resolved in favour of the persons whose claims are at stake, and would preclude a general attitude of deference to the executive with respect to the meaning of social statutes. Third, social rights or a social charter, however worded, should be available to inform the interpretation of section 1 of the current Charter and the limits that can reasonably be placed on Charter rights, especially those rights that have been interpreted to give some protection to commercial actors. This is especially important if the proposed right to property survives and makes its way into the Charter, without an explicit savings clause attached to it. The Supreme Court of Canada has eloquently stated on several occasions that the Charter must not be interpreted so as to undermine governmental attempts to remedy disadvantage and to roll back legislative gains made on behalf of more vulnerable sectors of society. Despite the doctrinal openness of the Supreme Court of Canada at the moment to using section 1 as a shield against certain Charter rights, this openness may not continue in the future without an explicit savings clause tied to the social charter.

These are, in my view, the minimum implications of a social charter for the role of the courts. However, we should ask whether we might not go further to protect directly the values contained in any social charter. As already discussed, the Ontario paper puts on the table the possibility of giving the courts a role with respect to certain fundamental features of social programs where we have done well (and which may be considered as baselines or givens of the social state in Canada). This is not the main emphasis of the Ontario discussion paper; indeed, it is in some tension with a general tendency to treat the social charter as being mostly about political obligations. However, we should be willing, as a country seeking to re-state what we stand for, to ask whether there are not fundamental features of the existing social state that we wish to preserve and treat as constitutional fetters on politics in Canada.

Finally, I come to the possibility of a limited court role with respect to basic social rights. Should individuals ever be able to go to court and claim a right to societal protection and assistance as a constitutional matter? In my view, yes. Courts should by virtue of a meta-democratic decision of Canadian society be permitted to engage in limited second order constitutionalism with respect to the most basic of social rights. Courts could be given the institutional role of prodding the political and policy-making process by dealing with individual circumstances that cry out for remedies. Courts would be concerned with results and would issue individual remedies requiring that a basic result be achieved

(housing a person freezing in the street in safe and adequate shelter) leaving the precise means (notably financing) to government (subject to ongoing scrutiny with respect to the sufficiency of the government's proposed or actual method of accomplishing the result). We could think in terms of the courts "putting the government to means."

Without wishing to be accused of a naive view of law or reality, there is, in the modern social state of Canada, a fundamental balance that the courts and governments can seek to work out between principle and policy. This balance is at the very least a regulatory ideal that can inform a dialogue between the courts, the executive and legislature as to when remedying individual circumstances is so fundamental to our self-understanding as an inclusive society that the courts can properly step in. The courts' role would tie into the view taken at the international level by the U.N. Committee that *all* states party to the Covenant are legally bound by a "minimum core obligation" to ensure the satisfaction of minimum essential rights such as those to essential foodstuffs, primary health care, basic shelter and housing and the most fundamental forms of education.

At a certain point, we have to eschew abstract doctrines on the role of the courts in favour of asking whether we should stand on such doctrines in concrete cases of serious suffering of persons in our midst. In a speech on the legitimate role of passion in judicial decision making, former U.S. Supreme Court Justice William Brennan has described how in *Goldberg v Kelly*,<sup>2</sup> a landmark case on procedural due process, "[t]he brief for the [social benefits] recipient told the human stories that the state's administrative regime seemed unable to hear" and went on to quote an extract:

After termination, Angela Velez and her four young children were evicted for non-payment of rent and all forced to live in one small room of a relative's already crowded apartment. The children had little to eat during the four months it took for the department to correct its error. Esther Lett and her four children at once began to live on handouts of impoverished neighbours; within two weeks all five required hospital treatment because of the inadequacy of their diet. Soon after, Esther Lett fainted in a welfare center while seeking an emergency food payment of \$15 to feed herself and her children for three days.<sup>3</sup>

This extract apparently profoundly influenced Justice Brennan's approach to the case. *Goldberg v Kelly* only involved indirect protection, namely the right to a hearing when social benefits are cut off. However, the point of the illustration is to demonstrate the impact that individual story-telling can, and

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2 397 U.S. 254 (1970)

3 Brennan, "Reason, Passion and 'The Progress of the Law'" (1988) 10 *Cardozo Law Review* 3, 21

should, have on how we deal with matters otherwise cordoned off as areas of "social policy."

I could tell numerous other real stories from the Canadian context which would similarly challenge you on whether you wish categorically to state that this is not the place for the courts. If you answer that the response of society is indeed purely a matter of social policy and general politics when faced with a homeless person living on the street (or in wretched or degrading conditions in temporary shelter) or with a malnourished child whose mother has been refused social assistance because she does not know who the father of the child is (and has not therefore made a "reasonable" effort to seek paternal support), then I will respect the fact that you have made that choice. But in my view, we would be a better society if we were to welcome the prodding role that courts could play in forcing us to truly treat as human beings and common members of society those suffering in our midst.

## Session II

# Summary of Discussion

Just as the presentations in this session ranged widely over the normative bases of the federal proposals, so did participants in the audience comment, contest, and question from many perspectives.

Bev Baines (Law, Queen's) led off with a comment on Taylor's analysis. She agreed that the issue of what binds the community together is a fundamental one. In contrast to Taylor, however, Baines argued that the communal glue could be supplied only by abandoning neutrality, which he seemed reluctant to do. Since an objectivist stance inevitably collapses differences, Canadians should instead unite in a collective effort to recognize and affirm the differences among various groups, realizing equality in practice through the empowerment of the disadvantaged. She further pointed out that such a position promoted responsible and representational equality, and was unlikely to be advanced by collections of middle-class white males, citing as evidence the panel's failure to reflect upon its composition.

Rob Howse (Law, University of Toronto) also took issue with Charles Taylor. Seizing on the Aristotelian conception of equality that Taylor advanced, he argued that such a view is entirely compatible with hierarchy; indeed, Aristotle's equality allowed even for slavery. Implying that Taylor's "difference recognition" would lead to such inequalities when applied to groups, Howse suggested that only a fundamental recognition of individual equality could secure freedom. Recognizing the differences between groups as a basis for limiting individual rights (as with the distinct society clause in the federal proposals) would lead inevitably to unequal freedom for the members of different groups. Further, he claimed, the direction of history is not towards the recognition of groups' diversity and their distinctive rights. Instead the lesson of history is that a choice must be made between nationalism and individual rights, the latter constituting the only reliable bulwark against the oppression that collectivities can inflict upon minorities and individuals.

Alan Cairns (Political Science, University of British Columbia) took the discussion into the area of aboriginal rights, which had been touched upon by

the panel only in general terms. He outlined how native peoples were involved in the constitutional reform process through several mechanisms that allowed for their special participation — the Royal Commission, the four parallel processes among the native communities, and, prospectively, through special representation in a First Ministers' Conference. Cairns linked the unique nature of aboriginal participation to Ovide Mercredi's statement to Joe Clark, that the latter simply could not speak for or represent the First Nations, because he was not a member of their community. Cairns pointed to the problems that could arise from this assumption and the several processes afoot. First, different recommendations or conclusions could be reached by the various special mechanisms now underway, each of which was likely to be accorded different degrees of legitimacy by the various actors in the overall constitutional reform process. More important, basic constitutional contradictions were likely to emerge when the recommendations of various uncoordinated processes were brought together. One stream of recommendations involved special arrangements for aboriginal representation in the Senate (*Shaping Canada's Future Together: Proposals*), and probably also in the House of Commons (anticipated recommendation of the Lortie Royal Commission on Electoral Reform). A second stream of recommendations would clearly be directed to enhancing aboriginal powers of self-government, thus removing aboriginal peoples from the jurisdiction of federal and provincial legislatures for the functions they would henceforth carry out themselves. At some point, the simultaneous strengthening of aboriginal representation in legislatures, and the limited or extensive removal of aboriginal peoples from the jurisdiction of those legislatures would produce a variant of the "Trudeau problem" (the incongruous positions of Quebec MPs, should that province gain special status and unique powers, of having full voting rights in the House of Commons over laws that do not affect Quebec but which will apply in the rest of the country). Should the constitutional result be that aboriginal communities come to exercise special powers, would one not have to ask whether aboriginal peoples should also continue to exercise the same voting rights held by other members of the electorate? Or, if there were special aboriginal representation in the Senate or the House of Commons, would not the constitutional question be raised of their participation in discussion and legislative voting over laws that do not apply to their people? Even now, the argument that Joe Clark or other members of the government cannot speak for aboriginal peoples is anomalous given the fact that aboriginal voters have had a part in electing these representatives.

Robert Groves (Native Council of Canada) broadened these themes. The essential constitutional question in his view is the need to define the community over which the constitution will apply. Modern societies consist of spaces within which social and market transactions occur, and the fundamental issue is not so much the rules governing these transactions as the extent and nature

of the community to which the rules apply. In this light, Quebec's problem is evident. It seeks recognition as a distinctive community, and the attempt to do so now reflects a fear that its society will be numerically overwhelmed and submerged within the larger Canadian community. Getting through the current constitutional crisis will require a definition of the constituent units of Canada, and this involves not only French Canada but also the aboriginal and other communities. Groves then turned to the problem of representation raised by Alan Cairns. Groves stated that demands for guaranteed representation had been made by native peoples in the past, but were no longer being advanced in the same way: representation in the existing political process designed for the larger community, guaranteed or not, might ameliorate under-representation of populations, but would not deal with representation of aboriginal governments or nations. Therefore such ideas as an Aboriginal Parliament or a House of First Nations is gaining more attention.

Turning to minority rights under the constitutional proposals, Marjorie Goodfellow (Townshippers' Association) spoke to the first of these which would modify access by Parliament and legislatures to the "notwithstanding clause," requiring a special majority of 60 percent rather than the current 50 percent plus one. Governments are usually in a position to pass legislation with support to spare. To permit any override of Charter rights is to put at risk those who most need Charter protection — members of minority communities, including official language minorities. Therefore, she urged that the "notwithstanding clause" be abolished. She explained that Quebec's anglophone community still felt strongly that its minority rights were at risk under the new proposals. To override rights by invoking the notwithstanding clause would henceforth require a 60 percent majority in the National Assembly, but this was not a sufficient guarantee of minority language rights in Quebec.

Next, Peter Leslie (Political Studies, Queen's) posed a direct question to Craig Scott. He wanted to know what were the advantages and disadvantages of enshrining in the constitution a social charter that would be justiciable. In particular, would courts come to usurp the role of legislatures in determining the allocation of public funds?

Last, Terrance Hunsley (School of Policy Studies, Queen's) raised several issues about how rights would be affected by any proposed social charter. First, he wondered whether a charter would confer new rights or act as a bulwark against the erosion of acquired rights. He asked about justiciability. And he requested that Craig Scott address the question of whether a social charter would help the Canadian courts enforce various international social rights covenants to which Canada is a signatory.

In response to all of these observations and queries, Craig Scott began by stating that the federal proposals, as they exist, contain no recognition of any new social rights, at the same time as they would unfetter market forces within

the strengthened economic union. Competitive market forces could produce new pressures on provincial governments to "ratchet down" their commitments to social programs, and some device would be needed to prevent this. The social charter would function in this capacity.

The role of the courts would be uncertain were a social charter in place. But justiciability would have several advantages, even were a social charter only to formally enshrine the rights to social programs which Canadians have already acquired. First, the right of recourse to the courts would allow individuals to claim before an impartial body that governments had not fulfilled their obligations. Judges could determine whether governments had failed, and would direct them to meet their responsibilities, and this procedure could be triggered by individuals who felt themselves to have been ignored by normal appeals to politicians and bureaucrats. Courts could also use the provisions of a social charter as an interpretive background in making decisions about redistributive programs. Here the social charter would be essential were property rights eventually to become inscribed in the Charter of Rights and Freedoms. Without an explicit declaration of social rights to counterbalance the new property right, Canada could be thrust back into a position like that of the United States in the 1920s, when the right to property provided grounds for striking down laws allowing for redistribution or for encroachments upon individuals' property undertaken to realize collective purposes.

Scott also addressed some objections to justiciability. The courts, he argued, would not take over the legislature's task of allocating public funds. But, he said, we must not hide from the fact that this approach *will* have financial implications and that it *will* place a special, if limited, constitutional priority on the allocation of resources in policy making. In particular, remedies in individual cases will have implications for legislative and regulatory schemes as the political process responds by seeking to generalize the remedy to others in similar circumstances of need.

In the end, with respect to basic minimum entitlements, Professor Scott suggested an interpretive clause be added to the existing charter of rights that would specifically mention particular social rights or refer to the rights contained in the social charter found elsewhere in the constitution. He proposed a clause such as:

(1) The following social rights [or, the social rights expressed in the Social Charter] shall actively inform interpretation of this *Charter* so as to secure for all their basic entitlements to be full members of, and participants in, society.

(2) In no instance shall anyone suffering social or economic disadvantage be deprived of other *Charter* rights and freedoms in the name of, or as a condition for, ensuring his or her social rights.

In his closing remarks, Reg Whitaker took up the problems of representation raised by Alan Cairns and others. He maintained that adequate representation of all constituent communities and interests is possible in the process of constitutional reform if it takes place through a constituent assembly. Similarly, representation of regional and aboriginal communities is possible within an elected House of the Federation, so long as this body is regarded as an intergovernmental one: in that case, representation — which, of course, commits communities to accept decisions — would not be representation within a particular order of government.

Charles Taylor agreed that representativeness of communities within some body is one way around the problems raised by the new view that equality requires difference recognition. He pointed out, however, that a single constituent assembly, whatever its makeup, would carry the implication that all the represented communities and groups constitute a single society.

Taylor spoke at greater length about how equal rights could be accommodated with the recognition of distinctive communities. The solution lies in appreciating that different rights have different degrees of importance (as is apparent in the existing charter). Rights to freedom of expression, for example, are more fundamental than rights to equalization. This appreciation allows for special status and for tailoring packages of rights to the preferences of various communities. The fundamental rights constitute a core which all within the broader community share, while those rights which are less important can vary across sub-societal communities.





## Session III

*Process: Closing the Deal?*



# Closing a Constitutional Deal in 1992: A Scenario

*Patrick J. Monahan*

There are two separate, but related questions which I would like to address this afternoon. The first is whether it is possible to achieve a successful outcome to the current constitutional discussions which are ongoing in Canada. This is an analytic issue. The second related issue is normative, rather than analytic: what method or process *ought* to be employed in seeking to achieve closure on the constitutional agenda.

My answers to these two questions can be summarized in fairly short and direct terms. First, I believe that it will be very difficult to achieve a successful outcome to the current constitutional negotiations. However, a successful outcome — which I define as an outcome that will permit Quebec to remain a partner in the Canadian federation — is possible. Moreover, I believe that the prospects of achieving a successful outcome are significantly higher today than they were six months ago, when the Allaire Committee and the Bélanger-Campeau Commission had just reported.

Second, the political process which is most likely to yield a successful outcome is also a process that can be justified in normative terms. To put this another way, there is no disjuncture between what we have to do and what we ought to do. I will argue that the process that is most likely to produce a successful resolution is also a process that is entirely consistent with basic democratic norms and principles.

## Six Propositions

I put forward six propositions that, taken together, point us in the direction which we are going to have to move in the months ahead.

My first proposition is that it is virtually certain there will be a referendum on sovereignty in the Province of Quebec by October 1992 unless, at a

minimum, there is a prior constitutional agreement involving the Government of Quebec, the Government of Canada and the governments of most, if not all, the other provinces.

It is well-known that the requirement to hold the referendum is contained in Bill 150, "An Act respecting the process for determining the political and constitutional future of Quebec." The terms of Bill 150 are clear and categorical: the Government of Quebec "shall hold a referendum on the sovereignty of Quebec between 8 June and 22 June 1992 or between 12 October and 26 October 1992." (section 1)

It is really quite amazing to read the popular accounts of Bill 150 which are circulating in English Canada. Media reports of Bill 150 constantly suggest that the legislation permits Robert Bourassa to cancel the referendum on sovereignty, or to substitute a referendum on a federal constitutional offer in place of the referendum on sovereignty. Of course this is quite mistaken: there is no "escape clause" permitting Bourassa to postpone or to cancel the referendum. The requirement to hold the referendum is absolute and mandatory, regardless of whether or not there are acceptable "federal offers" from the rest of the country.

Some commentators have pointed out that Bourassa could simply amend Bill 150 and in this way avoid the requirement of holding the referendum on sovereignty. This is perfectly correct. The question is: what would have to happen in order to permit Premier Bourassa to repeal or amend the legislation? The answer, it seems to me, is provided by the first proposition which I have set out above: *at a minimum*, he would have to have obtained a formal agreement from the Government of Canada and from the other provincial governments that is politically acceptable in Quebec. Without such an acceptable agreement, he will not be able to touch even a comma in Bill 150.

This flows from certain fundamental laws of political behaviour. While politicians change their minds all the time, they never want to be seen to be changing their minds. This is particularly the case if the issue is one in which the government has invested considerable political capital. The commitment to hold a referendum by the fall of 1992 is precisely this kind of issue for the Government of Quebec.

One further comment on this issue. It is also sometimes said that Premier Bourassa can avoid the referendum obligation by holding an election instead. The question that arises, however, is what would be his position on the referendum during the election campaign? Could he run on a platform advocating the repeal or the amendment of Bill 150? In the absence of some kind of formal agreement from other governments that is politically saleable in Quebec this would appear to be an unlikely prospect. Thus, even if an election were called, Bourassa would be forced to maintain his commitment to holding the sovereignty referendum during the campaign. This, in turn, would constitute a

binding political commitment which could not simply be ignored, even if Bourassa were fortunate enough to win the election.

My second proposition follows from the first. In the absence of a formal constitutional agreement, the Premier of Quebec will have no option but to tacitly or explicitly support the sovereignty option in the referendum campaign. The basis for this conclusion is simple. If Bourassa has not obtained an acceptable "offer" from the rest of the country by the summer of 1992, then he will have demonstrated the "bankruptcy" of Canadian federalism (at least from the point of view of Quebec nationalists). The rest-of-Canada (ROC), having been granted one last reprieve after the Meech Lake debacle, would have failed to produce an offer acceptable to Quebec. This would mean that during the sovereignty referendum which would inevitably be held, there would be just one option on the table. That option would be sovereignty for Quebec. Federalists in the province of Quebec would have nothing that they could put forward as a credible alternative. There would be nothing to vote for on the federalist side. This will mean that Bourassa will have no real alternative but to concede that sovereignty is the only acceptable option for the province of Quebec. The outcome of a referendum campaign conducted on this basis could scarcely be in doubt.

Commentators in English Canada continually refer to Bourassa as a wily politician who has the ability to manipulate outcomes and to ensure that he always emerges as the victor in any political struggle. But considering the predicament he is currently facing, what is remarkable is how little room for manoeuvre he has given himself. He has legislated a requirement to hold a referendum on sovereignty. He has further declared that English Canada must come up with binding offers that are acceptable to Quebec prior to that referendum. And then, to top it off, he has announced that he will not attend any first ministers' meetings on the constitution. Instead, he has insisted that he will negotiate on a bilateral basis with Ottawa alone.

This is the equivalent of pulling the pin on a grenade, chaining it to your wrist, and then throwing away the key, thereby ensuring that no one else can rescue you. What should be crystal clear to Bourassa is that the one way to guarantee that he will *not* achieve an acceptable constitutional agreement is to continue to boycott first ministers' meetings on the constitution.

It is my view (and this is the third of my six propositions) that the only way to achieve an acceptable constitutional agreement is through the vehicle of a First Ministers' Conference (FMC). An FMC is a necessary condition for the securing of an agreement. Now I do not mean to suggest that other possible processes might not be put in motion, processes such as conferences, constituent assemblies, commissioned studies, panels of individuals, and a federal parliamentary committee, which we now have. The point is that none of these other processes is sufficient, in and of themselves, to achieve an agreement. Only a

meeting of all first ministers — including Premier Bourassa — can possibly achieve a general agreement. This conclusion is borne out by an assessment of the available alternatives.

One is the Special Joint Committee of Parliament. Of course, the current federal committee has serious credibility problems. But even if this were not the case, a parliamentary committee itself is really only a prelude to some kind of attempt to bring governments onside. This has always been our experience in the past. Thus, for example, the Charest Committee in May of 1990 put forward an excellent report which enjoyed the support of the three major parties in the House of Commons. But the Committee itself could not close the deal. It could merely set places at the table around which the deal would be struck.

This is also the case with bilateral negotiations between the federal government and individual provinces. This is Premier Bourassa's preferred option — he will negotiate with Ottawa, and Ottawa in turn will negotiate with the remaining provinces. Again, bilateral negotiations are useful and necessary. But they merely set the table for a deal rather than close the deal itself. Consider the negotiations that produced the Meech Lake Accord itself. There were two separate tours by Gil Rémillard to present Quebec's proposals and two separate rounds of meetings between Senator Murray and the provinces. These bilateral negotiations narrowed the differences and broadened the areas of consensus. But in order to make the crucial final adjustments and accommodations that produced Meech, it was necessary to bring all the first ministers together. Only this type of direct bargaining between the actual governmental decision-makers — the premiers — allows for the direct engagement of all the relevant interests and produces the trade-offs that have to be made in order to achieve agreement.

So by refusing to attend an FMC on the constitution, Bourassa has thrown away the key that might be used to free him from the hand grenade that he has chained to his wrist. He has renounced the one vehicle — an FMC — that might permit him to obtain an acceptable constitutional settlement.

Premier Bourassa's policy has been explained on the basis that negotiations involving all the other provinces have been discredited in Quebec following the Meech failure. This may well be true, but is beside the point. The point is that Bourassa cannot amend the constitution by simply negotiating with Ottawa. Therefore, if he is serious about amending the constitution, he is going to have to negotiate with the decision-makers whose consent is necessary for a constitutional amendment. You cannot get an agreement by refusing to undertake negotiations with the very people whose agreement is required.

My fourth proposition is that a First Ministers' Conference, if it is to be held, would also have to include "behind closed doors" negotiations. While part of the meeting would be held in public, the negotiations themselves would take place in private. This is not because of the failings of politicians, but simply because of the dynamics of a successful negotiating process. Bargaining

compromise does not take place in public. When the heads of the European Community met in December 1991 in Maastricht to discuss economic and political union, the negotiations did not take place in front of television cameras. Nor did any media accounts of the meeting (even those from the Canadian media) suggest that there was anything untoward in this type of "behind closed doors" process. It was simply assumed that it was entirely appropriate and necessary for the European leaders to meet privately if they were to achieve an agreement. This assumption is perfectly correct. Bargaining compromise will only take place when you have relatively small groups of persons meeting in a private setting. Only in this context will there be the type of flexibility and risk-taking that is necessary in order to reach an agreement.

My fifth proposition is that while a First Ministers' Conference is a necessary condition for an agreement, it is not a sufficient condition. The reason for this, alluded to by Reg Whitaker, is that the first ministers' process of elite accommodation or "executive federalism" has been largely discredited in this country. People are suspicious of any agreement that would be reached solely by negotiations among first ministers and then forced through legislatures. There would be a widespread resistance to any such attempt. Could this be remedied by broadening the membership at a First Ministers' Conference to include opposition politicians or aboriginal organizations, as suggested by political scientist Peter Russell?<sup>1</sup> I do not think that this type of arrangement would deal with the legitimacy problems. Nor would conferences or constituent assemblies, at least not an assembly held after an FMC. Such an assembly would not necessarily come to the same result as had been reached at the FMC. Thus a constituent assembly could precede an FMC, but not follow it; you would still be left with the problem of the legitimacy of the deal which the first ministers had reached.

So my sixth proposition is that there must be some other mechanism that will grant political legitimacy to any agreement reached through an FMC. It is difficult to see what this mechanism would be, other than a national referendum. Simply passing resolutions through provincial legislatures will not be regarded as sufficient. The Meech Lake process demonstrated that reality. A Canada-wide referendum, on the other hand, would conclusively settle any legitimacy problems. If the referendum approved the deal, ratification by provincial legislatures would follow as a matter of course. If, on the other hand, the agreement was rejected by the people, then the amendment simply could not proceed any further and governments would be forced back to the drawing board.

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1 Peter Russell, "Towards a New Constitutional Process," in Ronald L. Watts and Douglas M. Brown (eds.), *Options for a New Canada* (Toronto: University of Toronto Press, 1991), pp. 141-56.



The idea of a national referendum on anything is a somewhat unpleasant prospect for many Canadians. The idea of a national referendum on a constitutional proposal is downright frightening. The fear is that the referendum would split the country along linguistic lines, isolate Quebec, and only further diminish the chance of emerging from our current muddle in one piece.

But a referendum is also decisive and cleansing. It may well pierce the constitutional boil that threatens to destroy this country. It will permit ordinary Canadians to have a direct say in the process, thus responding in a tangible way to the sense of exclusion that was experienced in the Meech debate.

Perhaps most importantly, a national referendum will force Canadians to focus on this constitutional debate. And it will force them to act as citizens, as members of a political community, rather than as mere rights-holders pursuing an agenda defined by narrow self-interest.

In any event, a referendum of some kind is likely inescapable. The province of British Columbia is already committed by law to hold a province-wide referendum on any constitutional proposal. The other western provinces as well as Newfoundland can be expected to follow B.C.'s lead.

It may be that a national referendum might be conducted under joint federal-provincial supervision and authority. There would have to be an agreement as to the timing of the vote and the question or questions that were asked. There would also have to be a guarantee that the proposal could not proceed unless it secured majorities in Quebec, Ontario, the west and the Atlantic provinces. Further, there would have to be some mechanism for aboriginal participation and consultation in the process. Assuming agreement on these essentials, there might be particular rules applicable in individual provinces, depending on the circumstances of those provinces. For example, the province of Quebec has a quite detailed and complicated procedure for holding referenda. There should be no reason why these rules could not be adapted so as to fit within the parameters of a Canada-wide vote on a constitutional question.

A possible scenario would see a meeting (or meetings) of first ministers in April or May 1992, to which representatives of the aboriginal peoples of Canada would be invited. Assuming that these meetings resulted in an agreement, this could be followed by a national vote on any agreement in September. Then Canadians would have to await the outcome of a possible vote on sovereignty in Quebec in October. With a little luck, we might just emerge on the other side with a country.

## Closings, Cynics and Cheerfulness<sup>1</sup>

Donna Greschner

The topic that I am about to discuss is a most difficult one: will there be a deal and if so, what and how? Everyone wants predictions. With circumstances changing rapidly, as they have done since the demise of Meech Lake, predictions are for the foolhardy. Moreover, the subject is so profoundly depressing, as the federal government appears more disorganized with each passing day, that I contemplated doing nothing except tell jokes in the hope of cheering up myself and others who share my despondency, such as Reg Whitaker. Indeed, last night, rather than reflect further on my assignment and slip deeper into melancholy, I read a book about women's humour. Even then, however, the constitution caught up with me because the book's title could describe my life before and after becoming interested in the often dirty business of constitution-making: *They Used to Call Me Snow White, But I Drifted*.

Hints of dirtiness in the constitutional process is connoted by the very word "deal" and the phrase in the title of this panel, "Closing the Deal." The image is of corporate board rooms or poker tables, closed doors, cigar smoke and the rolling of dice. Even as a metaphor, the games of business and cards seem inappropriate when the future of the country is at stake, a point realized by the public during the Meech Lake debates. It was the wide-spread perception of a secret deal, of a completely closed process, that was in very large measure responsible for the failure of Meech Lake. Perhaps in a better world, the

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1 In revising my panel remarks for publication, I would like to thank the conference organizers for inviting me, and to point out how important it is for conferences such as these not to be only a meeting of the old boys, the "big white male heavies" who comprise the constitutional elite. In this respect the conference on 30 November was an improvement over the conference on 29 November organized by the John Deutsch Institute, where not one woman spoke, either in presenting a paper or commenting from the floor. This speaks volumes about what is wrong with the process of constitutional reform and I was pleased to see more women at the 30 November conference.

constitutional process will be fully open and inclusionary, reflecting all the best principles of a rich and effective pluralistic democracy. That process may be my hope and objective, but my expectation is different.

Perhaps I speak as a cynic when I focus on the *real politik* of constitution-making and describe one realistic scenario, rather than the process I would like to see. If so, my cynicism is not without foundation. My expectations differ from my hopes for several reasons. One is the resistance of people with power towards sharing it; other processes suggested in the recent debates, such as constituent assemblies and referenda, involve power-sharing. But the more important reason is the short amount of time available before a referendum in Quebec. The deadline of 26 October 1992, contained in Bill 150 passed by the National Assembly in June, likely prevents any change to the basic elements of the process we have now.

My scenario is that a deal will be worked out by the first ministers. They will finalize the details at a First Ministers' Conference which will involve hard bargaining and horse-trading. However, the events leading up to the FMC and the circumstances surrounding it will look different from Meech, as they have done already. We should expect even more committees and conferences, provincial reports and public consultation. These reports and gatherings are useful even if their conclusions mostly end up in the same place as where the socks go. They increase the legitimacy of the final product, the deal. The deal will likely not be ratified by referenda but instead will receive speedy approval in Parliament and the legislative assemblies. In sum, the summer of 1992 will witness the same process of the Meech Lake Accord.

My scenario is based on the following five premises about the state of constitution-making. They may be off the wall. Hence I will be very brief about them and the contents of the "deal."

1. *All first ministers want a deal.* In other words, everyone wants Quebec to stay in Confederation. This assumption may seem obvious but bears articulation for two reasons. First, it is by the far the most important requirement for a deal. If merely one first minister, for whatever reason, does not want an intact Confederation, sitting at the table becomes either pointless or dangerous. Second, while trite the premise is not necessarily accurate. Given Brian Mulroney's lack of popularity outside Quebec, he may well want to run for the job of Prime Minister of Quebec! As well, the three NDP premiers have a collective veto since they represent over 50 percent of the population. Particularly now with the federal Liberals sounding more like the Tories every day, the New Democratic Party has a much better chance of forming the government federally if Canada does not include Quebec. So too would Preston Manning's Reform Party. A cynic may well interpret the manoeuvres of Reform as motivated by a desire for separation.

If the first ministers want a deal, they must be prepared to alienate and offend some of their constituents. They should resist responding to every burp and blather of the Reform Party. The federal package is already too marked by concessions to the Reform agenda. After all, the New Democrats have won three provincial elections in less than 18 months. These victories cannot be blithely dismissed as caused only by voter disenchantment with politics generally. They also indicate voter dislike with conservative policies. Support for the programs of social democrats, for an agenda different from the neocons, is more widespread than Bay Street or the *Globe and Mail* want to believe.

2. *The population still believes in representative government.* This premise must be true to some extent in order for the first ministers to have the legitimacy to make a deal. Contrary to some opinion, the Meech Lake debacle has not destroyed all public confidence in representative democracy. The public revulsion about the substance of Meech was integrally linked, whether or not rational, to the process. The visuals were terrible: no prior public awareness of an impending deal, then white male elites cozily gathered behind closed doors, followed by their announcements that no amendments would be permitted during the hastily called public hearings in several ROC jurisdictions. Ignored was a cardinal rule of problem-solving that people must be involved in the process to approve of the product. This time, the process will not look so bad. Already the public is flooded with reports, proposals and new requests for their opinion.

If this premise is true, the first ministers of ROC should not be too quick to turn to referenda or other methods of approval outside of resolutions before ordinary legislative assemblies. From the perspective of politicians, referenda are poker games with very high stakes because outcomes are far more uncontrollable than with other methods of change. Nor need politicians assume that every Sally and Joe Citizen favours referenda. From the perspective of disadvantaged groups, referenda present the danger of their rights and interests being negatively affected by the majority.

3. *The population is deeply distrustful of the prime minister.* This premise is a qualification to the preceding one. The people of ROC believe in representative democracy but not the representative they currently have in Ottawa. It is remarkable that Brian Mulroney only required five years to generate the jokes in coffee row throughout western Canada that took Pierre Trudeau an entire career. Moreover, his advisors are as distrusted as him, especially by several key constituencies. Several influential chiefs in aboriginal organizations assume that whenever Norman Spector speaks to them he shades or evades the truth. None of the prime minister's inner staff (the road show of Lowell Murray and cohorts) won friends among major aboriginal organizations during the three-year Meech process.

Thus, the prime minister cannot take the lead role nor be seen to take it. Placing Joe Clark in charge of the constitutional portfolio has restored a bit of trust in the public mind but only with the government generally, not with Brian Mulroney. Clark's appointment has not removed the distrust completely because too few people believe that Mulroney is not still pulling the strings.

4. *The population outside Quebec is apathetic about the constitution, but the apathy is shallow.* In western Canada it is almost impossible to prod anyone into a discussion about the constitution. A few weeks ago, the host of Saskatchewan's largest open-line show asked me to talk about the constitution on his program. He said that I had to realize that we would be talking to ourselves because no one was interested in the constitution. He was right. Although we both tried to be provocative and witty, we received three calls, one from a listener who calls every day, whether the subject is the constitution or the activities of the local branch of the Canadian Diabetic Association.

In Saskatchewan, the economy is front and centre on everyone's agenda. If you have been in Saskatchewan recently, you know that the economic situation is not dismal. It is desperate.

The apathy can be used to advantage to address successfully the constitutional crisis, but carefully because it is shallow. As Pierre Fortin reminded us yesterday,<sup>2</sup> prejudice is fuelled by economic hard times.

The shallowness of apathy is one reason to ensure that the First Nations are happy with the deal. Their rejection or exclusion from the deal would be strong justification for a significant proportion of the population turning against the agreement. In part, this reflects considerable support in principle for the First Nations claims. In addition, however, for a too-large segment of the public, rejecting the deal because of its unacceptability to aboriginal peoples is far more politically correct than expressing anti-Quebec sentiment.

5. *The first ministers refuse to exaggerate the importance of constitutional language respecting their own powers.* Since 1867, history has shown that the words of the constitution often, if not usually, have little impact on the scope of their interpretation by the judiciary. The courts are influenced more by broad political and social trends, not by words alone, in their adjudication of constitutional conflict.

For players with power, the words are often irrelevant because they can do what they want through other means. Words are important for groups with less power because words are all they have. Thus, the precise wording of

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2 Editor's Note: Fortin's comments are provided in the publication of the conference proceedings. See Robin Boadway and Douglas Purvis (eds.), *Economic Aspects of the Federal Government's Constitutional Proposals* (Kingston: John Deutsch Institute, Queen's University, 1991).

constitutional amendments is of critical importance for the First Nations because they have very little political clout in Parliament or the provinces. Words are very significant to women's organizations for the same reason. The 11 governments, however, are players with power, not with equal power of course, but still with considerable power. The first ministers, therefore, should not fret too much about the language chosen in relation to their own powers.

These are my five premises that make reading a deal possible. What will be the content of the deal? As John Helliwell suggested yesterday,<sup>3</sup> it will be a minimal one primarily because of the constraints of time. A truly minimal deal will have the following elements.

1. *A distinct society clause in the Charter.* As we all know, Quebec will never accept a deal without recognition of its distinctiveness, and for very good reason. Clyde Wells is intimating that he finds the placement in the Charter more acceptable than the Meech Lake version. Women's groups in ROC will not be as concerned about diminution of women's equality because the new clause (the proposed section 25(1) of the Charter) will have less potential to trump the equality rights in sections 15 and 28. Generally I agree with David Schneiderman's comment from the floor that the legal effect of the clause is frequently exaggerated. Indeed, the Supreme Court has rendered other interpretive provisions superfluous, trivial, or of small consequence. Sadly, section 28, the clause with the strongest wording, is virtually ignored by the courts.

2. *Transfer of some jurisdictional ground to Quebec.* Limited asymmetrical federalism could be sold, especially if Charles Taylor and others continue to articulate a richer conception of equality; one fuller than the thin and often damaging concept of formal equality; one grounded in the realization that true equality requires recognition and respect of difference. Women's organizations have been advocating this conception of equality in their discussions about the federal proposals and in their interventions before the Supreme Court. Clyde Wells will be a very tough sell here, since he believes equality means only formal equality. At a minimum, he should agree to delegation, perhaps the sleeper in the federal package.

3. *Self-government for aboriginal peoples.* Constitutional recognition of inherent self-government appears inevitable when one traces the changes in the discourse over the past 25 years. Moreover, as I discussed in the fourth premise, it is simply too politically inexpedient to exclude the First Nations. The politicians should recognize "inherent self-government" and do it soon. Again, the cynic would say that the Supreme Court can be counted upon to keep

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3 Editor's Note: See comments by Helliwell in Bowdway and Purvis (eds.), *Economic Aspects of the Federal Constitutional Proposals*.

aboriginal governments within manageable limits, for even its decisions hailed as significant breakthroughs for aboriginal peoples retain roots in colonial thought.

4. *Some move on Senate reform.* The extent of Senate reform depends to a large measure on the weight of Reform Party pressure on premiers, especially Premier Getty. It will likely be a one and one-half "E" Senate because in my view support for the full triple-E package has diminished with the election of Premiers Romanow and Harcourt.

In my perfect world, I would include more amendments in the package. But I am speaking as a realist and these four elements are the deal-breakers. Everything else in the federal package is superfluous to a deal now and simply muddies the waters.

Who will likely cobble together the deal? The most likely person to play a leading role is Bob Rae. He is the most powerful premier in ROC because of the province he governs and the obvious leader of the three NDP premiers with their collective veto. Moreover, he is trusted, as much as they trust anyone, by the First Nations and by women's groups and other non-governmental organizations. Thus, he should take the lead role with the premiers. The federal power-brokers and their sycophants should stop criticizing him and let him develop a set of proposals acceptable to Quebec.

A silver lining may exist for the prime minister. Bob Rae may pull it off, if he can be convinced to take on the job. Then, if history repeats itself, the electorate will reject him as they have rejected other premiers who have taken a lead role in constitution-making. Such was the fate of Allan Blakeney in 1982 and David Peterson in 1990. Voilà! Brian Mulroney will see both the unity of the country and the ouster of the government he most dislikes, although he will be gloating as a private citizen himself. I leave it to you to decide whether my last prediction reinstates your cheerfulness.

## Is a Deal Possible? Public Opinion and Political Strategies

*André Blais*

My task is to look at the constitutional process from the perspective of public opinion and its impact on politicians, with a special focus on Quebec. A basic assumption of my analysis is that public opinion affects public policies. I also assume that the federal government's basic objective is to make a deal that is acceptable to both Quebec and English Canada (I leave aside the aboriginal issue, which is too complex to be dealt with in the context of this short paper).

As politicians and bureaucrats were preparing the federal government's constitutional proposals, this past summer, that task must have appeared daunting. From Quebec, there were demands for a recognition of its distinct society and for a substantial shift of powers to the provincial government. From the rest-of-Canada, there was strong resistance to the concept of a distinct society, and to the idea of giving too much to Quebec in general; there were some additional concerns, the most obvious one being a reformed Senate.

The most difficult decision, perhaps, concerned the distinct society issue. In retrospect, the decision to propose once again a distinct society clause, with a more explicit formulation, seems to have been a bold and shrewd move. For sure, this was and still is an unpopular idea in English Canada. But if you are going to give something to Quebec, it is easier to offer the distinct society clause than, let us say, the whole transfer of social policies to the provincial governments. The federal government has opted for mounting another battle in favour of the distinct society. The battle is not won, but it can possibly and even probably will be won. And, perhaps more important, as long as this is the battle, the transfer of powers issue is not on the agenda.

For English Canada, of course, the pill had to be sweetened. This was done in two ways: first, by making the clause more explicit in its reference if not in its implications, thereby countering the claim that it was too vague; second, by



offering something else, most importantly a reformed Senate, to which I will return.

It would seem that the federal government may well win its case. The latest *CBC-Globe and Mail* poll, published 4 November 1991 indicated that a strong majority outside Quebec still opposes the recognition of the distinct society. The same poll, however, shows that 40 percent of those opposed are willing to accept it in order to keep Quebec from separating. This gives a slight majority more or less willingly on side.

English Canada is not simply more open to Quebec's demands. The federal government had to convince English Canadians that it was not responding solely to Quebec's concerns. This it achieved first and foremost by proposing a reformed Senate. But perhaps as significant was the series of proposals to promote the economic union. In my view, this section of the package conveyed a crucial message — that the new round of discussions is not just a Quebec round, and that Ottawa wants to keep a strong Canada.

The first polls have shown widespread rejection of the proposals as a whole. The *CBC-Globe and Mail* poll indicated strong disapproval in Quebec (62 percent against; 28 percent in favour; and 20 percent do not know); and a more muted response in the rest-of-Canada (38 percent against; 28 percent in favour; and 34 percent do not know). These numbers, however, may be misleading. As Hugh Windsor pointed out, "responses to individual proposals were often more positive than the responses to the package as a whole, a phenomenon which suggests that some of the unpopularity of the government which is sponsoring them has rubbed off on the constitutional package."<sup>1</sup>

Briefly, let me go over some specific proposals, and give my personal appreciation of their "acceptability" to public opinion in Quebec and the rest of Canada. My judgement is based on the following reading of attitudes. I assume most Quebecers have a greater attachment to Quebec, lean towards sovereignty, but are concerned and sometimes scared about *short-term* economic costs. They would prefer a deal, renewed federalism, but not at any cost; it ought to be clear that they are getting something substantial out of the deal. As for English Canadians, they are fed up with the whole thing, are unwilling to give a lot to Quebec, but are ready to make modest compromises to save the country.

If that is the public mood, it seems to me that there is room for compromise on most of the issues. As I have said, a substantial minority of English Canadians will staunchly oppose the distinct society clause till the very end, but a slight majority is now resigned to swallow it. In the same vein, many Quebecers may have concerns about its being narrowed down, but the bottom line is that Quebec has won on this, and it would be very difficult to convince

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1 *Globe and Mail*, 4 November 1991, p.A-6.

the majority of Quebecers that it is a defeat. Likewise, the insertion of a Canada clause may be seen as an annoyance in Quebec, but it can hardly be a sufficient condition for rejecting a deal.

The same verdict applies to the Senate. Most Quebecers are resigned to the idea that if there is to be a Senate, it makes sense to have an elected one. And both Quebecers and Canadians are also resigned to the idea of a compromise between the principles of equal and equitable representation.<sup>2</sup> Finally, the federal government's proposal to give the Senate a six-month suspensive veto neatly corresponds to the kind of middle ground that should be acceptable to most Canadians. A lot of people (a majority indeed) will dislike the deal, but again not enough to break it.

Then comes the set of proposals concerning the economic union. The economic union concept is in many ways similar to free trade. How is it possible to oppose freedom, trade, the economy, and unity? In the abstract, it is a motherhood concept, with very positive connotations. As it gets embodied in concrete gestures, however, support weakens substantially. Public opinion is consequently changeable; very much depends on how the issue is defined. In the *CBC-Globe and Mail* poll, for instance, 45 percent of Quebecers agreed with giving the federal government greater powers to strengthen the economic union. But a Multi-Reso poll indicated that 73 percent disagreed with giving the federal government more powers than it presently has. Slight variations in question wording yield substantially different results, suggesting the absence of firm opinions.

The federal government has announced its intention to tone down its proposals on the economic union. The real concern in Quebec is whether the economic union could serve as a major centralizing force. That concern could be allayed if the proposals, which give Ottawa full power to implement policies geared to promote an efficient economy, are withdrawn, and if provincial governments are allowed to use a kind of notwithstanding clause. In short, although the proposals as they stand are clearly unacceptable, there is still room for compromise. All the federal government needs here is to establish the principle of free movement of people, services and capital in the constitution. To the extent that this can be obtained at least partially without giving the federal government extra powers, I see real possibilities for an acceptable compromise.

The last issue I deal with is the potential transfer of powers to provincial governments. The present proposals offer very little on this score. An earlier *CBC-Globe and Mail* poll of 22 April 1991 indicated that a majority of Quebecers would like "many functions now performed by the federal government [to be] shifted to the provinces"; more specifically a majority

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2 See results of *CBC-Globe and Mail* poll reported in *Globe and Mail*, 4 November 1991.

would want welfare and social programs to be the entire responsibility of Quebec. What we do not know, however, is how intense these preferences are. My hunch is that most Quebecers are not overly concerned with the division of powers, but that English Canada must show its good faith by giving away some additional powers to Quebec. Whether what is now being offered (which is almost nothing) is enough is a moot point. I must confess I really do not know. It strikes me, however, that the federal government has been highly successful, to this point in time, in focusing attention away from this most difficult issue. Perhaps Quebecers will be relieved with the federal government's retreat on the economic union section, and will be content with the status quo on the division of powers. I believe this to be a possibility, and this is why it is in the interest of the federal government that distinct society, the Senate, and the economic union continue to occupy the agenda. I should add, however, that the status quo will be much more difficult to swallow for young Quebec Liberal militants. I would anticipate a substantial fraction of them becoming full-fledged sovereigntists if no additional powers are on the table.

The other side of the coin is whether English Canada could accept a decentralization of powers. The April 1991 CBC-*Globe and Mail* poll reveals that 35 percent of English Canada is favourable to wide-ranging decentralization. This is much more than usually assumed. English Canadians prefer the status quo, but they lean more towards decentralization than centralization. How would they react to a proposal to shift social policy, for instance, to the provinces? My hunch is that there would be formidable resistance, in part as a reflection of Canadian nationalism, but even more so because this would be perceived (rightly) as another concession to Quebec. I do not think English Canada is willing to give Quebec anything else, after having yielded on the distinct society.

In my assessment, then, there is room for acceptable compromises on most of the issues, the big question mark remaining the transfer of powers, especially on social policy. I also perceive the three major federal political parties as being keen to reach a consensus. I am deeply puzzled when I see the parties seemingly sharing the same interest on an issue. This simply does not square with my view that politics is basically a zero-sum game: one party's gain is another party's loss. What may be going on here is that the partisan implications are fraught with so much uncertainty, and the two opposition party leaders feel personally so uncomfortable with the present constitutional situation, that partisan considerations are basically kept aside. All parties are convinced that the stakes are high, that there is a real possibility of the country breaking apart. Under such circumstances, the probability of a package backed up by the three major parties seems very high.

This leads me to consider the issue of a national referendum (or plebiscite). The question I want to discuss is not whether there should be a referendum. (In

my mind it is crystal clear that, on democratic principles, any constitutional reform should be approved by the people; I am appalled by the traditional lack of support for this basic democratic principle in Canada, especially in English Canada. And I cannot help notice that it was through an appeal to his democratic principles, i.e., by proposing a referendum, that Trudeau tricked Lévesque in 1981. We got the Charter perhaps because Lévesque was too convinced a democrat). But rather, what are the benefits and costs of a national referendum from the perspective of the federal government. For this exercise, I assume that the package will be endorsed by the three major parties (the position of the Reform Party is still unclear to me).

What could the federal government potentially gain from a national referendum? Clearly, if the proposals were to get strong approval, they would acquire greater legitimacy, undoubtedly a precious asset at a time of rising political cynicism. The gains, then, depend on the probability of success. It seems to me highly likely that a package backed up by the three major parties (and perhaps even the Reform Party) would get strong majority support in English Canada. The big question mark is Quebec. There, I believe, the costs are potentially serious. The basic point is that it is easier for Quebecers to *reject* the federal government's proposal than to vote *for* sovereignty, for two reasons. First, and most important, economic concerns are bound to weigh more heavily in a referendum on sovereignty, when the potential consequences of separation will be widely debated, than in the context of a national referendum, when the focus will be on the specific reforms being proposed. Second, a national referendum will necessarily allow the expression of anti-Quebec feelings. In Quebec, these feelings will be widely reported in the media, and this will inevitably fuel Quebec nationalism. I do not rule out the possibility of the referendum passing in Quebec, but I believe the odds are low. And if the federal proposals were accepted in English Canada and rejected in Quebec, this would create a momentum in favour of sovereignty-association.

Now the question is whether not having a national referendum is acceptable to English Canada. There is strong support for the view that a constitutional agreement should be approved by a referendum. And given the wide ranging cynicism and the shaky start of the consultation process, an immediate commitment to holding a referendum may be the only way to restore some degree of confidence in the process.<sup>3</sup> The Conservative government's hesitations on this question are thus understandable. It makes perfect sense to have a referendum, but having one increases the probability of Quebec's separation. The Liberals and the NDP, perhaps because of their lesser sensitivity to the public mood in Quebec, do not seem to share that ambivalence. The Conservatives need their

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3 See Richard Johnston, "Cutting the Gordian Knot," *Globe and Mail*, 28 November 1991.

support, and, I expect, will extract in return a commitment for a referendum. And we will have a referendum. In doing so, Canadians will assert that it is worth risking a country to save democracy.

## Session III

# Summary of Discussion

As one would expect, this session generated a great deal of commentary from the floor. David Slater (former Chairman of the Economic Council of Canada) led off. He was concerned about the degree of emotionalism that the constitutional debate might engender, especially were a referendum to be held. He also drew attention to the fact that while political leaders and constitutional experts were likely to ride out any economic storms unleashed by political and economic uncertainty, this is not true of what Ed Broadbent used to call "ordinary working people." Constitutional change is a high-stakes game for the people who are least involved in it. Both these observations imply that responsible leaders should exercise great caution in constitutional reform, so as not to set in motion events that will cost Canadians a lot. Slater also pointed out that the system as it exists has flexibly accommodated pressures for change. There is a substantial degree of asymmetry now in the distribution of responsibilities, and Slater expressed the view that Quebec currently enjoys sufficient control over programs vital to its development. The best route to change, all things considered, might be for Ottawa to proceed in terms of transferring programs, or of offering to do so, rather than transferring functions.

David Milne made the next contribution to the debate on process. Building on the observations of Monahan and Blais, he suggested that there might be substantial advantages in proceeding to develop and secure initial approval of the package within the rest-of-Canada (ROC) alone. The process he envisaged, beginning with the proposals on the table, would continue through informal, bilateral negotiations among Ottawa and the provinces. These would define a package that would be simultaneously and quietly discussed with the Bourassa government. If necessary, a First Ministers' Conference could take place, with or without Quebec representation. The package could then be submitted to provincial legislatures, and to provincial electorates, through referenda where required. If a general referendum in ROC were thought necessary, it could place a seal of public approval on the constitutional amendments and underscore a subsequent resolution by Parliament.

This process, Milne argued, would meet the basic demand of Quebec that it be presented with a "binding offer" from the rest-of-Canada. It would then be up to the citizens of Quebec, through their referendum, to pronounce on its acceptability. Milne noted that the terms of the ROC ratification process would have to specify that the constitutional changes would only take effect when approved by Quebecers. Thus the process would draw a clear link in Quebec between its vote and Canada's future, a take-it-or-leave-it offer of renewed federalism. Given the panelists' analysis of the forces at play, and the application of the combined resources of other governments, business and other federal interests in any Quebec referendum, Quebecers would probably vote yes to a package that went at least some distance towards their goals and objectives.

Chris Brecht (Ministry of Intergovernmental Affairs, Ontario) took up Donna Greschner's analysis of the minimum acceptable package. He pointed out an inconsistency between her characterization of Bob Rae as the pivotal player and the package's contents, for Ontario's key requirements were that constitutional reform address (a) aboriginal rights, (b) a stronger economic union, and (c) the social charter. He further explained that the proposed social charter was not linked, in Ontario's view, with property rights, as a sort of counterbalance to this market-oriented amendment. Instead, the link is with the economic union. At the same time as a stronger, more flexible economy would increase Canadians' capacity to create wealth, it was necessary to ensure that redistribution would also take place. Moreover, economic growth is based on the social programs which the proposed charter would protect: growth is impeded by inadequate education, health services, housing and so on.

Brecht made two further observations on the social charter. First, it would make the constitutional package an easier sell, given the popularity of the concept. Second, the social charter does not infringe upon the principles of responsible government. Ideally, it would be for the most part non-justiciable, so the roles of legislatures and cabinets would not be eroded; as well, it would still leave to governments the task of raising the money they spend on social programs. They would still be accountable to taxpayers for their decisions about how social rights were met.

Doug Brown (Institute of Intergovernmental Relations, Queen's) drew the conference back to an important issue of process. The panelists and other participants had focussed on referenda as a means of finally resolving constitutional matters through majority democratic decisions. But, Brown pointed out, elections also can settle matters, and he invited the panelists to speak to how elections might figure in the reform process, in both Quebec and ROC.

Dan Soberman (Law, Queen's) had some qualms about the analyses presented so far. In his view, Quebec's involvement in any negotiations is very important. What would happen if ROC managed to cobble together a package but aspects of it were objectionable to the Quebec government or the electorate

in the province? To avoid such basic problems and to make sure the package could go forward with some expectation of acceptance, it is essential to involve Quebec in the negotiations, formally or informally. The problem, given Bourassa's stand against negotiating as one premier among many, is how to secure this involvement.

Next, Robert Groves (Native Council of Canada) addressed several points raised by the panel. Any minimum package must contain provisions about aboriginal rights. But what is the process whereby native peoples can agree to these provisions and take part in negotiating them? Groves stated that Ottawa's current position on aboriginal issues seems to be that it will accept whatever the native peoples can secure from the provinces; that is, the natives' organizations have been left to work with individual provincial governments, and to secure the consent to some definition of native self-government of seven provinces representing 50 percent of the population: if this is done, Ottawa will sign off on any agreement. But instead of this abdication of responsibility, Groves noted, it is quite within the power of the federal government, under section 35 of the constitution, to sign a national treaty with all First Nations, one that would settle their basic constitutional status. Yet there seems to be no inclination in Ottawa to do this.

Groves also raised the issue of aboriginal peoples in Quebec. He wondered what would transpire were Quebec First Nations to hold a referendum of their own. This possibility has been discussed by Quebec's native leaders. There could be a variety of motives for such a move, and it could have various repercussions. But such a referendum, like all referenda, would provide "focus" on the concerns of Quebec First Nations.

Finally, and more generally, Groves suggested that national and provincial referenda need not be incompatible. The federal government could pass framework legislation specifying the question (or one of the questions) to be posed, the organization of campaigns, and other rules of political behaviour, while responsibility for implementation could be devolved to the provincial governments. This might circumvent the problem of over-lapping or conflicting provincial and federal referenda.

Gordon Robertson (Clerk of the Privy Council, retired) made several comments on the process through which agreement might be reached on a constitutional package. He agreed with Patrick Monahan that a First Ministers' Conference would be essential to facilitate the compromising necessary to close a deal. He stated that Premier Bourassa's presence at such a conference would also be essential. Although the Quebec premier has said he will not attend such a meeting, this refusal might possibly be finessed by some diplomatic device: for example, Bourassa might be willing to attend as an observer.

On the referendum issue, Gordon Robertson agreed that it was important to legitimize a constitutional package. But it would be dangerous for Ottawa to



hold a referendum in Quebec. This follows from the assertion of the provincial government, the nationalist opposition, and francophone Quebec MPs that the citizens of the province will determine their own constitutional future, and also the means of determining it. Robertson's solution would be to have each province decide for itself the means of ratifying the agreement. This would be particularly important for Quebec, because of André Blais's observation that it is easier for Quebec voters to reject Canada's constitutional proposals than it would be for them to choose independence. Allowing provinces to determine the ratification process would leave Bourassa free to make his own calculations about the relative advisability of holding a referendum on sovereignty or on the proposals.

A retired federal official reacted to all the discussion to this point. He stressed that cobbling together a package under tight deadlines and following this with possible referenda represented very high-risk strategies. Essentially, Ottawa's strategy has been to assemble a set of constitutional changes that provides a little bit to all interests. Yet there is always the chance that proposals seen as partial concessions to everyone will be rejected as insufficient. He maintained that the time has come finally to face up to the essential problem of Quebec, and to recognize its special status. This would require several steps. First, a "menu of powers" would have to be designated, and from these areas of jurisdiction Quebec would choose those that it desires to exercise. This transfer of jurisdiction would actually be an exchange of powers, and so (to get around the "Trudeau problem" of unequal representation in the House of Commons) MPs from Quebec would lose the power to debate and vote about these areas. A transfer of authority over Unemployment Insurance, for example, would mean that Quebec MPs could never again vote on Unemployment Insurance issues in Ottawa. Third, rather than make cash transfers to the provincial government to compensate for the tax revenues that formerly supported the federal programs now shifted to Quebec City, Ottawa would send tax credits to individual Quebecers to recompense them for the foregone benefits of federal programs. Last, the former official argued that selecting from the menu of powers those to be exercised by Quebec must involve both the National Assembly of Quebec and that province's MPs in Ottawa. A double majority would be required to approve of jurisdictions being transferred to the province.

The last commentator was Alan Cairns (Political Science, University of British Columbia), who made several observations about how referenda might and do work. He thought it possible that a referendum in ROC could precede one in Quebec. He accepted David Milne's point that the ROC referendum would have to be conducted with the understanding that the changes would not apply until Quebec accepts them; however, he also noted that the referendum would have to be conditional in another way: that if Quebec did not accept them, then they would never apply. It is most unlikely that ROC, faced with a future

without Quebec, would create a constitution similar to one designed with a view to maintaining Quebec as a member of the federation.

More generally, Cairns pointed out that the format of any referendum matters greatly. People go in to vote with particular orientations, and these are dictated in part by the organization of the referendum. It makes a big difference whether the popular consultation is in fact a national one, with all Canadians voting simultaneously, or one confined to ROC, or one that is provincial. The framework dictates whether voters are being consulted in their capacity of, say, Ontarian, or "English Canadian" or Canadian. Even faced with the same question, they may respond differently within different frameworks. In particular, they may be more inclined to vote their narrow self-interest in a provincially organized referendum, whereas they would be more inclined to compromise and vote for the collective good in a national consultation.

Cairns went on to make two further points. First, he observed that the time at which the future referendum is announced is very important. Once the commitment to hold a referendum is made, all behaviour changes. Bargaining stances and tactics will be different from what they otherwise would have been, as actors know they are operating in the shadow of the future public consultation. Pushing this further, and considering the behaviour of voters rather than politicians and officials, Cairns suggested that the certainty that a referendum would be held ultimately could ease the negotiating process in the interim. As the panelists and others had suggested, the public mood combines weariness and apathy about the constitution with wariness and mistrust of politicians and the process of executive federalism. Yet were the voters to know that a referendum would be held in the end, so that the citizenry would have the opportunity to exercise its judgement about the work of its leaders, most Canadians might happily forget about the constitution and allow the process of executive federalism to proceed. The public, in short, may feel no need for vigilance or suspicion of secrecy when it understands that it will be the ultimate judge of the constitutional package that emerges.

In his summary remarks, André Blais dealt systematically with this large set of comments. Based both on poll results and the experience of the Meech Lake Accord, he argued that special status for Quebec simply is unacceptable to English Canada. The most that can be offered to Quebecers seems to be the distinct society clause, and, especially in its current format, this is a pale shadow of special status. If this is all that can be offered, then this is what Quebecers may have to decide to settle for. The whole matter, according to Blais, concerns symbolism more than content, because Quebecers see themselves as having been rejected in the past. Their differences from the rest-of-Canada were denied. In constitutional matters, pride and respect are fundamental, and Quebecers feel they need the distinct society clause to be accepted by English Canada in order for their identity to be recognized.

On the matter of elections raised by Doug Brown, Blais predicted that in Quebec a Parti Québécois victory now seems likely. The polls show that this party has a substantial lead, and the Bourassa government will have to carefully calculate the relative merits of holding an election or a referendum. Obviously, considerations of timing will also be crucial — and difficult, when the referendum must be considered as well.

It was on the referendum issue that André Blais had most to say. He first argued that a Quebec referendum would be a hard campaign for the federalist side. The tendency of Quebecers would be to assess the proposals for renewing the federation through comparison with "reference points." One obvious point of reference would be the recommendations contained in the Allaire Report. Were there to be a referendum campaign, Blais could readily picture large billboards erected by the sovereigntists, with a long list of powers "demanded" and a very short list of powers "granted." It would be a tough fight.

On the other hand, Blais was surprised that the suggestion of holding a referendum in ROC would be taken so seriously by the conference participants. A national referendum, including Quebec, might involve a substantial risk that renewed federalism would be defeated in Quebec or some other region. But if there is, and is to be, a single country, then Canada should face the logical consequence — the electorate should pronounce itself collectively and simultaneously through a national referendum.

In her summary remarks, Donna Greschner addressed several issues raised by commentators from the floor. The social charter was one. Greschner frankly stated that she hoped the proposed right to property is dead, or will be shortly. In her view, its death would not obviate the benefits and functions of a social charter which, like Chris Brecht, she saw as a logical accompaniment to the economic union proposals. A social charter would help drive governments to uphold minimum standards in social programs, and it would reassert Canadians' commitment to sharing. Although valuable in and of itself and popular in have-less provinces, she had not included such a charter in her minimal package, simply because she did not see it as a deal-breaker, as an item that, if not included in the final set of proposals, would cause the defection of enough provinces to block the whole package. This was true, however, only if the economic proposals, such as section 121, were also absent from the deal.

Greschner also spoke to process at some length. She was more cynical than many others about how negotiations would proceed. There was no obvious need, in her view, for a formal First Ministers' Conference to be convened soon. Bilateral and informal negotiations could take place without such a conference, and sufficient consensus could be reached that the formal meeting, which would be necessary at some point, could serve almost as a rubber stamp to seal the agreement. The problem of popular mistrust of secret meetings and closed-door bargaining sessions, responsible in large measure for killing Meech, has already

been lessened by the public hearings and reports at the federal and provincial levels. Simply enough, the apathy among the populace about constitutional reform is sufficiently deep that resentment about executive federalism will likely not be strong enough to derail the process of negotiation if the appearance of public consultation is maintained.

Greschner's final comments on referenda were equally optimistic. It is true that the commitments of some provincial governments to consult their electorates about any proposed changes to the constitution could complicate a national legitimization of the reform package. But these commitments are not ironclad. In British Columbia, for instance, the Harcourt administration could denounce the legislation requiring a referendum as a measure that issued from a desperate Social Credit government; hence, were a national referendum proposed, the B.C. law could be repealed by the new government. In a similar vein, Greschner downplayed the resistance that the distinct society clause might encounter in ROC. Leaders should be capable of getting across the message that the clause, as it stands, will have little effect on judicial interpretation of the Charter of Rights and Freedoms.

It remained for Patrick Monahan to respond to the queries raised. First, he took issue with the suggestion that negotiations between Ottawa and the provinces could take place in some informal manner, or that a First Ministers' Conference could produce an acceptable package without the participation of the government of Quebec. In Monahan's view, compromise is the essence of any agreement. Compromises must be made by all parties. Premier Bourassa, therefore, has to be present at the meeting where the last hard choices and trade-offs are made. Without this personal participation in the final negotiations, the Quebec premier would have no commitment to the final package. He will not have "bought into" a mutually acceptable compromise.

On the referendum issue, Monahan argued against a ROC-only consultation. Such a procedure would require some justification, but how could it be explained to the citizens of English Canada? The only possible reason that could be provided for not holding a national referendum, in the end, would be that ROC was meeting Quebec's requirement that binding offers of constitutional reform be presented to it. Implicitly, this would recognize a cleavage between ROC and Quebec, as well as signalling that English Canada was acceding to Quebec's basic demand. The result would be resentment in ROC, and this could lead to the proposals not being ratified.

Apart from procedural issues, what is the minimal package that would be acceptable to the whole country? In Monahan's view, it would be minimal indeed. There would have to be a recognition of Quebec's distinctiveness, one that incorporated all the elements of the Meech Lake Accord that can be approved under the 7/50 rule. Second, there must be Senate reform, substantial enough that westerners especially could sign on to reform. Last — and so

Monahan excluded both the social charter and the economic-union proposals — are provisions that would satisfy the native peoples. Such a package, according to Monahan, could be acceptable to Canadians.

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*David Milne* is Professor of Political Studies at the University of Prince Edward Island. He received his B.A. (Hon.) from Queen's University and his M.A. and Ph.D. from the University of Toronto. Professor Milne's tastes are diverse,

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