



# Canada: The State of the Federation 1993

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Current research interests include fiscal federalism, constitutional reform, the reform of federal political institutions and the machinery of federal-provincial relations, Canadian federalism and the global economy, and comparative federalism.

The Institute pursues these objectives through research conducted by its own staff and other scholars through its publication program, seminars and conferences.

The Institute links academics and practitioners of federalism in federal and provincial governments and the private sector.

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Les priorités de recherche de l'Institut portent présentement sur le fédéralisme fiscal, la réforme constitutionnelle, la modification éventuelle des institutions politiques fédérales, les nouveaux mécanismes de relations fédérales-provinciales, le fédéralisme canadien au regard de l'économie mondiale et le fédéralisme comparatif.

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## PREFACE

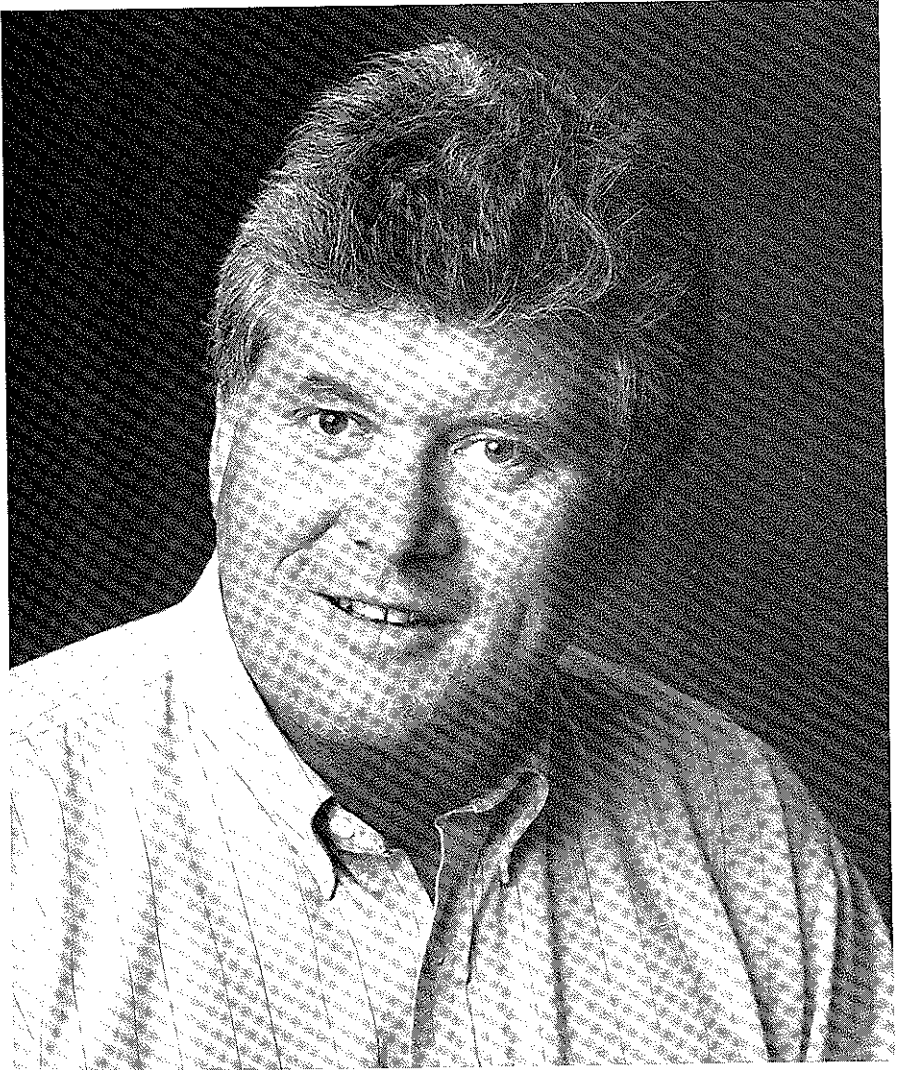
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This is the eighth volume in the annual series of the Institute of Intergovernmental Relations entitled *Canada: The State of the Federation* appearing early each autumn. The previous number reviewed the "Canada round" and concluded with an analysis of the Charlottetown Accord. This volume starts with a chapter examining the referendum campaign itself followed by four chapters looking retrospectively at the issues and processes involved in the effort at constitutional renewal and prospectively at the implications of the outcome for the constitutional evolution of Canadian federalism. These are followed by three chapters addressing major issues which currently confront the operation of Canadian federalism: aboriginal policy and politics, the revision of federal-provincial fiscal arrangements, and the impact of the proposed North American Free Trade Agreement. As in previous volumes, the final chapter consists of a chronology listing the most significant developments in intergovernmental arrangements over the year 1 July 1992 to 30 June 1993.

The editors wish to express their gratitude for the cooperation and promptness of all the authors in this volume in meeting our deadlines and in complying quickly to the revisions suggested by our independent peer reviewers. We also thank the referees for responding so rapidly to our requests. We are indebted to the following people who read one or more of the contributions and provided comments to the authors: Kathy Brock, Donna Dasko, Paul Chartland, Roger Gibbins, Janet Hiebert, Guy Laforest, John Meisel, David Milne, Patrick Monahan, Kenneth Norrie, Evelyn Peters, Alasdair Roberts, Gordon Robertson, Daniel Soberman, Katherine Swinton, Hugh Thorburn, and Robert Young.

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Ronald L. Watts  
Douglas M. Brown  
September 1993



DOUGLAS D. PURVIS (1947-1993)

*Douglas Purvis, Head of the Department of Economics and Director of the John Deutsch Institute for the Study of Economic Policy at Queen's University and a member of the Advisory Council of the Institute of Intergovernmental Relations died on 11 January 1993. Doug took a very active interest in the work of the Institute of Intergovernmental Relations, giving us wise advice and collaborating in the organization of colloquia and conferences.*

*The Institute and I personally have lost a close and dear friend and we dedicate this volume to him.*

*Ronald L. Watts  
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# I

## Introduction

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## Overview

Ronald L. Watts

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*On trouvera difficilement fait plus marquant que le rejet, par les Canadiens, de l'Accord de Charlottetown, lors du référendum du 26 octobre 1992; il allait donc de soi que cet événement se retrouve au coeur de l'édition 1993 de Canada: The State of the Federation. La plupart des articles du présent ouvrage offrent une perspective à la fois rétrospective et prospective. Le volume comprend d'abord une analyse spécifique de la campagne référendaire; sont ensuite passées en revue les stratégies «alternatives» appelant tantôt à une révision constitutionnelle tous azimuts, tantôt à une solution adaptative et par étapes de la problématique canadienne, c.-à-d. hors des sentiers battus constitutionnels; on s'interroge également sur le rôle et l'utilité des négociations au sommet et de la participation du public au processus constitutionnel; enfin, des collaborateurs examinent trois questions qui seront au tout premier plan du débat politique au cours des deux prochaines années, soit, en l'occurrence, le dossier autochtone, la révision des accords fiscaux fédéraux-provinciaux, ainsi que les répercussions prévisibles de l'Accord de libre-échange nord-américain.*

*Canadiens et Québécois auront, dans un même élan, signifié leur rejet de l'Accord de Charlottetown et partant, ils auront exprimé une commune lassitude à l'égard du dossier constitutionnel; si, depuis l'échec référendaire, un calme apparent semble régner sur ce dernier front, il faut s'attendre en revanche, après les élections fédérales du 25 octobre 1993 et celles prévues au Québec d'ici la fin de 1994, que la «question du Québec» détermine à nouveau l'ordre du jour de la politique canadienne et, par conséquent, l'avenir même de la fédération.*

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### INTRODUCTION

The most significant event since the publication a year ago of the previous volume in this annual series was the referendum on the Charlottetown Accord and the rejection of those proposals by a majority of the Canadian people. The previous volume which was sent to press in September 1992 surveyed and analyzed the preceding two years of consultation and negotiations. Those two years had involved concerned Canadians in unprecedented exercises in public

participation. The resulting Charlottetown Accord represented the best efforts of their elected leaders to reach a consensus on fundamental reform of Canada's constitutional framework. A theme that ran through the essays in that volume was the profound ambivalence of Canadians about their constitutional future as they approached the referendum, despite the firm consensus of their political leaders.

In the event, on 26 October 1992 Canadians rejected the package of constitutional proposals carefully negotiated and agreed upon by their leaders. Nationally, the "No" vote came to 54 percent. Six of the ten provinces, including Quebec, and one of the two territories, Yukon, voted "No." Three of the Atlantic provinces — Newfoundland, New Brunswick and Prince Edward Island — voted a substantial "Yes," while Ontario voted "Yes" by a very narrow margin. Since most of the items in the Charlottetown agreement required the assent of the legislatures in at least seven provinces representing 50 percent of the population, and a few of the elements needed ratification by every province, it was clear that the agreement had been rejected decisively.

The rejection in October 1992 of the effort to obtain popular support for the Charlottetown Accord marks another critical turning point in the evolution of the Canadian Federation. The public weariness with constitutional issues and the relatively tranquil constitutional scene in the year that has followed has suggested to many politicians and political commentators that for some time constitutional issues will be set aside and that the current constitutional arrangements will be able to continue with only incremental adjustments. Certainly, the aftermath of the demise of the Charlottetown agreement has contrasted with the increased French-English polarization over the status of Quebec, with the heightened aboriginal demands, and accelerating challenge in western Canada to the dominance of central Canada that followed the failure in June 1990 of the effort to ratify the Meech Lake Accord. Nevertheless, underlying the apparent tranquility following the referendum there remains unresolved the fundamental problems and issues that gave rise in Canada to the mega-constitutional politics during the past 25 years and the efforts to reach some resolution that would ward off a potential deeper crisis.

During the coming year two defining political events will again raise these issues and shape the further evolution of the Canadian Federation. The first of these is the federal general election scheduled for 25 October 1993, exactly one year after the referendum. That election will determine whether a weakening in the ability of national political parties to aggregate and integrate regional interests will lead to a consequent reduction in the capacity of the federal government to provide leadership in uniting the country.

The second defining political event will be the Quebec general election which must be held before the end of 1994. Given the Parti Québécois advocacy of sovereignty for Quebec, the stark choice between membership in an

unrevised federal structure on the one hand and sovereignty as advocated by the Parti Québécois on the other, will inevitably be an issue in that election.

In view of the significance of the rejection in the referendum of the Charlottetown agreement, it will come as no surprise that that event dominates the contributions to this year's volume. Most of the contributions are both retrospective and prospective in their outlook. They include an analysis of the referendum campaign itself, consideration of alternative strategies of comprehensive constitutional revision and of incremental non-constitutional adaptation, the value of elite accommodation and public participation and the lessons to be learnt in this respect from the Canada round, and analyses of issues that will be in the forefront during the next year or two, particularly aboriginal policy and politics, the revision of federal-provincial fiscal arrangements, and the impact of the North American Free Trade Agreement. The chronology of significant events from July 1992 to June 1993 included in this volume, following practice in previous editions, outlines the ongoing developments in intergovernmental relations during that year.

## THE REFERENDUM

After a year and a half of the most intensive, extensive, exhaustive and exhausting round of public consultations and intergovernmental negotiations on the constitution that has occurred in any country during this century, the Charlottetown agreement of August 1992 appeared to indicate that the country's leadership had squared the constitutional circle — to have obtained the agreement of the federal government, all ten provincial governments, the two territorial governments and the leaders of the four major aboriginal groups on a Consensus Report sufficiently inclusive to accommodate all conceivable forms of constitutional disaffection. At the moment the Accord was struck the prospects, according to initial opinion surveys, looked good.

During the course of the campaign for popular endorsement things came unglued, however. In the hurly-burly of the referendum debate the larger vision embodied in the Charlottetown Consensus Report were lost in the media and partisan preoccupations with specific provisions and with concerns about the extent to which each particular group had or had not achieved all its own specific aims. The result was an ensuing preoccupation with assessing losses under the agreement: Canadians seemed to become involved in a competition to see which province, region or group could lay claim to being the biggest losers as a result of the Charlottetown agreement. In the end, the political leaders found that in trying to accommodate every group they had drafted a document that because it required so many compromises made more enemies than friends.

Despite the apparent Canada-wide referendum consensus for rejecting the Charlottetown agreement, the contradictory motivations of different groups for voting "No" in the referendum illustrated vividly the continued contradiction of views held by different groups within Canada. The majority in Quebec, including many Quebec federalists who would prefer not to separate from Canada, voted "No" because the Charlottetown agreement did not give Quebec enough control over its own affairs; many in the rest-of-Canada and particularly in the west voted "No" because in their view it involved too much in the way of special arrangements for Quebec. Many Aboriginal People voted "No" or abstained because the agreement did not go far enough in recognizing their claims; many non-Aboriginal People voted "No" because they felt that the recognition in the agreement of an inherent aboriginal right to self-government was too sweeping and would be too costly. Many Canadians voted "No" from fear that the particular rights of a specific group were not adequately reinforced; others voted "No" because they were opposed to the emphasis upon the rights of specific groups. Efforts to reduce disaffection in one region or for one group seemed only to increase disaffection elsewhere. Thus, in the crucible of the referendum the will of the electorate to accept the concessions and compromises necessary to resolve Canada's structural problems in a united way seemed to leak away.

During the referendum campaign the National Election Study Research Group of political scientists conducted a day-by-day tracking of public opinion and an analysis of the positions of different groups upon the issues involved. The chapter in this volume by Richard Johnston, André Blais, Elisabeth Gidengil and Neil Nevitte is a distillation of that study. They present evidence on shifting support during the campaign and on support for the various elements in the Charlottetown agreement both in Quebec and in the rest-of-Canada. Outside Quebec, the prospects for a "Yes" vote were strong at first with over 60 percent in favour. Subsequently, there was a particularly dramatic collapse of the "Yes" support immediately after Pierre Trudeau's "Maison Egg Roll" speech on 1 October. Later in the campaign, public realization of the weakness of support for a "Yes" vote both in Quebec and elsewhere, as revealed by polls, appears to have contributed further to the decline of the "Yes" share outside Quebec. Public opinion of Brian Mulroney and of other leaders would appear to have been a factor in the negative result, but the outcome was not based solely on a desire to punish political leaders. The "Yes" vote came disproportionately from better-off and better-informed voters, not so much because they liked the content of the Accord as because they were prepared to override their doubts in the interests of avoiding Quebec's separation. On the other hand, within Quebec, the balance of opinion right from the beginning leaned towards a "No" vote, although initially there were some signs of a possible advance towards a "Yes" vote. The possibility of such an advance seems to have been arrested,

however, by the leaked Tremblay-Wilhelmy telephone conversation which appeared to confirm that Premier Bourassa had failed to bargain hard enough. In the end the narrow "Yes" majority among non-sovereignists within Quebec was insufficient to offset the virtually total rejection of the Accord by the substantial number of sovereignists.

In this chapter, the authors also consider the question of whether voters can make meaningful and interpretive choices on a document as formidably complex as the Charlottetown Accord. There is extensive evidence of the conservatism of voters in constitutional referendums in most other countries. Furthermore, in the case of the Charlottetown agreement, the failure during the preceding intergovernmental negotiations to decide at the outset whether the Accord would be put to a Canada-wide referendum and the consequent failure to design a document that would be "user-friendly" to the voter led to the production of an agreement that was complex and difficult to understand. This contributed to the reluctance of voters to approve it.

## THE IMPLICATIONS OF THE REFERENDUM RESULT

Given that the Charlottetown agreement was the product of such an extensive process of prior constitutional discussion, and that in the subsequent intergovernmental negotiations the great variety of views were reconciled only with extreme difficulty, one implication of the referendum result is that the prospects now for producing another comprehensive proposal for constitutional reform that would obtain public support in the near future, however desirable, are virtually nil. In spite of the earlier widespread public demand for an extensive constitutional reform not only in Quebec but also as reported by the Spicer Citizen's Forum on Canada's Future elsewhere in the country, the referendum result points to just how difficult it is to get agreement within the diverse Canadian society on comprehensive constitutional change. Ironically, even the Reform Party, whose very label was intended to express a desire for fundamental change, advocated a "No" vote during the referendum on the grounds that a moratorium on constitutional deliberations was desirable. What the referendum seems to indicate is the paradox that the Canadian electorate wants transformation but without change! Indeed, the *Economist* of 31 October 1992 described the negative referendum result scathingly as "horrendously Canadian: a populist revolt in favour of the status quo."

Two chapters, those by Gérard Boismenu and Peter Meekison examine the implications for the future of the apparent impossibility of getting Canadians to agree on comprehensive constitutional change.

Gérard Boismenu reviews the process of the Canada round and the compromises embodied in the Charlottetown agreement from a Quebec perspective, showing how the result was a proposal that was inadequate and unattractive to

Quebec. Although for many Quebecers sovereignty may be regarded as no more than a default option, he suggests that the blockage of constitutional reform and the inability to change the status quo could in the end, following the federal and Quebec elections of 1993 and 1994, lead to a "big bang" in the form of pressure within Quebec for a dynamic new alternative.

Peter Meekison, on the other hand, suggests that much might be achieved by abandoning efforts at comprehensive constitutional change in favour of incremental constitutional adaptation. The past 25 years of mega-constitutional politics have demonstrated how difficult it is to achieve comprehensive constitutional reform. Nevertheless, the failure of the referendum has not removed the forces underlying the demand for constitutional reform. The author draws particular attention to the continuing salience of Quebec's concerns, western grievances, and aboriginal self-government. The principal theme of his chapter is that formal constitutional amendment is not the only means by which change can be achieved. There are alternatives available to Canadians and their governments for dealing with their constitutional concerns. Among these are changing conventions, enacting statutes and the greater use of reference cases. Furthermore, he suggests that there is a far greater possibility of rediscovering our traditional means of conflict resolution through relying upon intergovernmental negotiation and agreement. Indeed, if governments were so inclined, a number of the provisions contained in the Charlottetown Accord could be put into effect by such means without the need for formal constitutional amendment.

Both Boismenu and Meekison agree that the relatively tranquil immediate aftermath of the referendum may be only temporary, masking the approach of what is likely to be a particularly difficult period ahead. With no realistic prospect of comprehensive constitutional reform as a way of tackling our unresolved problems, the alternatives seem to be either an explosion of new pressures in Quebec, suggested as a possibility by Gérard Boismenu, or reliance upon incremental non-constitutional political processes and policy adjustments to address our problems, as suggested by Peter Meekison. Experience in other federations indicates that comprehensive constitutional change is much more difficult than incremental change. For example, Switzerland which has separate procedures for partial revision and total revision of the constitution has managed the former over 90 times since 1848 but of four attempts at total revision, including the protracted effort from 1965 to the early 1980s, it has succeeded only once in achieving a total revision, that more than a century ago in 1874. The Australian movement for comprehensive constitutional revision in the period 1975-88 also came in the end to naught. On the other hand, the Canadian federal system in its first 115 years of history, during which it lacked an agreed formal amendment process, proved remarkably flexible in adjusting pragmatically and incrementally to changing circumstances and conditions. This suggests that an incremental approach to constitutional change should be the



preferred strategy. Considerable progress could be made by means of ordinary legislative and administrative action and by intergovernmental agreements on rebalancing the roles and fiscal relationships of the federal and provincial governments, on the development of aboriginal self-government, on improving the economic and social union and on electoral and procedural reforms relating to that body. It has been only during the past two and a half decades that constitutional reform and mega-constitutional politics have become such an obsession for Canadians. Perhaps the 1992 referendum has inoculated Canadians from the disease of wanting to solve all structural and policy problems by re-writing the constitution.

But an important question, however, will be whether sufficient progress can be achieved and quickly enough by such incremental methods. There are, of course, limitations to this approach. The first is whether enough can be achieved and sufficiently quickly in this incremental mode to meet the concerns that gave rise during the past two decades to the intense focus upon constitutional change. The second is that this approach cannot provide the *symbolic* significance and the assurance of constitutional safeguards that formal constitutional amendments would. Nevertheless, given the growing realization of the almost certain immobility in any effort to resolve Canada's structural problems through constitutional amendment, the pragmatic incremental approach may now be the only practicable route left. Indeed, agreement may be easier to achieve through such an approach when the higher stake deliberations of mega-constitutional politics are avoided. Both Boismenu and Meekison warn us, however, that if reliance on such an approach becomes simply an excuse for inaction it is likely to be fatal.

## THE ROLE OF ELITE ACCOMMODATION

A major issue in the consideration of future processes for constitutional change or adaptation concerns the appropriate role of the public and of elites in such processes. The 1990-92 Canada round process attempted to establish a blend of extensive prior public input followed by elite intergovernmental negotiation and finally public endorsement by referendum. This represented a conscious effort to avoid the accusations of lack of prior public discussion that were directed at the politicians who produced the Meech Lake Accord. Indeed, during the 1990-92 process there was extensive public consultation and involvement. Furthermore, those participating in the process observed at first hand the constraints that the intergovernmental elites thought they had to work within in order to achieve an agreement that would take account of the great variety of views and positions that had been expressed by the Canadian public prior to the intergovernmental negotiations. Yet, in spite of this, during the referendum

campaign the media and public critics attacked the Charlottetown agreement as simply the product of politicians.

This raises two questions. First does the failure of the most recent attempt at constitutional reform represent the end of the tradition of elite accommodation as a means to reconciling differences within Canada? Second, if so, is there any viable alternative process for constitutional change? The alternatives are not clear. Some have advocated a constituent assembly process but that requires prior agreement on the composition of the assembly, the method of selecting delegates and their mandate, all issues on which there is no easy consensus. Furthermore, a study of constituent assemblies and conventions elsewhere undertaken for the Institute of Intergovernmental Relations by Patrick Fafard and Darrel Reid in 1991 suggested that such processes have rarely been successful except in post-revolutionary situations where the establishment of a new political structure is unavoidable.<sup>1</sup>

If the alternatives are not promising what then are the prospects for elite accommodation in contributing to the resolution of constitutional issues? The chapters by Michael Stein and by Herman Bakvis and Roselle Hryciuk analyze the role of political elites in the recent constitutional review process and possible lessons that might be drawn from this experience.

Michael Stein notes that the failure of both the Meech Lake and Charlottetown accords has led many political observers to believe that executive federalism has lost its value as an effective structure for conducting constitutional negotiations in Canada. He takes issue with this new conventional wisdom. He advances an alternative view that executive and summit federalism are a natural organic development of Canadian parliamentary federalism and therefore that when the constitutional issues reemerge, as they are certain to do after the next federal and Quebec elections, executive federalism and elite negotiations will be both necessary and desirable for successful constitutional reform. Such processes allow for creative compromise and mutual accommodation resulting in "win-win" outcomes. An important lesson from recent experience, however, relates to the need to combine somehow these elite structures and processes with mechanisms for popular consultation including referendums and for wider interest group involvement in order to achieve long-term success and legitimacy. Such a blending is difficult to achieve because of the inherent tensions and contradictions between the "non-zero-sum" or compromising logic of elite negotiations and the "win-lose" or maximizing logic of referendums and interest group representations. These tensions are reinforced by recent changes in political culture affecting parties, interest groups and new social movements. Nonetheless, in Stein's view elite negotiation and significant public input are not inherently irreconcilable and he suggests a number of tension-managing devices to facilitate their combination.

Herman Bakvis and Roselle Hryciuk focus specifically upon the role of the Cabinet Committee on Canadian Unity and Constitutional Negotiations chaired by Joe Clark in shaping the federal proposals of September 1991. Those proposals following subsequent modifications made by the joint parliamentary committee and then the intergovernmental negotiations, ultimately became the Charlottetown Accord. The Cabinet committee's role as a federal institution attempting to reconcile regional interests and the impact on its deliberations of bureaucratic influences is examined in considerable depth by the authors on the basis of interviews with a range of officials who participated in the process. They also examine this process in the context of the extensive Canadian literature on intrastate federalism.

### IMMEDIATE ISSUES

Whatever the degree to which constitutional issues in general reemerge following the forthcoming federal and Quebec elections, three issues will demand immediate attention. All three will have a pervasive impact upon the evolving character of Canadian federalism in that they involve very broad reaching consequences for the continuing nature of intergovernmental relationships within Canada.

The first of these related to aboriginal policy and politics, a subject considered in the chapter by Anthony Long and Katherine Beatty Chiste. During 1992 the aboriginal public policy agenda was dominated by the negotiations leading to the Charlottetown Accord. But while the leadership of all the national aboriginal organizations supported the Accord's aboriginal provisions, a substantial segment of the grass-roots Indian community did not. The defeat of the Accord in the October referendum had the effect of reconfirming the current ambiguous status of the Aboriginal Peoples within Canada, although the substantive provisions of the Accord will undoubtedly leave their mark on future aboriginal demands and future governmental responses. Pressure for non-constitutional policy initiatives — such as land claims and community-based self-government — can be expected to accelerate. Without an overarching framework such as the Charlottetown Accord, however, the diverse aboriginal community within Canada is likely to drift further apart. Varying aspirations, cultures and resources are likely to lead different aboriginal communities along different paths. The one potentially harmonizing force is the Royal Commission on Aboriginal Peoples (1991-95) with its broad mandate, and the spotlight within the aboriginal policymaking arena over the next year or two will undoubtedly be focused on the Royal Commission and its deliberations. At the same time there will be a need to sort out the appropriate roles and relationships between the federal and provincial governments in this policy area.

The second immediate issue relates to the forthcoming major review of federal-provincial fiscal arrangements scheduled for completion by April 1994. Paul Hobson considers how the federal government's preoccupation with deficit reduction has compromised the functioning of the transfer system. He notes particularly the undermining of the important redistributive function of the federal government to the detriment of both fiscal equity and economic efficiency within the federation. He points to areas that require particular attention and suggests that there appears to be some scope for developing a greater degree of interprovincial revenue sharing. The chapter is valuable in laying out the issues that will be involved in the forthcoming review of fiscal arrangements and in drawing attention to important recent literature on the subject.

The third immediate issue is the impact of the North American Free Trade Agreement (NAFTA) upon the operation of Canadian federalism. Ian Robinson identifies the principal areas in which the NAFTA would impinge on provincial jurisdiction, and the means available to the federal government to enforce these incursions, relating these changes to those found in the Canada-U.S. Free Trade Agreement (FTA) and in the Tokyo and Uruguay rounds of the GATT. He examines how these agreements will increase market constraints on provincial policy initiative and efficacy. He argues that the implementation of the Canada-U.S. FTA marks the beginning of a new era of Canadian federalism, one that the NAFTA and the Dunkel Draft of the Uruguay GATT will substantially extend and entrench. He suggests that these agreements will usher in a new form of "subordinate" federalism that can be distinguished from the "social" federalism of the postwar era in two ways: first by the changes to the economic and social role of Canadian governments that these agreements seek to enforce, and second by the dramatic shift in the *de facto* distribution of powers implied by the federal government's claim to possess the necessary powers to enforce these agreements.

## THE FUTURE PROSPECTS

Although the possibility of achieving comprehensive constitutional reform in the near future would now appear unrealistic, as many of the contributing authors have noted that the crucial structural problems facing the Canadian federation still remain before us. The issues of Quebec's place within the federation, of aboriginal self-government, of the political framework for economic development and the reduction of disparities, of more representative and responsive federal institutions, and of articulating uniting values are still there. Experience in federations elsewhere that have disintegrated indicates that the repeated refusal to resolve basic problems may accentuate internal grievances and frustrations cumulatively to the point where eventually disintegration may

become unavoidable. The referendum result, therefore, has not put these issues behind us.

Furthermore, because of the contradictory positions of the different groups that supported a "No" vote in the referendum, the political leaders have been given no clear guidance on the direction required for a resolution that would obtain the support of most Canadians. The conflicting and contradictory positions of the various "No" advocates — the Quebec sovereignists represented by the Parti Québécois and Bloc Québécois, the Reform Party, the Trudeautes, and the National Action Committee on the Status of Women — give no coherent alternative path for the future.

Does this indicate a gloomy prospect for Canada's future? The *Economist* suggested that to Canada the referendum result may mean: no consensus, no end to uncertainty, and even possible eventual fragmentation.

Optimists, on the other hand, have expressed the hope that after a few years of concentrating attention instead upon the economic issues that we have been neglecting and of allowing our existing political institutions another chance to work, Canadians will somehow decide to resolve their differences and stay together. Certainly after their recent experience few politicians will want in the near future to touch constitutional issues only to be kicked in the teeth for trying to meet the conflicting demands of citizens. Canadians may remain deeply divided over their sense of identity but in all of Canada, including Quebec, the referendum has left them united in their constitutional fatigue. In this respect an encouraging result of the referendum is the way in which the situation contrasts with that following the demise of the Meech Lake Accord. Because of the breadth of the rejection of the Charlottetown agreement across Canada it has not been followed by the same heightened polarization of views that followed the failure in 1990 to ratify the Meech Lake Accord. At least for the time being the heat has been taken out of the issue. When one compares this to the situation in 1990 this has been a not inconsiderable achievement for which those involved in the constitutional negotiations can take some credit since the process they followed contributed to this result.

But while apparently normal politics may continue for a short period, the fundamental issues remain unresolved and two watershed elections that must be held within the next year or so are likely to bring constitutional issues back sooner than many expect or wish. The first is the federal election scheduled for 25 October 1993. If that election were to produce a majority government with an overarching support from all the major regions, the prospects for resolving interregional issues might be much improved. On the other hand, if in that election the electorate were to turn its back on the mainline parties and produce, as many are forecasting, a fragmented Parliament with primarily regional parties such as the Bloc Québécois and the Reform Party playing a crucial role in the dynamics of Parliament, then the prospects for continued federal cohesion

would indeed be seriously diminished. An examination of the disintegration of federations elsewhere reminds us that a tell-tale sign of imminent dissolution has been the demise of national parties and the rise of predominantly regional political parties operating within their federal institutions. Such situations have generally led to the failure to moderate regional cleavages and to a cumulative regional political polarization and often to eventual fragmentation.

The second critical election will be that due in Quebec before the end of 1994. Jacques Parizeau, the leader of the sovereigntist Parti Québécois, sees the vote as a green light for sovereignty and that the Quebec election will be fought on that issue. While post-referendum opinion surveys indicate that declared separatists still make up only about one-third of the Quebec population, those same surveys indicate that a substantial number of those who still call themselves federalist would support continued federalism only if Quebec were to get more powers than Charlottetown offered. With little prospect of agreement from the rest-of-Canada on such additional powers before the next Quebec election, the Quebec electorate is likely to be faced then simply with the stark choice between the status quo and sovereignty. In the past, Quebecers focused on relatively soft options: a revised decentralized federal system advocated by Robert Bourassa's Liberal Party and sovereignty with a close economic association with Canada as advocated by Jacques Parizeau's Parti Québécois. Now with the referendum closing the door on any realistic possibility of a revised federalism and with the lack of sympathy in the rest-of-Canada for sovereignty-association as an alternative, Quebecers will probably have to make the more dramatic choice between the Canadian federation as it is and unmoderated sovereignty.

Despite Premier Bourassa's declaration on referendum night that he would continue "to build Quebec within Canada" and his clearly federalist stance on several occasions since, the Quebec Liberal Party has been left as a result of the referendum with little in the way of attractive alternatives in the form of "renewed federalism" to counter the proposals of the sovereigntists. Another complication is the question of who will provide the federalist leadership within the Quebec Liberal Party following Premier Bourassa's retirement and what position the Quebec Liberal Party under new leadership takes in the forthcoming Quebec election. At the same time it is worth taking note of Stephane Dion's recent suggestion that, faced in the next provincial election or in the referendum following a Parti Québécois victory with the hard choice between the current federal structure unchanged and complete sovereignty, a majority of Quebecers may prove reluctant to vote for complete sovereignty when the full implications of its consequences are clear.<sup>2</sup>

As we are already seeing in the autumn of 1993 with the commencement of the federal general election and with the announcement of Premier Bourassa's

retirement, the coming 12 months will be a period when there are likely to be major developments in the further evolution of Canadian federalism.

#### NOTES

1. Patrick Fafard and Darrel Reid, *Constituent Assemblies: A Comparative Survey*, Research Paper 30 (Kingston: Institute of Intergovernmental Relations, Queen's University, 1991).
2. Stephane Dion, "The Quebec Challenge to Canadian Unity," *P.S.: Political Science and Politics*, xxvi, 12 (March 1993): 42-43.



## II

# Constitutional Debate and the Referendum



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## The People and the Charlottetown Accord

*Richard Johnston, André Blais,  
Elisabeth Gidengil and Neil Nevitte*

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*Ce chapitre analyse le déroulement de la campagne référendaire ainsi que le soutien accordé au Québec et dans le reste du Canada envers plusieurs éléments de l'Accord de Charlottetown. Le brusque effondrement des appuis en faveur de l'entente, immédiatement après le discours de Pierre Trudeau à la Maison du Egg Roll, se sera avéré l'un des faits les plus spectaculaires de cette campagne. Cette chute du OUI signifiait qu'une majorité de Canadiens s'opposaient à l'Accord de Charlottetown au niveau de ses grands principes. Plus tard, au cours de la campagne, les sondages révélèrent toutefois que l'option du OUI aurait pu réaliser une certaine remontée dans l'opinion publique. Le jugement porté à l'endroit de Brian Mulroney et des autres chefs politiques influença, à coup sûr, le vote des Canadiens; toutefois, il serait exagéré d'y voir purement l'expression d'une sanction appliquée par une population envers ses leaders. Si les partisans du OUI comptèrent parmi les citoyens les mieux renseignés sur la question constitutionnelle, en revanche cette avalanche d'information n'aura pas permis que le contenu de l'Accord soit mieux compris ou accepté de la part des électeurs canadiens. Au Québec, le résultat du vote ne réserva aucune surprise : ainsi, on ne pouvait s'attendre des souverainistes qu'ils approuvent l'entente; de fait, en raison de leur importance numérique, ils parvinrent à contrebalancer la faible majorité d'appuis obtenus par le OUI dans cette province auprès des non-souverainistes.*

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To whom was the 1992 constitutional referendum result a "No" and for what reasons? Was the "No" inevitable, or could the result have been a "Yes"? Popular commentary on and elite reaction to the result treated it as resounding and remarkably uniform. In fact, the contest was close nationwide and the "Yes" won in four provinces, including Ontario. On the meaning of the result we have a surplus of interpretations: a repudiation of Quebec; a repudiation of all group recognitions; a judgement on Brian Mulroney; a judgement on the whole political class, unelected as well as elected; and a cry of anguish by victims of

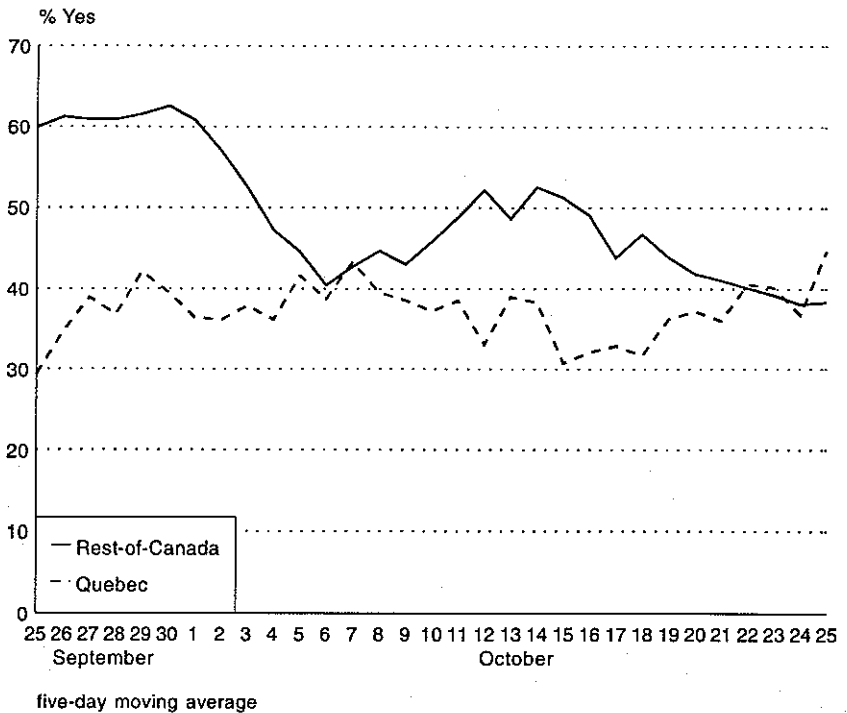
recession. The result could have been any and all of these and each proposition merits serious consideration.

The referendum raises a more general question about the very possibility of direct democracy. An abiding theme in the empirical study of politics is whether "public opinion" as such even exists, whether voters can make meaningful and interpretable choices on anything, much less on a document as formidably complex as the Charlottetown Accord.<sup>1</sup> There is, moreover, the question of whether voters can act as citizens, whether they can transcend self- or group-interest and prejudice and reason broadly about the consequences of their actions. An intermediate question in this realm asks what shortcuts busy voters can employ to deal with the costliness of information. Can these shortcuts distort the process?

### THE COURSE OF THE VOTE

The place to begin is with the path of vote intentions. Daily trackings for Quebec and the rest-of-Canada appear in Figure 2.1.<sup>2</sup> The daily reading in the figure is

**Figure 2.1: The "Yes" Share by Day**



the five-day moving average "Yes" share, centred on the indicated day.<sup>3</sup> The story differs sharply between the two electorates.

Right from the start, Quebec leaned to the "No." Nothing in the campaign seemed to have an interpretable effect and no trend manifested itself. There is a hint of an uptick after the leaders' debate (12 October). If there was a surge it was reversed in a few days, perhaps as a result of the last Wilhelmy transcripts episode (16 October). The last week did seem to bring a recovery: by voting day, the "Yes" share seems to have been about ten points higher than it was a week before. The surge, if indeed it was a surge, did not suffice. One cannot escape the impression that in Quebec the official campaign was over before it began.<sup>4</sup>

Outside Quebec, prospects for the "Yes" seemed bright at first: a "Yes:No" ratio of about 60:40. But the "Yes" lead outside Quebec collapsed over the first weekend in October, a total drop of 20 points, such that the "Yes" share outside Quebec bottomed out at 40 percent. According to Figure 2.1, the drop was accomplished in five days, from the 1st to the 6th. This understates the speed of the drop: the most obvious reading when the data are not averaged over five days is that the drop was *overnight*, between 3 and 4 October!<sup>5</sup>

Then the share for "Yes" began a recovery. According to the moving-average tracking in Figure 2.1, the "Yes" began a surge on the 10th, reached a 50 percent share on the 12th, and began to fall back on the 15th or 16th. Tracking without smoothing suggests a shift to 50 percent "Yes" between the 11th and 12th, a plateauing on the 13th, a move up to 61 percent on the 14th, and then subsidence over the next three days. All of the recovery was erased, in any case. The shifts in question were of too great a magnitude and duration to be just sampling error.<sup>6</sup>

Table 2.1 indicates that the critical regions were Ontario and the Prairie provinces; the Atlantic provinces always stayed on side and British Columbia never came on side. The table gives weekly readings, in deference to the fact that the number of daily completions in each region was very small. In the opening phase, Ontario and the Prairie provinces looked rather like the Atlantic provinces. Once the first October weekend passed, Ontario and the Prairies looked more like British Columbia. The setback for the "Yes" was visible — at least temporarily — everywhere. But it mattered only in Ontario and the Prairie provinces. In British Columbia the province was already in the "No" camp. In the Atlantic provinces, the drop was comparable in absolute size to that elsewhere, but the starting point was just too high to produce a net reversal of direction. Also visible everywhere was the recovery in the second last week. The gain was greatest in Ontario and the Atlantic provinces. The Atlantic region, indeed, ended the campaign virtually where it began. On referendum day, 45 percent voted "Yes" in the country as a whole. In Quebec, the "Yes" stood at

Table 2.1: The "Yes" Share Outside Quebec, by Region

<i>Week</i>	<i>B.C.</i>	<i>Prairies</i>	<i>Ontario</i>	<i>Atlantic</i>
24-27 Sept.	41 (26)	60 (34)	62 (37)	59* (62)
28 Sept. - 4 Oct.	44 (55)	59 (105)	63 (88)	
5-11 Oct.	31 (45)	41 (82)	44 (126)	48 (37)
12-18 Oct.	40 (49)	49 (83)	51 (111)	63 (47)
19-25 Oct.	39 (47)	32 (98)	38 (146)	61 (60)

Number of observations in parentheses

\*This number covers the entire period 24 Sept. - 4 Oct.

42 percent. In the Atlantic provinces, the "Yes" held its 60:40 margin; in the west, the margin was 40:60; and in Ontario the outcome was essentially 50:50.<sup>7</sup>

The following basic patterns beg explanation:

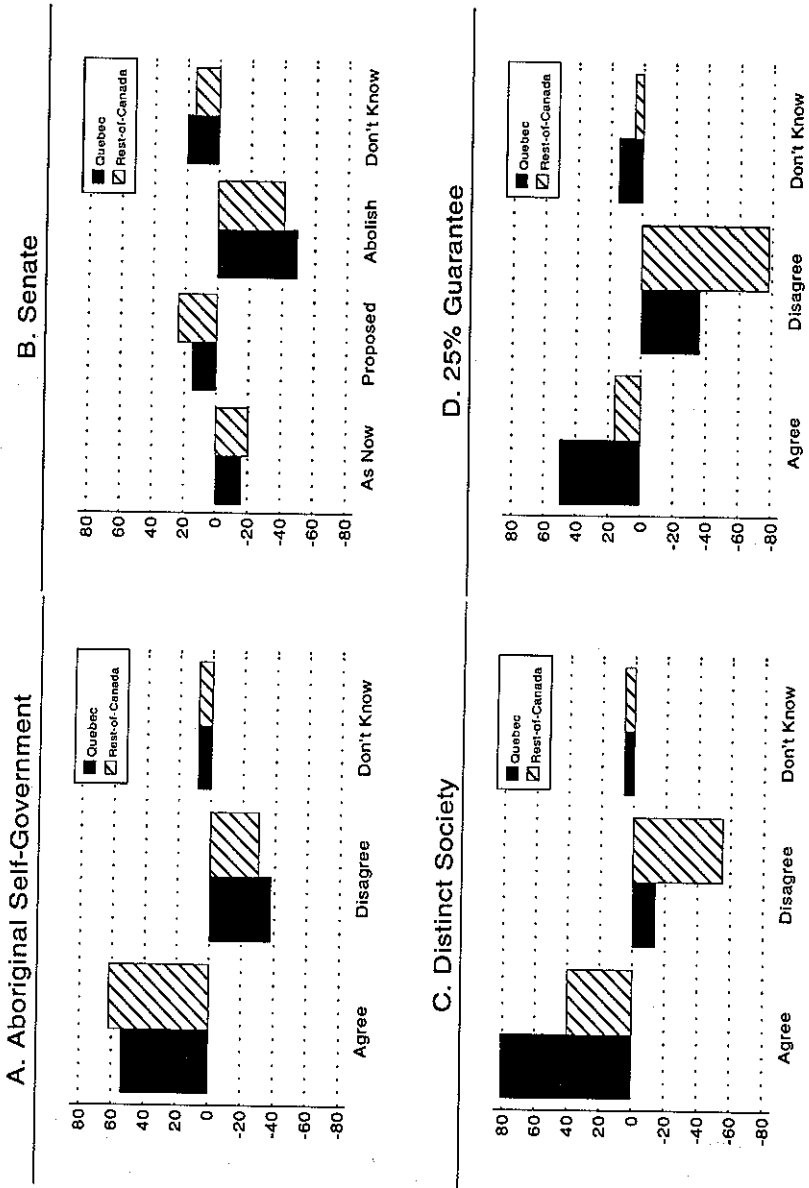
- The most important dynamic feature was the early October collapse of the "Yes." What propped the "Yes" up early on? What accounted for its ultimate weakness? Why was the drop so abrupt?
- In the end, support for the Accord outside Quebec followed an east-west gradient. What accounts for this?

### THE CHARLOTTETOWN ACCORD AS A BARGAIN

Figure 2.2 helps account for the final result, by suggesting that, piece by piece, the Accord was politically weak. The figure gives support and opposition to four key elements in the document, separately for Quebec and the rest-of-Canada. The percentage disagreeing with a proposal is cast as a negative value; support and "don't know" are cast as positives. On the Senate, preference for the status quo and for abolition are both deemed to be positions in opposition to the proposals in the Accord. First consider the pattern outside Quebec:

- The one element with one-sided support was the recognition of an aboriginal right to self-government.

Figure 2.2: Support for Elements in Accord



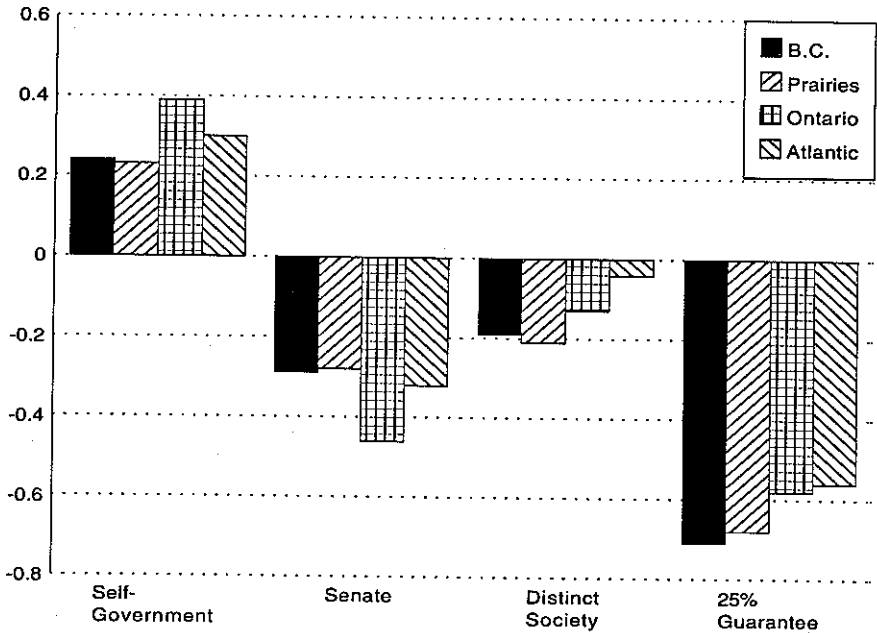
- Senate reform, allegedly the key element for westerners, received only tepid support. The Senate as proposed in the Accord received hardly any more support than the existing body. The plurality preference was for outright abolition of the chamber.
- On recognizing Quebec as a distinct society, opinion was modestly opposed, a 55:40 balance.
- The margin in opposition to the 25 percent guarantee (of seats in the House of Commons) was a stunning 78:16.

Now compare the rest-of-Canada with Quebec:

- On two elements, aboriginal self-government and the Senate, Quebec and the rest-of-Canada were hardly distinguishable. Quebecers were a little less supportive than non-Quebecers of self-government but still supported the proposal. Quebecers were more inclined towards outright abolition of the Senate, less supportive of either the status quo or the new proposals, and slightly more undecided overall. But as in the rest-of-Canada, the clear plurality was for abolition.
- On the other two elements — the ones designed for Quebec — the polarization was striking: a Quebec/non-Quebec gap of roughly 40 points. In each case, the balance of opinion was clearly negative in the rest-of-Canada and clearly positive in Quebec. The principal difference between the distinct society and the 25 percent guarantee proposals was in the overall balance: in both Quebec and the rest-of-Canada, the distinct society distribution was some 25-30 points closer to the approval end of the spectrum. Quebec was consensual around the distinct society clause while the rest-of-Canada was divided. On the 25 percent guarantee the rest-of-Canada was consensual in opposition while Quebec was divided.

On these questions, the various regions of Canada outside Quebec were *not* strikingly at odds with each other. Figure 2.3 gives a simplified picture of opinion on each element by region. Here the regional mean for each element appears, where approval was coded as 1, disapproval as -1, and “don’t know” as 0;<sup>8</sup> for an element on which opinion was mostly approving, the mean rating is above zero, and so on. Figure 2.3 confirms that the only element on which opinion was mostly positive everywhere was aboriginal self-government. Even in the western provinces supporters outnumbered opponents. In those same provinces, the opposite was true for the proposal aimed at redressing their alleged representational deficit, the Senate. To be sure, support for the new body was highest — or opposition lowest — in the smaller regions, but not even there did it win many voters over. On the two Quebec-related matters, an east-west gradient was certainly visible. But for neither element was any non-Quebec

Figure 2.3: Support for Elements by Region



region polarized against any other: all regions opposed both elements; in each region, the balance was much more negative on the 25 percent guarantee than on the distinct society clause.

At first glance, this is not a promising pattern. Only one key element — aboriginal self-government — was supported in both Quebec and the rest-of-Canada. Another element — the new Senate — was opposed both inside and outside Quebec, even in the places for which it was thought to be a concession. Most ominously, on the heart of the package — the two Quebec elements — the country was deeply split. And on one of them, the 25 percent guarantee, there was no hint of a serious division within Canada outside Quebec.

But building coalitions of minorities is what much of politics is about. The critical thing is *asymmetry between support and opposition*: what you support you support intensely and what you oppose you oppose only weakly. The bargain succeeds because it is preferable, for each actor, to have an outcome in which there is no movement at all from the status quo. At a minimum, then, a majority must like at least one element in the package. Different parts of the

majority may want different things but, given asymmetry of support and opposition, that should not matter; one thing is enough.

By this standard, the Charlottetown Accord seems to have succeeded. In Quebec, majorities supported three of the four key elements. Outside Quebec, fewer than one respondent in five supported nothing (or opposed everything) in the deal. About one in three supported only one element and a slightly smaller number supported two. Now, if a deal is constructed properly, it should not matter that non-Quebec respondents support only one element, as long as a majority does support at least one.

The trouble is that that one element, as should be clear from Figures 2.2 and 2.3, was usually aboriginal self-government. The proportions supporting other elements were tiny, even for the one thing contrived for a white, anglophone clientele: Senate reform. Aboriginal self-government had to carry a heavy coalition-building burden. But this brings us to a general point.

For a document conceived so clearly and self-consciously as a bargain, the Charlottetown Accord was most peculiar. Typically, elements in a bargain appeal to the self-defined interests of pivotal actors, actors whose withdrawal from the coalition would doom it. It is odd, then, that the most widely supported element was a concession to one of the smallest groups. In sheer numbers, withdrawal of aboriginal voters would be of virtually no electoral significance. Aboriginal Peoples might have practical *non*-electoral clout, by threatening to take us back to the tense summer of 1990. This probably weighed on many non-aboriginal voters, but the implicit threat was also double-edged; resort to unconventional politics could easily undermine support for aboriginal claims. For most voters in 1992, support for aboriginal self-government must have been disinterested, a recognition of a powerful moral claim. Whatever its exact basis, it was support for a *concession* to somebody else. But the same was true outside Quebec for the Accord's Quebec elements: a respondent outside that province who supported, say, the 25 percent guarantee was unlikely to be making a positive statement of approval; more likely, the respondent was saying that he or she can live with it as part of a package or for the sake of constitutional peace.<sup>9</sup>

The one major element in the Accord designed to satisfy the non-aboriginal non-francophone part of the electorate failed to do its job. The meagre support for the proposed Senate admits two readings. One possibility is that the new institution was seen as too much of a derogation from the "Triple-E" ideal, so weak a reed that outright abolition would be better. If a satisfactory question about a "real" Triple-E could be formulated it might win greater support, most importantly, majority support in small provinces. The alternative reading says that Senate proposals — all of them, aside from abolition — rested on a profound elite misapprehension. On this alternative view, the only real thoughts Canadians have about the Senate are about the existing institution and these



thoughts are overwhelmingly negative. Polls about the Senate were driven by the elite's definition of the Senate reform agenda, typically, and so offered respondents only something called "Senate reform" as a means of expressing their disdain for the existing institution. Naturally, respondents rose to the bait, but then found their expressions presented in elite discourse (and here, even Preston Manning engages in such discourse) as overwhelming popular support for new Senate arrangements. Instead, for most Canadians the best new Senate is none at all. Our sense is that the second reading is closer to the truth. Just as the 25 percent guarantee was something Quebecers hesitated to accept and never really asked for, so Senate reform was not something really on the minds of Canadians elsewhere, not even in the west.

The discussion so far has made no mention of *shifts* in opinion on key elements. The omission was deliberate: there were no such shifts. The patterns in Figures 2.2 and 2.3 persisted over the entire official campaign.

#### THE PARTS AND THE WHOLE: OUTSIDE QUEBEC

Yet *something* propped the non-Quebec "Yes" share up in the early going. Opposition to the distinct society clause or to the 25 percent seat guarantee did not kill the overall deal at the start and support for aboriginal self-government did not save it at the end. If the campaign was *not* an exercise in persuasion about elements in the Accord, only the following possibilities remain:

- Considerations telling against the "Yes," for example the 25 percent guarantee, might have become more important.
- Considerations that sustained the "Yes" in the early going might have become less important; for example, opinion on aboriginal self-government might have been important at first but irrelevant later.
- The general burden of proof may have shifted and the Accord may have lost the benefit of the doubt.
- Combinations of the above could have occurred, inasmuch as no one pattern excludes all of the others.

As it happens, all these things did occur. Figure 2.2 showed that the factors with the greatest potential for damage were the Quebec-related ones and both factors became more important. Before 5 October, among voters who opposed one of the two Quebec elements, two in three nonetheless intended to vote "Yes." Even among opponents of both key concessions the "Yes" share was close to 50 percent. After 5 October, these numbers plummeted: among voters opposed to one but only one concession the share dropped below 50 percent; among voters opposed to both Quebec elements the share was only 25 percent. In other words, a respondent who opposed both Quebec elements was only half as likely after 5 October as before to vote "Yes."

At the same time, the factor with the greatest positive potential, aboriginal self-government, got decoupled from the vote, at least in the vital middle of the campaign. Voters did not become less supportive of the principle of aboriginal self-government; but they became less likely to act on the basis of that support.

Support, such as it was, for the new Senate helped brake the decline of the "Yes." At the end, a voter who opposed both Quebec concessions but who approved the new Senate had a roughly 50:50 chance of voting "Yes." But the new Senate just did not enjoy as wide support as did aboriginal self-government.

These shifts admit another, complementary interpretation: that some force stripped away the general arguments in support of the Charlottetown Accord. In a sense, it is no surprise that someone who opposed both the distinct society clause and the 25 percent guarantee was, in the end, very likely to vote "No." What is more surprising is that such a voter had a 50:50 chance of voting "Yes" early on and that even among voters who opposed all four things, about 40 percent intended to vote yes. Before the first weekend in October, then, many voters were prepared to give the Accord the benefit of the doubt. What general arguments were marshalled to bring voters onside and how did they fare?

First, the process that delivered the Charlottetown Accord encouraged voters to ask as a generalization *how well their province did out of the deal*. The negotiations concluded in Charlottetown were much like a first ministers' conference; this naturally directed attention to how one's own premier performed. The near consensus of the federal parties deprived voters of an overarching nationwide division. The contrast with the 1988 debate over the Canada-U.S. Free Trade Agreement is instructive: there the parties divided sharply and these divisions were reflected in sharp contrasts between party groups and weak contrasts between regions and language groups in the electorate at large. The partisan exceptions in 1992, the Bloc Québécois and Reform, were small parties with sectionally concentrated appeals. In the absence of a major-party fault line that transcended provincial boundaries, then, voters may have been encouraged to see cleavages between provinces.<sup>10</sup> Moreover, in a low-information world a general judgement on how one's province did was an obvious conduit for opinion on the Accord's individual elements; one could see it as a running total. But it ought also to have been a cause as much as a consequence of judgements on individual elements: for example, voters might have been more likely to endorse the distinct society clause had they believed their own province to be a winner. As it happens, voters everywhere tended to see their own province as a loser and this perception hurt the chances of the Accord. But, as with support for individual elements, this perception did not move; it was as negative at the beginning as at the end.

Second, proponents felt impelled to move beyond the arguments about the contents of the Accord. What might move someone who liked nothing of substance in the Accord to consider voting for it anyway?

- Most central was the argument that, for all its flaws, the Charlottetown Accord was *the best compromise possible* under the circumstances. Almost by definition an "Accord" is a compromise. To evaluate the compromise is to make the most general possible judgement on the Accord. For many voters, this would be not so much a matter of embracing the logic of a logroll, which includes something for oneself, as accepting the necessity for an accommodation among strategically placed or morally advantaged others. We have already articulated a transcendental logic such as this in relation to certain elements in the package. Now the logic is extended to the package as such: even if you cannot bring yourself to support *any* element in particular, are you prepared to live with the whole package, for the sake of compromise? The general necessity of compromise was an argument repeated *ad nauseam* by proponents. For the most part, it did not work: at no point did a majority accept the argument and, most critically, the proportion accepting it plummeted over the first weekend in October.
- Second was an argument from consequences: even a voter who can imagine a better compromise might still accept that this particular compromise, though suboptimal, would nonetheless allow us to shift the agenda, *to move on to other questions*, while rejection of the Accord would allow the current crisis to continue, with possibly dire implications for the economy. Of all arguments, this one performed best among voters: early on, the balance of agreement/disagreement was close to 60:30; after the first weekend in October, however, the balance was about 50:40.
- Lurking behind the whole process was another argument from consequences, fear of *separation by Quebec* if the Accord went down. Clearly, this fear was not widely shared in the electorate. In the early going, about one voter in three, by a generous estimate, exhibited such fear; at the end, the proportion was under one in four.

Although only one of the three general arguments received majority endorsement by itself and that majority shrank, at every point in the campaign a one-sided majority of voters accepted at least one argument. Over most of the campaign each additional argument accepted added about ten points to a voter's likelihood of saying "Yes." Voters were not, thus, utterly oblivious to general claims about the wisdom and necessity of the Accord, notwithstanding its flaws. But the average number of arguments accepted/dropped and did so most

dramatically over the critical first weekend in October. This brings us to dynamics.

## THE SOURCES OF DYNAMICS

Outside Quebec, three turning points presented themselves for explanation. Most important was the "Yes" collapse in the first weekend of October. It brought the largest shift in vote intention; it increased the relevance of what were all along the most potentially damaging elements in the Accord; and it undermined some of the supporting arguments for the "Yes." The other two points were the "Yes"'s apparent recovery over Thanksgiving weekend and its final collapse, which began the following the weekend, around 17 October.

What accounted for the early-October collapse of the "Yes" and of at least two of its key supporting arguments? All indications point to Pierre Trudeau's speech at the Maison du Egg Roll on the night of 1 October. The speech was given in the late evening, Montreal time, and so for most voters it could not have been a news story until the next day, the 2nd, at the earliest. The collapse occurred on the day after that, the 3rd. Awareness of Trudeau's intervention surged just in advance of the collapse of the "Yes." Figure 2.4 links the two by taking the daily percentage aware of Trudeau's opposition, turning the percentage upside down, and superimposing it on the daily "Yes" share. Before the Egg Roll speech around 50 percent of the sample attributed an opposition stance to Trudeau. This seems reasonable in light of the prominence given his mid-September essay in *Maclean's*. The latter was not in fact directly on the Accord, but was initially reported as such and was couched in terms that made inference of opposition perfectly reasonable. In any case, the Egg Roll speech dispelled all doubts. Virtually overnight, awareness of his opposition grew 20 points. No other intervenor was as widely visible to our respondents and for no other was there a surge as dramatic as this. Equally to the point, the gain in his visibility took place in lockstep with the decline of the "No" and led that decline by one day.

Figure 2.5 helps bring out why Pierre Trudeau remains such a pivotal figure. In the figure, our respondents are divided into three groups: those who liked Trudeau very much; those who held him in middling regard; and those who disliked him.<sup>11</sup> At the outset, the more a voter liked Pierre Trudeau, the more likely he or she was to vote "Yes"! We take this to indicate that English Canadians who like Trudeau tend to take the French Canadian project seriously and wish to accommodate it. Although the definition of the project implicit in the Charlottetown Accord was not Trudeau's own, voters may be forgiven if, in the early, low-information context, they were a bit hazy on this. It seems perfectly consistent for someone who likes Pierre Trudeau to give a proposed

Figure 2.4: Unawareness of Trudeau's Opposition and Support for the Accord

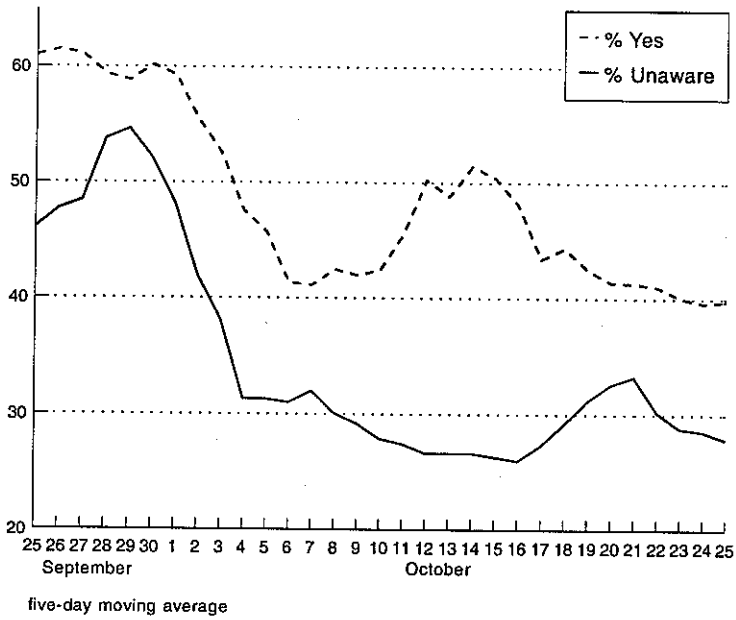
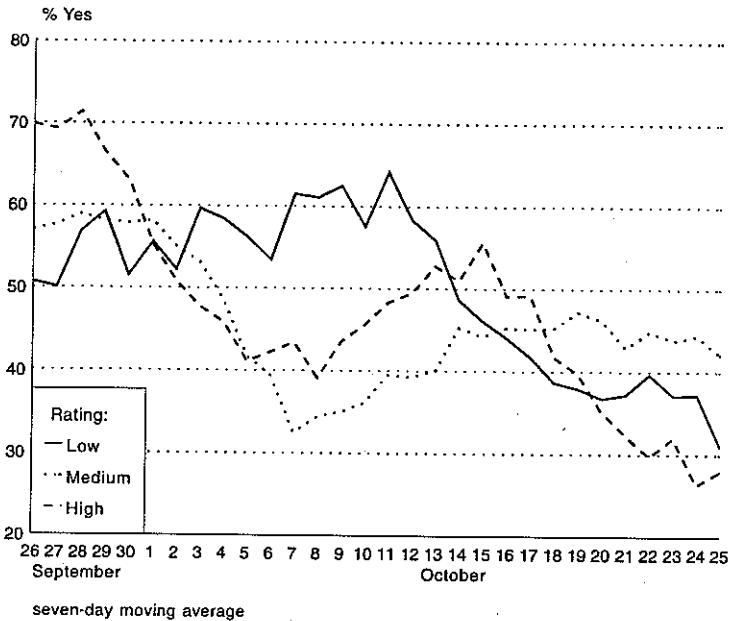


Figure 2.5: "Yes" Share by Trudeau Ratings



accommodation with Quebec the benefit of the doubt. At least it would seem so until Trudeau himself says otherwise.

Once he did say otherwise, the relative positions of the groups shifted dramatically:

- Respondents who disliked Trudeau were not persuaded by the Egg Roll speech. If anything, the "Yes" gained ground in this group right after the speech. But the middle and high Trudeau groups turned against the Accord.
- Among both neutral and pro-Trudeau respondents the "Yes" recovered ground, such that by 15-17 October pro-Trudeau respondents were once again most likely and anti-Trudeau respondents least likely to vote "Yes"; now, though, the "Yes" share in each group had dropped about 15 points.
- At the end, a new configuration emerged, one reminiscent of the coalition against the Meech Lake Accord. Where both neutral and pro-Trudeau respondents shared in the mid-October recovery, only among neutrals was the recovery sustained. Among pro-Trudeau respondents the "Yes" slide resumed. Trudeau fanciers, who started the campaign most likely to vote "Yes," ended up least likely to do so. Closest to them at the end were the group that sustained the "Yes" in mid-campaign: voters who disliked Trudeau. The Charlottetown Accord, like the Meech lake Accord, may have been brought down by a coalition of opposites.

The recovery over the Thanksgiving weekend finds no immediately obvious source in the campaign narrative and may only have been an inevitable, and essentially autonomous, decay of the impulse generated the week before.<sup>12</sup>

The most plausible source for the final collapse of the "Yes" was the barrage of poll information on the 16th and 17th of October: a *Globe and Mail* poll on the 16th and Reid-Southam and Environics-CTV polls on the 17th. This was the first clear indication that the "Yes" would lose. Earlier polls had only hinted at trouble, if they did even that. Before 26 September, polls suggested that the "Yes" would win by a wide margin in the country as a whole, if not in every province. On 26 September an Angus Reid poll gave the first real indication of serious trouble: it placed the all-Canada "Yes" share among decided respondents at 51 percent and polls over the next three weeks confirmed roughly this picture. If on 26 September it became clear that the "Yes" forces faced a real fight, on 16-17 October, it suddenly appeared as if they would lose. We asked respondents their expectations for the result in their province, in Quebec, and in Canada as a whole. For the province and the country as a whole, these expectations plummeted right after 17 October. In turn, the drop in expectations induced a further drop in the "Yes" share.<sup>13</sup>

## OTHER FEATURES OF THE VOTE OUTSIDE QUEBEC

Pierre Trudeau was not the only key player. Feelings about Brian Mulroney were also caught up in the vote: the more a voter liked him the more likely he or she was to vote "Yes." Few voters liked him: our respondents typically rated him far below the Accord's other proponents and far below Trudeau. But it would be premature to say that the "No" victory was just a repudiation of Brian Mulroney. First of all, feelings about other key players in the Accord coalition — notably Jean Chrétien, Audrey McLaughlin, and the premier of the voter's province — were even more important than attitudes to Brian Mulroney. Does this just mean that the repudiation was more broad-gauged, that it extended to the whole political class? The problem with this argument is that other leaders, typically, were held in considerably higher regard than Brian Mulroney. Other leaders tended get middling ratings: slightly more voters disliked them than liked them, but the proportion who gave positive ratings was never trivial. And, roughly speaking, the further east one went (outside Quebec) the more highly rated the key politicians (Brian Mulroney aside) tended to be. Attitudes to the political class were clearly important, then, but their importance was not unequivocally negative for the prospects of the Accord.

There remains, moreover, the question of what the very connection between vote on the Accord and attitudes to the political class means. It is too simple to say that the Accord was only a conduit for punishing politicians, a lightning rod whose content was largely irrelevant. Although the Accord must have been such a conduit for some voters, our sense is that most voters truly did grapple with the content of the Accord. Recall from above that clear majorities always accepted at least one general argument for saying "Yes," right down to the campaign's end. And here is where the other meaning of the leader rating-vote relationship lies: busy voters, facing costly information and uncertainty, commonly look to intervenors for guidance. A useful intervenor need not necessarily hold the voter's own interests to heart. For many voters, then, liking or disliking of politicians is a guide to accepting or rejecting their judgement. Rejecting their judgement may have the effect of punishing politicians, but only incidentally.<sup>14</sup>

In addition, judgements on the Accord's public supporters were affected by voters' party commitments, if they had any. Party identification sorted voters in two ways. First, identification with *any* of the three parties in the Accord coalition increased a voter's likelihood of saying "Yes," as compared to identification with Reform or with no party at all. Second, Conservative identifiers were the most likely of all to vote "Yes." Although New Democrats were slower than the Liberals to come around, by referendum day these two party groups were indistinguishable, half-way between non-partisans and Conservatives. And whenever party identification was added to a vote estimation, the

predictive power of leader ratings was cut. Neither the vote on the Accord nor the processing of judgements about politicians and their stances were completely detached from the ongoing party struggle in the background.

All other intervenors paled by comparison with members of the Accord coalition and with Pierre Trudeau. Some, such as the women's movement and the business community, had a modest impact in the first few weeks. Curiously, awareness of opposition by the women's movement had a greater effect for men than for women; the impact was *not* a backlash. And women were not summarily more likely to vote "No" than men. The union movement had a modest effect towards the campaign's end, in the sense that awareness of union leaders' support for the Accord modestly increased the chances of a "Yes" vote, other things being equal. But union leaders were bucking their own rank and file: union families were less likely than non-union ones to vote "Yes." Preston Manning had a discernible effect, but not the one he intended: other things equal, awareness of his opposition boosted the "Yes" vote!

Liking Quebec helped a voter mightily in getting to a "Yes" vote and did so in various ways. Party commitments reflected, and may have helped produce, differentials in sentiment about Quebec. Party and group sentiment, in turn, reflected degrees of economic comfort and educational attainment: higher-income voters tended to like Quebec more than lower-income voters did; similarly, the higher the education, the more sympathetic to Quebec one tended to be; unemployment had the opposite effect.

But economic marginality and distress were important in their own right, not just as they affected sympathy for Quebec. In general, the less advantaged one was, the less likely was a "Yes" vote. This suggests that the trough of recession is a bad time to bring forward a major constitutional proposal which is not itself directly about economic recovery. But the pattern is probably not peculiar to economic bad times, not just an indicator of short-term distress. The economic and social differential in response to the Charlottetown Accord corresponded to differences remarked in Maastricht voting in the European community: the socially most marginal voters are least likely to be persuaded by elite consensus on what the country needs. This could indicate one or both of two processes: lower status voters may be less exposed to the arguments originating in the elite; alternatively, they may identify less with the elite and so might reject the elite's arguments, when they do get exposed to them.

And feelings about Quebec were not just ways of articulating degrees of economic comfort or optimism. When voters struggle to compose a response to a complex policy question they listen for clues. One important source of clues is how the question plays into the contours of the polity's group life. In Canada, the most sharply etched discontinuity pits French against English, Quebec against the rest.<sup>15</sup> It should come as no surprise, then, that feelings towards Quebec affected evaluation of the Accord and the chances of a "Yes." As a rule,



the less equipped one was to gather substantive information, the more one went straight from simple feelings about Quebec to the vote.<sup>16</sup> And the less one knew, the less one liked Quebec. Again, though, the story is not one of simple rejection. Most Canadians outside Quebec gave that province positive ratings, markedly more positive ones than they were prepared to give to virtually any politician. Only among the least informed were negative ratings as common as positive ones. So feelings about Quebec were clearly implicated in the vote and were most implicated among voters for whom the feelings were most likely to be negative. But the story is not one of a simple backlash.

Each side in the debate believed that getting voters to know more about the Accord worked to their advantage. Each side was right, up to a point. The more a voter knew the more willing he or she was to accept the new Senate or the recognition of Quebec as a distinct society.<sup>17</sup> On the other hand, knowing more about the Accord produced scepticism about its supporting rhetoric: well-informed voters were disproportionately likely to disdain the compromise, dismiss the claim that the Accord would allow us to move on, and reject the possibility of Quebec's separation. But the more one knew about the Charlottetown Accord the more likely one was to vote "Yes." Differences by information level were never large but widened at the end.<sup>18</sup>

## QUEBEC

Right from the start, the Quebec electorate must be divided in three: non-francophones, francophone sovereignists, and francophone non-sovereignists. The first group was solidly for the "Yes" and the second solidly for the "No." The relative sizes of these two groups tilted the field of play but the third group decided the outcome. The "Yes" was not helped by the relatively small size of its captive group: although non-francophones represent 18 percent of the total Quebec population, their share of the electorate is closer to 15 percent. Sovereignists constitute a larger share but how much larger is a matter of debate. Here the issue is what a self-described sovereignist means by the term. It seems fairly clear that some Quebecers are confused about what sovereignty entails,<sup>19</sup> but how would respondents who think of themselves as sovereignist react if it were pointed out that a sovereign Quebec would no longer be part of Canada? The sovereignist hard core ought to consist of those who still call themselves sovereignist when confronted with the hard truth. By our estimation these constitute 39 percent of the total electorate (44 percent of francophones).<sup>20</sup> Another 8 percent might be called diffident sovereignists; for this group, it is an empirical question of which is more important: the diffidence or the reflexive self-definition as sovereignist. This leaves 38 percent of the electorate as clearly on the battle ground, francophone non-sovereignists. They may or may not be supplemented by diffident sovereignists.

In our sample, 80 percent of non-francophones voted "Yes." If anything this underestimated the "Yes" share; we suspect that the real share was closer to 85 percent.<sup>21</sup> On the other, sovereigntist side, 89 percent voted "No." Although there was subtle variation on this side, more striking was the unanimity: intensity of support for sovereignty amongst self-described sovereigntists made only a modest difference; the experimental manipulation mentioned above made no difference; and even ambivalence or indifference on the question mattered little, as 78 percent of those with no opinion on the sovereignty question voted "No."

Given the overwhelming "No" among self-described sovereigntists as well as among voters unsure on the question and given the small size of the non-francophone bloc, the "Yes" side needed to win over 70 percent of francophone non-sovereigntists to win overall. Instead, the share was 56 percent. By one standard, this was an impressive showing for the "Yes," matched by few electorates in the rest-of-Canada. Perhaps, given the threshold, the task was just impossible. Still, we can ask what kept it so low and the following considerations seem pertinent:

- Just as feelings of attachment to Canada and Quebec are strong predictors of attitudes to Quebec sovereignty, so among non-sovereigntists were they factors in the vote. In our sample, 39 percent were more attached to Quebec than to Canada, 14 percent were more attached to Canada than to Quebec, and 48 percent were equally attached to both.<sup>22</sup> Some non-sovereigntists clearly viewed support for the Accord as an expression of patriotism: 70 percent of francophone non-sovereigntists more or equally attached to Canada voted "Yes," compared to 37 percent of those more attached to Quebec. But the size of the latter group hurt the prospects for the "Yes."
- The great majority of francophone non-sovereigntists who turned out in the 1989 provincial election voted Liberal. But 12 percent voted for the Parti Québécois, and this group looked at the agreement with a critical eye: 84 percent voted "No."
- A majority of francophone non-sovereigntists saw Quebec as a loser in the Charlottetown Accord. A majority also rejected the claim that the compromise was the best possible, and these positions were closely linked to the vote. Also linked to the vote was perception of the stakes: was a "No" to the Accord a "Yes" to sovereignty? The campaign neutralized this link.
- Among specific proposals, the pattern roughly complemented the one outside Quebec: voters worried more about concessions to other groups than they approved concessions their own representatives had secured. Although a strong majority approved the distinct society clause, few

non-sovereignists thought the clause went far enough. At the same time, the Senate proposals were closely linked to the sense of Quebec as a loser, even as Quebecers did not see them as much of a gain for the west. The 25 percent guarantee more than offset losses induced by the Senate proposal, however. Quebecers did not see Aboriginal Peoples' gains as Quebec's losses but neither did their general approval of aboriginal self-government help the "Yes."

- Among non-sovereignists there is little evidence that disappointment with the meagre transfer of power to the province made much difference to the vote.
- In contrast to the rest-of-Canada, the party battle was absolutely central to the Quebec vote, even among non-sovereignists. Feelings about Jacques Parizeau and (especially) Robert Bourassa were crucial to the vote, even controlling other factors (including the 1989 vote). Federal actors were of little to no significance. The only other individual or group to matter was the business community: feelings about the community affected the vote and the community was generally warmly regarded.
- To Robert Bourassa's credibility, two events were potentially critical: Jean Allaire's signing on with the "No" camp; and the Wilhelmy affair(s). We lean to an emphasis on Allaire, as the largest drop in "Yes" support came *before* the Wilhelmy affair and around the time that the "No" team was consolidated. Allaire's presence on the "No" side may have reassured voters that the integrity of the federation was *not* at stake and reminded them that Robert Bourassa had been, to say the least, inconsistent. If the Wilhelmy affair was important, it was so because it strengthened doubts already in place about Bourassa's credibility.

## CONCLUSIONS

Did Canadians outside Quebec indeed say "No" to Quebec? to Brian Mulroney? to the political class in general? Some of these questions must be answered in the affirmative. But staking such claims is more complex than it seems at first. And in all discussions, it should be kept in mind that about 45 percent of the non-Quebec electorate said "Yes" to the Charlottetown Accord, notwithstanding the depth of voters' reservations about the document.

There seems to be no escaping the conclusion that the "No" was a rejection of Quebec's demands, at least packaged as they were in 1992, even if Quebec voters also rejected the same Accord. To begin with, neither key Quebec-related element earned majority support outside that province. By itself, this comes as no surprise, and early in the campaign the rejection of these elements did not block majority support for the package of which they were part. But when the

“Yes” collapse began, the most divisive issues were the 25-percent seat guarantee and the distinct society clause. It is also material that, from the beginning (long before reassuring noises came out of Quebec proper), few respondents bought the argument that rejecting the Accord would encourage Quebec’s separation from Canada.

Does an emphasis on rejection of the Quebec-specific content in the Accord make the result any less of a rejection of Brian Mulroney? No, but to a great extent only because rejecting Mulroney was so easy at the end. Opinion on the prime minister was a factor all along, to be sure. But early on, his role was partly, perhaps mainly, as a cue-giver about substance. It was the Charlottetown Accord’s misfortune that it was tied so closely to Mulroney’s reputation, despite his own deep reservations about the settlement. Even so, as long as some combination of general arguments overrode objections to substance, Mulroney’s unpopularity was not fatal. It is tempting to speculate that once it was clear that the Accord was going down, voters were free to indulge themselves, as it were, in Mulroney bashing. It is not clear that they would have felt so free had the battle been — or been made by published polls to seem — more closely joined.

Were voters also bashing the rest of the country’s political leadership? There is no question that opinion on that leadership mattered; indeed it mattered more than opinion on Brian Mulroney. As with Mulroney some of this impact looks like punishment rather than cue-taking. But the account cannot stop there. An awkward fact is that other leaders were not as uniformly reviled as Brian Mulroney. Most were not as popular as Pierre Trudeau, but most got middling grades and opinion was fairly divided. For political figures about which opinion is divided, the language of punishment is just not appropriate. Voters who intensely disliked the leaders may well have been sending a punitive message. But many voters disliked the leaders only mildly and a large minority gave them a positive rating. In places where politicians continue to be held in relatively high esteem, most notably the Atlantic provinces, the near consensus in the political class helped the Accord.

Did Quebec voters say “No” to Canada? Some did, more or less: sovereignists could hardly be expected to say “Yes” to an Accord designed to negate their very objective. It was only partial mitigation, if any, that for some sovereignists the objective itself was obscure. But as many Quebecers said “Yes” as did voters outside the province and the “Yes” had a powerful patriotic motivation. The non-sovereignists who did say no, themselves a clear minority, did so in part out of reassurance that the stakes were low.

Did voters, in Quebec as well as in the rest-of-Canada, say “No” to all forms of group recognition? Since the referendum, the question has come up in relation to official language communities in New Brunswick, and the claim was made, notably by Deborah Coyne, that such recognition was incompatible with

the spirit of the 26 October vote. Some voters, outside Quebec mainly, probably did mean something like this by their vote. For instance, voters who rejected aboriginal self-government also tended to reject the two Quebec items and it is easy to imagine them saying "No" to all such entrenchments. In this sense, the self-government proposals were a litmus test. But by this test, a strong majority could *not* be said to reject group recognition as a matter of principle: majorities everywhere said "Yes" to aboriginal self-government. What else they might say "Yes" to is a matter for conjecture, but the bald claim that "No" meant no recognition of groups simply cannot stand.

Did Canadians fail the test set by their leaders and thus vindicate opponents of direct democracy, either in general or in its specific 1992 manifestation? It *is* true, on the one hand, that the less a voter knew, the less likely he or she was to vote as the political class wished. This pattern surfaces in many ways: differences by education and by measures of respondents' actual knowledge. It is reinforced by information-level contrasts in the importance of "tribal" sentiment; simple feeling towards Quebec was important generally and especially important in low-information groups, as a proxy for substance. All this said, knowledge did not make a voter happier with the Charlottetown Accord. Voters at *all* information levels became *less* persuaded as the campaign advanced of general arguments for the document, and at each stage of the campaign, more informed voters were less willing to accept a general argument for the deal. Strikingly, even though well-informed voters were generally more favourably disposed to Quebec, they were the least persuaded that that province's separation was a serious threat. And the one intervenor who appealed, even if covertly, to tribal sentiment, Preston Manning, was the one opponent who actually helped the "Yes." The data pattern forces us to conclude that many who voted "Yes" did so despite deep reservations. Certainly it does seem true that characteristics associated with entertaining doubts also conduced in the end to giving the Accord the benefit of those same doubts. On one hand, then, we should not delude ourselves about direct democracy: faced with a complex task, many voters will resort to cues and devices that do not pass muster in polite company. On the other hand, many voters struggle mightily with the demands of the choice and many were even prepared to override their doubts and go along with the country's political leadership.

Was the defeat inevitable? It is true that most of the world's ballot measures fail, and it seems reasonable to ask why the Charlottetown Accord should be exempted from this rule. The rule may be misleading, however: most ballot measures are private initiatives placed on US state ballots. Voters naturally distrust such initiatives and the measure commonly stimulates sharp opposition. Conversely, where the political elite forms a consensus on a measure, at least in U.S. states, the measure usually passes.<sup>23</sup> The 1992 Canadian referendum may be a standing refutation of this generalization, if we accept that the

Canadian elite was largely united on the Charlottetown Accord.<sup>24</sup> Then again, it may signal that the 1990s have so discredited political elites that consensus among them is no longer persuasive, indeed may even cause voters to smell a rat. Another possibility is that we have defined the elite too narrowly: given where he sits ideologically, Pierre Trudeau may represent a large body of elite, as well as mass, opinion. But there is another reading of the event worth considering. Canadians did not like much of the Charlottetown Accord's content. And it is not clear that they should have, when one considers where most voters sit, namely, *not* at the bargaining table. Yet almost half the electorate said "Yes," in spite of themselves and even after polls had indicated that the cause was hopeless.

## NOTES

Data reported in this paper are drawn from the referendum waves of the 1992-93 Canadian Elections Study, for which the authors are among the co-investigators. Support for the study came from the Social Sciences and Humanities Research Council of Canada, under grants 411-92-0019 and 421-92-0026, the US National Science Foundation, our respective universities, and Queen's University, where the first-named author was a Skelton-Clark Fellow during the referendum and during the writing of this chapter. Fieldwork was conducted by the Institute of Social Research, York University, under the direction of David Northrup and Rick Myles. Special thanks are due to Henry Brady, Joe Fletcher, Ron Watts, Doug Brown, and the anonymous referees. All of the foregoing are absolved from the errors that remain.

1. Key contributions to this debate are: Philip E. Converse, "The Nature of Belief Systems in Mass Publics," in David Apter (ed.), *Ideology and Discontent* (New York: Free Press, 1964); Paul M. Sniderman, Richard Brody, and Philip Tetlock, *Reasoning and Choice* (Cambridge: Cambridge University Press, 1991); and John R. Zaller, *The Nature and Origins of Mass Opinion* (Cambridge: Cambridge University Press, 1992).
2. Interviewing for the referendum campaign wave of the 1992-93 Canadian study began on 24 September and continued to 25 October, the eve of the vote. Sample was released daily and clearance of each day's release was carefully controlled, such that the day of interview was effectively a random event. Altogether, 2,533 interviews were completed, an average of 79 per day. Immediately after the vote, a second wave of interviewing began; 2,226 respondents completed the second interview. About 40 percent of the total sample was drawn from Quebec. Outside Quebec, smaller provinces were modestly overrepresented. The questionnaires included items covering a wide range of considerations: specific elements in the Charlottetown Accord; general arguments; heuristics that might help interpret the event; expectations for the outcome; vote intentions and behaviour; awareness of intervenors; attitudes to a range of persons, places, and groups; general values; perceptions of Canadian society; and basic demographic information.

For more detail on the study and for wording of individual items see Richard Johnston, André Blais, Elisabeth Gidengil, and Neil Nevitte, *Rhetoric and Reality*:

*The Referendum on the Charlottetown Accord* (Montreal: McGill-Queen's University Press, forthcoming).

3. All figures and tables are based on decided voters or leaners. On the logic and the practice of moving averages with rolling cross section data, see Richard Johnston, André Blais, Henry E. Brady, and Jean Crête, *Letting the People Decide: Dynamics of a Canadian Election* (Montreal: McGill-Queen's University Press, 1992).
4. There was, however, substantial movement in September, before our fieldwork began: published polls indicate that the "Yes" dropped seven points before the campaign's official start. The five polls done in the last week of August indicated that Quebecers were almost evenly divided: the median "Yes" vote among decided respondents was 47 percent. In the first half of September, by which time the exact wording of the question was a matter of record and each side had articulated its basic theme, the median "Yes" share (three polls) dropped to 43 percent. The four polls between 14 September, the date of the Quebec Superior Court injunction on publication of the Wilhelmy transcript, and the beginning of our fieldwork on the 24th gave a median "Yes" vote of 40 percent. This chronology suggests that the impact of the Wilhelmy affair was limited, indeed that the decline in late September merely continued a trend. We return to this below.
5. For a typical non-Quebec daily sample of about 50 observations. The implied daily 95 percent confidence interval is  $\pm 14$  percentage points, less than the overnight drop.
6. The shifts between the 11th and 12th and between the 13th and 14th were just inside the 95 percent confidence interval, although well over a standard error in size. The difference between the 14th and the preceding and succeeding low points were well over the threshold of conventional statistical significance.
7. In the Atlantic provinces, the "No" won barely in Nova Scotia. In the west, British Columbia gave the "Yes" only 32 percent.
8. On the Senate, preference for either the existing institution or abolition were deemed disapproval of the body proposed in the Accord.
9. There were, of course, other elements in the package, notably clauses on the economic union and a kind of "social charter." Evidence from other polls indicated that most voters supported these but, like the aboriginal self-government proposals, neither the economic-union nor the social-charter proposals moved many votes.
10. The formulation of the argument in these terms is not original to us. To the best of our knowledge, it originates with Alan Cairns, in his oral presentation to the Advisory Board of the Institute of Intergovernmental Relations, Queen's University, 30 November 1992. Of course, some lines of debate and opposition did transcend provinces, for example NAC's intervention attempted to create debate along general ideological lines.
11. Liking of Pierre Trudeau is indicated by ratings on a "feeling thermometer" which runs from 0 to 100 "degrees," where 50° indicates that the respondent neither likes nor dislikes the person in question. The boundaries for Figure 2.5 are 33° and 66°.
12. Tom Flanagan, in remarks to a seminar at the University of Calgary, suggested that recovery may have been helped along by the two-stage release of the Accord's

- legal text. Although the official release date was Tuesday, 13 October, the effective release date was the Saturday before, the 10th: the government of Quebec made the legal text available as the Bourassa-Parizeau debate was looming and Parizeau was refusing to debate a non-existent text. Manitoba also released the text. Officials in Ottawa did not resist early release in these provinces. Indeed, early release in just two provinces might have been tactically ideal. No one could say that the text did not exist, that something was being hidden. But actually getting a copy of the text was still next to impossible. This gave the "Yes" forces a long Thanksgiving weekend of favourable publicity.
13. The estimations on which this claim is based are complicated and do not bear explication here. For more detail, see Johnston, Blais, Gidengil and Nevitte, *Rhetoric and Reality*, chaps. 6 and 7. It is worth emphasizing, however, that voters seemed to focus on the national share, not on the Quebec one nor on the share in their home province.
  14. The clearest statements of this argument are Arthur Lupia, "Busy Voters, Agenda Control, and the Power of Information," *American Political Science Review* 86 (1992): 390-403; and "Credibility and Responsiveness of Direct Legislation," prepared for the International Symposia on Economic Theory and Econometrics (1992).
  15. Although, strictly speaking, language and province do not coincide, they seem readily conflated in voters' minds, notwithstanding a generation of effort to drive a wedge between the two.
  16. This corresponds to a recurring pattern in public opinion data: the less informed the voter, the greater the reliance on group likes and dislikes to compose a politically consistent response. The canonical source is Sniderman, et al., *Reasoning and Choice*. For an example in a direct vote context, see James H. Kuklinski, Dan Metlay and W.D. Kay, "Citizen Knowledge and Choices on the Complex Issue of Nuclear Energy," *American Journal of Political Science* 26 (1992): 615-42.
  17. Knowledge made no difference to the likelihood of accepting or rejecting aboriginal self-government or the 25 percent guarantee. On each of these, apparently, the consensus was too complete for knowledge to matter.
  18. A respondent's level of information here means the number of correct mentions about the Accord in response to the following question in the post-referendum wave: "What proposals in the agreement do you remember the media and politicians talking about before the referendum vote?" The same pattern appears when respondents are stratified by formal education. Respondents with post-secondary education gave the "Yes" a small majority.
  19. For further discussion, see André Blais, "Les Québécois sont-ils confus?" *La Presse*, 31 March 1992, p. B1; and Maurice Pinard and Richard Hamilton, "Les Québécois votent NON: le sens et la portée du vote," in (ed.) Jean Crête *Comportement électoral au Québec* (Chicoutimi: Gaétan Morin, 1984). As a recent example, a CROP-La Presse survey (*La Presse* 30 March 1992) revealed that 31 percent of Quebecers think that a sovereign Quebec would still be part of Canada.
  20. This estimate comes out of a question-wording experiment administered to the Quebec sample. Respondents were asked if they were very favourable, somewhat



favourable, somewhat opposed, or very opposed to Quebec sovereignty. For one random half, the item ended with the mention of "sovereignty." For the other half the item went on to supply a definition: "that is, Quebec is no longer a part of Canada." When posed the simple question about sovereignty, 47 percent of Quebecers (52 percent of francophones) said they were favourable. When the meaning is supplied, the proportion of "don't knows" dropped (15 percent to 6 percent overall, 17 percent to 7 percent among francophones), as did support for sovereignty (to 39 percent overall and to 44 percent among francophones). If the second variant of the question taps genuine support for sovereignty better than other indicators have done, standard surveys in Quebec overestimate support for sovereignty by close to 10 points. Equally importantly, defining sovereignty strengthens opposition to it: overall, opposition grew from 38 percent to 53 percent; among francophones, the gain was from 31 percent to 49 percent and percentage very opposed more than doubled (28 percent as compared with 12 percent).

21. Our survey followed standard practice in initiating contact in French and so may underrepresent those not fluent in the dominant language, who should have been especially likely to vote "Yes." On the other hand, analyses based on constituency data place the share closer to 90 percent, almost certainly an overestimate. See Maurice St-Germain, Gilles Grenier, and Marc Lavoie, "Le référendum décoriqué," *Le Devoir*, 23 February 1993, p. A7, and Pierre Drouilly, "Le référendum du 26 octobre 1992: une analyse des résultats," in Denis Monière (ed.), *L'année politique au Québec 1992* (Montréal: Département de science politique, Université de Montréal, 1993).
22. Attachment is indicated by scores on feeling thermometers.
23. These assertions are based on David B. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* (Baltimore, MD: Johns Hopkins University Press, 1984). This also seems to be the lesson of the closest parallel we can find to the Canadian vote, the 1975 British referendum on continued membership in the European Community. David Butler and Uwe Kitzinger, *The 1975 Referendum* (London: Macmillan, 1976), argue that the near cross-party frontbench consensus in the British Parliament was critical to the measure's success.
24. Not in Quebec, of course, for in that province the elite was deeply divided.

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## When More Is Too Much: Quebec and the Charlottetown Accord

Gérard Boisjoly

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*C'est par un «non» retentissant que la classe politique canadienne essuie le refus de la population canadienne à sa proposition constitutionnelle le 26 octobre 1992. À n'en pas douter, il s'agissait d'une révision constitutionnelle majeure (sujets traités et retombés sur le fonctionnement de la fédération).*

*Dans ce processus qui a mené à cette proposition, l'attitude du Québec apparaît étonnante à plus d'un point de vue. Pour la population et la classe politique du Québec, l'Entente de Charlottetown est nettement décevante. Le gouvernement Bourassa se lance en campagne en soutenant qu'il a été impossible de faire mieux mais que ce n'est qu'un jalon devant mener à de nouveaux gains lors de négociations ultérieures.*

*Pour le Québec, il fallait plus, mais plus, est-ce trop? L'une des questions fondamentales qui reste posée, c'est dans quelle mesure est-il possible d'introduire la reconnaissance des communautés nationales dans l'ordre constitutionnel canadien? Lorsque l'on examine certaines concessions au sujet de la question autochtone, on peut imaginer qu'il pourrait être possible d'apporter une réponse à la question québécoise.*

*La situation politique actuelle est paradoxale. On ne voit pas exactement ce qui pourrait permettre la reprise des négociations constitutionnelles, mais on ne voit pas comment on pourrait y échapper. Pour que l'on sorte de l'impasse actuelle, il faudrait peut-être un big bang politique qui touche à la fois la classe politique et l'opinion publique au Canada. Mais il se peut fort bien que l'on n'en soit pas encore au big crunch préparatoire.*

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On 26 October 1992, the people of Canada issued a resounding "No" to the constitutional reform package proposed by the country's political elite. For the first time the Canadian public was asked to decide a constitutional matter by referendum.

This political happening may be analyzed in several ways. We will settle with the painting of a scene in which certain elements will stand out in relief. After an impressionist review of the events that have marked the constitutional saga

during 1992, we will bring forth and evaluate the main components of the Charlottetown Accord, with Quebec being the observation post.

The unanswered question that remains but which necessarily must be asked, is to what extent the failure of the referendum will end the constitutional debate? Yet again, many facets are pertinent, but it remains that unclear prospects with regard to elections and the public opinion of political parties and representative movements in Quebec and Canada alike constitute a major element in the spectrum of possibilities. One may analyze the uncertainty of the various players and of the evolving conjuncture, but one cannot escape it.

### AN IMPRESSIONIST REVIEW

For a government struggling to survive, as was the case with the Conservative government, the constitutional exercise could have proved extremely difficult — and possibly even fatal. At the same time, the referendum allowed the federal government to take the initiative and it could have turned the political situation to its advantage.

In either case, the Mulroney government was in a difficult situation. After the failure of the Meech Lake Accord, which had dominated Canadian political life from 1987 to 1990, governments (federal and provincial) of Canada-outside-Quebec had to propose a solution for change. Doing otherwise would have suggested that they considered the status quo acceptable. Such a position would have provoked public opinion in a Quebec already polarized by the Meech Lake process. Setting forth a new operation appeared to be a political necessity.

Throughout the debate on the Meech Lake Accord, the non-democratic nature of the constitutional reform process was stressed insistently by critics, particularly in Canada-outside-Quebec. Deliberations held more or less in secret — or at very least, not in public — have been a constant trait of Canadian constitutional history. In the wake of the *Charter of Rights and Freedoms* of 1982, however, a series of groups, associations, spokespersons, intellectuals and so forth presented themselves as promoters or defenders of one side or the other: these “Charter patriots” proclaimed that the constitution was not the business of governments alone, but a heritage that belonged to the entire Canadian population. As a result, one should not — or could not legitimately — modify the constitution without the participation and acceptance of the Canadian public.

The government tried to respond to this objection. First, it established in November 1990 the Spicer Commission — also known as the Citizen’s Forum on Canada’s Future — which was to settle Canadians’ qualms about the constitution. Then followed the Beaudoin-Dobbie Committee, which was to gather reactions to the federal constitutional proposals put forward in

September 1991. Its mission of public consultation eventually took the form of public constitutional conferences, all with a thematic orientation, and held at the beginning of 1992 all across Canada.

Coming from another angle, the Government of Quebec affirmed that the Quebec people were the sole masters of Quebec's destiny. At the same time, however, the Liberal government did not wish to opt for a radical alternative. The signals the Bourassa government sent were contradictory.

At first, Robert Bourassa seemingly shared the population's strong resentment towards the ongoing constitutional process: he refused constitutional negotiations involving 11 governments, did not participate in intergovernmental issues unless they concerned Quebec's immediate interests, and he flirted with constitutional alternatives presuming the sovereignty of Quebec.

But these signals were mixed. At the moment of the adoption of the Allaire Report<sup>1</sup> on the constitution — which favoured a confederation rather than a federation — Robert Bourassa insisted at the party's annual meeting that Canada remained the first choice of the Quebec government. In much the same way, he subscribed to the report of the Bélanger-Campeau Commission<sup>2</sup> which fixed a deadline for a Quebec referendum on political sovereignty; almost concurrently, however, he insisted on the government's freedom to interpret the report's proposals as it saw fit.

In retrospect the attitude of the Quebec government was astonishing. It refused to negotiate in a process involving 11 governments and chose instead to wait for "offers" coming from the rest-of-Canada. The Quebec government thought it did not have to lay out specific conditions. What did the Quebec government really want? There was the constitutional position of the Liberal party, but its leader, Robert Bourassa, emphasized that this was not a government document. In any case, the constitutional position of the Liberal party was no reasonable base for a constitutional discussion within the framework of a federation. What is more, upon completion of the Bélanger-Campeau Report, the Quebec government set a deadline, by the adoption of a law that established that a referendum on sovereignty would be held at the latest by 26 October 1992.

Canada could ignore this threat or start a process of discussion that, at the least, would give the impression of trying to respond to the aspirations of the Quebec people. As much as 1991 could be perceived as a year dedicated to consultation, 1992 could equally well be perceived as a year of choosing.

#### TIME FOR A "CANADA'S ROUND"

It would be tedious to go over the entire process of constitutional negotiations that followed the death of the Meech Lake Accord. Regardless of how much one discusses the Spicer Commission, the Beaudoin-Edwards Committee, the federal constitutional proposals of September 1991, the Beaudoin-Dobbie

Committee and its numerous constitutional conferences, and so forth — one fact remains: the centre of gravity for the negotiations had moved.

In the discussions leading up to the Meech Lake Accord — that is to say, from 1985 to 1987 — it was understood that negotiations involved nothing more than accommodating the “conditions” required for Quebec to subscribe politically to the constitutional reform of 1982. After the Meech Lake failure, the expression “Quebec round” lost all relevance in favour of “Canada round.” A much broader set of questions could now be raised as legitimately as the restricted set of questions that constituted the menu of previous negotiations.

Which is simply to say, the Canadian program was clearly immense and encompassed some tremendously diverse subjects: a preamble to the constitution, a social charter, Senate reform, Aboriginal Peoples’ claims, and federal authority in matters of economic union, among others.

From the Quebec side, the question of sharing of powers became a central issue. The Quebec government wanted, in 1987, to avoid any debate on that question. It hoped that the introduction of the interpretative principle of “distinct society” could lead to an expansion of Quebec powers.<sup>3</sup> But the constitutional discussions, which finally led to the Meech Lake failure (and those talks that followed), showed clearly that this potential, to the extent that it existed, could be neutralized in the course of new negotiations. The question of division of powers had therefore to be broached directly. In this fashion, the focus for Quebec was slowly turned from the distinct society clause to the question of division of powers.

Indeed, on 13 June 1991, Gil Rémillard, minister responsible for constitutional affairs, declared that the five conditions posed in 1987 were no longer sufficient and that it was now necessary to move towards changes in the power-sharing agreement. Following suit, the Quebec government devoted considerable time to the question of power sharing in commentaries pertaining to the proposals it had raised.

The space occupied by the subject of power sharing at first led participants in the thematic constitutional conferences held by the Beaudoin-Dobbie Committee to flirt with the idea of constitutional asymmetry. This would permit them to satisfy the demands of Quebec without imposing on the other provincial governments any responsibilities that they did not necessarily wish to assume. The federal minister responsible for the file, Joe Clark, himself proclaimed on 18 January 1992 that he was ready to offer special status to Quebec. This idea, however, was eventually overshadowed by the themes of strong central government, of independent government by Aboriginal Peoples, and of a Triple-E Senate.

## ARDUOUS AND LABORIOUS NEGOTIATIONS

Following the March 1992 report of the Beaudoin-Dobbie Committee,<sup>4</sup> the provincial governments, the major players in the constitutional revision process with respect to the amending formulas, were called upon to participate in a process of negotiation — in order to define a position that would establish consensus and that could be proposed to the Government of Quebec.

Even if Joe Clark wanted to move quickly, he agreed, following the first federal-provincial meeting on the constitution (12 March 1992), to look again at his schedule. Furthermore, six newcomers obtained places at the table: representatives of the Aboriginal Peoples and of the Territories.

The negotiation followed a circuitous route. There were some obvious points: the native people imposed the notion of an “inherent right of self-government”; Senate reform constituted a major stumbling block; integration of the so-called “substance” of the Meech Lake Accord was finally accepted; there was a blockage on the question on the right of a veto for Quebec; there was division on the idea of a “social charter” written into the constitution; and the objective of “reinforcing” provincial powers was accepted. Results were a long time in coming.

The Bourassa government abstained from formally participating in these negotiations, but it remained active behind the scenes. The refusal to negotiate in a body of 11 — and now one of 17 — participants was formally supported in a show of quasi-unanimity by the Quebec National Assembly on 18 March 1992. Simultaneously, the frequent meetings with the ministers and premiers of the other governments, the telephone conversations, the exchanges of information of all types — these all gave to the presence of Quebec a sense of character that was at the same time real yet invisible. What is more, the “knife-at-the-throat” strategy — the threat of a referendum on sovereignty if there were no interesting offers (a threat that had been officially adopted by the Quebec government) — seemed to be abandoned little by little as the talks advanced, especially as the moment of truth drew near (the pressing date of the referendum).

Various statements by Robert Bourassa suggested a pulling back. While in Europe in February 1992 he declared in Brussels that if the constitutional offers of English-Canada (or of the federal government) were unsatisfactory, he would hold the referendum on the theme of shared sovereignty within an economic union. Little more than a month later on 19 March 1992, all the while acknowledging his dissatisfaction with the recommendations of the Beaudoin-Dobbie Report — particularly on the sharing of jurisdictions — Robert Bourassa employed his inaugural address for the start of the 19 March parliamentary session to profess faith in federalism and to beseech English Canada to come up with acceptable offers. He came full circle some weeks later when, in an

interview given to the newspaper *Le Monde*, he declared on 19 April 1992 his intention to hold a referendum on the federal proposals and not on sovereignty — as was stipulated in the law that he had had voted upon by the National Assembly less than a year beforehand.

The final negotiation session of the 16 “other” participants was on 6 and 7 July 1992. Following that meeting, a document outlining a state of agreement was made public. English Canada succeeded in achieving an agreement on a constitutional revision and in making an offer to Quebec.

This agreement was received coldly by many commentators and analysts in Quebec, and even Robert Bourassa expressed reservations about the presence of “substance” in the Meech Lake Accord, about the Senate proposal, and about the sharing of powers.

On 25 July, Bourassa remarked that he was awaiting responses to the uncertainties that he had expressed. When he did not obtain this satisfaction, he agreed to participate in a first ministers’ conference some days later. For the first time (4 August and 10 August 1992), it might be said that, officially, discussions concerned only the process of the constitutional negotiation. After these two days, the Quebec government joined formally in the constitutional negotiations with a total of 17 participants. The sessions took place from 18 August to 22 August in Ottawa and, to refine the final text, on 27 and 28 August 1992, in Charlottetown.

For Quebec, this episode gave birth to arduous negotiations. The content of the negotiations, however, was determined by the agreement already reached by the governments of Canada-outside-Quebec and the Aboriginal Peoples. Any reopening of the principles of this agreement was ruled out. The Quebec government appeared condemned to pluck amendments from the margins of a constitutional document of which it had not been the co-author, which it had not negotiated and which had not been made to respond primarily to Quebec’s preoccupations. The discussions conducted during the month of August stemmed directly from the agreement of 7 July.

One must remark upon the scope and importance of the constitutional revision that was being proposed — witness the number of subjects being treated and the overall importance of the repercussions for the Canadian federation.

For the entire federation, a “Canada clause” was introduced — this was to serve as a guide in interpreting the constitution — as well as a social and economic charter. With regard to institutions, the Senate was greatly reformed, the Supreme Court was constitutionalized in terms of status, composition, and nomination, and the proportional nature of representation in the House of Commons was assured. The sharing of powers was approached in terms of federal spending power and the assigning of a few specific jurisdictions. For Aboriginal Peoples, the inherent right of self-government was recognized,

which would lead to the establishment of a third order of government. Finally, the amending formula would be modified.

It may be useful at this stage to examine more carefully certain points in the final document that led to the referendum question put to the population on 26 October.

### THE "HONOURABLE COMPROMISES"

This agreement<sup>5</sup> is striking by virtue of its extensiveness. In its way, it is a reform at least as substantial as that led by the Trudeau government in 1982 with the *Canada Bill*. The document, at least in terms of issues tackled, fitted in with the long-term priorities and aspirations of the federal government in 1968. Specifically, after the establishment of a charter of rights and liberties, it was understood that a second step was necessary: to modernize the federal institutions. The issue of sharing of powers was considered supplementary. Since the summer of 1980 the idea of a preamble, which would provide a general outline of the Canadian reality, had also been advanced by the federal government.

Now, based on the principles that define the reality, the values, and objectives of the federation, we had a "Canada clause" and a "Social and Economic Charter." In the domain of federal institutions, the Senate, the House of Commons, the Supreme Court, and the amending formula became objects for modifications. Furthermore, there was proposed the institution of a third order of government destined for the Aboriginal Peoples. Finally, there was a series of arrangements relating to the sharing of powers. Obviously, every part of the Charlottetown agreement concerned Quebec's institutional interests, but a more limited number related to the province's traditional demands.

### A COPIOUS CANADA CLAUSE

Those who were opposed to the Meech Lake Accord in 1990 saw the introduction of the Canada clause in the constitutional framework as an effective means to counter any potential interpretive criterion regarding the distinct society clause. In the Charlottetown agreement, this clause (a. 1)<sup>6</sup> was presented as a long article for the interpretation of the constitution, in its entirety, and of the Charter of Rights, in particular.

Beyond the attachment declared for the parliamentary regime, federalism, and the primacy of law, the clause includes two categories of specifications: those that involve the socio-political composition of the Canadian people, and those that recall the principles of liberty and equality.

The Aboriginals are designated as "Peoples," thus suggesting that there are several groups. From this they can, on one hand, promote their languages,



cultures, traditions and, on the other, maintain the integrity of their societies. In this context, notions such as culture, language, and tradition are only elements of a society defined more broadly, a society that appears indefinite, multidimensional, and certainly extensive. Moreover, the concept of a third order of government was articulated in order to make concrete the principle of an inherent right of self-government for Aboriginal Peoples.

For a second time, Quebec was described as a distinct society within Canada, a society that unites the entire population within Québécois territory. This distinct society, which is not defined by its ethnic character, corresponds to a modern national community. Nevertheless it was not designated in terms of a nation or a people. The distinct society was rather reduced to a handful of traits: a majority of French-speaking individuals, a unique culture, and a tradition of civil law. The expression "which includes" preceding these traits identifying the distinct society would not make any difference for judicial interpretation. Whereas the notion of society for the Aboriginal Peoples was an open concept — despite its essentially ethnic character — in the case of Quebec this notion was restrained.

Further on, in paragraph 2 of this clause, the National Assembly and the Government of Quebec were provided a joint role in the preservation and promotion of the distinct society. This role, however, risked conflicting with the principle provided in paragraph 1 (d) which committed Canadians and their governments (federal and provincial) to the vitality and development of official-language minority communities throughout the rest of the country. In other words, for Quebec, the government could indeed promote the concept of a distinct society but in a manner compatible with the rights and liberties of the individual, and with the vitality and development of the anglophone population.

What was stressed, as with other issues, was the importance accorded to individual — and collective — rights and liberties, to the equality of the sexes, and to the equality of the provinces (a. 1(1)f,g,h). This last principle is, let us keep in mind, the antithesis of the notion of special status or constitutional asymmetry. It thus seemed that the idea of an asymmetrical constitution that would permit a possible reconciliation of the traditional claims of the Quebec government and of the position of the other provinces had been definitely rejected.

In sum, we had the recognition of Aboriginal Peoples through a new order of government, a distinct Quebec society defined in a restrictive fashion and in which the juridical and political potential seem completely neutralized — and, finally, by the legal equality of the provinces, the renunciation of any notion of constitutional asymmetry.

## AN EQUAL SENATE

The institution that would have undergone the most significant change was, without doubt, the Senate. Its members were to be elected, provincial representation was to be equal, and its role in legislative work would have been considerable and real. Each province would have had the right to representation by six senators (a. 8), to which was added one senator for each Territory. It was anticipated that eventually the question of aboriginal representation in this body would have to be discussed (a. 9).

The place of the Senate in the legislative process would have been quite complex. It would ratify or reject legislative bills according to variable conditions. As well, the Senate could initiate legislative bills so long as they did not relate to budget issues. This body, where Quebecers would occupy only 9.7 percent of seats (as compared to the present 25 percent) would be required to play a singularly important role in the legislative process and in the selection of principal appointments to the major institutions of Canada.

In return, Quebec would have been guaranteed to benefit forever from a representation of 25 percent in the House of Commons. For the time being, this provision would be quite symbolic, because it confirmed the current situation and the situation anticipated for at least the next 30 years. In the long run, however, it constituted a guarantee against minoritization in the main federal legislative body as a result of regional demographic evolutions in Canada.

## SHARING OF POWERS:

## STARTING POINT OR ULTIMATE CONCESSIONS?

For the Quebec population, this question of powers is the acid test of any constitutional revision. This is not so much because other issues are without import. It is because in the context of negotiations — even those of a give-and-take nature — this seminal matter becomes a platform for establishing that there are sufficient reasons to accept all the other issues in dispute. Moreover, the neutralization of the distinct society clause helped bring this chapter further into the picture.

On the subject of the spending power, the principles in the Meech Lake Accord (a. 25) would have been maintained. That is to say that for a new co-financed program established in an area of exclusive provincial jurisdiction, the provincial government would have had the right to compensation so long as this government set up a program “compatible with national objectives.” The Accord called for a framework to guide future federal interventions in areas of exclusive provincial jurisdiction.

On another point, in establishing legislative controls for both provincial and federal governments, intergovernmental agreements would have been protected

for a period of five years maximum, but with the possibility of renewal. This mechanism would be evoked in several domains (a. 26).

First, let us consider training and upgrading of the labour force (a. 28). The Accord began by establishing on one side or another exclusive responsibilities: to the federal government — the Unemployment Insurance Commission; to the provincial government — the training of workers. The provinces could limit federal expenditures in this last area by employing intergovernmental agreements. But at the same time this did not signify the abandonment of the sector by the federal government; it was stated that the federal government would have the authority to establish national policy objectives in the area of labour market development. These objectives might become a focus of consultations but, when all is said and done, they would be in force for provincial programs even when agreements on federal limits had been negotiated. In fact, a provincial government that “negotiated agreements to constrain the federal spending power should be obliged to ensure that [its] labour market development programs are compatible with the national policy objectives.”

Next, the area of culture requires attention (a. 29). The Accord began by establishing that the provinces would have exclusive jurisdiction on cultural questions relating to their own territory. At the same time, however, the federal government would continue to hold responsibility for matters of Canadian culture. Notably, it maintained full authority for Canadian cultural institutions (such as the National Film Board or the Canada Arts Council), as well as for the grants and contributions that apply to these institutions. In this division between national and provincial cultural matters, the responsibility of provincial governments for cultural matters within the province would be acknowledged within agreements ensuring harmonization with federal responsibilities.

Six legislative areas (forests, mines, tourism, housing, recreation, and municipal and urban affairs), which were already thought to be under provincial jurisdiction according to a current interpretation of the 1867 constitution, were to be now considered areas of exclusive provincial interest (a. 30 to 35). This signified that the provinces would have the power to limit federal expenditures in these matters by virtue of intergovernmental agreements. This arrangement seemed less designed to exclude the federal government than to coordinate its presence with the various provincial governments. In reality, up to the point that the federal government actually negotiates or renegotiates the form that its intervention will take, it would always be a major player in these fields.

Two other domains were designated as having shared jurisdiction: telecommunications (a. 37) and regional development (a. 36). When needed, negotiations between the two orders of government were to give way to intergovernmental accords, protected for five years. In addition, immigration (a. 27), which is already a concurrent jurisdiction, would also give way to federal-provincial agreements.

What is surprising about these constitutional arrangements is that the language used does not correspond to the usual sense extracted from the words. At first, when one designates a domain as exclusively provincial, one might well think that this means the jurisdiction is under the sole control of provincial political institutions. This is just not so. In fact, a concurrent presence of the two orders of government was accepted. What we had, in the end, was a particular form of shared jurisdiction.

Provincial exclusiveness gave the right to provincial governments to enter into negotiations before heading into intergovernmental agreements. These accords, however, would have been by nature administrative, with special power to renegotiate every five years and, in so doing, define the place the federal government would occupy. What is more, the negotiations could always result in a failure to agree: thus the federal government would remain in this sense a major player — indeed, a constancy.

From another side, there would have been a certain federal tutelage exercised in provincial jurisdictions. For example, for labour training and the limitations on the federal spending power, it would have been the federal government that established national norms, and for culture, the large institutions would remain under federal control. Furthermore, for all the jurisdictional sectors labelled exclusive or shared, the federal government would define the conditions under which it would consent to intergovernmental accords. In a sense, then, the federal government was granted a sort of freedom-of-the-city in many provincial jurisdictions.

## AN UNATTRACTIVE PROPOSAL

For the population and the political elite of Quebec, the results of the negotiations of July-August 1992 were clearly at a remove from traditional claims; and they were, in any sense, a very long way from the proposals of the governing Liberal party. The Bourassa government threw itself into a referendum campaign with “offers” which, only with difficulty, would extract great concessions. It had, on the other hand, to sustain proposals that had little resonance for the dominant political representation within Quebec, and for the constitutional vision most anchored in the Québécois political arena. What is more, it had to go against the expectations of the Liberal party, which had kept these self-same expectations alive throughout the previous two years.

When the federal Conservatives started their campaign, draped in the flag of an ambitious reform campaign, Quebec governmental forces preached a pell-mell resignation; it was impossible to do better but, given the various elements, it was nothing other than a marker along the way to a possibility of winning through subsequent negotiations. The proposal, it was understood, was not attractive.

What is more, there was the perplexity and the feeling of resistance towards the idea of Senate reform and the creation of a third order of government. Just what was to be gained by reforming this second House of Parliament — one that virtually consecrated a somewhat miniscule minority of Quebecers, and one that in itself refuted the binational character of non-aboriginal Canadians? Could one leave it to various tribunals to define a third order of government, its powers and its territories? These were questions that were left dangling. Could one accept the definition of a distinct society — such as presently defined — in the Accord and its character as purely symbolic? Was Quebec more ahead of the game with the sharing of powers? Would it be better to look at other alternatives rather than confirming the current entanglements based on official support?

The big and difficult question was: Does Quebec win? Even the most favourable responses were nuanced. On the government side there was an inclination to say “this is just a beginning.” These proposals were greeted with difficulty.

Throughout the Quebec bureaucracy, there was an assortment of critical — indeed unfavourable — judgements on the continuation of negotiations and on the “gains” that might be had.

The result is all-too-well-known. The agreement was rejected by almost 56 percent of the electorate in Quebec. All four western provinces also rejected the Accord, as did Nova Scotia. And, as for Ontario, it recorded a weak majority. Overall, the Accord was opposed by 54 percent.

### IS MORE TOO MUCH?

For Quebec, more was necessary. But more — was it too much? First of all, let us begin to point out that Quebec society was not on a death march; Quebec is neither destined to be part of Canada, nor to be independent. The path it will follow depends on a multitude of factors — among them, the manner in which it faces the constitutional question.

We can say that for many Quebecers sovereignty is no more than a default option. This is the attitude, it seems to me, of about 20 percent that represent the “swing voters” in the current make-up of our two-party system. And these are those who largely hold the key to the future. Globally, there is a widespread but deep attachment for Canada, but a Canada capable of recognizing the socio-political reality of Quebec and of permitting its institutions to assure a cultural flowering — linguistically, but also socio-economically. If Quebec is still a part of Canada it is because a majority believes, even to this day, that this challenge can be met. But it would be presumptuous to take this fact for granted in Canada-outside-Quebec.

If we put the political sovereignty of Quebec in brackets for a moment, can anyone imagine a scenario that would make sense for those wishing to meet this challenge? We could here and now — and henceforth — say that the die is cast and that it remains simply to draw conclusions: submission or secession? Elsewhere, Kenneth McRoberts has concluded in a recent study that Canada-outside-Quebec has hardened its attitude towards Quebec over the last 20 years and that a renewal of federalism that takes into account Quebec's traditional demands is improbable. This hardening may be explained in part by demographic changes and the economic rise of the west, but as McRoberts states "the growth of English Canadian resistance to duality and distinct status was primarily the responsibility of governments, most notably that of Pierre Elliot Trudeau."<sup>7</sup> He succeeded in convincing English Canadians to adopt his vision of the country and the place Quebec should have in it. This clear-minded evaluation leads us directly to an impasse.

But if one does not accept this conclusion, one must still address the fundamental question: to what extent is it possible to introduce a recognition of national communities into the Canadian constitutional order.

A negotiation among three national communities: (English) Canadians, Quebecers, and Aboriginal Peoples could be a path to explore.<sup>8</sup> Such a prospect could be fruitful in the sense that no party would have the pretence of imposing on any other any real expression of nationhood nor their model of identity.<sup>9</sup> A search for perfect symmetry would be illusory.

Discussions on a political pact creating a multinational and polyethnic state that would not clean the table of its present constitution, represents an hypothesis full of risks and ambushes. Such an hypothesis would demand a certain amount of work to dismantle Trudeauist certainties, but is it not also extravagant?

As for the Canada-outside-Quebec proponents, they are juggling here and there with the idea of negotiation among nations.<sup>10</sup> It is true, however, that they represent a minority.

But when one examines carefully the "closedness" of English Canada — which presents itself in the form of Charter patriotism, with uniform citizenship and juridic equality among the provincial governments — that closedness appears, in certain places, nevertheless, capable of making concessions when negotiating the aboriginal question.

For the Aboriginal Peoples, in the Charlottetown Accord concessions were made to recognize one or more ethnic nations, to subordinate the application of the *Charter of Rights and Freedoms* to ancestral law and to the freedoms relating to the utilization or protection of their languages, cultures, or traditions (a. 2), to subordinate eventually their political citizenship to ethnic adherence (electoral body and eligibility) (a. 46), to establish a correspondence between one nation (even ethnically based) and a state level with sovereign powers

(a. 41), to leave — should the case arise — the judiciary to define the jurisdictions of these governments and their territory (a. 41, 42).

To satisfy the claims of Quebec, it seems to me that the concessions required would not be so significant: the nation is more a territorial society than a kinship society; political citizenship has no reserves; for freedoms, it might be supposed that, in one way or another, the question of commercial sign language might be solved; there is already a correspondence (recognized in Meech and Charlottetown) between the provincial government and the Québécois community. It would be necessary to accompany provincial jurisdictions with shared jurisdictions in which the provincial must be preponderant<sup>11</sup> — for example: regional development, social security, labour training, culture and immigration.

One can envision diverse mechanisms. What is important from the start is to establish principles from which one can build constitutional reform. The time for building without vision has lasted long enough. In any case, in these matters, the people speak and make their will clear above and beyond these questions, even if one tries to camouflage them.

#### WHAT AWAITS US IN THE FUTURE?

If there is a pause at this moment, it will not last long. This is not quite the time for sleepiness. When the status quo guards the gates it becomes a beckoning for future unrest. Let us recall certain facts.

The political parties, federal as well as provincial, have practically nothing to propose to reform Canadian federalism. In a general sense, setting apart the sovereigntist movement in Quebec and the Reform party in the west, the political elite was favourable to the Charlottetown agreement; it was disaffected by the result obtained. Even before the referendum result was confirmed, the anticipated defeat said to these people that one should definitely consider posting a moratorium on all constitutional negotiations. The current policy is more of a "wait-and-see" outlook.

How long is one supposed to remain contented with this attitude? Or, how long can such an attitude continue to be accepted? As much rests at stake in this as in the whole current constitutional debate.

On the Quebec side, the Liberal party will be tempted to set aside the whole constitutional question. For the party to settle for the present constitutional débâcle might appear to be political suicide, but without a credible alternative it seems to be the route they are ready to take. However, the die has not been thrown yet. Adding to this uncertainty is the possibility of a change in the leadership of the Liberal party in the coming months — because of the serious health problems of Robert Bourassa. This, of course, would favour internal debates on the question.

According to this scenario, the new Liberal leader could have difficulties in reconciling the gap between inflexible federalists and strong nationalists within the party. The ambiguities of Robert Bourassa permitted him to play both — and if it were possible — several sides of the fence. A new leader could well disappoint a clientele so well versed in this school of politics. This could be one of the factors that leads to the defeat of the present government in the next election — which must be held by the fall of 1994. And, broadly speaking, the electorate's fatigue towards a Liberal government in its second mandate could be another factor leading to a defeat.

As noted above, for now, we have put in brackets the option of the political sovereignty for Quebec. These brackets are clearly artificial. One might estimate that the chances of the Parti Québécois winning the next election are reasonably good. If this is the case, the constitutional question will once again go back to square one. The new government will give the issue high priority in its agenda. Ways of obtaining independence are specified in a recent PQ publication.<sup>12</sup> But one can suppose that a majority vote in favour of sovereignty would be followed by negotiations well before setting in place conditions for sovereignty and common institutions. One cannot exclude negotiations that could touch upon common institutions evoking a confederation. In any case, it is certain that an electoral victory for the Parti Québécois will change the conditions of negotiations and, at the very least, render them inescapable.

Beyond that, for how long can we permit ourselves to be spectators — more or less passive — in the face of the various options and proposals, such as those advanced by the Aboriginal Peoples in order for them to concrete a third level of government despite the Charlottetown impasse. A call for patience will not suffice. Already we have witnessed many zones of tension. The installations of gaming houses on reserves creates a pretext for a new political crisis.

The current political situation is also paradoxical. No one quite sees exactly what it might take to revive the constitutional negotiations. The Charlottetown agreement was insufficient for Quebec and, it seems, for the Aboriginal People; the political elite was disavowed the moment there was a referendum by a majority of Canadians. Given the fact that the referendum route is almost indispensable in terms of major constitutional reform, it is difficult to see who could sway public opinion.

The situation is also paradoxical because no one knows how to stop these new negotiations in the very near future. The aboriginal question is going to raise its head, no doubt. The possible election of the Parti Québécois might also provide a degree of amplification. Besides that, the next federal election may give us a thoroughly uncommon House of Commons, with five political parties represented substantially and a minority government in the lead. In this possibility, one could say that the crisis of legitimacy and representation of the traditional political elite might spill over into a parliamentary crisis.



Do these conditions — partially or totally joined together — announce a horizon that is politically blocked or the opening to a dynamic new alternative? It is impossible to say. For those who would square the current circle, it is perhaps necessary to have the equivalent of what might be called the “Big Bang” that will simultaneously touch public opinion and the political elite. The question is: Are we steeled enough for the preparatory stage of the “Big Crunch”?

## NOTES

I am grateful to my colleague Alain Noël for helpful suggestions on a previous draft of this chapter.

1. *Un Québec libre de ses choix*, Rapport du Comité constitutionnel du Parti libéral du Québec, 25<sup>e</sup> Congrès des membres du Parti libéral du Québec, janvier 1991, 74 p.
2. Commission sur l'avenir politique et constitutionnel du Québec, *L'avenir politique et constitutionnel du Québec*, Rapport remis au Président de l'Assemblée nationale du Québec, mars 1991, 180 p.
3. G. Boismenu, “Through a Glass, Darkly: The Meech Lake Mirage,” in A.B. Gollner & D. Salée (eds.), *Canada Under Mulroney. An End-Of-Term Report* (Montreal: Véhicule Press, 1988), pp. 48-64.
4. *Un Canada renouvelé*, Rapport du Comité mixte spécial du Sénat et de la Chambre des Communes, février 1992, 211 p.
5. For this section we refer to the *Consensus Report on the Constitutional Consensus*, Charlottetown, 28 August, of which the definitive text was made public when the referendum campaign had just begun.
6. Editors' note: “a.” refers to numbered article in the *Consensus Report*, *ibid.*
7. K. McRoberts, *English Canada and Quebec: avoiding the issue* (North York: Robarts Centre for Canadian Studies, 1991), p. 14.
8. For a developed discussion see: G. Boismenu, “Is The Reconciliation of Ethnicity, Nationality and Citizenship Possible?” in J. Laponce and J. Meisel (eds.), *Ethnicity and Canadian Constitution*, forthcoming.
9. Greg Marc Nielsen writes: (trans.): “The symbolic representation of each event differs according to whether one belongs to one or the other of the existing political cultures ... The two societies are thus relatively separate. But, at the same time, on the symbolic plan, their statements are profoundly inseparable, given their communal institutional history. How does one explain one without reference to the other?” *Possibles*, 16, 2 (1992): 67-68
10. P. Resnick, *Toward a Canada-Quebec Union* (Montreal: McGill-Queen's University Press, 1991); C. McCall et al. “Three Nations,” *Canadian Forum* (March 1992): 4-6.
11. The system proposed by the Task Force on Canadian Unity in 1979.
12. Parti québécois, *Le Québec dans un monde nouveau* (Montreal: VLB Éditeur, 1993).

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## Let There Be Light

*J. Peter Meekison*

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*Le 26 octobre 1992, les Canadiens ont rejeté l'entente de Charlottetown, mettant fin ipso facto à un quart de siècle de négociations constitutionnelles. Or, l'échec du référendum sur cet accord ne signifie pas pour autant que toutes les questions discutées en ce domaine, au cours de ces vingt-cinq dernières années, ont été renvoyées du même coup aux calendes grecques. Certes, on note peu d'empressement de part et d'autre à rouvrir le débat constitutionnel; néanmoins, d'autres avenues s'offrent aux Canadiens et à leurs gouvernements pour traiter ce dossier.*

*Cet article avance pour l'essentiel que la procédure formelle de modification de la constitution ne représente qu'un moyen, parmi d'autres, d'effectuer un changement à ce chapitre. De fait, on pourrait arriver à un résultat similaire en modifiant les usages établis, en promulguant de nouvelles lois et en recourant davantage à la jurisprudence existante. En outre, les ententes et négociations intergouvernementales s'avèrent, et de loin, la meilleure façon de renouer avec la procédure traditionnelle de résolution des conflits.*

*Au reste, advenant que les gouvernements décident d'agir sur le plan constitutionnel, plusieurs dispositions contenues dans l'entente de Charlottetown pourraient être appliquées sans qu'il soit nécessaire de procéder à une modification formelle de la constitution.*

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The defeat of the Charlottetown Accord on 26 October 1992 brought a decisive end to a 25-year search for constitutional perfection.

When the vote was over, many Canadians gave a collective sigh of relief, believing that, at last, governments could address more pressing issues like the economy, the deficit, unemployment and the environment. But to others, the constitutional agenda remained unfinished business. During the past quarter century, the route chosen for change has been formal amendment to the *Constitution Act*. This process, however, has recently proven unsuccessful. Now, the question arises, are there ways to make needed changes to our system

of government other than by formal amendment to the constitution? The answer is a resounding yes!

The first part of this paper explores some of the methods governments have at their disposal to bring about constitutional revision. These are ordinary legislation, convention and reference to the courts.

If the past quarter century can be characterized as the era of constitutional reform, the period immediately preceding it can be characterized as the era of cooperative federalism. It is my contention that governments can address much of what was found in the Charlottetown Accord through intergovernmental agreements, as was done during the era of cooperative federalism. A number of issues such as interprovincial trade barriers, fiscal federalism and labour market training are strong contenders for such agreements.

The final portion of the chapter is intended to serve as a reminder that the principal reason for the intensive constitutional debate was, and still remains, national unity. Constitutional reform was seen as the means to achieve this goal. Until Quebec indicates in some way its acceptance of the 1982 constitutional amendment which patriated Canada's constitution, the subject of constitutional reform will never completely disappear. A similar argument can be made about Aboriginal Peoples and the constitution. Their quest for aboriginal self-government has been intensified, not diminished, by the defeat of the Charlottetown Accord.

In summary, while some Canadians feel the constitutional debate has ended, others feel that, far from having ended, a constitutional crisis of major proportions looms ahead.

Despite agreement on the need for constitutional reform, many scholars have been critical of the process chosen and pessimistic about the possibility of Canadians reaching agreement on constitutional amendments.

The titles of only a few books written between the demise of the Fulton-Favreau formula and the collapse of Meech Lake illustrate this point. *The Future of Canadian Federalism* (1965); *Confederation at the Crossroads* (1968); *One Country or Two?* (1971); *Canada in Question: Federalism in the Seventies* (1972); *Divided Loyalties* (1975); *Must Canada Fail?* (1977); *Unfulfilled Union* (1982); *And No One Cheered* (1983); *Canada Notwithstanding* (1984); *The Federal Condition in Canada* (1987); and *A Deal Undone* (1990) do not indicate a particularly optimistic view. In fact, collectively they convey a message of despair about our political and constitutional future. All the works cited relate in one way or another to Quebec or to constitutional reform.

Closely related to this pessimism is the theme of Canada in crisis. For more than 25 years Canadians have been told they are in the midst of a crisis. It seems that every time the subject of reform is raised, those examining the question conclude that Canada is undergoing a crisis far worse than any previously encountered.

In their *Preliminary Report*, published in 1965, The Royal Commission on Bilingualism and Biculturalism stated:

The Commissioners ... fully expected to find themselves confronted by tensions and conflicts. They knew that there have been strains throughout the history of Confederation.... What the Commissioners have discovered little by little, however, is very different: they have been driven to the conclusion that Canada, without being fully conscious of the fact, is passing through the greatest crisis in its history.<sup>1</sup>

In 1972 the Joint Parliamentary Committee on the Constitution, established in 1970 by Prime Minister Trudeau, declared that Canada "is in the midst of the most serious crisis in its history."<sup>2</sup>

The Pepin-Robarts Commission established in 1977 by Prime Minister Trudeau after the Parti Québécois (PQ) electoral victory in 1976, released its report entitled *A Future Together* in January 1979. They, too, emphasized that Canada was in the midst of a crisis. They also issued the warning, "We recognize that even crises can become tedious and difficult to believe in if they go on too long and nothing seems to happen."<sup>3</sup>

In 1991, the Spicer Commission, established by Prime Minister Mulroney after the demise of the Meech Lake constitutional accord, released its report. One observation stands out.

This part is the commissioners' voice. And we must tell you clearly: Canada is in a crisis. This is a crisis identified and experienced by the people of Canada as immediately as a drought affects a farmer. This is a crisis of identity, a crisis of understanding, a crisis of leadership. We have arrived at this conclusion not because participants used the word crisis — few of them did — but because what they told us adds up, mercilessly, to this conclusion.<sup>4</sup>

The Beaudoin-Dobbie Committee, the Special Joint Committee of the Senate and House of Commons responsible for reviewing *Shaping Canada's Future Together*, stated:

Canada is at a critical point in its history. Either it continues on the path of unity, a strong nation, confident of its future and of its people, or it engages itself on a drastically new path, one laden with uncertainty and doubt.<sup>5</sup>

So, one can track the theme of constitutional crisis back over the past quarter century. This sense of immediate or imminent disaster, reported by five very diverse groups, all of which crossed Canada holding public hearings, has coloured how Canadians perceive constitutional reform. They simply do not believe the prophets of doom, because all predictions thus far have proven false.

During this so-called crisis period, Canadians have witnessed a number of failures — Quebec's rejection of the Fulton-Favreau amending formula in 1965; Quebec's rejection of the Victoria Charter in 1971; the collapse of constitutional negotiations in 1980 and subsequent unilateral federal action; Quebec's

rejection of the agreement on patriation of the constitution reached in 1981; the failure, in 1987, after four years of negotiation to reach agreement on aboriginal self-government; the failure of the Meech Lake Accord in 1990; and the rejection by the electorate of the Charlottetown Accord in 1992. For 25 years we have assumed that Canada is going to disintegrate if agreement is not reached. We have tried mightily to avoid this catastrophe by attempting to reform the constitution. In other words, we have had our fingers in the constitutional dike for almost a generation.

With the defeat of the referendum, we have pulled our fingers out and, amazingly, there are no visible leaks in the dike. What we do not know, however, is what is happening underneath the surface. Has there been significant structural damage which for the time being is invisible and undetected?

The referendum defeat represents a watershed, bringing to a sudden and convincing end the long era of constitutional reform which has monopolized centre stage one way or another since our centennial. It is significant that a generation of Canadians and thousands of new Canadians have witnessed continuous discussions about constitutional reform. To them such debate must appear a normal facet of Canadian political life. It became very clear after the referendum that the public was in no mood to continue this debate. They would rather wait and see what happens next, then deal with the issue. But, they reason, if past experience serves as a guide, nothing catastrophic is likely to happen.

Our search for renewed federalism, reform or accommodation with Quebec — call it what you will — may therefore be at an end or, at the very least, sidetracked for the foreseeable future.

This view is reflected in a statement by Premier Klein of Alberta after meeting with Premier Bourassa. He said:

Perhaps there should be a reasonable post-mortem of the process — not the package itself, but the process and what went wrong. Perhaps when the time is right ... five, 10, 15 years down the road, put it back on the front burner when the Canadian people are more receptive.<sup>6</sup>

A similar view is reflected in the following exchange between Gil Rémillard, Quebec's minister of intergovernmental affairs, and Premier Rae of Ontario. In response to questions in the National Assembly, Rémillard once again emphasized the importance to Quebec of constitutional reform.<sup>7</sup> To the possibility of reopening constitutional discussions, Premier Rae responded that Mr. Rémillard just "didn't get the message."<sup>8</sup>

While some political leaders are clearly avoiding the issue, others are continuing to remind Canadians that discussions are far from over. Headlines include: "Parizeau maps out route to sovereignty," "PQ predicts independent Quebec by 1995," "Bouchard predicts new union for Quebec and rest of Canada," "Natives look to themselves for new deal: Less talk more action in

1993," "Ground lost since death of accord, Mercredi says."<sup>9</sup> Nor should one ignore the Rt. Hon. Joe Clark's warning:

Some of the anger [over the referendum] is gone. [But] That phrase "calm before the storm," came up very frequently in a series of meetings I held recently in Quebec. I think it is the case generally.<sup>10</sup>

It is a fact that both the PQ and Bloc Québécois are committed to Quebec independence. Whether or not they will succeed is unknown. One way or another, though, they intend to keep the public's attention focused on the inevitability of Quebec's separation from the rest-of-Canada. Aboriginal Peoples are equally determined to achieve self-government and secure the promises held out to them in the Charlottetown Accord and associated political accords. To emphasize this point, both the Assembly of First Nations and the Inuit Tapirisat of Canada walked out of an intergovernmental conference in Inuvik in July 1993 because they felt the Government of Canada no longer seemed to accept the principle of the Aboriginal Peoples' inherent right of self-government.<sup>11</sup>

The rejection of the Charlottetown Accord also brought an end to efforts to achieve Senate reform. Nevertheless, the subject of Senate reform continues to surface, as it did when Senators decided to increase their expense allowances by \$6,000 in the summer of 1993. The prevailing option this time, however, appears to be abolition of the Senate rather than its restructuring.<sup>12</sup> To many westerners, however, abolition of the Senate would end their hopes of having a more equitable voice in national decisionmaking. Debate about the structure and role of the Senate will continue.

What we need to understand is that forces underlying the demand for constitutional reform have not disappeared simply because the Charlottetown Accord was defeated. Quebec's concerns, western grievances and aboriginal self-government still remain as unfinished business. How and when they will be addressed is uncertain but they *will* resurface. In many respects, our current situation is comparable to being in the eye of a hurricane. The last 25 years carried us here. In the next few years, we will once more be in stormy seas. Or will we?

#### ALTERNATIVES TO THE MEGA-AMENDMENT OR "LET THERE BE LIGHT"

Consider this question. "If formal constitutional reform — the mega-amendment — is *not* attainable, are there other ways to bring about constitutional change?" The answer, as I have said, is yes. If this route is successful, the demand for formal constitutional solutions should fade. Of equal

importance, the emotions aroused as we have attempted formal amendments should also fade.

There are four basic ways that constitutional frontiers can be shifted: formal constitutional amendment, convention, statute and judicial interpretation. Let me examine the latter three in greater detail. One cannot predict what changes will be thought necessary or pursued through these processes, so rather than develop a new list of subjects for consideration I have tried to use matters that, in one way or another, have been central to previous constitutional negotiations. Indeed, in my opinion, governments can implement much of what was contained in the Charlottetown Accord without resorting to formal constitutional amendment.

#### CONVENTION

Much of our constitution consists of convention or usage. These practices have evolved over time and, while not part of the written constitution, are equally important. To a great extent, the functioning of cabinet government is influenced by convention. Other examples include alternating the Governor General and Chief Justice of the Supreme Court of Canada between English- and French-speaking individuals.

When the federal government released its paper on constitutional reform in September 1991, it contained references to parliamentary reform.<sup>13</sup> For whatever reason, there was no apparent interest in pursuing this subject during the multilateral constitutional process and there are no references to it in the Charlottetown Accord. Nevertheless, there continues to be demand from the public for parliamentary reform.

One way to achieve this objective is to modify a number of the conventions by which parliamentary government operates. For example, the public has demanded more free votes and a corresponding reduction in the tight party discipline now present. Any changes here will lead to new understanding of votes of non-confidence. It should be recognized that there is no reason, other than political unwillingness, why conventions governing matters such as votes of confidence, budget secrecy and the functioning of parliamentary committees cannot be changed. Indeed, both the Liberal Party of Canada and Prime Minister Kim Campbell have made a number of proposals in this area.<sup>14</sup>

#### STATUTE

Statutes also form a major part of our constitutional fabric, for they add substance to the bare bones of the basic document. Examples such as the *Canada Elections Act*, *Official Languages Act* and the *Supreme Court Act* come readily to mind. Such statutes represent important constitutional building blocks.

Although electoral reform was not central to the recent constitutional discussions, the topic has generated considerable interest. Is our current system fair? Do election results reflect the popular vote? Should there be a separate system of representation for Aboriginal Peoples? Such questions were addressed by the Royal Commission on Electoral Reform and Party Financing (the Lortie Commission) in its report of November 1991. There is nothing in the constitution that limits us to single member districts and a single non-transferable vote. We could, instead, institute a system of proportional representation or an alternative ballot by statute.

It is of interest to note that neither the Lortie nor the Macdonald Royal Commission supported the idea of introducing proportional representation.<sup>15</sup> With either change, the composition of Parliament would be fundamentally altered to make its representation more closely reflect the popular vote, a concern that surfaced after the 1979 and 1980 federal elections. Canada is not alone in questioning its electoral system. Italy is attempting to move away from proportional representation while New Zealand is considering adopting it.<sup>16</sup>

The Charlottetown Accord contained a number of constitutional amendments, the main purpose of which could be accomplished by statute. For example; the *Supreme Court of Canada Act* could be amended to provide for a provincial nominating process and the *Bank of Canada Act* could be amended to have the Governor's appointment ratified by either house. Parliament could pass an act guaranteeing the sanctity of intergovernmental agreements. A statutory framework authorizing governments to conclude agreements harmonizing telecommunications regulations is another possibility. To be sure, statutes would not provide the same degree of protection as a constitutional amendment, but our choices are to jettison an entire idea or achieve our policy objectives another way. At some point, an element of trust and opportunism must be reintroduced into the realm of federal-provincial relations.

#### JUDICIAL INTERPRETATION

Since Confederation, judicial interpretation has had a profound impact on the division of powers and our constitutional evolution. The courts act as our constitutional referees. Individuals and corporations occasionally challenge the constitutionality of government actions or legislation. Governments also have the ability to refer constitutional questions to the courts for review and determination. The courts have ruled on matters such as communications (radio), aeronautics, anti-inflation, off-shore resource ownership, and export taxes on natural gas and patriation, all through reference cases. What needs to be remembered here is that governments can initiate legal proceedings, the outcome of which will alter our constitutional boundaries. While governments can frame the questions to be answered, they have no control over the outcome.



Since there is an element of risk associated with references, it is likely that this alternative to constitutional reform will be used sparingly.

Just as there are examples of instances where cases have been referred to the courts, there are examples of situations where provinces decided it was not in their interests to take the matter to court. Two non-challenges that come to mind pertain to the *Canada Health Act* of 1984 and the *Canada-United States Free Trade Agreement Implementation Act* of 1988.

Alberta, for example, did not directly challenge the *Canada Health Act* even though the province had traditionally challenged similar exercises of the federal spending power. The Act prohibited practices like extra billing which Alberta then permitted. Despite provincial concern, it was not in the province's interest to go to court. Why? Because it was a lose-lose situation. If the provinces *won* the case they might have succeeded in dismantling the national health care system and ending up by paying 100 percent of the costs. If the provinces *lost* the case — a more likely scenario — the federal spending power would have been clearly established within whatever limits were set by the courts.

Although there were federal-provincial discussions leading up to the Free Trade Agreement between Canada and the United States, the treaty itself was implemented by a federal statute. Speaking to this issue in 1987, the then Attorney General of Ontario, Hon. Ian Scott, said, "In short, whether or not the agreement amounts to a constitutional amendment in any formal sense it represents, in my view, *de facto* constitutional change — and a constitutional change of very significant magnitude."<sup>17</sup> Despite Ontario's opposition to the Free Trade Agreement, it did not initiate a court challenge. Why? While one cannot overlook the fact that the 1988 federal election was fought over this issue, the most likely reason is that the province would have lost. If so, Parliament's legislative jurisdiction over trade and commerce, particularly international trade, would have increased. This would not have been in Ontario's interest. Political sabre-rattling was as far as Ontario was prepared to go.

A recent case that helped to define federal jurisdiction over the environment is the Oldman Dam decision of 1992.<sup>18</sup> In this case, an interest group took the federal government to court because, in its opinion, the government had not fulfilled its obligations to carry out an environmental impact assessment. The court agreed with the position presented by the Friends of the Oldman River Society. The importance of this case is considerable, particularly in light of the recommendation from the Beaudoin-Dobbie Committee that the environment *not* be added to the list of items to be discussed under the division of powers. They said,

At the present time, there is no subject heading in the Constitution dealing with this matter [environment]. But, both the federal and provincial governments, under various heads of power, share responsibility for the environment. We agree with

this sharing of responsibility and see no need for constitutional change in this area.<sup>19</sup>

If the parliamentary committee's view prevails in the future, individuals will continue to turn to the courts to adjust constitutional boundaries.

The foregoing discussion outlines some of the alternative processes to formal amendment to the constitution. In each instance, governments have to decide if they want to initiate change. Part of their willingness to do so will depend upon the public's demand for change.

## A RETURN TO COOPERATIVE FEDERALISM

In the previous section, several alternative processes to formal amendment were described. Although these approaches will permit the solution of some problems, they may not necessarily be the most effective means of addressing all the difficulties currently confronting our federal system. Other approaches which are best characterized as intergovernmental in nature may sometimes be more suitable. It is my contention that, through intergovernmental negotiation, governments can conclude agreements which are similar in scope to a number of the provisions contained in the Charlottetown Accord.

The genius of post-war Canadian federalism has been the development of a series of federal-provincial agreements covering a wide range of policy fields ranging from health care to social assistance. National policies have emerged — not always harmoniously — but they have been developed. Health care, energy pricing, and fiscal arrangements are good examples. As one observer remarked 30 years ago, "This leads us away from the preoccupation with the lawyers' constitution to some analysis of the politician's or administrator's constitution."<sup>20</sup>

Since the failure of Charlottetown, there are three policy areas that remain issues of major concern for governments. They are interprovincial trade barriers, the federal spending power and labour market development and training.

Dispute in these areas will not disappear just because formal constitutional amendment cannot be reached. Indeed disagreements appear to have intensified since the referendum. Rather than expending our energy searching for constitutional solutions to our problems, we may be more successful in falling back on what has proven successful in the past — intergovernmental negotiation and agreement — cooperative federalism.

A brief history of attempts to resolve disputes in the three policy areas reinforces this point.

## INTERPROVINCIAL TRADE BARRIERS

The federal government added the subject of interprovincial trade barriers to the constitutional agenda in 1980. At that time, governments were unable or unwilling to reach agreement.<sup>21</sup> The Macdonald Royal Commission studied the issue and, in 1985, recommended against constitutional solutions. To quote the Commission:

We have reservations about placing further responsibilities on the courts in an area where complex economic and political trade-offs often seem to be required. Many practices that have attracted attention in relation to the economic union fall into grey areas that even a strengthened section 121 cannot easily reach.<sup>22</sup>

Instead the commissioners recommended a Code of Economic Conduct. A committee of federal-provincial ministers responsible for economic development under the aegis of the first ministers' conference was to be responsible for developing the Code.

During the negotiations leading up to the Charlottetown Accord the federal government pressed very hard for provincial agreement to the proposals contained in its September 1991 position paper. Just as in 1980, most provinces, while accepting the principle of the common market, resisted any constitutional limitations to their legislative authority to protect or preserve particular aspects of their economies. For example, P.E.I. wanted to protect its limits to land ownership, Alberta wanted to protect its natural resources, Saskatchewan wanted to protect its Crown corporations and British Columbia wanted to protect its social assistance programs. The list of exceptions grew to the point that the proposed cure was worse than the problem. In a rather prophetic statement, the Royal Commission predicted this eventuality. They said, "A constitutionalized code formulated today would probably include so many opting-out, *non obstante* and exemption clauses that it would perhaps only legitimize what it was designed to prevent."<sup>23</sup> As the provinces' list of exceptions increased, the federal government's enthusiasm for a constitutional provision decreased. At the meeting in Charlottetown, first ministers deleted the subject from the main agreement and added it to a companion "Political Accord" for further review at a future first ministers' conference.<sup>24</sup>

In the course of the negotiations on interprovincial trade barriers, the idea of devising a dispute resolution mechanism took root. Although most provincial governments were determined not to have the courts review their trade policies, they appeared to be amenable to the creation of some kind of intergovernmental tribunal. The Macdonald Commission used GATT mechanisms as their model, but negotiators of the Charlottetown Accord proposed one patterned after that in the Canada-U.S. Free Trade Agreement. While I see little prospect of governments resurrecting the detailed provisions of the "Political Accord," I do

see a much greater prospect for governments agreeing to a code of conduct and a dispute resolution mechanism.

That interprovincial trade barriers remains a contentious issue is reflected in the following statement by Premier McKenna of New Brunswick in late November 1992. He said, "Those provinces that want to put up barriers will have barriers put up against them.... We can't wait to have unanimity from 10 provinces, so let's introduce interprovincial free trade with those who want it."<sup>25</sup> Such language is the basis for both political and legal conflict. Indeed these words were not idle musings. In the spring of 1993 New Brunswick announced its "Quebec Reciprocal Treatment Policy." Speaking in the New Brunswick legislature, the minister of economic development said:

The following statement is to be included in all applicable tender documents and advertisements of tenders: *Note to Quebec bidders only: Until the preferential restrictions in Quebec currently applying to non-Quebec businesses and labour are repealed, only those having their principal place of business in New Brunswick are allowed to bid unless specifically invited.*<sup>26</sup>

In the spring of 1993, the federal and provincial governments established a schedule to eliminate trade barriers.<sup>27</sup> The actual negotiations began in June 1993 and are scheduled to continue for about a year. New Brunswick's drawing the line in the sand may force all governments to reassess their policies before further retaliatory measures are taken. That such an eventuality might occur is reflected in various news accounts. Ontario is concerned about Quebec's restrictive policies limiting Ontario business and labour opportunities, while New Brunswick is concerned about Ontario's policies with respect to marketing Moosehead beer, despite the fact that an all-province agreement was reached in 1990 on domestic beer sales.<sup>28</sup> Reports from the June conference have not been encouraging. It appears that British Columbia insists on maintaining certain barriers affecting regional development.<sup>29</sup> Although problems continue to exist, my sense is that governments have made the political commitment to solve this problem once and for all. What we are seeing today is the preliminary skirmishing.

#### THE FEDERAL SPENDING POWER

The issue of the federal spending power was one of the original topics placed on the constitutional agenda in 1968 and it has remained there ever since. It was one of Quebec's five demands listed in 1986. The question is not whether the federal spending power exists — it does — but rather how it can be controlled.

During both the Meech Lake and Charlottetown negotiations, the limits developed (provincial opting-out with federal compensation) were a matter of considerable controversy. Many Canadians felt that if such a clause were

included in the constitution, national programs such as health care could be dismantled while others such as day care would never get introduced.

Another reason why this topic was prominent during the Charlottetown negotiations results from the 1990 federal budget. At that time, the federal government unilaterally introduced a ceiling on the Canada Assistance Plan (CAP) for the three wealthiest provinces — Ontario, British Columbia and Alberta. Parliament approved this policy by statute. The provinces had two choices — to accept the decision or to take the federal government to court. The provinces affected did, in fact, take the federal government to court — and lost.<sup>30</sup> It should come as no surprise that throughout the negotiations leading to the Charlottetown Accord the provinces pressed for a provision that would protect intergovernmental agreements from unilateral changes for their duration.

The reason the spending power is so important is that it goes to the heart of our federal system and touches upon most aspects of public policy. That is why, throughout the Charlottetown Accord, one finds reference to the federal spending power, including the following: the limits to new national shared-cost programs,<sup>31</sup> the so-called six policy fields such as forestry<sup>32</sup> and most importantly the agreement to establish “a framework to govern expenditures of money in the provinces of Canada in areas of exclusive provincial jurisdiction.”<sup>33</sup>

If people doubt the importance of the spending power and the increasing apprehension of the provinces, they should pay close attention to Premier Rae's remarks when he claimed the federal government owes Ontario \$2 billion for welfare payments under CAP.<sup>34</sup> Nor should one ignore Premier Klein's comments about user fees for health care which he made shortly after his successful leadership race.<sup>35</sup> The subject of user fees for health care has also surfaced in both the Conservative leadership race and the 1993 Alberta provincial election.<sup>36</sup> While one can dismiss all such statements as political posturing, they can also be seen as trial balloons sent up to test the political waters. They also serve to underline the rather precarious nature of our social safety net and highlight potential areas of federal-provincial conflict.

Closely-related to the question of the spending power is the burgeoning public debt because it limits the funds available for social programs and leads to intergovernmental dispute. The C. D. Howe Institute has referred to the size of our public debt as a crisis.<sup>37</sup> While some dismissed the C. D. Howe report as alarmist, prudence would suggest that it be given some credence. Here is the reaction of the minister of finance, Don Mazankowski, to the report. According to one newspaper account:

“Canadians will not tolerate any increase in taxes,” said Mazankowski....

But he was “quite intrigued” by the suggestion of some economists in the report that it's time to look seriously at “wholesale” cuts in federal transfers.

The government has repeatedly cut the growth in those payments used to fund old age security, higher education, and health care.<sup>38</sup>

This comment leads one very quickly into the political minefield known as offloading or, put another way, shifting the burden of expenditure from one level of government to another — usually from the federal to the provincial governments. The various provincial budgets introduced this spring have all contained reference to this problem, some in particularly harsh terms. The federal government is blamed for provincial deficits and, by inference, the need to increase provincial taxes. The B.C. budget refers to “federal offloading”; Saskatchewan talks about “a diminishing federal financial commitment”; New Brunswick mentions the “arbitrary ceiling provision” on equalization payments; and Newfoundland talks about the “unilateral federal EPF restraint measures.” To Quebec, “Federal transfers are part of the problem of Quebec’s public finances. They should be part of the solution.” Alberta said, “Current federal-provincial fiscal arrangements blur responsibilities, fail to give provinces adequate revenue to meet their responsibilities, penalize some provinces in providing national programs, and do not allow provinces sufficient flexibility. All of this leads to waste and duplication.”<sup>39</sup>

Offloading involves more than expenditure reductions and intergovernmental transfers. It also raises the question of what should or will be the federal government’s continuing role in the policy fields of health, post-secondary education and social assistance. When Parliament approved the *Canada Health Act* of 1984, provinces were instructed to eliminate policies such as extra billing and other user fees or face equivalent reductions in federal transfers. The time may be rapidly approaching when federal cash contributions will be at such a low level that provinces will simply refuse to accept the funding and its conditions and will establish their own programs. Policy control over shared-cost programs by the federal government is ultimately linked to federal expenditures, and a reduction in funding serves only to weaken the control.

The possibility of a major federal-provincial dispute over the financing of our most important shared-cost programs would increase tensions in the federal system and reduce the federal government’s ability to influence national standards. Thomas Kierans of the C. D. Howe Institute states, “Fiscal federalism is in danger of disintegrating and time to salvage it is running out.”<sup>40</sup>

The constitutional and fiscal agendas are inevitably intertwined, make no mistake about that! If for no other reason than to restore public confidence, a review of the use of the spending power appears timely. A good place to start is with the commitment to establish the framework found in section 37 of the Charlottetown Accord which stated:

The government of Canada and the governments of the provinces are committed to establishing a framework to govern expenditures of money in the provinces by

the government of Canada in areas of exclusive provincial jurisdiction that would ensure, in particular, that such expenditures

- (a) contribute to the pursuit of national objectives;
- (b) reduce overlap and duplication
- (c) respect and not distort provincial priorities; and
- (d) ensure equality of treatment of provinces while recognizing their different needs and circumstances.

While finance ministers are the logical persons to initiate such a study, it should not be conducted as merely another part of the periodic renegotiation of fiscal arrangements. The nature of the framework contemplated in section 37 appears to be a much more fundamental restructuring of the spending power with very real consequences for the functioning of fiscal federalism. In my opinion, the deficit issue has served to highlight the importance and timeliness of such a review.

#### LABOUR MARKET DEVELOPMENT AND TRAINING

Of all the proposed changes to the division of powers in the Charlottetown Accord, the one to labour market development and training was the most profound. With the failure of the referendum, the federal government very quickly reasserted its authority over this field. The subject was discussed at a January 1993 meeting of ministers responsible for labour market training where ministers stressed the need for cooperative and coordinated action.<sup>41</sup> The first tangible agreement was reached in early August 1993 between the federal and Quebec governments.<sup>42</sup> Under the agreement, the main responsibility for job training would be turned over to the province, a role the province had sought for many years. The agreement parallels the provisions found in the Charlottetown Accord and was achieved through intergovernmental negotiation which does not require legislative approval.

At the same time that there have been pressures to devolve responsibility for labour market development and training to the provinces, groups like the Business Council on National Issues and the Canadian Chamber of Commerce have been arguing for the creation of a federal role or presence in the field of education.<sup>43</sup> In its 1991 publication entitled *Learning Well ... Living Well*, the federal government linked its national unity and prosperity initiatives together. The authors, while fully acknowledging the provinces' exclusive jurisdiction over education, raised the possibility of an expanded federal role "in promoting excellence and supporting provincial efforts to improve the acquisition of knowledge and skills."<sup>44</sup>

One of the last reports published by the now defunct Economic Council of Canada painted a rather dismal portrait of the current state of Canadian education. It notes that, "Canada is the only federal country without a federal ministry

of education."<sup>45</sup> There is a growing belief in Canada that federal involvement in setting national standards and coordinating provincial efforts would raise Canada's standard of education. Another straw in the wind was a speech by Conservative leadership candidate, Jim Edwards, now President of the Treasury Board, to the Empire Club calling for a system of national tests.<sup>46</sup>

To this point in our history, education has been seen as an area of exclusive provincial jurisdiction. Any idea of federal involvement was dismissed as totally unrealistic because of the potential for constitutional wrangling. Commenting on Ontario's recently-established Royal Commission on Education, Michael Valpy, a columnist with the *Globe and Mail*, said "the mosquito of the Constitution is interfering with Canadians coming together as a whole people to hold a national inquiry into this subject."<sup>47</sup>

As with everything else today, the assumption that the federal government cannot participate in education needs to be questioned. The demands by business lobby groups and expressions of concern by parents cannot be simply swept aside. The question that needs to be answered is whether or not such concerns and demands are justified and what can be done about them if they are. In looking at the various statements, one finds a demand for national standards and a greater federal role in training. While the federal government has some constitutional responsibilities (undefined) through its responsibility for unemployment insurance, how and where to draw the line between these responsibilities and education has never been clearly spelled out. What is becoming increasingly clear, however, is the need for increased federal-provincial dialogue in this area.

The preceding discussions on interprovincial trade barriers, spending power and labour market training have a common theme: federal-provincial cooperation and negotiation. In one instance — the removal of interprovincial trade barriers — some new form of dispute resolution mechanism (other than the courts) is called for. In labour market training, it appears the first federal-provincial agreement is about to be reached. There is every reason to believe that other instruments of flexibility may emerge. It is not inconceivable that some form of intergovernmental secretariat will be established to act as the coordinating organization reporting to first ministers' conferences. Does this sound far-fetched? Not really. Better structures or institutions than the first ministers' conference do not come readily to mind. To date, such conferences have been the means by which policy differences have been resolved. I would expect that matters like administrative interdelegation, mirror legislation and new areas for intergovernmental agreements including telecommunications, a code of economic conduct and labour market training will be pursued. Indeed, the failure of constitutional reform may force governments to become more pro-active in developing mutually acceptable solutions.



Two precautionary notes should be sounded. First, after the CAP experience, thought will have to be given to a means of protecting intergovernmental agreements. Second, the issue of transparency needs to be addressed. After their experiences with constitutional reform, the public will expect to be kept informed and most likely involved in influencing decisions related to reaching such intergovernmental accords.

#### THE AMENDING FORMULA: PROSPECTS FOR MORE MODEST USE

Canadians' experience with the amending formula of 1982 is relatively limited. It was first used in 1983 to secure changes to the aboriginal provisions of the 1982 constitutional accord. When applied to mega-amendments such as those proposed in 1987 and 1992, success has eluded us. I do not place the blame on the amending formula but instead on the constant expansion of the constitutional agenda and the apparent imperative to solve all problems at once.

Constitutional queuing, or addressing one issue at a time such as Quebec's concerns, was ruled out when Meech Lake failed. If we want to have reform on the scale previously contemplated, it is difficult to see how one can avoid a mega-amendment along the lines of Charlottetown because there are so many linkages and trade-offs among the competing interests.

We should perhaps accept the fact that amendments that are properly characterized as *major reforms* are unlikely to find favour. Therefore the amending formula should be used for less grand purposes — to solve a very specific problem comparable to the insertion of section 92A that was precipitated as a result of two Supreme Court of Canada decisions on natural resources. An early candidate, in my opinion, is an amendment to protect intergovernmental agreements similar to the one found in the Charlottetown Accord (section 126A).<sup>48</sup>

There is another fact about the amending formula that deserves mention. Parliament alone can amend certain parts of the constitution using its authority under section 44 of the *Constitution Act, 1982*. For example, section 51 of the *Constitution Act, 1867* specifies the composition of the House of Commons. Parliament last amended this section in 1985 and I am confident that few were aware that, as this proposal went through the legislative process, it was in fact a constitutional amendment. I raise this example because the composition of the House of Commons received considerable attention during the referendum debate. In other words, there is nothing to prevent Parliament from examining (and changing) the distribution of seats, gender balance or aboriginal representation if it wishes to do so. Indeed, in 1991 the Lortie Royal Commission recommended an amendment to section 51 concerning aboriginal representation.<sup>49</sup>

A part of the amending formula that needs greater scrutiny is section 43, which applies to amendments affecting some but not all provinces. In 1987 it was used to amend the provisions of Newfoundland's 1949 terms of union with respect to denominational schools. More recently, it has been used at the request of New Brunswick to make that province officially bilingual.<sup>50</sup>

The Charlottetown Accord included a bilateral amendment to section 16 of the *Charter of Rights and Freedoms* as it applied to New Brunswick. The amendment gave equal status to the "English linguistic community and French linguistic community," and affirmed the authority of the legislature to preserve and promote these communities. Immediately after the referendum failed, New Brunswick requested a constitutional amendment under section 43. The federal government obliged in February 1993 and the amendment was proclaimed on 12 March 1993. What should have been a more or less routine matter (New Brunswick voted in favour of the referendum) was challenged in federal court by Deborah Coyne, a fierce opponent of both Meech Lake and Charlottetown. She claimed the Crown did not have the authority to act.<sup>51</sup> Her suit was withdrawn in late June 1993 because it had apparently been filed in the wrong court.

The case would have been interesting because it would have explored the limits of section 43. For example, could this section be used to confer some form of special status on Quebec? While this interpretation is unlikely, it raises some intriguing possibilities. Another potential change that could be introduced under this section is an amendment to the Alberta Act protecting Alberta's Métis Settlements, a provision lost with the defeat of the Charlottetown Accord. In short, one should not discount a more limited use of the amending formula.

## ONE NATION — OR TWO?

Before concluding this chapter, I should mention the darker side of the constitutional debate. We can solve our constitutional problems in a variety of ways but even these attempts can be derailed by our lack of unity over basic goals for our country and a lack of charity towards each other's aspirations. Put plainly, Canada could be on the verge of self-destruction. Unfortunately this claim has been made so often that it is now often discounted. My purpose is not to give the claim credence but to explore it and some of its implications.

After the 1992 referendum, *The Economist* made the following observation:

Journey's end, it seems, is a bog. When 54% of its people and six of its provinces said No on October 26th to the set of constitutional proposals on which they had been asked to vote, Canada reached the end of the road it has been traveling for the past dozen years. The bog in which it now comes to rest is deeper and stickier even than the one from which it started, and it is not clear there is a way out. Canada may well be mired for years.<sup>52</sup>

Although it will take a long time for a detailed and comprehensive analysis of the referendum to emerge, certain public opinions were made fairly clear during the fall of 1992. One is that Quebec got too much in the form of "concessions," the one most frequently mentioned being the guarantee of 25 percent of the seats in the House of Commons. Some critics thought the Canada clause and its distinct society provisions established a hierarchy of rights. Another concern was that too much power, again because of Quebec's demands, had been devolved to the provinces — that Canada was becoming too decentralized and, hence, more ungovernable. In Quebec one heard the opposite argument. Quebecers felt there was insufficient recognition of their historic demands for greater legislative responsibility. Charlottetown was not even close to meeting the proposals of the Quebec Liberal Party's Report (Allaire) of January 1991.

Although the referendum is behind us, one must ask whether or not the two visions of our federal system — centralization or decentralization just mentioned — are reconcilable. If Charlottetown did not strike the appropriate balance with respect to the division of powers, it is difficult to see what alternatives are available. For one thing, the "have not" provinces were most reluctant to see further devolution of federal authority and, in fact, they insisted on guarantees that federal funding would continue if they requested it. The provisions on culture in the Charlottetown Accord clearly highlighted the tensions between these two opposing views. Even Alberta, which to this point has championed province-building, showed no particular desire to pursue the transfer of additional federal powers to the provinces. Quebec was more or less by itself on this agenda item.

Another worrisome trend is the erosion or outright rejection of any special consideration for Quebec. Nobody denies that Quebec is a distinct society. It is — but there is a very obvious reluctance to recognize and protect its distinctiveness in the constitution, and that reluctance is becoming more and more wide-spread. A key reason is that Canada today is fundamentally different from the Canada of its 1967 centennial when recent constitutional discussions began. One need only examine the development of multiculturalism over the past two decades, the shifting patterns of immigration or the louder voice of the Aboriginal Peoples to discern reasons for a growing disenchantment with policies that give protection to Quebec's distinct society. It is interesting that "nearly a third of Canadians reported in the 1991 census that their ethnic background was neither British nor French."<sup>53</sup>

In a perceptive article, journalist Richard Gwyn, suggests that the two-nations idea is *passé*. He said:

Canada is understood better as an ethnic, European-style nation in Quebec, and a "rest of Canada" well on the way to becoming a multiethnic world nation....

All that's certain is that Quebec and the rest of Canada now are marching to quite different drummers in quite different directions, which is a real problem.<sup>54</sup>

In his book, *Charter versus Federalism: The Dilemmas of Constitutional Reform*, Alan Cairns reaches a comparable conclusion when he argues that Canada, except Quebec, has embraced the Charter.<sup>55</sup> What appears to be occurring is a gradual drifting apart of Canada's two solitudes. During the 1980 Quebec referendum campaign, there was a tremendous outpouring of affection for Quebec. People genuinely and generously wanted to know what Quebec wanted and were prepared to accommodate those demands. During the 1992 referendum campaign the opposite sentiment surfaced. One would frequently hear, "If they want to go, let them."

An issue over which there has been significant conflict is language policy. In 1988, Quebec's Bill 178, or sign law, had a profound effect on the rest of Canada and can be listed as one the chief reasons for the demise of the Meech Lake Accord. Since the Bill's constitutionality depended on the use of the notwithstanding clause contained in the Charter, it had a five-year time limit. It could be amended or renewed as-is. The Bourassa government introduced legislation in the spring of 1993 amending the legislation and softening the restrictions. Perhaps what is of greater significance is that in 1993 the government did not feel the need to use the notwithstanding clause. The passage of Bill 86 represents a shifting position in Quebec on language policy. Despite efforts by the PQ to arouse public opinion on this issue, the debate was rather low key and the government was able to have the legislation approved without much difficulty.<sup>56</sup>

The language issue is not confined to Quebec. Problems have appeared in Ontario with that province's new bilingual highway signs.<sup>57</sup> There continue to be problems across Canada in minority language education. Francophones on the prairies have turned to the courts to enforce their rights under section 23 of the Charter. This spring the Supreme Court of Canada ordered Manitoba to give francophones control over their schools "without delay."<sup>58</sup> Victor Goldbloom, Commissioner of Official Languages, in his 1992 report, while acknowledging the great progress made by provinces in the area of minority languages, stated:

A few months ago, all provincial governments were prepared to make a *constitutional* commitment to fostering the vitality and development of official language minority communities. It does not seem unreasonable today to expect them to provide legal underpinning to well-established policies on essential services in the minority language.<sup>59</sup>

This is yet another example of non-constitutional solutions to matters of public policy. Voluntary changes in policy positions have far greater symbolic significance than court-imposed decisions.

What of the future? A number of possibilities come to mind. The most frequently mentioned, particularly by the Parti Québécois (PQ), is that the PQ would be elected in the next Quebec election. Within a year, they would hold a referendum on sovereignty and the referendum would pass. What would

happen next? We would negotiate — but what would we talk about? The PQ has always advocated, from René Lévesque to Jacques Parizeau, some kind of continuing link with Canada. Whether or not the rest-of-Canada would agree is unknown.

There is no way to predict the public mood if Quebec, through a referendum, decides it wants out of Confederation. While it makes sense to maintain some kind of economic links such as customs, transportation and currency, one cannot assume that a break-up will necessarily be amicable. Nor can one assume that solutions will be based on logic as opposed to emotion. It is reasonable to expect, however, some kind of cooperation. After the initial shock and the ensuing economic uncertainty wear off it should be evident that some kind of association is better than building fences between us. Moreover, each separate polity will need to establish, or reinforce, some form of linkages with the United States. It is unlikely that a completely different relationship would evolve among the three nations.

An alternative would be some form of asymmetrical federalism or special status for Quebec. This concept is not a new one; indeed it has been debated for years. Under it, Quebec would assume responsibility for an unspecified number of subject areas not available to the other provinces. Interestingly enough, this approach found favour last year in the first of the public conferences held to review the federal government's position paper of September 1991.<sup>60</sup> The difficulty with pursuing this course today is reconciling it with the concept of provincial equality which has also taken root. Commenting on *Maclean's* year-end survey, pollster Allan Gregg stated:

In short, the differences appear irreconcilable. At the very least, we might logically conclude that any new constitutional package that is predicated primarily on a partnership between English and French will be doomed to failure in English Canada. Conversely, a new proposal founded on the principle of equal provincial partnership will surely create fissures and debate in Quebec that are unlikely to produce any kind of consensus in that province.<sup>61</sup>

If this dichotomy remains, I hold out little hope for the alternative of asymmetrical federalism.

Let me return, therefore, to M. Parizeau's scenario. I would argue that, once negotiations conclude between Canada and Quebec, there would need to be yet another referendum to ratify what has been agreed to, just as there was in October 1992. It seems almost inconceivable that the public will agree in advance to whatever the two sides negotiate. Moreover, once these hypothetical negotiations commence, there is no way to predict with any degree of accuracy what will emerge as the final agreement, or if an agreement will be reached at all. Both domestic and international pressures are unknown, as is the identity of the negotiators. While some are forecasting possible outcomes and, in some instances, dictating solutions, most commentary is highly speculative.

A number of scholars are giving serious attention to what was once a taboo subject. Just as there were books on the future of Canadian federalism, a number on Canada without Quebec have been published recently. Included are: *Toward a Canada-Quebec Union* (1991); *Deconfederation, Canada Without Quebec* (1991); *Canada Remapped, How the Partition of Quebec Will Reshape the Nation* (1992) and *Negotiating With a Sovereign Quebec* (1992).<sup>62</sup> While the works offer different perspectives, they do not shrink from confronting the fracturing of the Canadian polity.

Indeed, in *Deconfederation*, Bercuson and Cooper advocate Quebec's separation as being in the best interests of Canada and Quebec. To quote, "Indeed, the departure of Quebec is the necessary condition for serious thinking about Canada's future as a country."<sup>63</sup> So much for 125 years of history! Thinking what was once the unthinkable, is not only occurring with greater frequency, but apparently to some is the preferred or inevitable outcome.

Before concluding, I should make a brief reference to the aboriginal question. There is no doubt that expectations of Aboriginal Peoples are high and solutions will not be readily forthcoming.

The Royal Commission on Aboriginal Peoples was established in 1991. It will not release its report until the spring of 1995. The Commission's mandate is extensive, covering virtually all aspects of the relationship between Aboriginal Peoples and Canadian society. Their mandate is to make recommendations that will lead to reconciliation. To some extent, the Charlottetown negotiations eclipsed the Royal Commission's activities, but now, with the failure of the Charlottetown Accord, there is much greater pressure on the Commission to propose recommendations that will be acceptable to both Aboriginal Peoples and other Canadians.

## CONCLUSION

There appears to be little enthusiasm on the part of Canadians and their governments to resume constitutional discussions. Paradoxically, constant reminders of our constitutional disagreements continue to surface. These two realities create a dilemma if solutions are to be found. Prudence suggests that the mega-amendment is not a realistic alternative today. But, the other approaches outlined in this chapter provide a framework by which accommodation can be accomplished if people press for change.

Canadians have spent so much time, energy and emotion on constitutional reform that we have ignored other means of solving our problems. The title of this chapter, "Let there be light," was intended to emphasize this possibility. Although such solutions do not have the permanence of a constitutional amendment, they nevertheless are easier to achieve, can be modified as needed and do not raise needless expectations.

Whether or not there is a willingness on the part of the public to press for the limited agenda I have outlined is another matter. The issues mentioned such as electoral reform and the removal of interprovincial trade barriers are real and require public discussion, parliamentary action and/or intergovernmental agreement. They cannot be ignored or allowed to fester. Indeed, many recent statements by our political leaders suggest that their patience on some of these matters is running out and that for the next few years intergovernmental relations, both federal-provincial and interprovincial, may be marked by conflict as opposed to cooperation. At the same time, fiscal realities may cause governments to put aside their differences and force them, however reluctantly, to work together on common solutions.

There remains one final thought. It was stated at the outset that the pressures that led to our constitutional negotiations have not disappeared. While that is true, my impression is that many of them may have faded in their intensity. If the PQ wins the next provincial election, we will once again be plunged into the depths of constitutional debate. But even here, there are too many unknowns to see into the future. For years now, Canadians have been told the country may break up. If and when they are confronted with the stark reality of Quebec separation, they will then have to be prepared to make the necessary compromises if they wish to remain united. It is difficult to believe Canadians will stand by and watch the disintegration of their country. There is an element of risk associated with the wait and see attitude but, at present, Canadians prefer this position to continued debate on constitutional reform.

The October 1992 referendum brought to an abrupt end the era of constitutional reform. Given the complexity of the federal system and our failure to bring about constitutional reform, the non-constitutional approach appears to provide greater possibility for success in the future.

## NOTES

1. Canada, Royal Commission on Bilingualism and Biculturalism, *Preliminary Report* (Ottawa: Queen's Printer, 1965), p. 13.
2. Canada, Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Final Report*, 16 March 1972, p. 3.
3. Canada, The Task Force on Canadian Unity, *A Future Together* (Ottawa: Minister of Supply and Services, 1979), p. 11.
4. Canada, Citizens' Forum on Canada's Future, *Report to the People and Government of Canada* (Ottawa: Minister of Supply and Services, 1991), p. 113.
5. Special Joint Committee of the Senate and House of Commons on a Renewed Canada, *Report of the Special Joint Committee on a Renewed Canada*, 28 February 1992 (Ottawa: Minister of Supply and Services, 1992), p. 4.
6. "Set aside Constitution, Klein urges," *The Edmonton Journal*, 3 February 1993, p. A3.

7. Rhéal Séguin, "Quebec seeks new talks on constitutional reform," *The Globe and Mail*, 10 March 1993, p. A4.
8. Richard Mackie, "Rae rejects unity talks based on old demands," *The Globe and Mail*, 11 March 1993, p. A5.
9. *The Globe and Mail*, 22 December 1992, p. A6; *The Globe and Mail*, 25 January 1993, p. A1; *The Globe and Mail*, 11 March 1993, p. A5; *The Edmonton Journal*, 2 January 1993, p. A3 and *The Globe and Mail*, 31 March 1993, p. A5.
10. "Prospects for unity uncertain — Clark," *The Edmonton Journal*, 20 February 1993, p. A3.
11. The two organizations issued a press release in Inuvik on 13 July 1993 expressing these concerns after what they deemed to be an unsatisfactory exchange between themselves and the newly-appointed minister of Indian affairs, Honourable Pauline Bowes.
12. See an editorial in *The Globe and Mail*, "They have sat too long in that place," 30 June 1993, p. A16 and a Canada-wide mailing from Audrey McLaughlin, leader of the New Democratic Party requesting donations in support of the People's Campaign to Abolish the Senate.
13. Canada, *Shaping Canada's Future Together* (Ottawa: Minister of Supply and Services, 1991).
14. See "Chrétien proposes reforms," *The Globe and Mail*, 20 January 1993, p. A7. See also an editorial in *The Edmonton Journal* criticizing their proposals, "Grits flunk Commons reform," 23 January 1993, p. A14.
15. Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy*, vol. I, (Ottawa: Minister of Supply and Services, 1991), p. 18.
16. "Electoral Reform," *The Economist*, 1 May 1993, pp. 19-21.
17. Hon. Ian Scott, "Notes for Remarks to the Canadian Bar Association," Toronto, 15 December 1987.
18. *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 2 W.W.R. 193 (S.C.C.).
19. *Report of the Special Joint Committee on a Renewed Canada*, Ottawa, 28 February 1992, p. 66.
20. D.V. Smiley, *Conditional Grants and Canadian Federalism; A Study in Constitutional Adaptation* (Toronto: Canadian Tax Foundation, 1963), p. iii.
21. Hon. Jean Chrétien, *Securing the Canadian economic union in the Constitution* (Ottawa: Minister of Supply and Services, 1980).
22. Royal Commission on the Economic Union and Development Prospects for Canada, *Report*, vol. 3 (Ottawa: Minister of Supply and Services, 1985), p. 137.
23. Ibid.
24. *Political Accords: The Multilateral Meetings on the Constitution*, Charlottetown, 28 August 1992, pp. 1-2.
25. "McKenna takes aim at barriers," *The Globe and Mail*, 24 November 1992, p. A3.
26. "Remarks by the Hon. Denis Losier delivered to the Legislative Assembly," 21 April 1993, p. 3.



27. See "Governments agree on comprehensive negotiations to reduce internal trade barriers," *Press Release*, Industry, Science and Technology Canada, Montreal, 18 March 1993.
28. Stephanie Nolen, "Ontario considers retaliating," *The Globe and Mail*, 7 July 1993, p. A3A and "Beer war brewing between provinces," *The Globe and Mail*, 24 July 1993, p. B3.
29. "B.C. opposed to dropping trade barriers," *The Globe and Mail*, 9 June 1993, p. B1.
30. *Reference Re Canada Assistance Plan*, [1991] 6 W.W.R. 1 (S.C.C.).
31. Agreement, section 16 (p. 27). This section incorporates the same provisions as found in Meech Lake.
32. Agreement, section 11 (pp. 17-18) which includes urban and municipal affairs, tourism, recreation, housing, mining and forestry.
33. Agreement, section 37.
34. "How Rae plans to get rid of the Tories in Ottawa," *The Globe and Mail*, 22 January 1993, p. A9.
35. "Medical User Fees Pushed," *Calgary Herald*, 13 January 1993, p. 1.
36. In a speech to the Empire Club of Toronto on 19 May 1993 Jim Edwards touched on this topic by noting that, while he personally did not favour user fees, other leadership candidates had proposed them. (p. 4)
37. "Debt crisis looms, study warns," *The Globe and Mail*, 16 February 1993, p. A1.
38. "Mazankowski hints at transfer cuts as weapon in fight against deficit," *The Edmonton Journal*, 17 February 1993, p. A3.
39. See Alberta, *Budget '93*, 6 May 1993, p. 18; Québec, *1993-1994 Budget*, 20 May 1993, p. 21; Newfoundland, *Budget*, 18 March 1993, p. 5; Saskatchewan, *Budget Address*, 19 March 1993, p. 16; British Columbia, *Budget '93*, 30 March 1993, p. 4; and New Brunswick, *Budget 1993-1994*, 31 March 1993, p. 12.
40. Peter M. Leslie, Kenneth Norrie, Irene Ip, *A Partnership in Trouble; Renegotiating Fiscal Federalism* (Toronto: C.D. Howe Institute, 1993), p. vii.
41. "Ottawa, provinces vow to improve job training," *The Globe and Mail*, 21 January 1993, p. A5.
42. André Picard, "Quebec to run job training," *The Globe and Mail*, 4 August 1993, p. A1.
43. "Business group calls for standard test," *The Globe and Mail*, 24 March 1993, p. A1, and The Canadian Chamber of Commerce, "Policy in Action," 2, 1 (Spring 1993): 4.
44. See Prosperity Secretariat Consultation Paper, *Learning Well ... Living Well* (Ottawa: Minister of Supply and Services, 1991), p. i.
45. Economic Council of Canada, *A Lot to Learn: Education and Training in Canada* (Ottawa: Minister of Supply and Services, 1992), p. 45.
46. Edwards, speech to Empire Club of Toronto, 19 May 1993.
47. "Just what do Canadians want their schools to do?" *The Globe and Mail*, 22 January 1993, p. A2.

48. References are to various sections contained in the *Draft Legal Text* of the Charlottetown Agreement, 9 October 1993, pp. 27-28. Referred to hereafter as Agreement.
49. Royal Commission on Electoral Reform and Party Financing, *Report* vol. I, Recommendation 1.4.14, p. 190.
50. The amendment is found at the very end of the draft legal text, p. 51 and is simply referred to as: "Bilateral amendment — New Brunswick and Canada."
51. "Language-law court challenge launched," *The Edmonton Journal*, 16 February 1993, p. A10. For more information, see University of Ottawa, Canadian Centre for Linguistic Rights, *Bulletin*, vol. 1:1 (April 1993): 7.
52. "Glug glug," *The Economist*, 31 October 1992, p. 18.
53. "Nearly 1 in 3 Canadians neither British nor French," *The Edmonton Journal*, 4 February 1993, p. A3.
54. "Two-nations idea is now out of date," *The Edmonton Journal*, 2 February 1993, p. A3.
55. Alan C. Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal: McGill-Queens University Press, 1992).
56. "Quebec government pushes through sign law," *The Globe and Mail*, 18 June 1993, p. A6.
57. "Ontario backlash brews over bilingual signs," *The Edmonton Journal*, 18 February 1993, p. A9.
58. Sean Fine, "Let francophones control schooling, Manitoba ordered," *The Globe and Mail*, 5 March 1993 p. A4.
59. Commissioner of Official Languages, *Annual Report, 1992* (Ottawa: Minister of Supply and Services, 1993), p. 18.
60. Atlantic Provinces Economic Council, *Renewal of Canada: Division of Powers; Conference Report*, Halifax, 22 January 1992, p. 11.
61. Allan R. Gregg "The New Canada," *Maclean's*, 4 January 1993, p. 29.
62. Philip Resnick, *Toward a Canada-Quebec Union* (Montreal and Kingston: McGill-Queen's University Press, 1991); David J. Bercuson and Barry Cooper, *Deconfederation, Canada Without Quebec* (Toronto: Key Porter Books, 1991); Scott Reid, *Canada Remapped, How the Partition of Quebec Will Reshape the Nation* (Vancouver: Pulp Press, 1992) and Daniel Drache and Roberto Heron, eds., *Negotiating With a Sovereign Quebec* (Toronto: James Lorimer, 1992).
63. Bercuson and Cooper, *Deconfederation*, p. 159.

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## Tensions in the Canadian Constitutional Process: Elite Negotiations, Referendums and Interest Group Consultations, 1980-1992

Michael B. Stein

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*Depuis l'échec des accords du lac Meech et de Charlottetown, plusieurs commentateurs politiques ont soutenu que les négociations au sommet entre acteurs de haut niveau du système fédéral canadien ne constituent plus un moyen très efficace pour la conduite des pourparlers constitutionnels au pays. Ces observateurs sont d'avis qu'en cette ère de souveraineté populaire, les Canadiens n'ont d'autre choix, s'agissant de la réforme de leur constitution, que de s'en remettre exclusivement à des structures de consultation populaire telles que les groupes de travail, les auditions publiques, les assemblées constituantes et les référendums.*

*L'auteur récusé en partie, quant à lui, cette nouvelle croyance populaire. Il affirme que les négociations au sommet dans le cadre fédéral sont à la fois souhaitables et nécessaires pour mener à bien la réforme constitutionnelle; selon Stein, celles-ci comportent, en soi, une possibilité de compromis entre les acteurs concernés. Auquel cas, on peut qualifier pareil résultat d'éminemment positif. Toutefois, il importe que ce type de négociations aillent de pair avec des mécanismes de consultation populaire, afin de tenir compte du climat politique du moment.*

*Or, concilier ces deux types de démarche n'est guère chose facile. Il existe des tensions et des contradictions entre, d'une part, la logique fondée sur le compromis qui détermine le processus des négociations constitutionnelles et, d'autre part, la logique tendant à maximiser la fonction référendaire, ainsi que le rôle joué par les groupes de pression. On assiste à un renforcement de ces tensions et contradictions par suite des récents changements survenus sur le plan politique, le tout ayant une incidence sur les partis politiques, groupes de pression et nouveaux mouvements sociaux. Ces types de conflits sont apparus lors des négociations entourant les accords du lac Meech et de Charlottetown et partant, ont peut-être contribué largement à leur échec. On peut cependant en venir à bout en recourant à divers procédés conçus spécifiquement pour la gestion des tensions.*

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Since the failure of both the Meech Lake and Charlottetown Accords, many political observers believe that executive federalism has lost its value as an effective structure for conducting constitutional negotiations in Canada. Executive federalism is a term which Donald Smiley first invented and defined as "the relations between elected and appointed officials of the two orders of government in federal-provincial interactions, and the executives of the provinces in interprovincial interactions."<sup>1</sup> In Canadian constitutional negotiations it refers to the numerous meetings, contacts and communications among top federal and provincial officials, ministers and first ministers which have contributed in a central way to the framing of constitutional proposals and the negotiation and implementation of constitutional agreements.

These relations have occurred intermittently over much of this century, and almost continuously in the last 25 years during intensive efforts at comprehensive constitutional renewal. Most such interactions take place in closed meeting-rooms, beyond the reach of the media and the glare of publicity. They are normally unknown to the general public and receive little if any attention within the elected legislatures of the two levels of government. Frequently the agreements produced by these relations are debated in a most cursory fashion by members of the federal Parliament and provincial legislatures, and often are not even ratified by the legislatures. They are, in short, highly elitist structures, whose institution, composition and decisionmaking processes seem to reflect the antithesis of the representative and participatory norms associated with the institutions of liberal democracy in the current age of popular sovereignty.

It is not surprising, therefore, that many Canadians, including both political experts and lay people, believe that it is no longer possible to leave these matters primarily to these political executives. They feel that in this era of popular sovereignty, they cannot allow *their* document, the people's constitution, to be negotiated and fundamentally altered without major input and the ultimate consent of the Canadian population in a referendum. After all, as they see it, the ultimate source of sovereignty and legitimacy in democratic political systems lies with the "ordinary" citizens.

I will discuss the issue as it relates to the Canadian case in six parts: (i) the new mythology of popular sovereignty and consultative processes; (ii) the concomitant critique of executive/summit federalism; (iii) my alternative view: the necessity and desirability of executive/summit federalism in a blended constitutional process of elite negotiations and popular consultations; (iv) the tensions and contradictions between elite negotiations and direct democratic consultations or referendums in constitution-making; (v) the tensions and contradictions between elite negotiations and interest group consultations in constitution-making; and (vi) some possible ways of reconciling these tensions and contradictions.

## THE NEW MYTHOLOGY OF POPULAR SOVEREIGNTY

As one of our most acute constitutional commentators, Peter Russell, has pointed out, the perception that popular sovereignty is both desirable and inevitable in the current constitutional climate of Canada is the culmination of Canada's long and somewhat retarded pursuit of decolonization, political maturity, and full democratic development; moreover, it follows a path travelled earlier and often more rapidly in other advanced industrialized countries. The United States was the first modern country to embody the principle of popular sovereignty in its written constitution of 1787, and to attempt to implement it in its institutional practices. This principle was ultimately derived from a Lockean view of political legitimacy based on the notion of popular consent; it may be contrasted with the Burkean concept of "organic constitutionalism" based on an incremental, informal and indirect collective consensus, which shaped the modern British constitution and evolving British institutions.<sup>2</sup>

Since 1787 most countries establishing liberal democratic regimes have embraced the *American* concept of legitimacy and democratic consent. They frequently include in the preamble of their constitution some reference to popular sovereignty, and attempt to incorporate this concept directly into their institutional design and practices. This is the case for democratic regimes of all types: parliamentary-cabinet or presidential-congressional, unitary or federal, or some hybrid of the two. For example Australia, which like Canada adopted a Westminster-style parliamentary-cabinet system and a federal structure when its constitution was first adopted in 1901, also included an explicit reference to popular sovereignty in its constitutional preamble, and adopted an amending formula that provided for ratification by popular referendum.<sup>3</sup> It is widely assumed, therefore, that adoption of a Lockean concept of legitimacy in both regime design and institutional practices is the most normal and sensible constitutional route for new or aspiring democratic countries to follow.

Moreover, there are more practical reasons for assuming that mechanisms of direct democracy and interest group consultation are likely to play a central role in future constitution-making in Canada. As Alan Cairns has pointed out, the Charter of Rights has entrenched a broad range of individual and group rights in our constitution since 1982, and therefore organized groups promoting these rights are likely to demand a greater role in future constitutional discussions.<sup>4</sup> This role may include the direct participation of individual citizens or of interest groups in the constitution-making process at different stages (such as negotiation and ratification), and through a variety of political structures (including legislatures, task forces, courts, constituent assemblies or referendums). It will be very difficult for political leaders to resist such demands.

Finally, some have noted that the very fact that the federal government and several major provinces have already instituted provisions for holding

consultative referendums or plebiscites and have applied them at the ratification stage of the Charlottetown Accord has important implications for future constitutional proposals. It suggests that the formal procedure for legislative ratification of constitutional amendment proposals provided in the 1982 Act may now be superseded by a new constitutional convention involving referendums similar to the formal ratification procedure and practice in Australia.<sup>5</sup>

In short, in Canada today, as well as elsewhere (e.g., the European Community), there is widespread acceptance of the ethos of popular sovereignty in constitution-making. Although direct democratic devices such as referendums or plebiscites are the most overt and popular expression of this new ethos, other mechanisms of public consultation involving both organized interest groups and individual citizens have also been widely advocated. These include open and peripatetic legislative and task force hearings at different stages of the constitutional process; different types of constituent assemblies comprised of various combinations of non-partisan groups, experts and "ordinary citizens"; and expanded use of public opinion polling, open-line radio and television programs, and government-subsidized telephone lines soliciting the views of the general public on political issues.

#### THE CRITIQUE OF EXECUTIVE/SUMMIT FEDERALISM

Simultaneously, there has been strong and widespread criticism recently directed against "closed-door" elite negotiations by politicians or officials in such constitutional matters. These structures are viewed as highly unrepresentative of the mass citizenry or minority groups; insensitive to strong local or regional, racial, ethnic-linguistic, or gender concerns; vulnerable to internal pressure tactics, personality conflicts, or techniques of subterfuge and deception; and ineffective in bargaining and decisionmaking.

A particularly strong target of criticism is the first ministers' conferences in Canada, made up of our federal prime minister, provincial premiers, and the heads of territorial governments, sometimes described collectively as "summit federalism." These conferences are viewed by many as purely public relations gambits by egoistic electorally-oriented politicians who lack the expertise, trust ties, or shared interests necessary for the negotiation of complex and delicate governmental agreements. Because constitutional matters generally involve discussion or bargaining over intangible symbolic goods rather than quantifiable or divisible material objects, the first ministers' conferences are seen as especially unsuitable policymaking structures in this policy sector. They are ill-equipped to achieve the cooperation and mutual understandings that are at the root of the compromises, trade-offs, and linkages essential to successful constitutional negotiations.<sup>6</sup>

According to the critics, evidence in support of their contentions about executive/summit federalism in Canadian constitution-making can be found in the entire historical record of constitutional negotiations in Canada. First, there were numerous, although intermittent, failed attempts by our first ministers to negotiate a limited agreement on patriation and an amending formula between 1927 and 1968, at a time when provincial support for constitutional change was generally weak.<sup>7</sup> Second, top officials, ministers and first ministers acting under the aegis of executive or summit federalism were unable to produce an accord over a more comprehensive constitutional renewal package between 1968 and 1980, despite many lengthy efforts by negotiating actors who were strongly committed to constitutional change.<sup>8</sup> In November 1981, a constitutional first ministers' conference (FMC) did manage to produce an accord which provided for patriation, an amending formula, and a Charter of Rights; however, it was a truncated agreement that excluded Quebec, and that was subsequently repudiated by a strong bipartisan majority of the Quebec legislature. Even the Charter contained in the package originally negotiated by the first ministers was initially rejected by important grass-roots interests such as women's and aboriginal groups, because it had unfairly circumscribed rights which they had won at an earlier stage. It required mass mobilization organized by leaders of those groups against some of the recalcitrant premiers to restore the original more comprehensive rights package.<sup>9</sup>

The purest manifestation of summit federalism and its inherent weaknesses in relation to Canadian constitution-making, in the opinion of most critics, occurred during the negotiation of the Meech Lake Accord in 1987. They point out that in the initial bargaining on 30 April, which led to a unanimous agreement, there was little or no consultation between the first ministers and the ministers, officials and experts who accompanied them. The final major compromises, trade-offs, and linkages leading to an agreement were all in fact made by eleven white males behind closed doors, working under intense group pressure.<sup>10</sup> The Accord, as amended at the Langevin Block in June, was subsequently declared to be a "seamless web," susceptible to only cursory scrutiny by the various legislatures involved in the ratification process. Amendments could only be made to the package where "egregious errors" had been discovered. All efforts to subject the Accord to more careful critical examination by organized interest groups and the public-at-large were ultimately rejected by the original signatories on the grounds that any fundamental alteration would unravel the finely-woven and delicately balanced fabric of the Accord.<sup>11</sup> Moreover, a major party to the agreement, the Quebec government, flatly refused to entertain later proposals for modification of the agreement which were designed to address public dissatisfaction towards the Accord; it maintained that it was politically bound to abide by its original five minimum conditions for re-entering the Canadian constitutional family. It is hardly

surprising, therefore, according to the critics, that organized interest group opposition directed both to the content and process of Meech Lake constitution-making eventually turned a substantial majority of the Canadian public against the Accord and ultimately managed to defeat it.

Even the highly public and broadly consultative Canada round between 1990 and 1992, culminating in the Charlottetown Accord, has been criticized as a further example of the weaknesses of elite negotiations through executive/summit federalism. The package was negotiated by first ministers in the summer of 1992 only after a lengthy process of public consultations. These included: the hearings of the Citizens' Forum on Canada's Future (chaired by Keith Spicer) in 1990; the hearings of the Special Joint Committee of the Senate and House of Commons on the process for amending the constitution of Canada (co-chaired by Senator Gerald Beaudoin and Tim Edwards, MP) in 1991; the hearings of the Quebec National Assembly Parliamentary Commission on the Constitutional and Political Future (co-chaired by Michel Bélanger and Jean Campeau) in the fall of 1991; the hearings of the Special Joint Committee of the Senate and House of Commons on a Renewed Canada (co-chaired by Senator Claude Castonguay and later Senator Gerald Beaudoin and by MP Dorothy Dobbie), which reviewed the federal government's proposals for reform released in September 1991; and the five Renewal of Canada conferences held in different cities across Canada, in January-February 1992, and composed in part of "ordinary citizens."<sup>12</sup> Yet the agreement ultimately reached in August 1992 by the first ministers was severely criticized for being too comprehensive, insufficiently fleshed out, not available in final legal form until late in the referendum campaign, and containing a number of items that were poorly conceived or unwisely conceded.<sup>13</sup>

One frequently cited example of the latter was B.C. Premier Harcourt's acquiescence in the formula for substantially increased legislative representation for Ontario and Quebec in the House of Commons and the provision for a permanent 25 percent floor for Quebec representation in that body. It was viewed by most British Columbians as operating against the long-run interests and democratic rights of their province, which has the fastest-growing population in Canada. Another was Premier Bourassa's acceptance of the provisions for moderate decentralization in the distribution of powers, which was severely criticized even by his own close advisors, Diane Wilhelmy and Andre Tremblay.

In summary, prevailing opinion in Canada today among many experts and wide segments of the mass public echoes this critique and seems to regard executive/summit federalism as an anachronistic, ineffective, undemocratic and undesirable institution in contemporary constitution-making in Canada. According to this view, the appropriate and desirable structures for framing and ratifying proposals for future constitutional change or renewal must include broad public consultation with organized interest groups, experts and individual



citizens through increased use of legislative hearings, public-oriented task forces or commissions, perhaps some type of constituent assembly, and final approval by direct referendum involving the electorate at large. Incorporating them into our constitution-making processes would constitute a giant leap forward in our endless quest for full constitutional maturity and popular sovereignty.<sup>14</sup>

#### AN ALTERNATIVE VIEW: THE NEED FOR A BLENDED PROCESS

Although the unresolved constitutional issues have been placed on the political backburner since the defeat of the Charlottetown Accord, this situation is only temporary. The issues are very likely to reemerge after the next federal and Quebec elections. At the same time, there will be renewed discussion of the appropriate structures and processes for debating and negotiating them. There is therefore an urgent need to examine critically the prevailing mythology about public participation in constitution-making, and the related critique of executive and summit federalism.

In my view, executive/summit federalism is a natural organic development of Canadian federalism and a valuable structural imperative of contemporary constitution-making in this country. Ronald Watts and Donald Smiley were the first to point out that executive federalism tends to evolve naturally in parliamentary federations as a method of reconciling regional and national interests in intergovernmental policymaking. It serves a functional need by providing an outlet for regional interests in a federation when alternative structures for representing these interests at the national level of government are inadequate.<sup>15</sup> It also reflects the general shift in power from the upper levels of the bureaucracy to elected political executives and their political advisors.

This trend to executive federalism, Ronald Watts notes, is a general phenomenon in all existing parliamentary federations; even countries like Australia, which have elected upper houses reflecting regional interests, have evolved similar structures in recent years.<sup>16</sup> Moreover, the greater concentration of executive power in the hands of governmental leaders and first ministers has produced a more global form of executive federalism, which Stefan Dupre has aptly labelled "summit federalism"; in this structure, intergovernmental consultations and negotiations are conducted largely or exclusively by first ministers.<sup>17</sup> In constitutional matters, probably because the issues involved are viewed as important for all policy sectors and government departments, there is a strong tendency to adopt the more global form of summit federalism for negotiating intergovernmental concerns.<sup>18</sup>

Richard Simeon was among the first to observe that the pattern of elite negotiation or bargaining by first ministers in intergovernmental relations in

Canada closely resembles that of heads of national governments in international relations; he appropriately called this process "federal-provincial diplomacy."<sup>19</sup> In Simeon's view, as in global politics, this form of diplomacy can be especially useful in resolving issues between governments in federal systems when solutions cannot be found by lower level politicians and officials such as ministers or deputy ministers. It also serves as an important legitimizing device.<sup>20</sup>

The structures of executive and summit federalism are also useful in political systems and societies that have consociational or semi-consociational features, as both S.J.R. Noel and Kenneth McRae have noted. Where a democratic society is deeply divided into two or more segments defined by ethnicity, language, religion or class, but there is a strong will at the elite level to maintain its existence as a single nation-state and democratic polity, then there is a natural tendency for such systems to evolve consociational-type arrangements. These include power-sharing and formal coalitions among the different communities, and representation of their leaders on a proportional basis; recognition of collective as well as individual rights and minority as well as majority rights reflecting these segmental differences in the constitution and governing structures of the society; the establishment of strong vertical linkages between political elites and masses in each segment; and regular intersegmental bargaining processes among the elites. In Canada, there are grounds for arguing that the structures of executive and especially summit federalism, along with the federal cabinet itself, have been important in maintaining a semi-consociational arrangement between French and English Canada since at least the late 1960s.<sup>21</sup>

Most of the multilateral negotiations of a non-constitutional nature in executive or summit federal structures in Canada until recently have involved a type of compromise bargaining in which attempts have been made to allocate rewards or outputs on an equitable basis according to some predetermined formula (e.g., in regional equalization or fiscal-sharing arrangements). However, in constitutional bargaining, these rewards or outputs are not readily quantifiable, and this has contributed to much conflict, stalemate and bargaining failure. The general tendency has been for negotiating parties to adopt fixed and rigid bargaining positions, which are incapable of easy resolution. Nevertheless, over the course of the last 25 years of intermittent but comprehensive ongoing constitutional negotiations, there has been a gradual process of "constitutional learning" which involves the incorporation and adaptation of new bargaining strategies and tactics and problem-solving methods developed in other negotiating arenas, such as labour relations or international relations. These techniques and methods have been subsumed by me under the concept of "integrative bargaining."

The concept of "integrative bargaining" was first developed by two labour relations specialists, Walton and McKersie. It was used to refer to the interactive

activities surrounding the common objectives of negotiating actors, capable of some integration.<sup>22</sup> The concept was later expanded to encompass problem-solving techniques and mutually beneficial outcomes in bargaining by Pruitt, a social psychologist.<sup>23</sup> In recent years it has been adapted to international negotiations by Oran Young.<sup>24</sup>

As I have explained elsewhere,<sup>25</sup> integrative bargaining involves a process of elite interactions which aim at achieving an "integrative" rather than a purely "distributive" or compromise agreement. The parties to the negotiation are divided by differences that are not so deep as to be fundamentally irrevocable. These differences are therefore susceptible to problem-solving methods and solutions involving mutual accommodation. This type of bargaining tends to produce "win-win" outcomes, in which the overall utilities of the bargaining actors are greater than those achieved by maintaining the status quo. The outcomes are generally obtained by devising creative solutions of mutual benefit embodied in new structures, ideas or institutions. The role of "soft" negotiating parties or "third-party mediators" is often crucial in discovering these solutions.

In distributive bargaining, on the other hand, the parties to the negotiation are generally in fundamental disagreement. The differences between them are "issues" not readily resolvable except by allocating rewards on a quantitative basis. This type of bargaining inherently involves a "fixed" or "zero-sum" exchange, in which there are clear winners and losers. It tends to promote "positional" rather than flexible negotiating styles, and binding arbitration or adjudication by neutral parties that are empowered to resolve the dispute.

I have also argued that "integrative bargaining," as a technique or method used by elites to bring about successful negotiations, is beginning to play a major role in constitution-making in Canada. All of the early efforts at achieving comprehensive constitutional agreement in Canada between 1968 and 1981 reflected "positional" or "non-integrative" patterns of elite bargaining, and they ended in stalemate or breakdown. However, in the first ministers' negotiations of November 1981 a type of integrative bargaining occurred for the first time which helped to break the constitutional logjam and produce the key institutional components of the 1981 accord: a charter of rights modified by a notwithstanding clause or legislative override and a 7/50 amending formula with limited provisions for opting out.<sup>26</sup> However, the integration achieved was only partial, since the accord was unable to win elite or public acceptance in Quebec.

Similarly in the 1987 negotiations leading to the Meech Lake Accord, a process of integrative bargaining occurred at the first ministers' level, culminating in their unanimous agreement. However, because this agreement was principally designed to respond to Quebec's demands, it failed to win wider

acceptance among contending elites, organized groups and mass populations of the English-speaking provinces, and therefore was eventually defeated.

The Charlottetown Accord negotiated in the summer of 1992 was probably the most clearcut case of successful integrative bargaining by the political elites in Canada. The package provided mutual benefits for all the major negotiating elites who were party to it, and contained compromise provisions, linkages, and trade-offs acceptable to these leaders and most contending political elites and groups as well. These included novel institutional proposals such as an elected, equal and partially effective Senate for the west, expanded representation in the House of Commons for Ontario and Quebec, a 25 percent floor in representation for Quebec, and aboriginal self-government for Native Peoples. Although it, too, was defeated at the ratification stage in the October referendum, the initial negotiation of the agreement by the political elites of this country was, in my view, a notable achievement in and of itself.

In short, I would argue that in spite of the shortcomings outlined by the critics, all of the elite structures and processes discussed in this section, including executive federalism, summit federalism, federal-provincial diplomacy, intersegmental bargaining by consociational elites, and integrative processes of elite bargaining, have made important and valuable contributions to past efforts at constitution-making in Canada. Moreover, I believe they will continue to help solve our constitutional and national unity conflicts in the future, in conjunction with popular consultative structures. There are several reasons for this. One cannot devise a meaningful constitutional accord in a popular consultative forum such as a task force, legislative hearing, constituent assembly, or referendum, since these types of mass participatory structures are far too unwieldy to produce sophisticated and coherent decisions on issues related to fundamental values and rights, formal institutional mechanisms, or complex technical and legal matters. Moreover, despite their claims to greater democratic legitimacy, such structures are likely to involve disproportionate participation and input by a few well-organized interests at the expense of many others.

It seems clear, then, that elite structures and decisionmaking processes are likely to remain a necessary and central component of constitution-making in Canada in the future. But one lesson, arising from the experiences of both Meech Lake and Charlottetown, must not be forgotten: the elite structures and processes described above are insufficient and incomplete by themselves for constitution-making in today's widely shared culture of popular sovereignty. Elite structures must somehow be combined with mechanisms of popular consultation, including referendums and interest group representations, in order to achieve long-term success and legitimacy.

## TENSIONS BETWEEN ELITE NEGOTIATIONS AND DIRECT DEMOCRATIC CONSULTATIONS OR REFERENDUMS

As we have noted above, elite negotiations within executive/summit federal structures encourage constitutional agreements which are overall compromises in a non-zero-sum bargaining context. There is a strong thrust or dynamic towards accommodation and reduction of conflict or competition among the bargaining units. The process of negotiation involves much effort at finding solutions that integrate the interests of bargainers; it is intended to increase overall utilities or satisfaction in comparison to the status quo or some alternative future. During this process, there is an attempt to forge linkages between high and low priority concerns of the different negotiating parties, and to use third-party mediators and problem-solving approaches of various types to find an integrative solution. This solution will not satisfy fully the demands of any single negotiating party, but it will allow all parties to obtain at least part of their demands. In other words, the outcome in elite-type integrative bargaining is viewed as "win-win" rather than as "win-lose"; it is more "satisfying" than "maximizing."<sup>27</sup>

Public consultations involving either direct democratic participation by individual citizens in a referendum or formal representations in hearings by organized interest groups, on the other hand, encourage constitutional interactions in a "zero-sum" bargaining context involving both winners and losers. The dynamic in such processes is towards competition, conflict and maximization of individual or group utilities. The processes of decisionmaking emphasize rational calculations of who are the winners and losers in the accord. There is also a thrust towards assertion of the interests of individuals and popular groups or movements, and maximization of their rights and freedoms against the larger collectivity and its leaders. The principles of equality of the individual citizen and majority rule tend to be asserted against minority ethnic, linguistic or communal group rights. Third-party mediators, closed-door bargaining, and problem-solving communications techniques are regarded with distrust, as instruments used to subordinate individuals and mass-based groups to narrow elite interests. An outcome that falls short of realizing the interests of the individual citizens or popularly-based groups through their negotiating representatives is viewed as a "loss," and therefore requires rejection of the leaders' unsatisfactory accommodations.

There is some support for this argument both in the general theoretical and comparative literature on referendums, and in that dealing with referendums in Canada. For example, Butler and Ranney (1978) noted in the conclusion to their comparative study of referendums that

Referendums disturb politicians — and us — because they tend to force the decision-makers, the voters, to choose between only two alternatives: they must either approve or reject the measure referred. There is no opportunity for continuing discussion of other alternatives, no way to search for the compromise that will draw the widest acceptance. Referendums by their very nature set up confrontations rather than encourage compromises.<sup>28</sup>

Similarly Hahn and Kamieniecki acknowledge in their study on *Referendum Voting* that “According to opponents of the referendum, too many people with competing interests prevent compromises from being reached on controversial issues. Under present conditions, they contend, the referendum is poorly adapted to achieving compromise on matters of major public concern.”<sup>29</sup>

Finally, in the Canadian context, Kathy Brock cites Butler and Ranney in noting that

While a clear-cut solution to the question posed in a referendum might resolve an impasse, it also precludes a compromise solution characteristic of a bargaining process. Decisions in representative assemblies and first ministers’ conferences may be scrutinized, delayed, revised, and negotiated. Thus the final result may reflect a broader selection of public opinion than one arrived at through a referendum procedure. This is important in Canada at a time when public opinion is so divided and citizens are questioning the viability of the political system.<sup>30</sup>

This device of the popular referendum may also be used to illustrate some of the dynamics that operate in such popular consultations, although it also has its own particular and distinctive characteristics. It is an institutional mechanism that involves the entire mass citizenry in political decisionmaking, usually on issues of more fundamental constitutional, moral or broad policy import. The objective in calling a referendum is frequently to try to produce a quick policy decision which also has broad public support. This is achieved by reducing multiple and complex issues to a single basic question that can be answered in simple dichotomous (“yes-no”) terms.

According to Gordon Smith, a referendum has four distinctive functional characteristics: first, it tends to force existing parties and groups into two large constituencies or groupings: a “Yes” and a “No” camp. This may reduce the importance of traditional partisan or organized group affiliations in the voters’ policy choice. Second, it requires that the decision be made by a stipulated majority of voters. This has the effect of emphasizing the primacy of the majority over the minority; hence majority rights, interests and perceptions tend to be favoured over minority concerns on that policy issue. Third, unlike a plebiscite, which is generally a popular vote on the entire policy record of the government, a referendum, whether binding or consultative, is normally confined to a clearly stipulated and limited policy issue. This may encourage more independence and autonomous voter action than is the case in plebiscites. Fourth, it enables the citizen to have a direct impact on the policy of the

government on the issue. Given the direct democratic nature of this policy instrument, it is almost certain to determine the fate of the policy, regardless of its formal status (that is, as mandatory or consultative). The overall effect, then, is to give to the citizen a kind of veto, and therefore a sense of being empowered.<sup>31</sup>

One would expect, then, that in an age in which the ethos of popular sovereignty has become so strong, that the referendum would be perceived as a useful instrument for asserting the power of the individual citizen, mass-based interest groups and new social movements against the political elites. Moreover, studies of advanced industrial democracies in the last two decades point to a general trend towards partisan dealignment and the embracing of new post-materialist values by a growing portion of the citizenry.<sup>32</sup> When these trends are combined with a significant general decline in citizen trust in political elites and leaders,<sup>33</sup> then it is not surprising that *recent* popular referendums in western countries appear to reflect a strong element of mass discontent directed towards the established parties, elite bureaucrats and politicians. I would hypothesize that this phenomenon may have contributed *significantly* to the results in the 1992 referendum in Canada on the Charlottetown Accord.

Unfortunately, there is as yet little available theoretical or empirical literature on referendum participation in Canada that may provide supporting argument or evidence for this hypothesis. Most of the rather skimpy literature on referendums in Canada tends to approach the phenomenon primarily from a historical, legal or institutional perspective.<sup>34</sup> However, Patrick Boyer offers some preliminary observations on the results of the recent October 1992 referendum on the Charlottetown Accord in his comprehensive historical study of referendums in Canada.

In Boyer's view, the referendum proposal was rejected because the Charlottetown package was too comprehensive and too ambitious in its program of constitutional reform. Hence the package on which Canadians were voting contained too many complex and contentious items for voters to handle in a simple "Yes-No" choice. As a result:

The internal dynamic of the campaign was that the Yes side spoke generally in favour of broad propositions and compromise, whereas those urging a No vote each focussed on one or two specific shortcomings in the accord, and made a strong emotional case on that basis alone. The cumulative effect of many specific and negative attacks, by a variety of groups, on many different points, administered to the accord the death of a thousand small wounds.<sup>35</sup>

Boyer later observes in a similar vein:

The paradox arose because the package contained so many different elements with dozens of major provisions. At many public meetings during the referendum campaign I was asked by troubled voters why the ballot question could not have broken out (sic) the component parts. A voter might, for instance, have agreed with

aboriginal self-government and disagreed with an elected Senate and distinct society status for Quebec; there was no way a voter could register that opinion. My answer usually was two-fold. First, since parliamentarians would have to make similar "Yea" or "Nay" choice, it was only fitting that individual citizens go through the same choice. Second, the Charlottetown Accord represented a negotiated package; each element in it related to concessions or new rights that had been bargained against other provisions... The fabric of the Charlottetown Accord had been woven together, and the strands could not be pulled apart for balloting purposes without unravelling the whole.<sup>36</sup>

It is interesting to note that Boyer, who is such a staunch promoter of referendums versus what he refers to as "first-minister" federalism and "special interest" groups in constitutional matters, uses the argument of a seamless web to defend the comprehensive referendum device. It is very similar to that used by the negotiators of the Meech Lake Accord to support the process of executive/summit federalism against the advocates of broader interest group or legislative consultation.

In a similar manner, Richard Johnston, a leading author of a forthcoming post-referendum electoral study by a team of Canadian voting behaviour specialists, presented some of their preliminary findings in the March 1993 issue of *Political Science*, a publication of the American Political Science Association. In his concluding reflections, he argues:

In law, amendments still have to meet a high threshold of provincial agreement. The coalitional net thus still has to be cast widely, more widely, I suspect, than most voters wish. Any package that the electorate might accept seems unlikely to be proposed. Any proposal that makes it through the ministerial processes is likely to fail with the people.<sup>37</sup>

It appears as if he has also detected the same contradictory impulses and tensions facing Canadians in constitution-making as we have noted above. His conclusion in this respect is rather pessimistic; namely, that "formal textual constitutional change [in Canada] is now at an end."<sup>38</sup>

Most other studies that are directly concerned with patterns of referendum voting are foreign and comparative in orientation, such as the studies of the various referendums on joining the European Economic Community in the 1970s. They tend to focus primarily on the relationship between referendum voting and changing party policy positions on the referendum issue.<sup>39</sup> There appears to be no study as yet of voter choice in referenda in a non-partisan context (i.e., one where all the major parties in the polity are united in support of the policy submitted to referendum decision or ratification, as was the case in Canada in 1992). Future studies of the 1992 and 1993 Danish and the 1992 French referendums on the Maastricht Treaty in Europe might prove revealing in this respect.



The general assumption in the comparative literature on referendums is that when they are initiated and organized by the government, they are likely to be successful; in this sense their results are perceived to resemble those of government-sponsored plebiscites. In the matrix of functional variance of referendums developed by Gordon Smith, referendums of this type are categorized as both "controlled" and "hegemonic."<sup>40</sup> The cases of "controlled" and "anti-hegemonic" referendums (e.g., De Gaulle's referendum on regional and municipal reform in France in 1969; the Irish referendum on abolition of the single transferable vote electoral system in 1968) are generally attributed to government miscalculation or mismanagement. There are relatively few cases of "uncontrolled" referendums, "since they provide an ideal vent for the expression of anti-governmental and anti-system feelings."<sup>41</sup> When they are held, it is usually because they are citizen-initiated (e.g., the Swiss referendum on foreign workers in 1970), and they tend to be defeated by an alliance of pro-government or pro-system forces.

The pattern in constitutional referendums in industrialized democracies in recent years, however, appears to be somewhat different. Most of these referendums are government-initiated and organized (that is "controlled"), but the results are either "anti-hegemonic" or narrowly "pro-hegemonic." It appears as if current governments are increasingly being pressured into holding referendums on controversial constitutional proposals. Despite an initial organizational advantage, they frequently lose the referendum contest to the "anti-hegemonic" forces. This appears to have occurred not only in Canada in late 1992 with respect to the Charlottetown Accord, but also in Denmark early in 1992 with respect to the Maastricht Treaty on European monetary union. A similar result was very narrowly avoided in France in late 1992. In Australia, rejection of constitutional proposals introduced by the governing authorities is also a frequent occurrence, particularly in recent years.<sup>42</sup>

## THE TENSIONS BETWEEN ELITE NEGOTIATIONS AND INTEREST GROUP CONSULTATIONS

What role have interest groups played in constitutional negotiations and public consultations since 1980? Have they tended to manifest an attitude of "self-interest" utility maximization and a "win-lose" negotiation style on constitutional issues, in contrast to those elite constitutional negotiators involved in genuine integrative bargaining? Put another way, have they been advocates of a broader "public" or a narrower "private" interest?

The most popular and widely-used framework for studying interest group behaviour in general in Canada, that of Paul Pross,<sup>43</sup> does not lend itself readily to a systematic empirical analysis of this question. Pross categorizes interest groups in Canada as falling somewhere on a continuum defined by two opposite

polar types "issue-oriented" and "institutionalized" interest groups (or more precisely, they are portrayed as developmentally different types, ranging from "issue-oriented" to "fledgling" to "mature" to "institutionalized" groups). These are differentiated primarily by such factors as organizational features (e.g., financial resources, size of membership), level and target of communication (politicians, officials, advisory boards, task forces/commissions, print/electronic media), and nature of objectives (single, narrowly-defined or multiple and broadly-defined). A major reason for the inapplicability of this framework to the questions addressed in this paper is that it provides little basis for evaluating whether the groups are advancing a "self-oriented" narrow group interest or a broader public or societal interest. In fact, Pross seems to consider all groups, whether essentially "issue-oriented" or "institutionalized," as acting in narrow "self-interest" maximization terms.

Similarly, Alan Cairns' view of interest group behaviour in constitutional matters in Canada also seems inadequate for our purposes. He advances an argument about these groups, presented from an essentially neo-institutional perspective, as part of what Brodie and Nevitte have referred to as his "citizens' constitution theory."<sup>44</sup> In his view, since the adoption of the *Charter of Rights and Freedoms* in 1982, a relatively small number of interest groups whose origin or rationale lies with those explicit equality or collective group rights embodied in the Charter, have generated a demand for broader public participation and consultation in constitutional matters. They have also led the assault on executive federalism and elitist government (the political "insiders") on behalf of the average citizens (the political "outsiders"). And they have successfully defeated their adversaries on two occasions since their emergence as a potent legal and organizational force; first in the struggle against the Meech Lake Accord between 1987 and 1990, and more recently, in the struggle against the Charlottetown Accord in 1992.<sup>45</sup>

The particular "charter-based" interest groups Cairns appears to have in mind are the aboriginal groups (e.g., the Assembly of First Nations) whose rights are protected under section 25 of the Charter, the multicultural groups (e.g., the Ukrainian Association of Canada) whose rights are protected under section 27, gender groups (e.g., the National Action Committee on the Status of Women, or NAC), whose rights are guaranteed under section 28, minority language groups devoted to the preservation or protection of English or French, whose rights are protected under sections 16 to 23, and equality groups (e.g., the disabled, visible minorities), whose rights are protected under section 15.<sup>46</sup>

One obvious difficulty with Cairns' perspective on interest groups in relation to constitution-making is that it is somewhat too narrowly defined; it confines itself almost exclusively to the "charter-based" groups, and leaves no role for other types of groups in the constitution-making process. These would include so-called "public interest" groups (e.g., consumers groups, criminal victims

groups) or "special interest" private sector groups (e.g., business interest groups like the Business Council on National Issues, legal, or medical groups).<sup>47</sup> It also discounts the constitutional impact of many groups arising from new social forces or movements in society that are not explicitly protected by the Charter — the so-called new social movements, such as environmental groups or peace groups.<sup>48</sup> This has the effect of eliminating a wide segment of the group universe from performing any leading or causal role in constitutional politics in this country.

A promising alternative framework for analyzing interest groups in terms of their contribution to the public/private interest has recently been developed by Peter Finkle and Kernaghan Webb and their collaborators.<sup>49</sup> They present a more inclusive typology of interest groups intended largely to isolate "objective" criteria on which to base future government funding of such groups. The typology includes three basic group types: public interest groups, charter-recognized groups, and special interest groups.

According to Finkle and Webb, "public interest" groups are defined by seven major distinguishing characteristics: (i) they seek public policies that produce collective benefits, (ii) they pursue what are widely perceived as broad societal interests (i.e., including benefits that are both broad-based in scope, such as the public education of citizens under the age of 19, or narrow in scope, such as assistance to refugees from a given country), (iii) their members or staff have no direct pecuniary interests in the policies that are being pursued, (iv) they have serious difficulties overcoming a "free-rider" problem,<sup>50</sup> and therefore need public funds to be effective, (v) they exist at least as a "fledgling" organization, (vi) no group can claim to have a monopoly in the promotion of the public interest involved, and (vii) their membership is voluntary. Examples of "public interest" groups, according to Finkle and Webb, are the John Howard Society and the Elizabeth Fry Society.

"Charter-recognized" groups are distinguished by four characteristics: (i) they are organized around the pursuit of collective interests recognized in the Charter or in subsequent court decisions, (ii) their main activity is to promote public policies that further their interpretation of collective interests, (iii) no organized group based on these Charter-recognized interests has a monopoly in the promotion of those interests, and (iv) their membership is voluntary. Examples of "Charter-recognized" groups are the Assembly of First Nations and the National Action Committee on the Status of Women.

Finally "special interest" groups are distinguished by the following five characteristics: (i) they mainly seek to advance the pecuniary interests of their members, although there may be positive spillovers or externalities for others in this, (ii) that part of their activity which involves influencing government policy (policy advocacy) may produce collective benefits that are widely distributed, (iii) they often acquire tax-deductible status for expenditures

involving the promotion of their group interests, (iv) unlike the two other types of groups, they may acquire a state-granted monopoly over a specific interest domain (e.g., doctors, lawyers), (v) their membership may or may not be voluntary.<sup>51</sup> Examples of "special interest" groups are the Business Council on National Issues and the Canadian Labour Congress.

There are a number of obvious problems with their typology. First, it is not clear how so-called "public interest" groups better represent and advance the "public interest" than a narrower "special" or "private" interest. In a later section, Finkle and Webb attempt to explain this by introducing a concept of "other-regardingness" versus "self-regardingness."<sup>52</sup> However, they also acknowledge that what one individual or segment of the population may consider to be a "public interest" orientation or "other-regarding" attitude, another will view as a "special interest" orientation or "self-regarding" attitude.<sup>53</sup> Susan Phillips et al. suggest a possible way of overcoming this problem by defining "public interest" groups as those "whose members act to influence public policy in order to promote their common interests" *and also* "whose objective is to benefit people beyond their membership."<sup>54</sup> The problem is that "the public interest is a highly evocative term and almost every group tries to argue that their particular demands are in the public interest."<sup>55</sup> Thus, it is not surprising, that there are many competing and rather different definitions of what is meant by the "public interest" in the literature.<sup>56</sup>

Second, apart from the ambiguity in the concept of "public interest," several other terms used by Finkle and Webb, such as "broad societal interest," "collective interest" and "non-pecuniary benefits" are unclear and not readily definable with any degree of precision.

Nevertheless, Finkle and Webb make the valid point that there is some need to use these ambiguous concepts to provide more rational and systematic guidelines for policymakers and analysts dealing with interest groups.

What relevance does their framework have for the problems addressed in this chapter? It seems to me that the Finkle-Webb typology has the potential to be fruitfully applied to the range of interest groups involved in the constitutional reform process in Canada from 1980 to 1992 in order to determine their attitudinal and behavioural responses to the various proposals and agreements. For example, one might explore whether there were some important differences in the attitudes and behaviours of "public interest" groups, "charter-based" groups, and "special interest" groups towards the 1980-81 patriation package and final constitutional accord, the Meech Lake Accord, and the Charlottetown Accord. Have "public interest" groups tended to accept the "integrative agreements" involving regional and ethnic-linguistic compromises, trade-offs, linkages and "win-win" utility "satisfying" rather than "optimizing" outcomes? Or have they rejected such overall compromises as unsatisfactory in terms of their own "utility maximizing" group self-interest and adopted a "win-lose"

perspective? What has been the case for the "charter-based" groups and "special interest" groups? Do the views of the interest group leaders and their constituent members appear to converge or diverge on these constitutional questions?

It is impossible to answer these questions without conducting comprehensive, systematic and detailed research on interest group attitudes and behaviour in recent Canadian constitution-making. This type of comprehensive research has not yet been done.<sup>57</sup> However, there are a few scattered writings on this topic in Canada that may offer some initial hints or some preliminary answers to these questions.

As Richard Simeon first pointed out in the early 1970s, interest groups have traditionally been "frozen out" of the constitutional reform process in Canada by the major actors involved in the elite negotiations of executive federalism.<sup>58</sup> This was the case since the search for an indigenous amending formula began in 1927, and continued during the period of unsuccessful comprehensive constitutional renewal between 1968 and 1979. It was also true, for the most part, of the intensive constitutional reform struggles and negotiations of 1980-81. The only important exceptions to this pattern were the interest group representations at the joint House-Senate committee hearings on the proposed Charter of Rights in December 1980 and January 1981, and the mobilization of women's and aboriginal groups in support of their threatened Charter rights after the first ministers' initial agreement in November 1981.

Many of the interest groups that testified before the joint parliamentary hearings of 1980-81 were part of a "rights-oriented" legal-political subculture which had been a significant presence in Canada at least since World War II, and particularly since the adoption of the Diefenbaker Bill of Rights in 1960. Those that successfully advanced their representations for a broadening of the scope of the somewhat narrow *Charter of Rights and Freedoms* originally proposed in Trudeau's unilateral package of October 1980 were able to do so largely because the federal Liberal government was strongly in need of public support and legitimacy at that time in the face of strong opposition against its unilateral action by the federal Conservatives and most provincial governments.<sup>59</sup> Nevertheless, it is generally acknowledged, even by those then opposed to the overall patriation package, that these successful group representations significantly improved the coherence and internal logic of the Charter, and thereby advanced the overall public interest in Canada. This is usually attributed to the superior expertise, research and information on rights issues which these groups were able to bring to these deliberations. In this sense they are viewed as acting generally in the "public interest." Yet in this case acceptance and even enlargement of the package was clearly also in the self-interest of these "rights groups." Hence it is not surprising that virtually all of these groups initially accorded the unilateral patriation package of October 1980 their strong support. The major exception in this respect were the

aboriginal groups, which failed to achieve all or even most of what they sought in such a package. The role of the two other types of groups, the "public interest" and "special interest" groups, appears to have been a marginal one in these negotiations.

However, the later actions of politicians in the patriation negotiations involving inclusion or exclusion of minority group and equality rights in the Charter did not reflect the same commitment to advancing or promoting "rights group" claims. Several academic and journalistic commentators, for example, have noted that decisions concerning which particular groups should be incorporated into or excluded from the final version of the Charter were made largely on an arbitrary basis. They were shaped essentially by political "horse-trading" within the federal cabinet or between various federal and provincial first ministers and responsible ministers. In this "horse-trading," the various groups representing women and aboriginals ultimately achieved success, largely through their superior organizational and strategic skills.<sup>60</sup> Yet their demands were often acceded to in a begrudging and reluctant manner by elite politicians (including some provincial premiers) and many members of the general public who viewed them as politically inevitable rather than inherently desirable or in the public interest.<sup>61</sup>

A subsequent call by academics and others for broadening public consultative mechanisms to ensure wider group participation in constitutional reform and policy matters actually antedated the negotiation of the Meech Lake Accord in 1987,<sup>62</sup> but it received little attention until after the signing of the Meech Lake Accord in 1987. It was the unusually narrow, secretive and elitist style of negotiations adopted with that Accord that led to a strong political, academic and public critique of executive and summit federalism as the major structure for negotiating constitutional agreements after 1987. Throughout the entire period of negotiation and ratification of the Accord between 1987 and 1990, there was only one genuine governmental effort to consult with and accommodate interest group representations on a systematic basis; that conducted by the Manitoba Task Force on the Meech Lake Accord between April and May of 1989. As Kathy Brock notes, the representations by the anti-Meech women's and aboriginal groups (two "charter-based" groups) were far better researched and more coherently and persuasively presented than were those of the better organized and financed pro-Meech business groups (a type of "special interest" group) and the former were also more successful in achieving their demands from the essentially non-partisan Manitoba Commission.<sup>63</sup> Were their attitudes and actions in Manitoba against the Accord in the "public interest" or in their narrower, utility-maximizing "self-interest"? Again, this depends on one's definition of the "public interest." At any rate, the gains that these groups achieved before the Manitoba Commission had little political resonance beyond that province. The parliamentary commissions and task force hearings in

Ottawa and in some provinces such as Ontario and Quebec were not genuinely open to group representation which would substantively alter the Accord, although they did permit the various interest groups that requested permission to make representations concerning the Accord in formal briefs and recorded hearings. In short, apart from Manitoba, in the Meech Lake process interest groups of all types continued to be "frozen out" of the constitutional policy process. Some of these groups then turned to more indirect action against the Accord by attempting to influence mass attitudes in local meetings and the media. In this manner they may have contributed substantively to its demise in 1990.

Between 1990 and August 1992, governmental consultations and negotiations leading up to the signing of the Charlottetown Accord seemed to actively encourage representations and participation by organized interest groups in constitutional policymaking processes. Their substantive contribution to the final package negotiated by the first ministers at Charlottetown has yet to be assessed. Assuming, however, that they did have an impact, then a systematic examination of the attitudes and role of these groups in the numerous task forces, commissions and legislative hearings conducted at both federal and provincial levels might now prove valuable.<sup>64</sup> We may finally acquire some perspective on the differing views of "charter-based," "public interest" and "special interest" groups on this comprehensive and complex "integrative" Charlottetown package, and on the tension between their group orientations and that of elite negotiators within executive and summit federal structures.

In short, the evidence concerning interest group "win-lose" utility-maximizing attitudes towards the various constitutional proposals and accords presented or negotiated since 1980 is still too sparse to provide any confirmation or disconfirmation of our original hypothesis (concerning contradictions and tensions between elite negotiations and interest group behaviour in constitutional policymaking). This is primarily due to their limited role in this process, at least until 1990, in which they were largely "frozen out." It may well be that unlike the case of referendums, with interest groups there is no clear attitudinal and self-oriented "utility-maximizing" dynamic operating in a clear direction, in opposition to the "utility-satisfying" and compromising orientation of elite politicians and bureaucrats. This would have important implications for future efforts to blend and merge elite negotiations and interest group consultations in any future constitutional negotiations.

## RECONCILING TENSIONS AND CONTRADICTIONS

In the preceding two sections I pointed to a fundamental tension or contradiction between the structures of elite negotiation on the one hand and those of referendums and possibly also interest group consultations on the other.

Because they have conflicting normative rationales, and because empirically they tend to operate in opposing directions, the benefits or utilities provided by each structure tend to be different. Moreover, there are important differences among individual citizens in a referendum and among types of interest groups on these questions.

One point seems certain, however: the current structural and cultural trends in Western democratic polities make it imperative that we find ways to combine both elitist structures of negotiation and structures of public consultation and mass participation in constitutional policymaking. Both types of structures are necessary for successful constitution-making, since they each contribute important but different values to the process, including efficiency, representativeness, and legitimacy. This view of the need for blending or joining these structures also appears to be shared by other specialists of Canadian constitutional process.<sup>65</sup>

In my view the tensions and contradictions outlined above are not *inherently* irreconcilable, provided that they are effectively managed by the political regime and its leaders, and are actively embraced or promoted by the spokespersons for mass participative and consultative structures. There are several possible ways of managing these tensions.

First, political elites involved in constitutional negotiations, leaders of interest groups and promoters of direct democracy must attempt to develop more effective appeals on those constitutional issues that emphasize common or "core" values and symbols of national patriotism. With respect to "core" values, these cannot be defined and imposed by a narrow segment of the political elite on the general population. Rather a gradual process of both elite and mass political and constitutional learning with respect to these "core" values should be fostered, which also underlines the need for regional, group and individual accommodation and compromise. Thus the idea of "two official languages" associated with the so-called two "founding peoples" must be reconciled conceptually and in political practice with the claims of aboriginal peoples and of other multicultural groups. Similarly, the concept of a "distinct society" of Quebec must be accommodated to the notion of "equality of the provinces" and the principle of "representation by population."

There is already considerable evidence in recent Canadian constitutional and political experience that constitutional learning of this kind can occur both by political elites and the broader mass citizenry. The Royal Commission on Bilingualism and Biculturalism in the 1960s and the Trudeau government in the 1970s initially promoted and subsequently implemented policies involving both "official bilingualism" and "multiculturalism." By the early 1980s there was little elite or public objection to their inclusion in the *Constitution Act, 1982* including the *Charter of Rights and Freedoms*. Similarly, the concept of a "distinct society" of Quebec involving some special legal and political rights



for that province, was fiercely opposed by many Canadians from outside Quebec in the Meech Lake negotiations of 1987-90. It appears to have won a much broader degree of public acceptance in the Charlottetown Accord of 1992. This seems to be even more true of the idea of "aboriginal self-government." At the time of the 1980-81 constitutional negotiations and the first ministers' conferences involving aboriginal rights from 1983-87, there was very little elite or mass support for this notion. By 1992 it had earned wide public endorsement as indicated by analysis of voter opinion in the referendum on the Charlottetown Accord.<sup>66</sup>

With respect to fostering symbols of national patriotism, emphasis should be placed on promoting the positive attributes of the country, rather than arousing fears of national disintegration or economic and social collapse. In particular, the widespread perception of Canada abroad as an economically prosperous, socially humane, environmentally sensitive, politically tolerant, and internationally engaged and influential country should be propagated more widely. In past constitutional negotiations, more weight appears to have been placed on negative appeals or threats to Canada's integrity. For example, Prime Minister Mulroney resorted to such a negative appeal at one point in the 1992 referendum campaign by tearing up a list of the gains Quebec would make if the Charlottetown Accord was approved; this was supposed to indicate to his Quebec audience what the consequences would be of a "no" vote against the constitutional package. The gesture was widely criticized both for its excessive histrionics and negativism and its lack of credibility.

Second, and on the other hand, an appeal to "loss avoidance" may be an effective tension-managing or problem-solving device in some constitutional situations. "Loss avoidance" or "loss aversion" has been defined as a psychological orientation or condition felt by political actors who "are generally risk averse with respect to gains and risk acceptant with respect to losses they identify from the reference point they have chosen. They are more willing to take risks to avoid losses than to make gains, in large part because losses loom larger than gains."<sup>67</sup> In the constitutional area, it refers to the pre-disposition of both political elites and masses to accept a constitutional deal which they view as less than utility maximizing for themselves or their constituents, or one which may even involve some risk of long-term losses. They do so in order to avoid the certainty of an immediate loss under deteriorating status quo conditions.

Such an appeal could be quite effective in the context of a real or perceived threat of Quebec separation should the constitutional/political status quo continue to deteriorate without the achievement of some kind of promised constitutional renewal. Populations that are particularly vulnerable to immediate political and economic losses arising from separation might be most susceptible to such appeals. It is possible that both government and grass-roots leaders may

have exploited such feelings of "loss aversion" to influence voters in three Atlantic provinces and among English-speaking Quebecers to "buck" the national trend and vote in favour of the Charlottetown Accord in the referendum.

Third, government and grass-roots leaders should avoid adopting the position that a constitutional accord, once negotiated, cannot be substantively amended or altered to fit the needs of particular negotiating parties. This position was adopted with respect to the Meech Lake Accord after 1987, with unfortunate consequences. As long as the major items in a package have achieved the required consensus, it is possible to introduce minor adjustments such as special parallel or side agreements or flexible opting-in or opting-out arrangements for one or several parties, which would make the overall package more palatable and "saleable" in particular jurisdictions.

A good example of this occurred in recent negotiations concerning the Maastricht Treaty providing for a single European currency and tighter political union by the end of the century. When Britain and Denmark objected to what they perceived to be real threats to their political sovereignty, they were able to negotiate special opting-out provisions for themselves on the political aspects of the Treaty, without destroying or undermining the carefully negotiated and delicately balanced compromise achieved at Maastricht. A similar attempt was made at the First Ministers' Conference on the Meech Lake Accord in June 1990, with the introduction of the so-called "companion accord." This was an initiative introduced by the federal government at the behest of dissenting provinces such as Manitoba in an effort to improve certain provisions of the agreement. The initiative might have succeeded if it had been undertaken at an earlier point in the ratification process, prior to the adoption of fixed bargaining positions by several major parties and widespread public disenchantment with the elitist negotiating and ratification process.

Fourth, leaders may make offers of "side-payments" in an effort to win broader public or mass support for a negotiated constitutional package. For example, an agreement by the federal government to allow Alberta a larger share in oil revenues early in the fall of 1981 may have helped to win its support for a compromise deal on the patriation package in the November 1981 negotiations. The Clinton administration in the United States has also recently offered such enticements to labour and environmental leaders in that country in an effort to win their support for the North American Free Trade Agreement. However, such offers of "side-payments" to political leaders and their constituents must be made with delicacy and sensitivity, or they could backfire. They may be misinterpreted or misrepresented by opponents of the negotiated package as attempts at public bribery. The federal government may have avoided linking its support of the Hibernia offshore oil project in Newfoundland to its

Meech Lake and Charlottetown constitutional proposals for precisely that reason.

Finally, elite bargaining structures in constitutional matters such as ministers' or first ministers' conferences and public input structures such as referendums and interest group consultations should be blended in a logical and coherent manner, in order to enhance the particular values of each. Thus elite structures might play the major role at the negotiation stage in constitution-making, and mass participative and consultative structures might be injected principally at the earlier (issue- and agenda-generating), and later (ratification) stages. There should be a clear consensus among governmental and grass-roots leaders about who has the right to participate in the constitutional process at each stage, and why. The rules governing public consultation and participation, whether in referendums or with interest groups, must be carefully negotiated and clearly set out. Both the political elites negotiating the agreement and the mass public should be informed that a referendum will be called well before the final package is negotiated, so that its contents can be framed with that type of direct consultation in mind. There should be a greater effort to educate political elites, interest group leaders and the mass citizenry about the benefits of such a "blended" system of representative and direct democracy.

As a final point, there are several techniques that may be adopted: emphasis on "core values," loss avoidance, flexible approaches to amendment, the use of side-payments, and a clearly articulated and openly agreed blending of both elite and more directly democratic processes. By adopting these techniques, one hopes that the result will be a more effective constitutional reform process, should one arise in the near future. This may take the form of comprehensive or incremental and partial constitutional change, or even constitutional custom and convention. Judging from current trends in Quebec and in the country as a whole, it may not be long before we must address these issues once again as part of our ongoing political agenda.

## NOTES

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1. Donald V. Smiley, *Canada in Question: Federalism in the Eighties*, 3d ed. (Toronto: McGraw-Hill Ryerson, 1980), p. 91.
2. Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (Toronto: University of Toronto Press, 1992), p. 10.
3. *Ibid.*, p. 9.
4. Alan C. Cairns and Cynthia Williams (eds.), *Constitutionalism, Citizenship and Society in Canada*, Research Studies of the Royal Commission on the Economic Union and Development Prospects for Canada, vol. 33 (Toronto: University of Toronto Press, 1985), chap. 4.
5. Patrick Boyer, *Direct Democracy in Canada: The History and Future of Referendums* (Toronto: Dundurn Press, 1992), p. 236.
6. Stefan J. Dupre, "Reflections on the Workability of Executive Federalism," in Richard Simeon (ed.), *Intergovernmental Relations*, Research Studies of the Royal Commission on the Economic Union and Development Prospects for Canada, vol. 63 (Toronto: University of Toronto Press, 1985), pp. 1-33.
7. Michael B. Stein, "Canadian Constitutional Reform 1927-1982: A Comparative Case Analysis Over Time," *Publius: The Journal of Federalism*, 14 (Winter 1984): 121-39. See also Russell, *Constitutional Odyssey*, chaps. 4 and 5.
8. Michael B. Stein, *Canadian Constitutional Renewal: A Case Study in Integrative Bargaining*, Research Paper No. 27, (Kingston: Institute of Intergovernmental Relations, 1990), chap. 3; Russell, *Constitutional Odyssey*, chaps. 6-8.
9. David Milne, *The Canadian Constitution: From Patriation to Meech Lake* (Toronto: James Lorimer & Co., 1989) pp. 155-60; Keith Banting and Richard Simeon (eds.), *And No One Cheered: Federalism, Democracy & the Constitution Act* (Toronto: Methuen, 1983), chaps. 14-15; Robert Sheppard and Michael Valpy (eds.), *The National Deal: The Fight for a Canadian Constitution* (Toronto: Fleet Books, 1982), chap. 14.
10. Bryan Schwartz, *Fathoming Meech Lake* (Winnipeg: Legal Research Institute, University of Manitoba, 1987), p. 4; Andrew Cohen, *A Deal Undone: The Making and Breaking of the Meech Lake Accord* (Toronto: Douglas & McIntyre, 1990), pp. 185-86; Deborah Coyne, *Roll of the Dice* (Toronto: James Lorimer & Co., 1992), p. 1.
11. Premier Howard Pawley of Manitoba was the sole exception in this regard. There were special rules governing legislative ratification of constitutional amendments in the Manitoba Legislative Assembly which required a more careful scrutiny of any package in public hearings. For this reason, Premier Pawley did not reject the idea of a more fundamental critical examination and alteration of the Accord by provincial legislatures, and informed the other first ministers of this when he signed the deal. I am grateful to an anonymous reviewer for this point. See also Cohen, *A Deal Undone*, p. 115.
12. James Hurley, "The Canadian Constitutional Debate: From the Death of Meech Lake to the Referendum," paper presented to the 1992 Conference of the

- Association of Canadian Studies in Australia and New Zealand, Wellington, New Zealand, 16 December 1992; and Brooke Jeffrey, *Strange Bedfellows, Trying Times* (Toronto: Key Porter Books Ltd., 1993), chap. 2.
13. Jeffrey, *Strange Bedfellows*, chap. 6.
  14. Russell, *Constitutional Odyssey*, chap. 10; Boyer, *Direct Democracy*, pp. 235-241.
  15. Smiley, *Canada in Question*, chap. 4; Ronald Watts, *Administration in Federal Systems* (London: Hutchison, 1970), chap. 2.
  16. Ronald Watts, *Executive Federalism: A Comparative Analysis*, Research Paper No. 26 (Kingston: Institute of Intergovernmental Relations, 1989), pp. 6-8.
  17. J. Stefan Dupre, "Reflections on the Workability of Executive Federalism," pp. 15-22.
  18. In this respect the Charlottetown Accord was an exception, since it was negotiated almost entirely by Constitutional Affairs ministers until its final stage in August 1992.
  19. Richard Simeon, *Federal-Provincial Diplomacy: The Making of Recent Policy in Canada* (Toronto: University of Toronto Press, 1972), chap. 13.
  20. Simeon, *Federal-Provincial Diplomacy*, pp. 268-77.
  21. S.J.R. Noel, "Consociational Democracy and Canadian Federalism," *Canadian Journal of Political Science*, 4 (1971): 15-18; Kenneth McRae, "Consociationalism and the Canadian Political System," in Kenneth McRae (ed.), *Consociational Democracy: Political Accommodation in Segmented Societies*, Carleton Library No. 79 (Toronto: McClelland & Stewart, 1974); Kenneth McRae, "The Meech Lake Impasse: A Theoretical Perspective," in Gagnon and Tanguay (eds.), *Democracy with Justice* (Ottawa: Carleton University Press, 1992), pp. 140-53; Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven and London: Yale University Press, 1977), pp. 124-27.
  22. Richard Walton, and Robert B. McKersie, *A Behavioural Theory of Negotiations* (New York: McGraw-Hill, 1965), p. 5.
  23. Dean G. Pruitt and Steven A. Lewis, "The Psychology of Integrative Bargaining," in Daniel Druckman (ed.), *Negotiations: Social-Psychological Perspective* (Beverly Hills and London: Sage Publications, 1977), chap. 5; D.G. Pruitt, *Negotiation Behavior* (New York: Academic Press, 1981), chaps. 5-6.
  24. Oran R. Young, "The Politics of International Regime Formation: Managing International Resources and the Environment," *International Organization*, 43, 3 (Summer, 1989): 361; Oran Young, "Political Leadership and Regime Formation: On the Development of Institutions in International Society," *International Organization*, 45, 3 (Summer, 1991): 281-307.
  25. Stein, *Canadian Constitutional Renewal*, pp. 37-42.
  26. *Ibid.*, pp. 40-42.
  27. Young, "The Politics of International Regime Formation," p. 361.
  28. David Butler and Austin Ranney (eds.), *Referendums: A Comparative Study of Practice and Theory* (Washington: American Enterprise Institute, 1978), p. 226.
  29. Harlan Hahn and Sheldon Kamieniecki, *Referendum Voting: Social Status and Policy Preferences* (New York: Greenwood Press, 1987), p. 21.

30. Kathy Brock, "The Politics of Process," in Douglas M. Brown (ed.), *Canada: The State of the Federation 1991* (Kingston: Institute of Intergovernmental Relations, 1991), p. 80.
31. Gordon Smith, "The Functional Properties of the Referendum," *European Journal of Political Research*, Special Issue: Referenda in Europe, 4, 1 (March 1976): 1-24.
32. Dalton Russell et al. (eds.), *Electoral Change in Advanced Industrial Democracies* (Princeton: Princeton University Press, 1984); Ronald Inglehart, *The Silent Revolution: Changing Values and Political Styles among Western Publics* (Princeton: Princeton University Press, 1977); Ian Brodie and Neil Nevitte, "Evaluating the Citizens' Constitution Theory," *Canadian Journal of Political Science*, 26 (June 1993), esp. pp. 239-42.
33. Allan Gregg and Michael Posner, *The Big Picture: What Canadians Think About Almost Everything* (Toronto: Macfarlane Walter and Ross, 1990); Harold D. Clarke et al., *Absent Mandate: Interpreting Change in Canadian Elections*, 2d ed. (Toronto: McClelland & Stewart, 1985); John Laschinger and Geoffrey Stevens, *Leaders, Lesser Morials: Backroom Politics in Canada* (Toronto: Key Porter Books, 1992), chaps. 12-13.
34. See for example, Patrick J. Boyer, *Lawmaking by the People: Referendums and Plebiscites in Canada* (Toronto: Butterworths, 1982); Boyer, *Direct Democracy*, and Vincent Lemieux, "The Referendum and Canadian Democracy," in Peter Aucoin (ed.), *Institutional Reforms for Representative Government*, Research Studies of the Royal Commission on the Economic Union and Development Prospects for Canada, vol. 38 (Toronto: University of Toronto Press, 1985).
35. Boyer, *Direct Democracy*, p. 75.
36. *Ibid.*, p. 239.
37. Richard Johnston, "An Inverted Logroll: The Charlottetown Accord and Referendum," *Political Science*, 26, 1 (1993): 47. Note, however, the somewhat different view of the Accord and of voter reaction to the "logroll" or overall compromise presented in a subsequent paper by Johnston et al. and his collaborators, "The People and the Charlottetown Accord" (See this volume, chap. 2). According to Johnston et al., rather than merely "embracing the logic of a logroll, which includes something for oneself," supporting the Accord for many voters would also have involved "accepting the necessity for an accommodation among strategically placed or morally advantaged others." For the most part, however, this logic "did not work" (p. 29).
38. *Ibid.*, p. 47.
39. See for example, Butler and Ranney (eds.), *Referendums*; Philip Goodheart, *Full-Hearted Consent* (London: Davis-Poynter, 1976); Hahn and Kamienieki, *Referendum Voting*; and the Special Issue on Referenda in Europe, *European Journal of Political Research*, 4, 1 (March 1976).
40. Gordon Smith, "The Functional Properties of the Referendum," pp. 6-9.
41. *Ibid.*, p. 13.
42. Russell, *Constitutional Odyssey*, p. 57.

43. See A. Paul Pross, *Pressure Group Behaviour in Canadian Politics* (Toronto: McGraw-Hill, 1975); Pross, *Group Politics and Public Policy* (Toronto: Oxford University Press, 1986).
44. Brodie and Nevitte, "Evaluating the Citizen's Constitution Theory," esp. pp. 235-239.
45. Alan Cairns, *Disruptions: Constitutional Struggles From the Charter to Meech Lake*, ed. Douglas Williams (Toronto: McClelland & Stewart, 1991), chap. 4.
46. *Ibid.*, pp. 15-16.
47. Cairns does, however, make a brief reference to the expanded role of business interest associations in managing relations with the state, particularly since the 1960s, citing the research findings of William Coleman. See Alan Cairns, "The Embedded State: State-Society Relations in Canada," in Keith Banting (ed.), *State and Society: Canada in Comparative Perspective*, Research Studies of the Royal Commission on the Economic Union and Development Prospects for Canada, vol. 31 (Toronto: University of Toronto Press, 1985), p. 71.
48. Susan D. Phillips, "Democratizing Society and State in Canada: From Identity Politics to Partnerships," paper presented to the annual meeting of the Canadian Political Science Association, Charlottetown P.E.I., 1992, pp. 4-11. A partial exception to this is Cairns' reference to "citizen groups" emerging as part of broader international trends. See Cairns, *Disruptions*, pp. 19-20.
49. Peter Finkle, Kernaghan Webb, William T. Stanbury and Paul Pross, *Federal Government Relations with Interest Groups: A Reconsideration*, Draft Manuscript (Ottawa: Department of Consumer and Corporate Affairs, 1993) chaps. 2-3. The first two are the principal authors.
50. Mancur Olsen, *The Logic of Collective Action: Public Goods and the Theory of Groups* (New York: Schocken Books, 1965), pp. 14-16.
51. Finkle et al., *Federal Government Relations*, p. 19, Figure 2-1.
52. *Ibid.*, p. 28.
53. *Ibid.*, p. 20.
54. *Ibid.*, p. 21.
55. *Ibid.*, p. 22.
56. *Ibid.*, p. 20. See, for example, the definition of "public interest groups" offered by Jeffrey M. Berry who defines a "public interest group" as "one that seeks a collective good, the achievement of which will not selectively and materially benefit the membership or activists of the organization." Jeffrey M. Berry, *Lobbying for the People* (Princeton, NJ: Princeton University Press, 1977), p. 7. This is a somewhat different definition from that of Phillips et al. cited above.
57. However, Professor Kathy Brock of the University of Manitoba has recently begun such a study, with support from the Social Sciences and Humanities Research Council of Canada. According to a recent communication, her study encompasses interest group activity in both the Meech Lake and Charlottetown constitutional negotiations. It also includes all three types of interest groups described by Finkle and Webb. The focus will be on interest groups at the federal level and in the provinces of Manitoba, Ontario, Quebec, New Brunswick, and Newfoundland. It

- will involve interviews of interest group leaders as well as politicians and public servants, and will be more qualitative than quantitative in methodology and approach. For some preliminary discussion of this study, see Kathy L. Brock, "Reflections on the Constitutional Process: Does More Inclusive Mean More Effective and Representative?" unpublished paper presented to the Annual General Meeting of the Canadian Political Science Association, Carleton University, Ottawa, Ontario, 6-8 June 1993.
58. Simeon, *Federal-Provincial Diplomacy*, p. 282; see also Hugh G. Thorburn, *Interest Groups in the Canadian Federal System*, Research Studies of the Royal Commission on the Economic Union and Development Prospects for Canada, vol. 69 (Toronto: University of Toronto Press, 1985), p. 69.
  59. David Milne, *The Canadian Constitution: From Patriation to Meech Lake* (Toronto: James Lorimer & Co., 1989), pp. 88-93; and Kathy Brock, "The Politics of Process," p. 59.
  60. Penny Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto: Women's Press, 1983); Chaviva Hosek, "Women and the Constitutional Process," in Richard Simeon and Keith Banting (eds.), *And No One Cheered* (Toronto: Methuen, 1983), esp. pp. 283-286; and Douglas Sanders, "The Indian Lobby," in Simeon and Banting (eds.), *And No One Cheered*, pp. 301-332.
  61. Kathy Brock, "The Demand for Greater Participation," in Richard Simeon and Mary Janigan (eds.), *Toolkits and Building Blocks* (Toronto: C.D. Howe Institute, 1991), pp. 72-74.
  62. See Thorburn, *Interest Groups in the Canadian Federal System*, pp. 128-132; and Cairns and Williams (eds.), *Constitutionalism, Citizenship, and Society*, pp. 40-42.
  63. Kathy Brock, "Being Heard: Interest Representation in the Manitoba Constitutional Process," Paper presented to the Annual Meeting of the Canadian Political Science Association, Kingston, 1991, pp. 14-25.
  64. As mentioned in note 57 above, Kathy Brock intends to conduct this kind of systematic analysis in her study of interest group consultations during the Meech Lake and Charlottetown negotiations. See also Brock, "Reflections on the Constitutional Process: Does More Inclusive Mean More Effective and Representative?"
  65. See, for example, Brock, "The Politics of Process," 1991, p. 77; Russell, *Constitutional Odyssey*, p. 193; and Boyer, *Direct Democracy*, p. 224.
  66. For some empirical evidence supporting these observations, see Richard Johnston et al., "The People and the Charlottetown Accord," chapter 2 in this volume.
  67. Janice Gross Stein, "International co-operation and loss avoidance: framing the problem," in Janice Gross Stein and Louis W. Pauly (eds.), *Choosing to Cooperate: How States Avoid Loss* (Baltimore and London: The Johns Hopkins University Press, 1993), p. 18. I am grateful to the co-editors for bringing this concept to my attention.



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## An Experiment in Intrastate Federalism: The Cabinet Committee on Canadian Unity

*Herman Bakvis and Roselle Hryciuk*

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*On accorde généralement assez peu ou pas du tout d'attention au rôle que joue le cabinet fédéral dans le processus de renouvellement de la constitution. Pourtant, la création en avril 1991, durant la Ronde Canada, du Comité du cabinet chargé de l'unité canadienne et des négociations constitutionnelles aura fourni justement au cabinet une occasion exceptionnelle de s'illustrer dans le plus grand intérêt de la réconciliation nationale.*

*Ce chapitre se penche sur le rôle du Comité dans l'élaboration du document qui est devenu, en définitive, l'entente de Charlottetown. Plus précisément, les auteurs tentent d'évaluer l'efficacité de ce comité en tant que corps intraétatique ou si l'on préfère, en tant que noyau central du gouvernement au sein duquel se trouvent directement représentés les intérêts régionaux du pays.*

*Les quatre modèles suivants sont utilisés pour analyser les activités du Comité : 1) fédéralisme intraétatique 2) compromis au sommet 3) politique des groupes d'intérêts et 4) politique de la bureaucratie. Même si les activités du Comité furent marquées par une transparence plus grande que prévue, celui-ci s'arrangea tout de même pour ne pas avoir à subir de pression directe de la part des groupes d'intérêts. Au même moment, certains acteurs de la bureaucratie fédérale furent appelés à jouer un rôle significatif dans la préparation des propositions fédérales contenues dans le document Bâtir ensemble l'avenir du Canada, publié en septembre 1991. Les ministres provenant de l'ouest du pays et du Québec furent ceux qui consacrèrent le plus d'efforts pour représenter les intérêts distincts de leur province ou région respective.*

*L'action du Comité fut efficace à deux points de vue : d'abord, en permettant la réalisation d'un compromis global, puis en relançant le processus constitutionnel. Toutefois, l'influence du Comité aura décru presque aussitôt après le dépôt des propositions; de fait, certaines de ses recommandations clés, comme celles sur l'union économique par exemple, furent écartées ou bien modifiées au cours des phases subséquentes — parlementaire et multilatérale — de la Ronde Canada.*

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## INTRODUCTION

In most discussions of Canadian constitution-making the role of the federal Cabinet attracts little or no attention, and for good reason. Since the 1960s the Cabinet has effectively been eclipsed by the federal-provincial conference as a body for resolving major policy issues and reconciling regional and linguistic differences within the country. As well, the federal government's constitutional proposals and negotiations with the provinces has typically been the preserve of the prime minister, a few key Cabinet ministers, and a limited number of officials in the Privy Council Office (PCO) and the Federal-Provincial Relations Office (FPRO). Furthermore, over the past decade the attention of journalists and social scientists has increasingly been captivated by the activities of special interest groups and demands for more direct citizen participation in the constitutional process. Thus in the most recent Canada round, attention was focused in good part on the innovative mechanisms that were introduced to ensure greater citizen participation, namely the five miniature citizen conventions held in the winter of 1992 and, of course, the October referendum.

While benign neglect of the federal Cabinet's role in the constitutional process may be justified in general, in the case of the Canada round it is not. For in the aftermath of the failure of Meech Lake in June 1990 and suspension of all formal first ministers' conferences, the federal Cabinet came to play a unique role in laying the ground work of the process that eventually led to the Charlottetown Accord. On 21 April 1991 the prime minister announced that Joe Clark, as minister responsible for constitutional affairs, would chair the special Cabinet Committee on Canadian Unity and Constitutional Negotiations (CCCU), and that in doing so Clark would "be responsible for the development of the Government's constitutional position and for the consultative and negotiating processes that will be followed in seeking a new national consensus."<sup>1</sup> In effect, the prime minister's announcement could be construed as an effort by the federal government to create what Alan Cairns, Donald Smiley and Ronald Watts have called an "intrastate" mechanism — an arena lodged within the bosom of the federal government in which regional and linguistic interests could both find expression and be reconciled.<sup>2</sup>

Until the Canada round, Cabinet had not played such an explicit and visible role in the constitutional process; previous constitutional crises did not appear to necessitate its participation on such a scale.<sup>3</sup> While certain key ministers have always been involved in constitutional negotiations, Cabinet or a committee of Cabinet has invariably played an after-the-fact role, essentially ratifying decisions reached by the key players during the course of negotiations with the provinces. It might be argued, therefore, that the striking of the CCCU represented an uncommon opportunity for the federal Cabinet to display its long dormant capacity to play an integrative, nation saving role. Alternatively, the

case of the CCCU might also demonstrate that whatever capacity the Cabinet had in this regard had long been extinguished.

The specific subject under investigation in this chapter, therefore, is the role the CCCU played in shaping the document that became the Charlottetown Accord. And the primary issue is the effectiveness of the CCCU as an intrastate body: how successful was it both in bringing the diversities of interests and opinions to bear on the constitutional process and in accommodating these diverse and often strongly held views on issues such as the constitutional status of Quebec as a distinct society? Obviously its success was limited in light of the final outcome, namely the failure of the Accord in the October 1992 referendum. Nonetheless, it remains important to ask whether there was something during the CCCU phase that contributed to the ultimate failure of the Accord, for example whether serious miscalculations made by the CCCU later affected either the multilateral process or public opinion. Answers to this question are worth having, in part for the historical record, but also to help assess the role of Cabinet in dealing with constitutional issues in the future, or for that matter any issue of major import.

## INTERPRETING THE PROCESS

The CCCU was struck in April 1991 and continued to play a role in the Canada round process up to and including the time of the referendum. The most critical phase for the CCCU was, however, the period from April 1991 to the delivery of Cabinet's proposals in September of 1991, embodied in the federal government's package *Shaping Canada's Future Together*. As with the constitutional process as a whole, the activities of the CCCU can be examined and interpreted from a number of different perspectives. In the existing literature, and in the public commentary on the process, there appear to be four models, none of them mutually exclusive, that can be used to help interpret developments: federalism theory, specifically that on intrastate federalism; elite accommodation theory; the interest group politics model; and the bureaucratic politics model.

### INTRASTATE FEDERALISM

Given the mandate assigned to the CCCU by the prime minister, that is to help put in place the basis for "seeking a new national consensus," it is appropriate to view the CCCU as an intrastate mechanism. Briefly, intrastate federalism can be defined as the representation of provincial and regional interests directly in the central institutions of government (as distinct from *interstate* federalism, where the representation of provincial and regional interests occurs *between* federal and provincial governments) and is seen by a number of federal theorists as an important and indeed necessary hallmark of a proper federal system.<sup>4</sup> As

Smiley and Watts have argued: "No matter how much a federal system allows for the expression of regional differences through autonomous state or provincial governments, the federal solution is bound to disintegrate without some positive consensus among its component groups. And it is upon the structure and processes of the central institutions that the ability to generate such a consensus exists."<sup>5</sup>

Canada is regarded as a relatively weak intrastate federation, however, one where the regional dimension has been largely absent in the operations of central institutions. Indeed, in recent years many of the advocates of constitutional change, especially from western Canada, have pushed hard to redress this imbalance by arguing for intrastate reforms such as an elected senate.<sup>6</sup> Yet intrastate federalism is not a wholly unambiguous or undifferentiated concept; it can be implemented in a variety of ways and mean quite different things to different people. Alan Cairns has identified two variants of intrastate federalism — centralist and provincialist.<sup>7</sup> Direct provincial appointment of Senate members by the provinces along the lines of the German Bundesrat would be an example of the latter; something like the present arrangement for regional representation in the federal Cabinet, where provinces have little if any influence in selecting representatives, is an example of the former. With respect to the federal Cabinet it has been suggested that while Cabinet may once have been reasonably effective as an intrastate mechanism, during the terms in office of Prime Minister Mackenzie King, for example, when leading provincial figures routinely entered the federal Cabinet, this is no longer the case. There is debate over the issue of the present regional role of federal Cabinet ministers.<sup>8</sup> Certainly, however, Cabinet is not generally perceived as an arena where significant constitutional issues are debated and ultimately brokered. The task that was thrust upon the CCCU, therefore, was in many ways an unfamiliar one and it can be legitimately asked whether the ministers really had the capacity to take it on.

#### ELITE ACCOMMODATION

This concept, originating in the comparative politics literature, has been applied both to federal-provincial relations and to the federal Cabinet to account for the accommodation reached between the different levels of government and significant political communities in Canada.<sup>9</sup> It overlaps considerably with the intrastate model and can be described as the process that makes the intrastate mechanism work in an effective manner. The primary characteristics of the elite accommodation process have been the important role of the elites of competing governments or significant political communities to reach agreement on critical issues, often in the face of dissensus at the mass level, the fact that elite bargaining takes place largely in secret, that the accommodation is

all-encompassing (that is, representing more than a simple majority of groups or populations) and that in this process elites have the loyalty and support of their communities. In the post-Meech climate, in fact well before the Meech Lake Accord itself, the basic assumptions underpinning elite accommodation as traditionally practiced, such as the norm of secrecy, had become largely discredited.<sup>10</sup> There is also a question of whom the members of the CCCU, as elites, could be said to represent and the loyalties they might be able to command from significant segments of the Canadian population. Thus while the elite accommodation model might accurately portray the efforts of the CCCU to reach a consensus, there is considerable question about the overall effectiveness of the CCCU in terms of legitimacy and acceptance by the broader polity, including significant interest groups, provincial governments and citizens at large.

#### INTEREST GROUP POLITICS

This model concerns the manner in which a variety of groups, the special interests if you like, representing both the advantaged and disadvantaged in society, were able to successfully penetrate and influence, by various means, the CCCU's deliberations and decisions on constitutional matters. Essentially these are groups that on the whole are not well represented in governments or political parties and which operate much more in the extra-parliamentary arena. Earlier writings on interest groups and their role in the constitutional process have argued that such groups have had very limited influence.<sup>11</sup> On the other hand, given the changes over the past decade regarding the increasing prominence and visibility of interest groups (and especially that of public interest groups), engendered and legitimized in good part by the arrival of the *Charter of Rights and Freedoms* in 1982, more recent writings have stressed the role of these groups in shaping the constitutional process.<sup>12</sup> It is important to ask, therefore, to what extent the CCCU was influenced by the lobbying of such groups. At the same time the question can be cast as one concerning the degree to which the CCCU was able to transcend the pleadings of special interests and represent the broader public interest in developing its proposals.

#### BUREAUCRATIC POLITICS

Ever since Graham Allison's classic study of the Cuban missile crisis, political scientists have paid close attention to how major policy outcomes can be influenced by bureaucratic interests.<sup>13</sup> There is the question both of the influence of the bureaucracy as a whole vis-à-vis politicians and the influence of different and often competing bureaus. The thrust of the Canadian federalism literature is that under the right circumstances officials in central agencies, specifically intergovernmental affairs agencies, can have considerable

influence.<sup>14</sup> With respect to the CCCU, the question becomes whether it is not the federal ministers, special interests or the general public, but non-elected federal government officials who were primarily responsible for the proposals tendered for consideration in September 1991. It was precisely this concern that led Newfoundland Premier Clyde Wells to state in June of 1991: "I'm bothered by the fact that a proposal for a national constitutional structure is being developed not by 11 first ministers behind closed doors, but by 11 or 21 or 25 deputy ministers with some federal advisers behind closed doors."<sup>15</sup>

As will be evident below, elements of all four models are useful in helping to make sense of the progress made, and not made, in achieving the broad objective set out for it by the prime minister. It will be argued that as an intrastate body, or more broadly as a deliberative forum, the CCCU had certain strengths, and in effect succeeded in its primary objective of restarting the constitutional process. It also had some distinct weaknesses, however, related in part to the nature of bureaucratic politics at the federal level, which influenced subsequent developments in the constitutional debate.

## THE PROCESS

To understand the role of the CCCU it is best to begin by noting its place in the overall Canada round process, which is best visualized in five phases:

1. From June 1990 — the failure of Meech — until April 1991, a period which saw the striking of both the Joint Parliamentary Committee on the Process for Amending the Constitution of Canada (Beaudoin-Edwards) and the Citizens' Forum on Canada's Future (Spicer Commission);
2. From the striking of the CCCU in April 1991 to the tabling of the federal proposal *Shaping Canada's Future Together* in September 1991. This period also saw tabling of the Beaudoin-Edwards and Spicer reports.
3. September 1991 until 12 March 1992. This represented the public hearings process, revolving first around the Special Joint Parliamentary Committee on a Renewed Canada (Castonguay-Dobbie/Beaudoin-Dobbie Committee) and then the five public conferences.
4. March through August of 1992: The multilateral process that saw, first, negotiations between the federal government and the "rest-of-Canada" (ROC) provinces and then later involving Quebec, eventually leading to the Charlottetown agreement.
5. August 1992 until 26 October 1992 — public debate leading up to the referendum.

This chapter is concerned primarily with phase two, the series of meetings held by the CCCU and the deliberations that led to the federal proposals in

September of 1991. Nonetheless, it is important to review briefly the events and federal initiatives prior to the striking of the CCCU. The summer of 1990 in the aftermath of the failure of Meech was in many ways a long and uncomfortable hiatus. Beginning with Elijah Harper and ending with Oka, the actions of Aboriginal Peoples made the Canadian public more aware, and more accepting, of aboriginal demands. Contrary to some expectations, one development that did *not* occur in 1990 was the wholesale defection of Quebec MPs from the Conservative caucus and Cabinet following, first, the defection of Lucien Bouchard and then the failure of Meech. Prime Minister Brian Mulroney succeeded in retaining the loyalties of most of his Quebec MPs and all of his remaining Quebec ministers.<sup>16</sup> Benoît Bouchard replaced Lucien Bouchard as Quebec lieutenant and came to play an important role in the CCCU and subsequent constitutional negotiations.

In the intergovernmental arena, one specific and visible development was suspension of all formal first ministers' conferences, prompted by Quebec's refusal to participate in them. In the summer of 1990 Prime Minister Mulroney created an ad hoc Cabinet committee on the constitution chaired by Deputy Prime Minister Donald Mazankowski. On 1 November 1990 the prime minister announced the creation of the Spicer Commission, largely in response to perceived demands for greater openness and transparency and, above all, greater citizen involvement. In December 1990 the Joint Parliamentary Committee on the Process for Amending the Constitution of Canada (Beaudoin-Edwards Committee) was struck. It was Quebec, however, with reports from the Quebec Liberal Party's Constitutional Committee (chaired by Jean Allaire — released 29 January 1991) and the Commission on the Political and Constitutional Future of Quebec (Bélanger-Campeau — released 27 March 1991), that set the pace and tempo. Bill 150, subsequently tabled in the Quebec National Assembly 15 May 1991, specified the deadline of 26 October 1992 for a referendum on proposals from English Canada for a new constitution or, in the absence of such proposals, on the issue of sovereignty itself.<sup>17</sup>

At the bureaucratic level in Ottawa there were also some important developments. Within the FPRO there was an almost complete changing of the guard. Norman Spector left as Secretary to the Cabinet for Federal Provincial Relations in August 1990 to become chief-of-staff in the Prime Minister's Office (PMO) and was replaced by Gordon Smith, who had been in External Affairs as ambassador to NATO. A number of new people, mainly from line departments, were brought in to work on different policy areas. Relatively few of them had much intergovernmental or constitutional experience, either in FPRO or other units. At the same time, given the prime minister's keen interest in matters constitutional, there was an expectation that Spector, as his chief aide and strategist, would continue to play an important role in that area. That summer of 1990 a request went out to all line departments for proposals, specifically for

suggestions of areas under federal jurisdiction that could conceivably be turned over to the provinces. September 1990 saw the creation of the Deputy Ministers' Committee on Canadian Unity, with deputies from key departments such as justice and finance to oversee the process of reviewing areas under federal government jurisdiction.

Throughout the fall of 1990 activity within the FPRO was simultaneously frenetic and aimless, with analysts keeping track of developments but having only a limited sense of their import or direction, or what forms federal initiatives should take. Someone there at the time likened it to holding a finger to a bare electrical wire, standing there frozen in place feeling the current coursing through their finger tips.<sup>18</sup> In January 1991 deputy ministerial task forces were struck to examine and report on nine different areas, including aboriginal affairs, fiscal federalism, social policy, and the economic union. Reports were to be ready by May. Ronald Watts of Queen's University was brought on board as Assistant Secretary (Constitutional Affairs) at FPRO in April of 1991, a few weeks before the appointment of Joe Clark as Minister of Constitutional Affairs. Watts in turn recruited a number of academic consultants such as Roger Gibbins of the University of Calgary, Katherine Swinton of the University of Toronto and Douglas Purvis and Peter Leslie of Queen's University to assist in the development of the federal proposals.

In the early post-Meech period the initial emphasis of the federal government was to search for constitutional solutions amenable to being handled through existing amending procedures, that is those issues not requiring unanimity, in the main so-called "7/50" issues.<sup>19</sup> This low-key, pragmatic approach was exemplified in the work of the ad hoc Cabinet committee under Mazankowski; its workings in fact were so low-key that it is almost impossible to discern its impact, at least certainly not from the public record. Joe Clark was a member of it, but apparently not an active one insofar as he missed several meetings.

Also working in relative obscurity was the Joint Parliamentary Committee on constitutional amendment (Beaudoin-Edwards). Much later, in the summer of 1991, this committee reported what most had realized earlier: if Quebec's demands were to be met, it would be virtually impossible to circumvent the political necessity of unanimous ratification, at least of certain key demands.<sup>20</sup> The Spicer Commission was proving, if not a vehicle for calming troubled constitutional waters, then certainly a means for a variety of groups and individual Canadians to ventilate their dissatisfaction with politicians and the political process. Thus well before the CCCU was struck, came the dawning in federal circles that any new constitutional round would require that all issues be on the table, including not only Quebec demands but also the issues of aboriginal rights, a reformed senate and so on. At the same time, within FPRO, officials used what was referred to as a split approach: attempting to focus as much as possible on 7/50 issues, while isolating issues such as Supreme Court



appointments and the constitutional amending formula, which would require unanimity, into a separate package.

The creation of the CCCU and Joe Clark's appointment in April of 1991 was thus premised on a number of assumptions: in contrast to the Meech Lake round, the new Canada round would have to be much more transparent and comprehensive; some means had to be found to begin the multilateral process and, at some point, to involve Quebec in the negotiations; and finally on the federal side the process would have to be led by a figure enjoying wide respect in all parts of the country. Given Brian Mulroney's direct involvement in Meech Lake, as well as his low standing in the polls, there is little doubt that this prevented him from taking a central or visible role in restarting the process. To a large degree this also applied to others closely associated with the Meech Lake process, Lowell Murray as minister of federal-provincial relations and Norman Spector, formerly secretary of FPRO. Hence the appointment of Clark, one of the few credible senior figures within the Conservative government seen as capable of handling such an assignment.<sup>21</sup>

Upon Clark's appointment, organizational problems surrounding the CCCU became evident. FPRO, as the secretariat responsible for supporting the work of the CCCU, was staffed by senior people who were not necessarily ones that Clark would have chosen. Furthermore, there was a more general sense that relatively little had been accomplished in terms of policy proposals: the deputy ministerial task forces had yet to report; there was very little for the new Cabinet committee to review or discuss. Later, when the deputy ministerial task force reports began arriving and overviews and proposals in specific areas were prepared, complaints surfaced that the material was now too ponderous and academic.

Specifically on the personnel side, after working together for nearly two months Clark indicated that he wanted Gordon Smith replaced as secretary to the Cabinet for federal provincial relations. The reasons for this are not entirely clear. It is known that as minister of external affairs, Clark had not been happy in working with Smith on previous occasions. The federal government's chief civil servant, Clerk of the Privy Council Paul Tellier, was also unhappy with Smith (despite having been responsible for his recruitment earlier), blaming him for the malaise affecting FPRO. At the same time Tellier, in representing the prime minister's interests in the process, wanted more direct influence and in this he was also joined by Norman Spector. What should be stressed, therefore, was the awkward situation of having three powerful figures — Smith, Spector and Tellier — all seeking to exercise direction over the activities of the CCCU and FPRO. It was this set of circumstances that helped set the stage for Smith's departure, perhaps triggered by frictions between Smith and Clark. The solution to the vacancy caused by Smith's leaving was that Tellier himself became Smith's replacement while retaining his position as clerk of the privy

council. The ambiguity of Tellier's position is noteworthy. He reported to the prime minister as clerk of the privy council and reported to Clark as secretary for FPRO. Nonetheless, it provided Tellier, and through him the prime minister, with a means of preserving and enhancing access to the deliberations of the CCCU.

Tellier also recruited other staff. During the course of the Deputy Ministers' Committee on the Constitution he had been impressed by the work of Jocelyn Bourgon, deputy minister of consumer and corporate affairs, who headed the Deputy Ministerial Task Force on Economic Union. She became the associate secretary at FPRO in mid-June and began bringing into FPRO people she felt were capable of bringing order to the perceived chaos in FPRO, in particular people she felt could present proposals based on the findings of the deputy ministerial task forces and individual line departments in a succinct and coherent fashion. These new people, including Suzanne Hurtubise and later Michael Wernick from Consumer and Corporate Affairs, essentially took over from Richard Dicerni and Ronald Watts the management of the paper flow. By late August Watts had shifted more to focusing on the background studies, many of which were later released as discussion papers at the same time as *Shaping Canada's Future Together*. During the critical final phase of the committee's work in September most of the drafting and revising of proposals was handled directly by Bourgon and Hurtubise.<sup>22</sup>

The role and style of Bourgon and Hurtubise were critical. Essentially, they used their experience with the economic union deputy ministerial task force as a model, that is to decentralize and consult, bringing departments much more openly into the process, farming out some of FPRO's responsibilities directly to the departments, for example, asking departments to prepare position papers. Their methodology was quite different from the closed shop approach of FPRO under Gordon Smith, that is: limited consultation and playing things close to the vest. The closed shop approach was perhaps particularly pronounced under Smith, but it has been in general a hallmark of FPRO's *modus operandi vis-à-vis* line departments, especially during constitutional negotiations.

The changes wrought by Bourgon and Hurtubise came into effect mainly during July and August. Preparations for the first meeting of the CCCU in Winnipeg, however, including the overview of what ought to be addressed in the federal proposals, had been undertaken by Watts and his consultants and, before being presented, were vetted by the then troika of Smith, Tellier and Spector. This troika constituted the core of the steering committee for the process. The steering committee was expanded when Joe Clark, upon his appointment as minister, decided to chair it. This soon changed, however, as scheduling problems and his overall workload made it impossible for Clark to continue in this position. Tellier became chair and Clark ceased to attend meetings of the steering committee. Fred Gorbet, Deputy Minister of Finance,

John Tait, Deputy Minister of Justice, Mary Dawson, Associate Deputy Minister of Justice, and James Judd, Clark's Chief-of-Staff became members; and later in June the steering committee was joined by Bourgon and Hurtubise, the latter becoming recording secretary. The dominant roles, however, remained those of Tellier and Spector, and the steering committee itself throughout the process played the singularly important role of framing the agenda, supervising the drafting of briefings and proposals for the CCCU, and, ultimately supervising the drafting of the final report. Rather strikingly, almost all the members of the steering committee had been brought up and educated in, or were longtime residents of, Montreal.

#### THE CABINET COMMITTEE

Turning to the CCCU itself, its composition did not differ radically from the Cabinet's premier committee, Priorities and Planning (P&P). The key difference was that it was chaired by Clark rather than the prime minister, and the latter was not a member. The complete membership of the CCCU is given in Figure 6.1.

Of the 18 ministers, five were from Quebec.<sup>23</sup> Overall the committee represented a good cross-section of the country as a whole. At the same time CCCU members shared a number of characteristics: they were not well versed on constitutional matters, most were in fact relative neophytes, and, at least at first, they embraced their task reluctantly. In the beginning Clark had to expend considerable energy cajoling CCCU members to participate; and ministers were initially unwilling to leave Ottawa for the out-of-town meetings of the committee that Clark had planned in various locations throughout Canada.<sup>24</sup> Secondly, at least in the eyes of some officials, CCCU members appeared to want officials and academics to present them with ready answers; they were most anxious to see specific solutions and were very reluctant to think up any of their own. Other observers were more charitable. They noted that ministers, despite an initial reluctance to leave Ottawa for the meetings, did participate wholeheartedly: attendance was remarkably good and individual ministers did bring forward some of their own ideas, such as having the provinces play a role in appointing members of the board of directors of the Bank of Canada along the lines of the German Bundesbank. In this instance Department of Finance officials persuaded ministers that the scheme could only be made to work if the Governor of the Bank was provided with greater independence and a more specific mandate. Furthermore, the ministers' lack of schooling in constitutional matters did mean that their views, beliefs and sensibilities were closer to that of ordinary Canadians. One additional factor accounting for the inability of at least some ministers to rise to the occasion was that they were cut off from their normal support staff. In virtually all other settings ministers could expect to be briefed

**Figure 6.1: Members of the Cabinet Committee on Canadian Unity (CCCU)**

<i>Member</i>	<i>Province</i>	<i>Portfolio</i>
The Rt. Hon. Joe Clark	Alberta	Constitutional Affairs, President of Privy Council
The Hon. John Crosbie	Newfoundland	Fisheries & Oceans, Minister for Atlantic Canada Opportunities Agency (ACOA)
The Hon. Don Mazankowski	Alberta	Deputy Prime Minister, Finance
The Hon. Elmer MacKay	Nova Scotia	Public Works
The Hon. Jake Epp	Manitoba	Energy, Mines and Resources
The Hon. Robert De Cotret	Quebec	Secretary of State
The Hon. Perrin Beatty	Quebec	Communications
The Hon. Michael Wilson	Ontario	Trade and Industry, Science and Technology
The Hon. Bill McKnight	Saskatchewan	Agriculture
The Hon. Benoît Bouchard	Quebec	Health and Welfare
The Hon. Marcel Masse	Quebec	Defence
The Hon. Barbara McDougall	Ontario	External Affairs
The Hon. Lowell Murray	Ontario	Government Leader in the Senate
The Hon. Jean Charest	Quebec	Environment
The Hon. Bernard Valcourt	New Brunswick	Employment and Immigration
The Hon. Doug Lewis	Ontario	Solicitor-General
The Hon. Kim Campbell	British Columbia	Justice Minister and Attorney-General
The Hon. Gilles Loiselle	Quebec	President of the Treasury Board, Minister of State (Finance)

Source: Office of the Prime Minister, *News Release*, 21 April 1991.

by both departmental civil servants and their own political staff. This was not the case here. There was little or no advance briefing material given to the ministers beforehand; and all material, discussions and decisions were to be kept strictly within the confines of the CCCU.

There was variation among ministers in their interest and degree of participation: John Crosbie was relatively inactive, as was Elmer MacKay; Mazankowski, while active, did not have strong views, except possibly on the distinct society issue; Kim Campbell and Perrin Beatty of the anglophone ministers were among the more dynamic and vocal members of the committee and had distinct views on most issues. Michael Wilson was most interested in the economic union issue. Among the Quebec ministers, while Bouchard did most of the talking, Loiselle was perceived to carry more weight; certainly the other Quebec ministers deferred to him. Jean Charest tended to speak during the closing phases of meetings and was regarded as particularly adept in perceiving common ground and integrating the often disparate views in the discussion. His views tended to carry less weight, however, certainly among Quebec ministers largely because of his junior status. While there were shadings of opinion, all Quebec ministers felt strongly about the distinct society principle. And, given the Quebec government's formal abstention from the constitutional process, the five ministers were acutely aware of the burden they carried in representing Quebec interests.

As noted, part of Clark's strategy for handling the committee involved a series of meetings taking place in different locations in Canada. A list of these meetings over the summer of 1991 is shown in Figure 6.2. These sessions would last two days on average and, clearly, were intended to wrest ministers away from the pressures and obligations of their portfolios in Ottawa so that they could devote their full attention to the constitutional matters at hand. These meetings were also intended to give them an opportunity to meet with groups and individuals in the different locales and to give them a feel for the different regions of the country.<sup>25</sup> In between these major sessions there were also shorter meetings in Ottawa, typically lasting an afternoon. The out-of-Ottawa meetings concentrated on broader issues while the briefer Ottawa meetings focused on resolving specific questions. Early on the CCCU adopted a self-imposed deadline of September 1991 for readying the federal proposals. As indicated in Figure 6.2, the CCCU met for major sessions approximately every two weeks until the middle of August. Then two sessions of the Cabinet's P&P committee, which included the prime minister, reviewed the CCCU's handiwork and resolved outstanding issues. After public release of the proposals the role of the CCCU changed considerably. It was reduced effectively to a working group of approximately eight ministers, a number that crept back up to 12 by March of 1992, and was used mainly as a sounding board. In effect, when the constitutional proposals moved to the parliamentary and later multilateral arenas

**Figure 6.2: Meetings of the Cabinet Committee on Canadian Unity Held Outside Ottawa**

<i>Date</i>	<i>Location</i>
10-11 May 1991	Winnipeg, Manitoba
25-26 June 1991	Niagara-on-the-Lake, Ontario
3-4 July 1991	Quebec City, Quebec
9-10 July 1991*	Meech Lake, Quebec
1-2 August 1991	Charlottetown, P.E.I.
14-16 August 1991	Iqaluit, N.W.T.
27-28 August 1991**	Kelowna, British Columbia
12-13 September 1991**	Sherbrooke, Quebec

\*This meeting was with the prime minister.

\*\*Meetings of the Priorities and Planning Committee (P&P) to deal with the federal constitutional proposals.

(phases 3 and 4 of the Canada round process as noted earlier) the CCCU ceased to have much influence.

The CCCU did not meet formally with groups or individuals, nor did it hold open hearings. It was only during luncheon sessions or receptions at the out-of-town meetings that groups might have an opportunity to interact with individual ministers, but these sessions were not well advertized and invitations were available mainly through local Conservative MPs. At one point in July, shortly after the Quebec City meeting of the CCCU, Clark by himself had a well publicized meeting with Grand Chief Ovide Mercredi of the Assembly of First Nations (AFN). An agreement was struck between the two that would see the Aboriginal Peoples organize their own consultative forums on the constitution and exchange ideas and information regularly with the CCCU.<sup>26</sup> While there may have been informal contacts subsequently between Clark and Mercredi, beyond this initial meeting there is no evidence of regular meetings between the AFN and Clark or the CCCU. Direct participation of the AFN in the constitutional process came later during the multilateral phase.

There were links between CCCU members, remaining members of Cabinet and the Conservative caucus. These were mainly individual links — there is no evidence of systematic efforts to brief caucus during the course of the summer — although items were included in the final package to appeal to some of

the more vocal elements in the caucus. The proposal for a Charter amendment to guarantee property rights was seen as one such item. As noted, on the whole efforts were made to keep a tight lid on the process. Usually, ministers only saw the most recent proposals upon entering the room and after discussing them would be asked to leave the drafts behind.<sup>27</sup> After the meeting at Meech Lake on 9-10 July, the only one attended by the prime minister until the P&P meeting late August, Mulroney explicitly warned ministers and instructed them not to discuss CCCU deliberations outside the confines of the meeting room.<sup>28</sup> This constrained Benoit Bouchard, by far the most voluble minister, but only somewhat. During the course of the summer a number of ministers, including Clark, continued to provide at least hints as to progress or lack of it within the committee. At other times actions were louder than words, for example, when four of the five Quebec ministers appeared to walk out for a short period during the meeting in Iqaluit.<sup>29</sup>

For the first major session, 10 and 11 May 1991, in Winnipeg FPRO staff had prepared an overview of the seven major issues: distinct society, economic union, central institutions, the Charter, language rights, Aboriginal Peoples, and the distribution of powers. Separate presentations were made on each of these issues at subsequent meetings. The preparatory work for this was done mainly by Watts under the guidance of the steering committee; subsequently experts in particular areas developed these issues and made more detailed presentations, such as those by Purvis and Leslie on the economic union, Gibbins on central institutions and Swinton on the distribution of powers. Later in August and September Bourgon and her officials took on responsibility for drafting specific proposals in light of CCCU discussions and again under the eye of the steering committee.

The sequence in which issues were discussed by the CCCU was determined in part by the format of the present constitution and the ill-fated Meech Lake document; these presented items in a primary order, for example, basic values were followed by central institutions and so on. The Canada clause and distinct society, therefore, came first in the discussion; then in late May the committee began tackling central institutions. Aboriginal issues came next, followed by the economic union. The distribution of powers issue was not discussed until near the very end of the process. The order in which these items were handled was of more than minor import. Considerable time was devoted to the distinct society clause and central institutions, for example; the economic union issue also proved contentious. Later at the end of the summer, when the committee ran up against its self-imposed deadline of September, distribution of powers, an issue of crucial importance to Quebec, was finally discussed in detail but in very rushed fashion. The term "tackling issues" is used advisedly and does not imply that agreements were always reached. At any given meeting a frequent outcome was stalemate, with perhaps the only agreement being that the issue

would be revisited later. This was especially true with regard to central institutions and the distinct society clause, about which the Quebec ministers felt strongly but where there were often equally strong opposing views from the non-Quebec ministers. In a statement to the press during an apparently tempestuous session in Quebec City, Benoît Bouchard, vice-chair of the CCCU, told reporters: "We have to get over walls 75 feet high, established by different cultures over 200 years."<sup>30</sup> And later Bouchard noted, "I have to admit that in terms of explaining or trying to convince that Quebec is different, it's a lot of frustration."<sup>31</sup>

The question, however, was not on whether a distinct society clause ought to be included; that was never an issue. As Clark noted at one stage during the summer, "It's accepted by the ministers as a fundamental concept that there is a distinct society here."<sup>32</sup> The debate was essentially over its form and its reach. Furthermore, it appears that the Quebec ministers were in some respects playing a double game, that is intimating to the media the presence of major rifts between themselves and the rest of the committee that in reality did not exist. This posturing was no doubt related to the difficult position in which the Quebec ministers found themselves, of the need to present themselves to their Quebec constituency as strong representatives aggressively pursuing Quebec interests in the face of anglophone opposition.<sup>33</sup> To be sure there were differences over the distinct society clause but again they related more to form and its placement in the proposed document.

In other areas, such as central institutions, there was perhaps more common ground. Western ministers, while favouring an elected Senate, were not strongly wedded to a Senate with equal representation, not even the ministers from Alberta. At one point the committee favoured a Pepin-Robarts type solution, that is an appointed Senate where both levels of government would be able to select members, until it was pointed out by officials that this proposal had received very little support when it had been made in earlier constitutional rounds. Here the committee was clearly struggling with the problem of finding ways to meet public expectations for a properly elected Senate, whetted in part by the federal government having committed itself to this concept in the parallel agreements of 1990 intended to help save the Meech Lake Accord, while at the same time providing some kind of institutional mechanism allowing for the direct representation of provincial government interests. The end result was the proposal for both an elected Senate and a Council of the Federation that appeared in the September package. Progress on central institutions, however, did tend to undermine progress made in other areas, such as distinct society.

The subject of the Canadian economic union was also cause of much debate and pre-occupied several sessions. And like the distinct society clause, while there was no objection to the basic principle of economic union there was disagreement over its concrete conceptualization. Some ministers felt that the



objective of economic union was best realized through the reinforcement of section 121, that is that the prohibition of barriers to interprovincial trade be extended to services, people and capital. Others put greater emphasis on harmonization in areas such as interprovincial transport. As well, debate centred around the means to be used to enforce the economic union and whether new provisions were best placed under section 91 (federal powers) or section 95 (concurrent powers). At a later stage there was discussion over an opting-out provision, both on its desirability and, if there was one, whether it should be renewable.<sup>34</sup>

Much of the debate within the CCCU cut across the Quebec-ROC divide, at least in the sense that Quebec ministers as a whole were neither more nor less opposed to the notion of a strong economic union compared to the others, which in some respects was surprising in light of the controversies that arose later after the release of the proposals. In the view of Quebec ministers on the committee, Quebec favoured a strong economic union; after all this was one of the major themes of the Allaire Report! This was also the position of Department of Finance officials, who played a key role on briefing ministers on the issue. With the benefit of hindsight, it was clear that Quebec ministers on the committee, and all members for that matter, had not anticipated the variety of interpretations that could be placed on the economic union proposals and that perhaps insufficient attention had been paid to alternative means for ensuring adherence to a set of proper and effective economic union provisions.

On other issues, however, little progress was made. The emotive question of distinct society, where the debate and misunderstandings tended to mirror in part those in Canadian society at large, was intrinsically difficult to resolve. Part of the blame, however can also be placed on the manner in which the chair of the CCCU, Joe Clark, conducted the meetings. His style was to let people talk as much as they wished, with little direction, in the hope of eventually reaching a consensus. While this approach did serve to help members educate each other, unfortunately it also hindered the committee in being able to bring matters to a conclusion, particularly on contentious issues. As will be noted below, Clark's manner of chairing meetings of the CCCU had further implications with regard to the role and influence of officials.

Throughout the process, ministers were acutely concerned with how the proposals would fly with the general public, and to this end detailed polling information was provided on all of the issues, and much of the discussion centred on what the public reaction might be, or whether public expectations would be satisfied, with regard to specific recommendations.<sup>35</sup> This presumably was one of the strengths of the CCCU, acting as the political antenna of the government, as a political reality check on proposals generated by officials, for example. On certain issues public opinion was reasonably clear cut. A strong majority of Canadians favoured affirming or extending aboriginal

rights. On Senate reform a plurality of Canadians favoured not an equal and elected Senate but simply outright abolition of the Senate. The dilemma was, however, that public opinion on a number of issues, on economic union, for example, was ill-formed at best, non-existent at worst. As is often the case, it is only when proposals are spelled out, and after discussion in the media by other political actors and the like, that the opinions of citizens begin to gel, and these opinions may be quite different from those held at an earlier stage.<sup>36</sup> Thus in September 1991 a Decima report to FPRO indicated that non-Quebecers' willingness to make compromises had actually lessened over the course of the summer.<sup>37</sup>

Overall, in terms of regional representation, the voices heard most forcefully within the CCCU were those of ministers from Quebec and western Canada. One common refrain was, "how would this particular proposal play in Alberta? Or in Quebec City?" Very rarely, if ever, was the question asked, "how would this play in Atlantic Canada?" Neither Crosbie nor MacKay were energetic participants. Bernard Valcourt, the third minister from the Atlantic region, was concerned primarily with the interests of francophones outside Quebec, an issue that often put him at odds with Quebec ministers, and those of his portfolio of Employment and Immigration. The views of Perrin Beatty, the most active participant among the Ontario ministers, represented a blend of sectoral and national concerns. Simply on the basis of his stated beliefs, it was difficult to discern he was from Ontario. Quebec ministers were clearly committed to positions important to their province. Non-Quebec ministers, to the extent that they were regional advocates, appeared to be more grudging in arguing their case and were more likely to justify their position in pragmatic or strategic terms.

#### THE STEERING COMMITTEE AND BUREAUCRATIC INFLUENCE

Prior to each meeting of the CCCU, proposals would be drafted by the steering committee. The ministers would discuss them at length; the steering committee and officials would then revise them in light of the discussion in the CCCU. The process was largely one of narrowing the options; while the CCCU was frequently unable to give specific directions or indications of specific proposals to the steering committee, it was nonetheless able to say what it did not like. Proposals often went through several iterations, and in this fashion progress was gradually made. At the end of many of the marathon sessions of the CCCU, however, because little had been accomplished by the ministers themselves, the steering committee draft proposals would often become decisions by default.

The steering committee, therefore, became the cockpit in which the direction of the CCCU's deliberations were set. And it was the prime minister's two key officials, Tellier and Spector, who effectively dominated the steering

committee.<sup>38</sup> In a room, on the walls of which were sometimes posted some of Spector's decision tree charts depicting the possible outcomes of different roads taken, steering committee officials would deal not only with proposals to be readied for next day CCCU deliberations but also longer term strategic considerations. It was also here where the influence of other officials, and through them certain agencies, could be felt. The two officials from Justice, John Tait and Mary Dawson, played a crucial role in drafting and redrafting the key sections on distinct society and aboriginal rights. Their role, however, was primarily one of facilitating, bringing some coherence to the sentiments of the CCCU in relation to the substance of these important issues, as distinct from asserting a particular agency interest.

If there was a discrete agency interest at work within the steering committee it was most likely that of Finance. The deputy minister of finance, Fred Gorbet, was both the main source of expertise on the topic of economic union for the steering committee and the CCCU and felt strongly about the issue of reducing interprovincial barriers. The Department of Finance had a special working group on the constitution that prepared much of the background material and helped draft the section on the economic union that ultimately appeared in *Shaping Canada's Future Together*.<sup>39</sup> The approach and philosophy of the special working group and of the Department of Finance as a whole can be discerned in the background paper, *Canadian Federalism and Economic Union*, released in September 1991 at the same time as the federal proposals.<sup>40</sup> An equally critical factor, however, was that the report of the Deputy Ministerial Task Force on Economic Union, chaired by Gorbet and Bourgon, was considered by far to be the most coherent and plausible of those submitted by the nine task forces.<sup>41</sup> As such the report on economic union had considerable impact on the drafting of the initial proposals considered by the CCCU; further it was the quality of the report that drew the attention of Tellier and resulted in Bourgon's move to FPRO and a position on the steering committee.

Beyond this, one must recognize the political context that gave impetus to the position of officials from Finance. During the initial post-Meech phase in 1990 and in the May 1991 speech-from-the-throne, where constitutional reform was twinned with the theme of rendering the Canadian economy more competitive, the government had indicated that the elimination of interprovincial barriers to trade and mobility would be an important goal for the federal government in any future round of constitutional negotiations.<sup>42</sup> Within Finance the issue of ensuring the integrity of a genuine Canadian economic union had been a long-standing concern; it was promoted by the long serving minister of finance, Michael Wilson, and it appeared to have the strong endorsement of the prime minister himself. For Gorbet a major goal, therefore, was to ensure that the government's position on economic union would be high on the agenda of the CCCU and become a major plank in the federal government's

constitutional proposals. Within the steering committee he had the opportunity to see that this was accomplished.

Gorbet was not alone in arguing strongly on behalf of an effective economic union proposal. Most officials within FPRO were sympathetic. And for strategic reasons it could be argued that the proposals on economic union would help impart a strong Canadian identity to the overall package. Where there was disagreement was on how the economic union proposal should be cast, particularly with respect to the active management of the economic union. Some officials thought it best that management powers be brought under section 95 of the *Constitution Act* as a concurrent power along with immigration and agriculture, indicating that it was not solely a federal power and thereby ensure greater likelihood of acceptance by the provinces. Those from Finance, however, were fearful that this might weaken the provisions and that it should, instead be placed under section 91, as a new head entitled "91A," the section normally reserved for federal powers.<sup>43</sup> The end result was a recommendation in *Shaping Canada's Future* that the "Power to Manage the Economic Union" provision "be added ... immediately after section 91."<sup>44</sup> Mazankowski, as minister of finance, endorsed the economic union proposal; but it is interesting that within the CCCU he did not give the impression of necessarily being the strongest proponent or promoter of this issue. This role clearly appeared to belong to Minister of Trade Michael Wilson with support from External Affairs Minister Barbara McDougall.

Evidence of departmental interests, as articulated through ministers, can also be discerned with respect to the distribution of powers issue, which as noted was not addressed until the end of the summer. In fact the prime minister in one of his briefings with Joe Clark in early August expressed considerable alarm that so little had been accomplished in this area. And when the issue was discussed a number of the ministers dug in their heels with the view to protecting departmental interests. Perrin Beatty, for example, as minister of communication was highly resistant to seeing the federal government give up significant powers in this field. And the reports of the nine deputy ministerial task forces, which were supposed to provide indications of areas that could be turned over to the provinces, contained very few actual candidate areas for decentralization other than important elements of language policy. This helps explain in part why the federal proposals ultimately proved disappointing to those who were expecting the federal government to yield more in the way of powers to the provinces.<sup>45</sup> With respect to language policy, after some initial forays the CCCU decided to leave this sensitive topic alone, a sentiment shared by the prime minister, Joe Clark and outsiders such as Robert Bourassa and former Alberta premier Peter Lougheed who indirectly advised the committee at various stages.<sup>46</sup>

Ministers such as Beatty, however, were not simply representing departmental interests. A number, including Beatty and Wilson, felt strongly about maintaining a strong federal government and not only with respect to their own portfolio interests. The case for decentralization was carried in the main by the Quebec ministers. The only area where they had much success, however, was in the field of labour market development and training. Jurisdiction over this area was something that the Quebec governments had long pressed for; within the CCCU the Quebec ministers took up the case, led by Bouchard who as a former college principal had a personal interest in the issue. The proposal for yielding labour market training to the provinces was first discussed at the Charlottetown meeting in early August and was not resolved until after the Sherbrooke meeting.

#### THE FINAL STAGES AND BEYOND

Several points, some of them quite substantial, remained unresolved when the results of the CCCU's deliberations were presented to the P&P committee of Cabinet first in Kelowna 27-28 August 1991 and then in Sherbrooke. The significance of the shift from the CCCU to P&P was that the prime minister himself was now in the chair, providing an opportunity for him to apply his considerable skills in bringing people together and reconciling their interests. This period also saw direct consultations with Quebec. According to an article in the *Montreal Gazette*, on 17 August after the Iqaluit meeting, Paul Tellier travelled to Bourassa's summer home in Sorel, Quebec, where Bourassa appeared to express satisfaction with the developing package.<sup>47</sup> Matters seemed to be progressing satisfactorily at the Kelowna meeting. Two weeks later, however, Bourassa's right hand-man, Jean-Claude Rivest, arrived in Ottawa to inform officials that Bourassa, upon reflection, was far from happy with the document and wanted changes. The distinct society clause, and in particular its placement in the constitutional document, remained a source of contention as well as the economic union provisions, among other issues. News of Bourassa's unhappiness led the Quebec ministers to increase their resolve to protect their province's interests. Two days before the scheduled Sherbrooke meeting of P&P, Mulroney called a "crunch meeting" of Joe Clark, his senior Quebec ministers — Loiselle, Masse and Bouchard — as well as Lowell Murray and Perrin Beatty who apparently still had major difficulties with the distinct society provision. Also in attendance were Tellier and Spector.<sup>48</sup> According to officials, "excellent progress was made."<sup>49</sup> The distinct society issue was largely resolved at the Sherbrooke meeting and, as well, "western ministers Don Mazankowski, Kim Campbell and Harvie Andre finally convinced their Ontario colleagues to accept an elected Senate with a limited veto."<sup>50</sup>

After the Sherbrooke meeting on 12-13 September differences still remained. At this stage it appears the CCCU was willing to entrust the prime minister to impose a solution on outstanding differences. As Bouchard explained it: "Those questions are for the Prime Minister: the co-ordination, the moment it will come out, what will be in it ... There are moments when all that depends on the Prime Minister himself. That's where we are."<sup>51</sup> Between this last combined P&P-CCCU meeting and the public release of the proposals on 24 September the prime minister made the final decisions on both labour market training and the economic union.<sup>52</sup>

The main highlights of *Shaping Canada's Future Together* were as follows:<sup>53</sup>

- A Canada clause acknowledging the core values of the Canadian identity;
- Recognition of Canada's linguistic duality and of Quebec's distinctiveness;
- A constitutional amendment to entrench a right to aboriginal self-government within the Canadian federation;
- A directly elected Senate providing more equitable provincial and territorial representation as well as aboriginal representation;
- An economic union managed by the federal government to guarantee the free movement of persons, goods, services, and capital within Canada;
- More control for provinces in immigration, culture and job-training;
- Creation of a Council of the Federation to determine shared-cost programs and national standards, composed of federal, provincial and territorial appointees; and,
- Charter amendments to guarantee property rights.

Upon release of these proposals the federal government concentrated most of its communication efforts on stressing that the package was not cast in stone; that the intent was to provide some basis for re-opening discussion of constitutional issues; and that in certain areas such as Senate reform important details still needed to be resolved. Some of the elements of the federal government's longer term strategy could be discerned, however. With the exception of the amending formula and procedures for Supreme Court appointments, the package was designed to circumvent the unanimity rule so as to avoid the case, as with Meech Lake, of one or two provinces being able to veto a final package. The proposals broke ground by affirming in principle a process to allow Aboriginal Peoples to attain self-government. Clearly the government wished to avoid a situation of eliciting negative reactions to its proposals right at the outset; it certainly did not want the aboriginal community to become an immediate opponent and thereby trigger negative public sentiment. Also, in

citing the need to entrench aboriginal rights and not just the need to recognize Quebec's distinctive nature among the "compelling reasons for constitutional renewal," Ottawa was sending a signal that this was not just a package for Quebec.<sup>54</sup>

Upon their release it was planned for the proposals to be turned over almost immediately to a special Joint Parliamentary Committee. Thereafter, it was hoped, the multilateral process would begin. Even before the Joint Committee began its hearings, however, the prime minister began intimating that certain features in the proposals, mainly those relating to the economic provisions, would likely be altered. For a time in October-November 1991 it appeared the whole endeavour would sink in the morass of the ill-fated Castonguay-Dobbie Committee. Revival of the Committee through the appointment of Gérald Beaudoin as the new co-chair and a parallel series of mini-conferences helped restart the process and resulted in significant changes to the *Shaping Canada's Future Together* proposals. Thus even before the start of the multilateral process in March, provisions such as the property rights amendment, the Council of the Federation and some of the more central components of the economic union proposal had been dropped.

At the time *Shaping Canada's Future Together* was released the understanding within the CCCU was that the Cabinet would have an opportunity to revisit the proposals, essentially to have a final say over the package, most likely before the start of multilateral negotiations. This was not to be, however. What started out as preliminary feelers to the provinces in early March 1992 very quickly blossomed into fullscale negotiations on 12 March. There was no longer an opportunity for the CCCU to participate in any significant manner. As noted, after release of the proposals in September 1991 the CCCU became little more than a sounding board. Clark continued to consult with key ministers such as Mazankowski and Wilson, but Norman Spector who left as Chief of Staff of the PMO in January 1992 and his replacement, Hugh Segal, made it clear to officials in FPRO that they did not wish to involve further the CCCU in the delicate process of dealing with the provinces and, ultimately, of enticing Quebec to the negotiating table.

Some ministers, especially those who felt they had particular interests at stake, were distinctly unhappy with the course of events and from being excluded from the process. Thus by July 1992 longtime Mulroney loyalist Michael Wilson publicly voiced his displeasure over what he saw as the gutting of the economic union proposal: "I have to say that I have some problems with the proposal as it stands now.... The results of the federal- provincial agreement last week are not good enough. We've got to do better."<sup>55</sup> Clearly, during the more critical phases of constitutional negotiations federal ministers, other than those directly involved in the negotiations such as Clark and Bouchard, were

reduced to the role of bystanders, and Cabinet as a whole had reverted to its more traditional role of non-involvement.

## ANALYSIS

To better understand what transpired and to draw lessons it is best to return to the four categories introduced at the beginning, although in the following discussion it makes sense to pair the categories, as will be seen.

### INTEREST GROUP AND BUREAUCRATIC POLITICS

It is clear that interest groups had little in the way of direct access to the CCCU process. In many ways the strategy of having the CCCU meet in different locations across the country was a clever one. It imparted a sense of the ministers breaking out of their cloistered Ottawa surroundings meeting with ordinary Canadians (selected ordinary Canadians to be sure). At the same time newspaper reports indicated that the logistics of this hectic travel schedule made it exceedingly difficult for various organizations to meet with the minister of constitutional affairs or to have him speak to their members.<sup>56</sup> Some of the proposals in the September package were clearly designed to cater to certain special interests, the proposals concerning aboriginal rights, for example. But these propositions were in response to long-standing and well-known claims by the Aboriginal Peoples, reinforced by the events of the summer of 1990, and not a result of specific lobbying during the summer of 1991. To the degree that there was a specific minister arguing on behalf of natives, it was Joe Clark who had definite sympathy for their position. And to the extent that the aboriginal community had a particular influence, it was the realization by the committee that given the general sympathy for aboriginal rights among the public at large the government simply could not afford to incur the enmity of this significant group, especially not at the beginning stages of the Canada round process.

In brief, while the CCCU was aware of the position of different interest groups and cast its proposals in part in response to the perceived significance of those groups, the CCCU managed to keep itself well insulated from direct lobbying pressures and, even more importantly, did not at any stage become involved in debate or direct negotiations with groups.

In assessing the influence of the bureaucracy one has to keep in mind that it was not simply a matter of the bureaucrats versus the politicians. There were differences between officials in central agencies and line departments; and there were differences within central agencies, in FPRO for instance where the approach of officials recruited under Gordon Smith was quite different from that of officials brought in under Jocelyn Bourgon. The interests of the different officials also varied. For Norman Spector, the goal was largely strategic — getting a deal. For Fred Gorbet of Finance, the goal was in some sense both



narrower and more substantive. For him preserving and enhancing the economic union was most critical. It should also be stressed that in many instances there were alliances that crossed the administrative-political divide. Thus the positions articulated by officials from Finance were strongly supported within the CCCU by ministers such as Michael Wilson and Barbara McDougall. Furthermore, there was support for the economic proposals among both ministers and officials simply on the basis of strategy: the federal government could not be seen as giving away too much to the provinces; there had to be something over which Ottawa was seen to have influence if not outright control; and subsequent bargaining in the parliamentary arena and with the provinces would likely see the initial federal position being eroded.

At the same time there were definite differences of opinion between officials and ministers. Clark, for example, was opposed to the idea of a national referendum, while Spector was of the view that this was a weapon that the federal government would be wise to have in its arsenal and for that reason should be taken into account in designing the package, if only for strategic reasons.

The approach of FPRO under Bourgon, of consulting more extensively with line departments and other agencies than had hitherto been the case, had the effect of giving those departments more say in the process. The impact here can be found in the rather limited number of powers that the federal government appeared willing to yield to the provinces, much less than was initially expected in the spring of 1991. The exception was labour market training, and this was only the result of strenuous argument by the Quebec ministers. Among bureaucratic interests, Finance can be seen as the biggest winner on the economic union issue, although in this instance it was a largely Pyrrhic victory as most of the economic union provisions were stripped away or radically weakened during the Joint Parliamentary Committee and multilateral stages. Some have argued that it was largely a matter of packaging, that rather than a section 91A there should have been a section 95A, and that a "federal power grab" was never the intention by either Finance or the CCCU. Outside observers, however, have noted that the provisions in the September document could legitimately be seen to centralize federal powers in economic matters, in part because the proposed sections 121(3) and 91A would not bind Ottawa.<sup>57</sup> At a minimum the federal economic union proposals helped trigger negative comments about the document as a whole, especially in Quebec, in a way that a milder set of proposals might not have done.

In short, bureaucratic interests had an important role in shaping the September package: less was yielded to the provinces in terms of the distribution of powers and the economic union provisions were more forceful than they might have been. Again, however, the broader strategic elements at play facilitated bureaucratic interests in generating support for their position. In addition, it

should be stressed that the influence of officials, and the steering committee in particular, was in part a result of stalemate within the CCCU itself. It would not be unfair to say that at times ministers simply invited officials to fill a vacuum that existed within the CCCU. Furthermore, simply from a process point of view, the steering committee played a critical role in keeping the CCCU on track and in refining the various proposals and the collective thoughts of the CCCU into a coherent document ready for release in September. This was no small achievement. Finally, it should be noted that the consultative-cooperative approach fostered by Bourgon and her officials within FPRO and vis-à-vis line departments may have served the federal government less well in the post CCCU phase. That is, in dealing with provincial governments during the multilateral phase, an arena where governments are much more used to playing things close to the vest and less willing to concede points, the cooperative and decentralized style of negotiating agreements favoured by Bourgon may have put the federal government at a disadvantage in making trade-offs or extracting concessions and more generally in influencing the overall course of events.

#### INTRASTATE FEDERALISM AND ELITE ACCOMMODATION

To what extent did the CCCU succeed in bringing differing regional and provincial interests to bear on the constitutional issue and to what extent were they reflected in the outcome? And to what degree did the ministers succeed in overcoming long-standing enmities over language and the like? According to one observer, *Shaping Canada's Future Together* reflected all too much the regional particularisms inherent in the country:

Mulroney ministers tend to be deeply rooted in their regions. Few have an over-arching sense of the whole country. Fewer still can speak both languages. In the end, what emerged was a brokered deal in which each region seemed to be offered something of interest.<sup>58</sup>

This would suggest that the CCCU, in reconciling competing regional interests, acted as an intrastate institution. One might wish to quarrel with this characterization, at least in part. Certain regional interests, Quebec and the west, likely had more influence than other regions. As well, it can be argued that inclusion of the economic union and aboriginal rights provisions both broke new ground and to a degree transcended regional differences. Recognition of Quebec as a distinct society, while designed to meet demands from the Quebec ministers, can also be seen as representing a broader spirit of compromise. Furthermore, items such as the property rights amendment reflected more internal Conservative party ideology than any particular regional dimension.

To the degree, however, that the brokered deal represented primarily the interests of the regions two points ought to be made. While ministers may have reflected in their arguments distinct regional views, these views were not

necessarily those of provincial governments. Nor is there evidence that ministers saw themselves as representing those governments. For example, western ministers, while favouring an elected Senate, did not support equal representation within that body. Furthermore, "provincial governments were told only in general terms about the outlines of the emerging package."<sup>59</sup> As one provincial official put it: "Our principal sources of information were the CBC and *The Globe and Mail*."<sup>60</sup> The exception may be Quebec. More so than the others, Quebec ministers (and in a sense the whole committee) did attempt to anticipate, and to a degree cater to, Quebec government views. Throughout there was a feeling that Quebec was constantly "at the table." Marcel Masse had at least two meetings with Bourassa. The Quebec government and premier were from time to time kept abreast of developments within the CCCU and efforts were made to elicit from Bourassa his reactions to possible proposals. If there was a flaw in the consultative process it resided with the Quebec government and with Bourassa's unwillingness to reveal his hand until near the very end of the CCCU process in September. Bourassa's hand, in turn, was likely constrained by conflicts and machinations within the Quebec government and the Quebec Liberal party.

In short, ministers were not primarily seeking to represent provincial government interests, with the possible exception of Quebec, and this was both a strength and a weakness. In not taking more explicit account of provincial government interests, this likely made the multilateral phase more difficult later on. On the other hand, it did mean that ministers were able to capture a wider range of views, and while *Shaping Canada's Future Together* may have had in the eyes of some a provincial flavour to it, at least it was a more broadly grounded provincialism based on more than just provincial government views.

The second point is that the CCCU never pretended to be a full-scale intrastate body. That is, it did not see itself as representing expressly the interests of the regions from which the ministers were drawn. Nor did it make any claims to be the final arbiter of what kind of constitution Canadians should have. Its pretensions were more modest: to act as a forum in which a set of initial proposals were to be developed for purposes of further discussion and negotiation. And in this the CCCU succeeded reasonably well, if success here is measured by the fact that the federal proposals did restart the constitutional process. When released in September the package drew grudging praise from Premier Wells who, while expressing doubts about the ultimate fate of the package did praise Joe Clark for his "tremendous effort."<sup>61</sup> And Robert Bourassa, while describing the economic union proposal as unacceptable to Quebec, nonetheless indicated a willingness to negotiate on the constitutional package as a whole.<sup>62</sup> Overall, assessments must be tempered by the fact that the CCCU represented the opening phase of the Canada round. The committee had to be careful not to give too much away in what would constitute the

government's initial bargaining position. Yet there needed to be enough in the package to get the bargaining started.

During the course of the CCCU deliberations, charges were made that the process was too closed, charges given credibility by Mulroney's injunction that "I never, ever, discuss anything that goes on in cabinet, nor will any of my ministers in the future,"<sup>63</sup> in response to alleged leaks to reporters by CCCU members. The saving grace here was that ministers felt only partially constrained by the prime minister's injunction and Bouchard in particular continued to let his feelings be known about what transpired within the committee room. In combination with close media scrutiny, this ensured that the main lines of conflict were made known. Further, it helped convey to the public that the CCCU ministers, like many other Canadians, were struggling hard with questions such as Quebec's position within the Canadian confederation and were seeking to come up with honest answers. These impressions as relayed through the media, however, may not have been wholly accurate, in part because of the efforts by some of the Quebec ministers to present their labours in a particular light before the Quebec public.

Nonetheless, precisely because the CCCU did not fit the mould of the traditional elite accommodation model, this allowed it to play a more constructive role. Along with Joe Clark's association with the proposals, the CCCU's semi-transparency helped impart a legitimacy to *Shaping Canada's Future Together* that a document emanating directly from the prime minister and the FPRO probably would have lacked. At the same time, elite accommodation customs were not absent. The master practitioner of the art, Brian Mulroney, applied his skills and succeeded in forging a consensus at the culmination of the process. Without his direct intervention there would not have been a package.

## LESSONS

What lessons can be drawn? At one level one can ask whether, in light of the ultimate failure of the Charlottetown Accord, Cabinet should have been used at all. Perhaps the federal government should have moved immediately to something like a constituent assembly or more generally adopted a process that was much more transparent. Whether the time frame, in large part dictated by the Quebec government, would have allowed for a much more open process or whether the end results would have been appreciably different is almost impossible to answer here.

Accepting the CCCU more on the terms that the prime minister initially set out for it, and with the inestimable benefit of hindsight, one can argue, for example, that ministers might have been better schooled in constitutional matters, that FPRO officials might have used more of a closed shop approach

in dealing with other agencies and departments, and that within the CCCU Clark should have been more effective in controlling discussion. Had it been done a little differently, the proposals might have drawn less negative comment from certain quarters. But applying these lessons to some unspecified future constitutional round is much more difficult. In effect, the CCCU and the Canada round as a whole was a one-shot affair. And even if Cabinet or a Cabinet committee were to be assigned a similar function in some future round, it may be impossible to recreate the conditions that helped make the CCCU at least a partial success, that is protection from direct lobbying by groups and other governments yet still allowing some public insight into its deliberations. The next time round there will be much greater awareness of its role in setting the constitutional agenda. A variety of interested parties, including special interest organizations, would seek to have access and be heard. Demands for such access will be difficult to resist on the one hand, given the contemporary stress on transparency, but difficult to meet on the other without transforming Cabinet or a Cabinet committee into something other than an executive body.

Nevertheless, it would be difficult to visualize any new constitutional round taking place without some direct involvement by Cabinet. To this end one specific recommendation might be for the prime minister to create a committee, or at least a core group of ministers, with responsibility for the constitution, at a stage well before the restarting of the constitutional process. This would allow ministers to be brought up to speed on constitutional issues so that they would be more effectively informed and engaged for the time when the prime minister and Cabinet confront the exigencies and crises invariably thrown up by any new constitutional round. In a similar vein, there is something to be said for letting ministers have access to advice on constitutional matters from sources other than FPRO. At a minimum they should be allowed to consult their own political staff during the course of Cabinet deliberations on the constitution with the view of making ministers more confident of their capacity to participate in the constitutional process.

To the extent that the role of the CCCU, or something like it, will be retained in some future round, one additional point is worth stressing. Although analysis of the role of the Joint Parliamentary Committee and the five mini conferences is beyond the scope of this chapter,<sup>64</sup> it is worth noting that many of the changes made in the September 1991 proposals, for good or ill — dropping property rights, the Council of the Federation, and key economic union provisions — occurred *before* the start of the multilateral process on 12 March 1992. In effect, there were checks in the system to counter at least portions of whatever interests, bureaucratic and political, influenced the September 1991 outcome. In other words, in setting the stage for any future constitutional round, the capacity of central governing institutions as a whole, and not just Cabinet, to play a meaningful role in the process should not be ignored.

## NOTES

Research for this chapter was based on documentary evidence, newspaper records and interviews with a number of officials in the Federal Provincial Relations Office (FPRO), and two separate line departments carried out by the first author. These did not include members of the Prime Minister's Office (PMO). The number interviewed totalled nine in all. While some were willing to have their name put on the record, others requested that the interview be confidential and not for attribution, or, when offered confidentiality, accepted. Given the limited number interviewed and to ensure confidentiality it was decided to keep all names of interviewees confidential. The initial ideas upon which the chapter is based were presented by the first author, and subjected to helpful criticism, at a seminar hosted by the Political Science Department of The University of British Columbia in February 1993. Peter Aucoin, David Milne, Robert Young, two anonymous reviewers and the editors of this volume kindly provided detailed comments on subsequent drafts. The research was made possible through the generous financial support of the Social Science and Humanities Research Council of Canada. We would like to thank all those who provided assistance, comments and ideas. Above all we would like to thank those who agreed to be interviewed. Errors of fact or interpretation remain the responsibility of the authors.

1. Office of the Prime Minister, *Release* (Ottawa, 21 April 1991).
2. Alan C. Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal: McGill-Queen's University Press, 1992); Donald V. Smiley and R.L. Watts, *Intrastate Federalism in Canada* (Toronto: University of Toronto Press, 1985).
3. It would be misleading to say that the federal Cabinet has played only a limited role in previous constitutional rounds. For example, during the period 1980-81, especially when Ottawa was developing its unilateral proposals, it appears Cabinet was used extensively; see David Milne, *The New Canadian Constitution* (Toronto: Lorimer, 1982), pp. 76-83. Overall, however, relatively little has been written on Cabinet's role in the constitutional process.
4. See, for example, Preston King, *Federalism and Federation* (Baltimore: John Hopkins University Press, 1982).
5. Smiley and Watts, *Intrastate Federalism in Canada*, p. 38.
6. Cairns, *Charter versus Federalism*, pp. 44-45.
7. *Ibid.*, pp. 45-47.
8. Herman Bakvis, *Regional Ministers: Power and Influence in the Canadian Cabinet* (Toronto: University of Toronto Press, 1991), chap. 1.
9. See S.J.R. Noel, "Consociational Democracy and Canadian Federalism," in K.D. McRae (ed.), *Consociational Democracy: Political Accommodation in Segmented Societies* (Toronto: McClelland & Stewart, 1974), pp. 262-68; Arend Lijphart, *Democracy in Plural Societies* (New Haven: Yale University Press, 1977)
10. The discrediting of the elite accommodation process can be attributed to a change in the nature of citizen participation, which is driven in part by value changes in society at large (the so-called post-materialist generational change) and in part by certain features of the *Constitution Act, 1982*, such as the *Charter of Rights and*