# *Recurring Issues in Canadian Federalism*

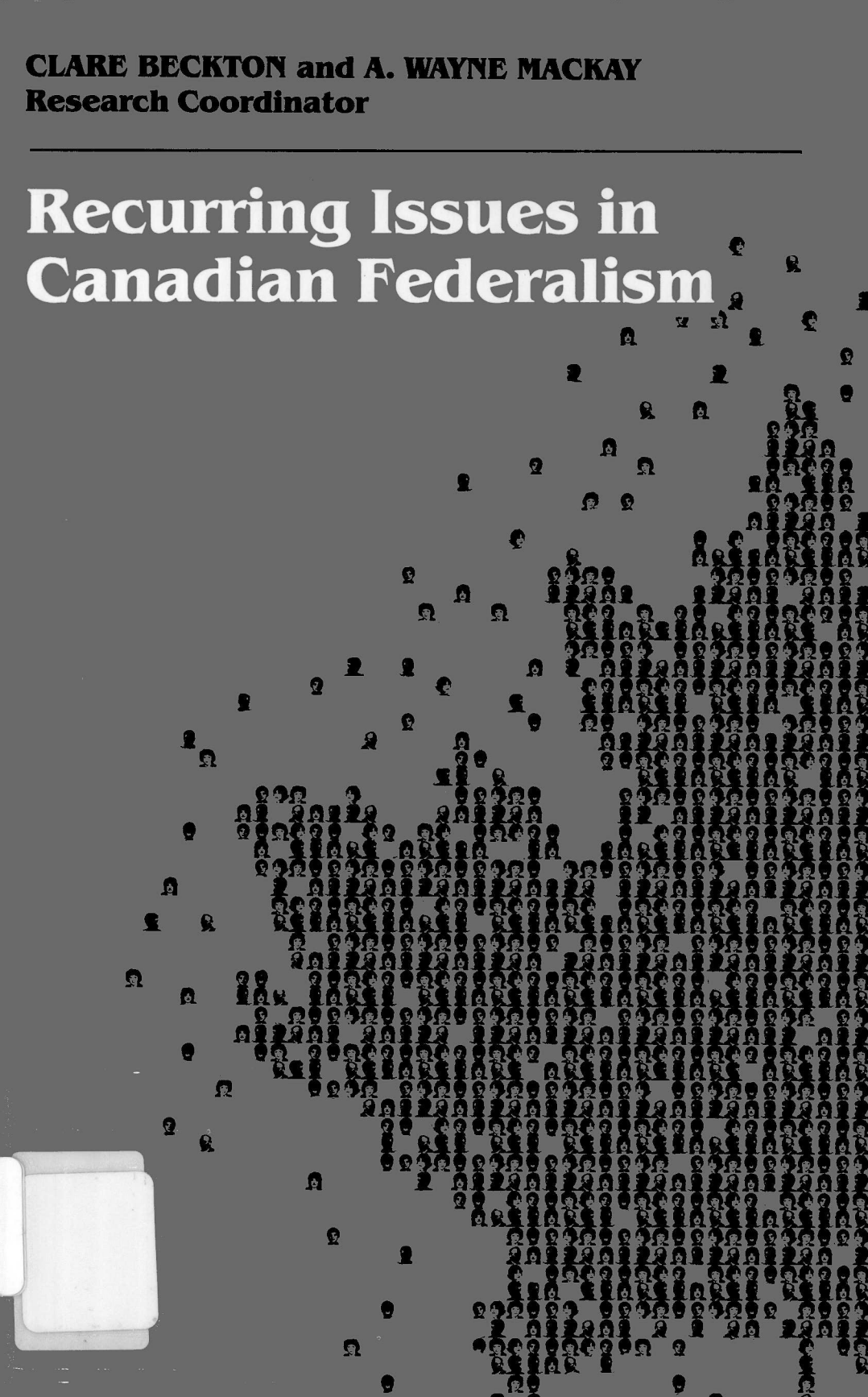


*This is Volume 57 in the series of studies commissioned as part of the research program of the Royal Commission on the Economic Union and Development Prospects for Canada.*

*The studies contained in this volume reflect the views of their authors and do not imply endorsement by the Chairman or Commissioners.*

CLARE BECKTON and A. WAYNE MACKAY
Research Coordinator

# Recurring Issues in Canadian Federalism



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CLARE F. BECKTON
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# FOREWORD

When the members of the Rowell-Sirois Commission began their collective task in 1937, very little was known about the evolution of the Canadian economy. What was known, moreover, had not been extensively analyzed by the slender cadre of social scientists of the day.

When we set out upon our task nearly 50 years later, we enjoyed a substantial advantage over our predecessors; we had a wealth of information. We inherited the work of scholars at universities across Canada and we had the benefit of the work of experts from private research institutes and publicly sponsored organizations such as the Ontario Economic Council and the Economic Council of Canada. Although there were still important gaps, our problem was not a shortage of information; it was to interrelate and integrate — to synthesize — the results of much of the information we already had.

The mandate of this Commission is unusually broad. It encompasses many of the fundamental policy issues expected to confront the people of Canada and their governments for the next several decades. The nature of the mandate also identified, in advance, the subject matter for much of the research and suggested the scope of enquiry and the need for vigorous efforts to interrelate and integrate the research disciplines. The resulting research program, therefore, is particularly noteworthy in three respects: along with original research studies, it includes survey papers which synthesize work already done in specialized fields; it avoids duplication of work which, in the judgment of the Canadian research community, has already been well done; and, considered as a whole, it is the most thorough examination of the Canadian economic, political and legal systems ever undertaken by an independent agency.

The Commission's research program was carried out under the joint

direction of three prominent and highly respected Canadian scholars: Dr. Ivan Bernier (*Law and Constitutional Issues*), Dr. Alan Cairns (*Politics and Institutions of Government*) and Dr. David C. Smith (*Economics*).

Dr. Ivan Bernier is Dean of the Faculty of Law at Laval University. Dr. Alan Cairns is former Head of the Department of Political Science at the University of British Columbia and, prior to joining the Commission, was William Lyon Mackenzie King Visiting Professor of Canadian Studies at Harvard University. Dr. David C. Smith, former Head of the Department of Economics at Queen's University in Kingston, is now Principal of that University. When Dr. Smith assumed his new responsibilities at Queen's in September 1984, he was succeeded by Dr. Kenneth Norrie of the University of Alberta and John Sargent of the federal Department of Finance, who together acted as Co-directors of Research for the concluding phase of the Economics research program.

I am confident that the efforts of the Research Directors, research coordinators and authors whose work appears in this and other volumes, have provided the community of Canadian scholars and policy makers with a series of publications that will continue to be of value for many years to come. And I hope that the value of the research program to Canadian scholarship will be enhanced by the fact that Commission research is being made available to interested readers in both English and French.

I extend my personal thanks, and that of my fellow Commissioners, to the Research Directors and those immediately associated with them in the Commission's research program. I also want to thank the members of the many research advisory groups whose counsel contributed so substantially to this undertaking.

DONALD S. MACDONALD

# INTRODUCTION

At its most general level, the Royal Commission's research program has examined how the Canadian political economy can better adapt to change. As a basis of enquiry, this question reflects our belief that the future will always take us partly by surprise. Our political, legal and economic institutions should therefore be flexible enough to accommodate surprises and yet solid enough to ensure that they help us meet our future goals. This theme of an adaptive political economy led us to explore the interdependencies between political, legal and economic systems and drew our research efforts in an interdisciplinary direction.

The sheer magnitude of the research output (more than 280 separate studies in 70+ volumes) as well as its disciplinary and ideological diversity have, however, made complete integration impossible and, we have concluded, undesirable. The research output as a whole brings varying perspectives and methodologies to the study of common problems and we therefore urge readers to look beyond their particular field of interest and to explore topics across disciplines.

The three research areas, — *Law and Constitutional Issues*, under Ivan Bernier; *Politics and Institutions of Government*, under Alan Cairns; and *Economics*, under David C. Smith (co-directed with Kenneth Norrie and John Sargent for the concluding phase of the research program) — were further divided into 19 sections headed by research coordinators.

The area *Law and Constitutional Issues* has been organized into five major sections headed by the research coordinators identified below.

- Law, Society and the Economy — *Ivan Bernier and Andrée Lajoie*
- The International Legal Environment — *John J. Quinn*
- The Canadian Economic Union — *Mark Krasnick*

- Harmonization of Laws in Canada — *Ronald C.C. Cuming*
- Institutional and Constitutional Arrangements — *Clare F. Beckton and A. Wayne MacKay*

Since law in its numerous manifestations is the most fundamental means of implementing state policy, it was necessary to investigate how and when law could be mobilized most effectively to address the problems raised by the Commission's mandate. Adopting a broad perspective, researchers examined Canada's legal system from the standpoint of how law evolves as a result of social, economic and political changes and how, in turn, law brings about changes in our social, economic and political conduct.

Within *Politics and Institutions of Government*, research has been organized into seven major sections.

- Canada and the International Political Economy — *Denis Stairs and Gilbert Winham*
- State and Society in the Modern Era — *Keith Banting*
- Constitutionalism, Citizenship and Society — *Alan Cairns and Cynthia Williams*
- The Politics of Canadian Federalism — *Richard Simeon*
- Representative Institutions — *Peter Aucoin*
- The Politics of Economic Policy — *G. Bruce Doern*
- Industrial Policy — *André Blais*

This area examines a number of developments which have led Canadians to question their ability to govern themselves wisely and effectively. Many of these developments are not unique to Canada and a number of comparative studies canvass and assess how others have coped with similar problems. Within the context of the Canadian heritage of parliamentary government, federalism, a mixed economy, and a bilingual and multicultural society, the research also explores ways of rearranging the relationships of power and influence among institutions to restore and enhance the fundamental democratic principles of representativeness, responsiveness and accountability.

*Economics* research was organized into seven major sections.

- Macroeconomics — *John Sargent*
- Federalism and the Economic Union — *Kenneth Norrie*
- Industrial Structure — *Donald G. McFetridge*
- International Trade — *John Whalley*
- Income Distribution and Economic Security — *François Vaillancourt*
- Labour Markets and Labour Relations — *Craig Riddell*
- Economic Ideas and Social Issues — *David Laidler*

Economics research examines the allocation of Canada's human and other resources, the ways in which institutions and policies affect this

allocation, and the distribution of the gains from their use. It also considers the nature of economic development, the forces that shape our regional and industrial structure, and our economic interdependence with other countries. The thrust of the research in economics is to increase our comprehension of what determines our economic potential and how instruments of economic policy may move us closer to our future goals.

One section from each of the three research areas — The Canadian Economic Union, The Politics of Canadian Federalism, and Federalism and the Economic Union — have been blended into one unified research effort. Consequently, the volumes on Federalism and the Economic Union as well as the volume on The North are the results of an interdisciplinary research effort.

We owe a special debt to the research coordinators. Not only did they organize, assemble and analyze the many research studies and combine their major findings in overviews, but they also made substantial contributions to the Final Report. We wish to thank them for their performance, often under heavy pressure.

Unfortunately, space does not permit us to thank all members of the Commission staff individually. However, we are particularly grateful to the Chairman, The Hon. Donald S. Macdonald; the Commission's Executive Director, J. Gerald Godsoe; and the Director of Policy, Alan Nymark, all of whom were closely involved with the Research Program and played key roles in the contribution of Research to the Final Report. We wish to express our appreciation to the Commission's Administrative Advisor, Harry Stewart, for his guidance and advice, and to the Director of Publishing, Ed Matheson, who managed the research publication process. A special thanks to Jamie Benidickson, Policy Coordinator and Special Assistant to the Chairman, who played a valuable liaison role between Research and the Chairman and Commissioners. We are also grateful to our office administrator, Donna Stebbing, and to our secretarial staff, Monique Carpentier, Barbara Cowtan, Tina DeLuca, Françoise Guilbault and Marilyn Sheldon.

Finally, a well deserved thank you to our closest assistants: Jacques J.M. Shore, *Law and Constitutional Issues*; Cynthia Williams and her successor Karen Jackson, *Politics and Institutions of Government*; and I. Lilla Connidis, *Economics*. We appreciate not only their individual contribution to each research area, but also their cooperative contribution to the research program and the Commission.

IVAN BERNIER
ALAN CAIRNS
DAVID C. SMITH

There are some recurring themes of Canadian federalism which impinge directly on the reform of institutions and the redesign of constitutional arrangements. One of the most obvious is the dispute between the federal government and the provinces on the proper distribution of legislative powers in the Canadian federal structure. This area of conflict is studied in other parts of the Commission's work and is not examined in this volume. The unifying feature of the issues discussed here is their link with the question of Quebec's status in Canada and, more particularly, the need to make Quebec part of the 1982 constitutional arrangements.

Beginning with a broad overview of the major issues emerging from the constitutional revamping of institutions, coordinators Wayne MacKay and Clare Beckton tie together the major research papers from the section and relate them to the broad themes of reform. The overview relates both to the ongoing issues of federalism examined in this volume and to the more emergent issues of courts and the Charter discussed in Volume 58. MacKay and Beckton also comment on the symposia sponsored by this Commission in late August 1984 on the topics of Quebec's status and language rights.

The research papers in Volume 57 highlight three recurring issues posed by Canadian federalism: Quebec's status in Confederation, an equitable amending formula for the Constitution, and a redesign of the treaty-making power. Peter Leslie of Queen's University makes a provocative analysis of Canada as, arguably, a "bicommunal polity." He examines views of Canada that stress the pervasive impact of cultural and social dualism on its politics and notes as well that not all people consider that dualism has such far-reaching political significance. Even among those who do, many consider that the form of bicommunalism

extant in Canada has changed in ways that may be a brake on the move toward a federal economic union.

One of the on-going tensions between the English and Quebec communities has been the proper amending formula for Canada's Constitution. As a result of the November 1981 Constitutional Accord and the resulting *Constitution Act, 1982*, Canada has finally adopted a unique amendment formula. The mechanics of this formula are carefully explained by Stephen Scott of McGill University. He then goes on to assess Quebec's objections to the present formula and the chances of meeting these objections. Scott is pessimistic about the chances of bringing Quebec and the other provinces together on the amending formula.

The final paper in this volume concerns the treaty-making power and was prepared by George Szablowski of York University. He recommends the abolition of the prerogative power as the source of the treaty-making power and its replacement with a specific constitutional provision. Szablowski also advocates the creation of an independent treaty-making commission to conduct treaty-making as a cooperative federal-provincial venture. He also notes that Quebec has been one of the most consistent proponents of a larger provincial role in treaty-making.

The so-called problem of Quebec's status in Confederation has not been resolved. It is still an important item of Canada's unfinished constitutional agenda. Indeed, Prime Minister Mulroney and Premier Lévesque have actively been pursuing this very agenda.

A. WAYNE MACKAY

# ACKNOWLEDGMENTS

The authors would like to acknowledge the leadership and assistance of Dean Ivan Bernier, Director of Research (Constitutional/Legal), who demonstrated the twin virtues of patience and understanding. We would also like to thank Jacques J.M. Shore, Executive Assistant and Research Program Administrator, who added vital doses of enthusiasm, encouragement and contagious good cheer.

CLARE F. BECKTON
A. WAYNE MACKAY

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# Institutional and Constitutional Arrangements
## *An Overview*

A. WAYNE MACKAY
CLARE F. BECKTON

This section of the legal and constitutional research arises from the terms of reference of the Royal Commission on the Economic Union and Development Prospects for Canada requiring a study of appropriate institutional and constitutional arrangements to promote the liberty and well-being of individual Canadians and is a companion to the research undertaken in the political institutions area. In order to avoid duplication, the emphasis in these research volumes (Volumes 57 and 58) is less on political institutions, such as the Senate and the House of Commons, and more on the judicial system, the Canadian Charter of Rights and Freedoms, the treaty-making power, and other arrangements designed to promote equality among all Canadians. Specific emphasis is given to the special status of Quebec in Confederation and the need to complete the agenda of constitutional reform.

Three primary themes are analyzed in this research section. One is the effect of the Charter of Rights on the economic union and institutional structures of Canada, especially in terms of its impact on traditional institutions and its potential role in changing and modifying them. The Charter of Rights is having a dramatic impact on the judicial and administrative structures in Canada. This development gives rise to the second theme.

This theme is the expanding role of courts and administrative boards in Canada's future. One result of this expanded role is that courts and administrative boards will be more active in shaping economic policy. The Charter of Rights will also have a significant impact on the nature of courts and judging in Canada. It necessitates an expanded role for judges and possibly some restructuring of the Supreme Court of Canada. At the

same time, section 96 of the *Constitution Act, 1867* (formerly the *British North America Act, 1867*) limits the ability of provincial governments to assign functions to administrative boards or provincially appointed courts. Since provincial boards such as tenancy, rent review and labour boards have a significant political, social and economic impact upon Canadian society, the limitations imposed by section 96 are of concern. Current reform proposals are assessed and suggestions are made to make section 96 less restrictive, while at the same time protecting the federal nature of Canada's judicial system.

The final theme concerns recurring issues in Canadian federalism, especially as regards the treaty-making power, a special status for Quebec, and the use of the new amending formula. Language rights in Canada are also discussed. A primary focus of Stephen Scott's paper, in this volume, on constitutional amendment is Quebec's position as assessed in the context of events leading to patriation of the Constitution in 1982. It is possible that the recurring nature of these problems is in part the result of an unfinished constitutional agenda.

While the focus is primarily on legal concerns, it must be remembered that none of these issues can be divorced from social and economic policy concerns. They must be related to other studies prepared for this Commission which focus on the economic and political aspects of Canada's national institutions. Legal and political structures are interconnected in their pursuit of both social and economic policy. Indeed, one of the important conclusions to be drawn from the research is that law, politics, economics, culture and language are all part of a complex Canadian whole.

The twin themes of the courts and the Charter of Rights and Freedoms are explored in Volume 58, while this volume addresses some recurring issues of federalism with a special emphasis on the need to bring Quebec into the constitutional accord of 1982. The papers in this volume in which Peter Leslie addresses the bicommunal nature of Canada, George Szablowski the need for reform in the treaty-making power, and Stephen Scott the process of constitutional amendment, are a rather eclectic lot. One of the important objectives of the overview that follows is to identify and emphasize the interconnecting themes. As a unifying device special attention will be given to the dualism of Canada and its implications for the constitutional and political status of Quebec.

In focussing on Quebec we may seem to be diminishing claims that Canada is a pluralistic or multicultural nation. The balance between Canada as a dualistic society and a pluralistic one is delicate but real. In many respects it is Canada's regional communities that give it character. Nor do we deny the valid claims to pluralism and multiculturalism, but we do assert that they cannot be extended to the extent of destroying the bicommunal nature of the country. Regional integrity is important, but for Quebec there is an added element of cultural survival.

## Some Recurring Issues in Canadian Federalism

### *Dualism in Canada: A Bicommunal Polity*

One of the most significant recurring problems of Canadian federalism is the gap between declared intentions and fact with respect to Canada's dualistic nature. This problem is complicated by the fact that Canada also claims to be a multicultural society. Even the *Constitution Act, 1982*[1] reinforces this ambivalence as the Charter proclaims both dualistic rights for the French and English in Canada and the existence of Canada as a multicultural nation. In the opinion of many politicians and scholars, Peter Leslie asserts, Canada has been and remains a "bicommunal polity" — one in which governmental structures, the allocation of public offices, and the exercise of public power are primarily shaped by the relationship between two territorial or ethnic communities. One expression of this point of view has come from former prime minister Pierre Elliot Trudeau, who once declared: "In terms of *realpolitik*, French and English are equal in Canada because each of these linguistic groups has the power to break the country," something no other ethnic group can do.[2]

A traditional variant of the bicommunalist thesis in Canada focusses especially on cultural distinctiveness and the relationship between the anglophone majority and the francophone minority across the country. The position of francophone minorities outside Quebec will be treated elsewhere in this overview. At present we shall focus primarily on the situation of francophones in Quebec. As was pointed out by the Royal Commission on Bilingualism and Biculturalism in 1965, the tensions between French and English in Canada have increasingly become a conflict of two majorities, one existing in Canada as a whole and the other within the boundaries of Quebec. This is, Leslie argues, a more up-to-date variant of the bicommunalist thesis, a "bicommunalism of two majorities."

Quebec's status in confederation was the topic of a seminar held during August 28–29, 1984, and sponsored by the Royal Commission on the Economic Union and Development Prospects for Canada. After exploring the situation in Quebec we shall return to some of the other aspects of bicommunalism in Canada, such as language rights. These were also explored at another seminar sponsored by this Commission during August 29–30, 1984.

### *Quebec in Confederation: A Special Constitutional Status?*

No Royal Commission could make a comprehensive report on Canadian affairs without making some reference to the status of Quebec in Confederation. In the 1960s the Royal Commission on Bilingualism and Biculturalism referred to the question of Quebec's status as the major

crisis of Canadian history to that date. In spite of a continuation of the crisis for two decades and a dramatic manifestation of it in the form of the 1980 referendum on sovereignty-association, the federal union appears to have survived. However, the real question is the form in which the Confederation has survived and, in particular, the accommodations made to the de facto special status of Quebec.

Given the emotional heat that is generated by any discussion of Quebec's status in Canada, the question is not an easy one with which to deal. Nevertheless, law, politics and the economy are inextricably integrated, and the issue of Quebec's status, however explosive, cannot be ignored in an investigation of Canada's economic and institutional future. Thus the operative question is not whether to address the issue of Quebec's status in Confederation but rather how to address it.

An important point emphasized by Claude Ryan, former leader of the Quebec Liberal party, at the seminar on Quebec status was the need to consider the actual status of Quebec in Confederation and not just its constitutional status. Other speakers, such as Gordon Robertson, of the Institute for Research on Public Policy, and Donald Smiley, underlined the advantages of pursuing extra-constitutional measures to improve Quebec's status in Canada. In our view, regardless of what the politicians, judges or economists say, Quebec does have a de facto special status in Canada. The question is how much de jure special status Quebec should have. Thus the interrogatory title on this section is a kind of double-entendre. Has Quebec really had a special legal or constitutional status in the past and should it have such a status in the future?

One reason that the Quebec status issue is perplexing is that it encompasses many different components. The use of the term "status" begs the question: status in what sense? Legal status, political status, cultural status and economic status all suggest different considerations. Jean Laponce, of the University of British Columbia, in his presentation at the seminar on language rights went so far as to argue that culture and economics are separate matters and should be so considered. Other speakers in that seminar as well as the majority of the speakers at the seminar on Quebec's status hotly contested that view. The prevailing view was that law, economics and culture were part of an integrated whole and that the individual components could not be studied in isolation. It may be stating the obvious to assert that law, culture and economics all have a political context.

## Differing Perspectives on Quebec's Status

The perspective one brings to the question of Quebec's status is crucial. In simplistic terms there are three major perspectives: québécois, francophone outside Quebec, and anglophone. Even the terminology is instructive. Two groups are described exclusively in terms of the lan-

guage bond while the term "québécois" is more comprehensive. Indeed it suggests the description of a race or nation bound together not only by language but also by territory, political and legal institutions, culture, and economic networks. Indeed, some speakers, including Andrée Lajoie and Daniel Latouche, emphasized that Quebec must be recognized as a nation unto itself. This view also seems to be accepted to some extent by Peter Leslie in the paper appearing in this volume.

There were few if any representatives of francophones outside Quebec at the seminar on Quebec's status, although they were well represented at the seminar on language rights. Thus we think it important to note that francophone Canadians outside Quebec are likely to be ambivalent about special status for Quebec. While sympathetic to calls for cultural autonomy and control over language, they may well view an increase in the legal, political or economic status of Quebec as a threat to themselves. However, the preservation of the Quebec fact in Canada is vital to the survival of linguistic minorities in other provinces. This is a point emphasized by Leslie. Separation of Quebec would likely deal a fatal blow to other francophone communities. Leslie indicates that it is only in Quebec that the necessary elements of history, language, culture and territory combine to create a truly distinct francophone society in North America.

Generalizations are always dangerous, and there is no single perspective from Quebec as to its status in Confederation. As the journalist Michel Vastel stated at the seminar on Quebec's status, there are at least three distinct political representatives of Quebec: the Parti québécois, the provincial Liberal party and the federal members of Parliament. Each group has quite a different view of what special status is appropriate. The Parti québécois argue for complete autonomy in the form of separation or sovereignty-association, that is, a status outside Confederation. As of April 1985 it appeared that one branch of the Parti québécois, led by Premier René Lévesque, had retreated, for the time being at least, from the separatist goal, while a significant number of dissidents remained true to the ideal of a separate Quebec. The provincial Liberals have consistently argued for greater recognition of Quebec's special status within Confederation. One of the best examples is Claude Ryan's beige paper.[3]

Finally, the Quebec MPs supported the 1982 patriation package as responsive to the needs of Quebec. It will be interesting to see whether the Conservative members of the Mulroney Government will share the perspective of their Liberal predecessors. Early indications are that Prime Minister Mulroney and Premier Lévesque would like to reach some kind of accord. Michel Vastel was optimistic that the federal Conservatives would be more nationalistic (vis-à-vis Quebec) in their outlook. Their backgrounds would suggest this, but only time will tell. In any event, Quebec has a new Tory voice in Ottawa.

Finally we come to the anglophone perspective. Again it is an overstatement to say that there is a uniform view, but we fear that the view stated by Gordon Robertson (but challenged by others) at the Quebec status seminar may well be quite representative. In his address, he suggested that English Canada would likely be surprised that there is any life in the issue of Quebec's status. The rhetoric surrounding the 1982 patriation was to the effect that Confederation had been renewed and the "Quebec problem" solved. This is largely a matter of wishful thinking. Political scientist Donald Smiley argued that the Quebec status issue had been too high on the national agenda for many years. He cited this as a prime reason for Western alienation.

The "no" vote in the 1980 referendum on sovereignty-association was also a signal to English Canada that Quebec was not too dissatisfied with her status. However, this vote was conditional on the promise of constitutional renewal. Obviously some segments of Quebec's population did not see the 1982 amendments as sufficient, for Quebec did not sign the Constitutional Accord.[4] Indeed, the Accord was largely responsive to the kind of demands put forward by former Quebec premier Jean Lesage two decades earlier rather than to the currently defined needs of Quebec. The extent to which the constitutional agenda is unfinished will be discussed later but attention will now be focussed on the historical roots of this issue.

## Quebec's Status in Historical Context

Many books have been written on this topic, and we shall not attempt even to summarize the much more extensive analysis of Quebec in historical context prepared for the Commission by Daniel Latouche of McGill University in his monograph *Canada and Quebec, Past and Future* (Volume 70 of the Commission's research series). Suffice to say that from the beginning the anglophone rulers of Canada have had to recognize that Quebec was in a unique position. This was recognized by the Proclamation of 1763 at the time of the British conquest, and Quebec's special status was further defined in the *Quebec Act* of 1774 passed by the British Parliament. Religion, most political institutions, and all matters of civil law were left unchanged. The inhabitants of Quebec were made subject to British criminal law, and anglophones took charge of some aspects of the economy, but the daily life of the habitant changed very little.

Peter Leslie describes Canada's historical evolution as being, according to many people, that of a bicommunal society. There have been some set-backs to the acceptance of Canada's bicommunal nature, one notable example being Lord Durham's Report of 1839 calling for the assimilation of the French into a dominant British population. In general the idea of two nations, two charter groups, or two founding peoples has been

widely regarded as one of the central realities of Canadian life. However, as Leslie indicated in his presentation to the seminar on Quebec's status, and in the paper in this volume, some people do not view Canada as a bicommunal society at all. Those who do tend now to think of bicommunalism less in terms of relations between a majority and a minority and more in terms of relations between two majorities. Attention has to some extent shifted from ethnicity to territory as a basis for bicommunalism.

The heated discussion that followed the presentation of Leslie's paper offers some insights. The bicommunalist view of Canada, especially the bicommunalism of two majorities, obviously stirs the emotions of both Québécois and anglophones. Leslie was asked by Commission Chairman, Donald Macdonald, whether protection of Canada's bicommunal nature was consistent with a movement to a more integrated national economy. Some Quebec commentators challenged what they felt was an implicit generalized description of Quebec as a monolithic society rather than a pluralistic one with many diverse communities. Any such stereotype was rejected by Leslie in his response to the questions and he expressly adopts the pluralistic description of Quebec in the paper prepared for this volume. In this paper he expands upon the significance of the bicommunal facts of Canadian life in economic terms as well as in political and cultural ones. He also warns that the economic forces moving Canada closer to continentalism and closer ties with the United States may add a new dimension to the problems of assimilation described by George Grant in his *Lament for a Nation*.[5] Quebec may not be able to survive as a distinct ethnic entity in an extensively integrated North American economy.

Andrée Lajoie of the University of Montreal attempted to link political life in Quebec with constitutional evolution in Canada, both in her paper prepared for this Commission's research series (printed in Volume 47, *The Supreme Court of Canada as an Instrument of Political Change*) and in her presentation at the seminar on Quebec's status. She concerned herself only with the post-1945 era. Only since Quebec's Quiet Revolution of the 1960s have arguments for Quebec special status taken on constitutional dimensions. Prior to the 1960s political ideas in Quebec were not clearly linked to constitutional law, which Lajoie describes as a centralizing jurisprudence built in the absence of Quebec. She explained the relative absence of Quebec cases in early constitutional jurisprudence by the dominance of the Roman Catholic Church and the Duplessis regime, which left little room for the kind of conflict that generates court cases. The civil liberties cases involving the Jehovah's Witnesses under the Duplessis regime are an obvious exception.

After the 1960s Quebec appears to have made up for lost time on the constitutional stage. Constitutional abstinence has been replaced by constitutional obsessions. Although a new phenomenon, constitutional

demands became a collective obsession of at least the political elite in Quebec if not the whole population. Demands for an active Quebec voice in external affairs, constitutionalizing of the guaranteed Quebec representation on the Supreme Court of Canada, and claims to cultural autonomy as detailed in Claude Ryan's beige paper are examples of the constitutional face of Quebec nationalism. Daniel Latouche, who described the constitutional claims as one of many strategies for Quebec nationalism, rejected a pejorative description of the role of elites in Canadian political life.

Political scientist Reginald Whitaker of York University, speaking at the Quebec status seminar, described much of the political and constitutional debate between Quebec and Ottawa as a battle between federal and provincial elites. He saw this as inherently undemocratic and described elites as part of the problem rather than the solution. In particular, Whitaker objected to the magnification of the "state" as the vehicle for province building in Quebec. He called for more creative and democratic processes for relieving the tensions between Quebec and the rest of Canada than have been practised in the past. Whitaker was taken to task by Daniel Latouche for being too simplistic in describing the people as good and the state as bad. Donald Smiley also rejected any claim that direct democracy was inherently superior to representative democracy as practised in Canada. In our view, a referendum is as subject to political and media manipulation as is a policy guided by political elites. No one, however, really rejected the claim that elites were the major actors in the recent constitutional phase of Quebec nationalism.

## Periods of Constitutional Reform

The real impetus for constitutional reform in Quebec's status came after Pierre Trudeau became prime minister in 1968. Ralph Heintzman, of the Federal-Provincial Relations Office, gave a lucid account of recent constitutional reforms at the seminar on Quebec's status. He described three major periods of reform:

| | |
|---|---|
| 1968–71 | First Ministers' conferences leading up to the Victoria Charter.[6] |
| 1975–79 | Further federal-provincial conferences producing: (a) draft proclamation, 1976; (b) draft resolution, 1977; and (c) Bill C-60[7] and *A Time for Action*, 1978.[8] |
| 1980–85 | Patriation and the *Constitution Act, 1982*.[9] |

This last phase includes not only the events surrounding patriation but also the follow-up conference on aboriginal rights, the creation of the joint Senate and House committee on Senate reform and arguably the creation of the Royal Commission on the Economic Union and Develop-

ment Prospects for Canada. To date this last phase has not produced a constitutional document such as *Federalism for the Future* (1968),[10] *Constitution and People in Canada* (1969),[11] or *A Time for Action* (1978).[12] It might be argued that *A Future Together* (the Pépin-Robarts Report)[13] linked phases two and three of constitutional reform. Perhaps one of the hidden agenda items for this Commission is to provide the definitive document on the third stage of constitutional reform.

Once the bottle was uncorked in 1968 and the constitutional genies escaped, it proved very difficult to get them back into the bottle. Indeed the third stage of reform is itself only in the first phase of a three-stage process: (a) renewal and symbolic renovation (patriation and the Charter); (b) institutional reform (for example, the Senate, House of Commons and Supreme Court); and (c) redistribution of powers (reallocation of the 1867 division of powers).

Heintzman suggested that the 1982 patriation package was the culmination of a symbolic renovation which started with the adoption of a flag and national anthem. He also proposed the interesting thesis that the federal strategy was to delay dealing with the redistribution of powers phase until the federal government had a stronger hand to play. To strengthen its hand the federal government went over the heads of the provincial governments and appealed directly to the "people." Patriation with the Charter of Rights was referred to as the "people's package," and there was a clear design to create a national constituency. Ottawa was to be seen as the true voice of Canada.

This general background is vital to an understanding of how constitutional reform impinged on Quebec's status and how Quebec reacted to the patriation package of 1982. Quebec was a major target of the symbolic renovation and an essential part of the new national constituency. Loyalty was to be divided between Ottawa and Quebec City. It was the promise of a renewed Confederation that was a major selling point for the "no" forces in the Quebec referendum. Throughout the stages of constitutional reform there had been tacit recognition of Quebec's special status. In addition to rhetorical recognition there was some acceptance of a Quebec veto in the Victoria Charter, recognition of the need for cultural autonomy in the 1976 proclamation and 1977 resolution and of the principle of double majority in Bill C-60 introduced in 1978. Furthermore, as a matter of practice, Quebec was granted greater powers than other provinces in respect to pensions, immigration and external affairs.

Any good strategy also involves the setting up of a straw person to be attacked. For the federal government in the process of constitutional reform, the enemy was balkanization. It was referred to by different names at various times: "the slippery slope of regionalism," "separation by installment," and "a chequerboard Canada." The term "balkanization" conjures up negative images of World War I, but Daniel Latouche at the seminar on Quebec status questioned whether it was really a bad

thing. He suggested that some Balkan countries such as Yugoslavia had done rather well and that Canadians should consider the virtues of regionalism and diversity. This argument coupled with a theme of *maîtres chez nous* (masters in our own house) is a good example of the Quebec counter-strategy in the process of constitutional reform.

## Patriation and the 1982 Constitutional Amendments

Not only did the 1982 amendments not give Quebec the renewed Confederation that was promised in the referendum, but they created new cleavages between Quebec and the rest of Canada. Quebec was not a signatory to the November Accord in 1981 and every Quebec law since the constitutional amendments has set aside the Charter of Rights. Michel Vastel in his presentation at the seminar on Quebec's status indicated that the only Quebec representatives present at the ceremony where the Queen proclaimed the *Canada Act 1982* in force, were federal members of Parliament. In Quebec, flags were at half-mast and there seems to be some symbolic significance in the fact that it rained on the royal signing ceremonies, producing a smudge on the historic document. Illustrative of the two solitudes that too often characterize Canadian life, there was little real appreciation in the rest of Canada for Quebec's objections. The federal government was quite successful in convincing people that the Quebec people were really on its side and that it was really the Parti québécois who were in dissent.

There needs to be some serious analysis of whether Quebec's status has been at least protected, if not enhanced, by the constitutional amendments of 1982. William Lederman of Queen's University, speaking at the seminar on Quebec's status, analyzed the significance of the 1982 constitutional reforms for Quebec. As he elaborated, he is more optimistic than many that, from a Quebec perspective, there are some positive elements in the 1982 patriation package. The amendment formula is not completely negative, as there is a provision allowing financial compensation when Quebec opts out of certain cultural and educational programs (*Constitution Act, 1982*, s. 40). In this partial defence of the amendment formula he is joined by his Quebec legal colleague, Gil Rémillard.[14]

Another positive development described by Lederman is the backdoor entrenchment of the Supreme Court of Canada. Quebec is the only province with a guaranteed representation on the Court, and if the Lederman analysis is correct then a constitutional status has been given to Quebec representation. In the amendment formula itself it is clear that the composition of the Court can be changed only by the unanimous consent of the federal government and all the provinces (*Constitution Act, 1982*, s. 41(d)).

Finally in the important guarantee of minority-language educational rights in section 23 of the Charter of Rights, Lederman recognizes that there is a potential threat to Quebec's control over language. This threat has already materialized in the *Quebec Protestant School Boards* case[15] which was the second Charter judgment rendered by the Supreme Court of Canada. The result was an invalidation of certain provisions of Quebec's language laws as inconsistent with section 23 of the Charter of Rights. However, Lederman takes heart from the approach of Chief Justice Deschênes, then of the Quebec Superior Court, who carefully considered the demands for Quebec autonomy on matters of language as a possible "reasonable limit" on section 23 rights. In the end, the claims were not found to constitute a reasonable limit, and this aspect of the case was not fully addressed in either the Quebec Court of Appeal or the Supreme Court of Canada.

Lederman also sees hopeful signs of a balanced approach to language rights in the 1984 *Reference re Minority Language Educational Rights*.[16] This Ontario Court of Appeal ruling vindicates the rights of Franco-Ontarians by giving a broad reading to section 23. The case also emphasizes that legislative preventive action to implement the Charter is preferable to post facto court reactions. This offers an incentive to provincial authorities to set their own houses in order. This is a limited blessing from the perspective of Quebec's status.

Other commentators at the seminar on Quebec's status were more pessimistic about the impact of the 1982 amendments on the constitutional and actual status of Quebec in Confederation. Claude Forget underscored the significance of the loss of the Quebec veto in constitutional matters. Historically Quebec has been able to say "no" to constitutional changes it felt were inappropriate. One of the most vivid illustrations of this power was with respect to the Victoria Charter in 1971. Not only was there a sense of power in having the power, even as a minority, to say "no," but there was also a sense of security in the tacit acceptance of this arrangement by the other partners in Confederation. This veto power is gone and was authoritatively buried by the Supreme Court of Canada ruling on the Quebec veto in 1982.[17] Little comfort is gained from the fact that Premier Lévesque was willing to surrender this veto as part of the provincial "gang of eight" in the patriation battles with the federal government.

Others at the seminar on Quebec's status were more pessimistic than Lederman about whether the courts and legislatures would take a balanced approach to educational language rights under section 23 of the Charter. Given the importance of language as one component in the survival of Quebec culture in an anglophone North America, it is not surprising that any invasion of provincial authority is suspect. Although language rights are developed in a separate theme as one of the significant aspects of federalism, it cannot be completely separated from the

question of Quebec's status. It is clear that some modification of section 23 is seen as a sine qua non to Quebec's agreement with the 1982 amendments. There are also some objections to the fact that the Charter generally limits provincial governments, but these concerns seem less deeply rooted than those with respect to language.

Three final complaints with the 1982 stage of reform concern glaring omissions. One is the avoidance of a genuine debate on distribution of powers. Other than the one provision on natural resources (*Constitution Act, 1982*, Part VI adding s. 92A), the reallocation of powers has been left to the future. A second omission is the lack of a preamble alluding to the existence of two founding peoples or nations. Although the language guarantees contained in sections 16–23 give some implicit recognition to this, other provisions, such as section 27 on multiculturalism, emphasize pluralism rather than dualism. Finally, and least significantly, the 1982 amendments do nothing to change the Senate or Supreme Court as institutional structures that could promote Quebec's special status in Confederation.

## Finishing the Unfinished Agenda

One of the most interesting features of the seminar on Quebec's status was the divergence of views as to whether there really was a significant unfinished constitutional agenda with respect to Quebec. Gordon Robertson served as a catalyst for debate when he suggested that many English Canadians would be unhappy to see the issue of Quebec's status return to the constitutional agenda. He doubted whether there was general agreement about whether Quebec should have a special constitutional status and cited the adoption of the present amending formula over the Victoria Charter as evidence that there was no such agreement. In light of the new amendment formula he felt there was little serious prospect for constitutional change.

Certainly large numbers of English Canadians consider the problem of Quebec's status as solved and will be reluctant to reopen it. The generally perceived problem is the economy and not the status of anyone and this view is reflected in the specific mandate of the Commission. Québécois, or at least those present at the seminar, take a very different view. They feel that there is a significant unfinished agenda that must be addressed. The views expressed by both Gordon Robertson and William Lederman were in marked contrast to those of Michel Vastel, Andrée Lajoie, and Daniel Latouche as to the pressing need for further reform. It would appear that the impetus will come from Quebec.

Later in the seminar some progress was made toward defining the elements of the unfinished agenda. These elements are listed in Table 1-1.

**TABLE 1-1 Elements of the Unfinished Constitutional Agenda, 1985**

1. Expansion of the limited compensation for opting out of cultural and educational programs to a general compensation clause for any provincial opting out.
2. Return of a Quebec veto to the constitutional amendment formula, at least in some form.
3. A reallocation of powers to enhance Quebec's control over its own status in Confederation.
4. A preamble to the Constitution recognizing the duality of Canadian society.
5. Modifications to the educational language rights as presently stated in section 23 of the Charter of Rights and Freedoms (*Constitution Act, 1982*).
6. Functional bilingualism and fuller Quebec representation on federal administrative and regulatory boards.
7. Reform of the Senate and Supreme Court of Canada as a protector of Quebec's status.
8. Analysis and evaluation of extra-constitutional mechanisms for protecting and enhancing Quebec's status in Confederation.
9. The inclusion of Ontario in section 133 of the *Constitution Act, 1867*.
10. An examination and limitation of the uses of the federal spending power as a device to invade provincial territory.
11. Development of mechanisms for harmonizing areas of joint federal-provincial jurisdiction, such as agriculture, fisheries and education.
12. A focus upon economic aspects of the special status of Quebec as well as the traditional political, cultural and legal aspects.

There was a surprising degree of agreement among the panelists discussing the unfinished agenda that the 1982 amendments were inadequate in many respects. Many commentators preferred the Victoria Charter to the present amending formula and recognized the importance of provincial control over education and language. On other aspects of the unfinished agenda there was less agreement.

Donald Smiley shared Gordon Robertson's pessimism about the real prospects for constitutional reform, perceiving a widespread sentiment that governments should leave constitutional reforms behind and address serious economic matters. Others, such as Alan Cairns and Ramsey Cook, were more optimistic about the possibility of ongoing constitutional change. However, one dominant theme was the desirability of pursuing extra-constitutional mechanisms for meeting the needs of Quebec. Delegation, federal-provincial agreements, and new governmental practices were advocated by most speakers as the most fruitful avenues for reform.

## The Prospects for Change and the Commission's Role

Where does all this discussion of Quebec's status really leave the Commission? In simple terms, there are four major questions:

1. Where should the issue of Quebec's status in Confederation be placed on the national agenda for the future development of Canada?
2. What if anything should be done to change Quebec's current status in Confederation?
3. How does the issue of Quebec's status relate to the Commission's primary economic mandate?
4. What should be the Commission's role with respect to this issue?

We are inclined to agree with the view expressed by Claude Ryan in the seminar on Quebec's status that the Commission should not get bogged down in trying to solve the problem. Other commissions addressing only this issue have failed to produce any solution. However, we feel equally strongly that the issue should not be ignored and that an important part of the Commission's role is to put the matter of Quebec's status in Confederation back on the national agenda. Even some articulation of the unfinished agenda and a reassertion of Quebec's special position in Canada would be useful.

Not only is the issue of Quebec's status related to the broad mandate of investigating Canada's development prospects for the future but also to the question of economic union. Both Peter Leslie and Daniel Latouche emphasize that law, political institutions, culture and the economy are interconnected. Indeed an important aspect of current Quebec nationalism is the development of viable economic networks in Quebec. What is the role of these provincial networks in a federal economic union and the broader international scene?

Matters concerning Quebec's status cannot be divorced from a study of the economy. Issues such as the portability of qualifications or the mobility of people and capital in Canada have a direct and profound effect on Quebec's status in Confederation. In some situations promotion of a strong economy will coincide with the maintenance of a unique Quebec status. In others the two objectives may conflict. Where the maintenance or extension of a special status for Quebec in Confederation involves economic sacrifice, difficult choices will have to be made. However, dealing with the issue of Quebec's status in some form is a challenge that cannot be avoided.

### *Language Rights in Canada*

Language has historically been an emotional and controversial issue in Canada. Although not as divisive a factor as race in the United States, it

is Canada's closest equivalent. As Peter Leslie indicates in his paper, language claims have emanated not only from Quebec but also from the francophone minorities in other provinces, particularly Manitoba, New Brunswick and Ontario.

During August 29–30, 1984, this Commission sponsored a seminar on the subject of language rights. Many of the leading Canadian experts on language policy gathered in Ottawa and presented their views. Jean Laponce of the University of British Columbia kicked off the seminar on what turned out to be a dissenting view. He asserted that culture and economics are not as closely interrelated as people normally assume. Building on this assumption, he argued for separate linguistic communities along territorial lines, in line with the Swiss and Belgian models. He did not think that this would preclude economic integration between the separate linguistic communities. This analysis would appear to support Quebec language policies. In Laponce's view, the role of the federal government was to make the process of assimilation less painful.

Several people at the seminar emphasized that the struggle is not a contest of equals, asserting that English is a "killer language," which tends to dominate and eventually destroy other languages. This is the process experienced acutely by francophone minorities in provinces other than Quebec. Other languages such as Ukrainian and Gaelic have also been overpowered by the English language.

Other speakers at the seminar, including Jean-Denis Gendron of Laval University and Michel Lebel of the University of Quebec at Montreal, were not convinced by the Laponce thesis that economics could be separated from language and culture. Given the nature of the Commission's mandate, they felt that the interconnections among language, culture and economics are crucial. Lebel asserted that the economic factor is the crucial one and that language is an important tool for obtaining economic autonomy. Gendron was equally emphatic that the economic matters are the crucial ones. He argued that making French the language of the workplace in Quebec is even more important than control over the schools. At many points he lauded the work of the Royal Commission on Bilingualism and Biculturalism and stated that it was high time that its recommendations were implemented in Quebec. On the other hand, Joseph Magnet, of the University of Ottawa, felt that Quebec had already paid the price for following such recommendations and was in danger of becoming an economic ghetto.

Alain Prujiner of Laval University focussed on the interaction of demographic, political, cultural and economic factors in linguistic conflicts. He stressed the importance of being flexible in the search for solutions and the need to tailor any proposal to the socio-economic conditions of the community for which it is designed. He doubted the relevance of the Swiss or Belgian models in Canada, where the two major linguistic groups are more geographically mixed.

## Individual versus Collective Rights

Joseph Magnet was an active participant in the seminar and he questioned the Laponce thesis that language rights in Canada have been individualistic in their focus. Magnet argued that language rights in Canada have been largely collective in their nature and he pointed to section 133 of the *Constitution Act, 1867* as an example. Like the denominational school rights affirmed in section 93 of the *Constitution Act, 1867* and reaffirmed in section 29 of the *Constitution Act, 1982*, the rights were conferred upon an identified minority group.

There are other examples in the Charter of what might be broadly referred to as collective or communitarian rights. Examples are aboriginal rights in section 35, regional rights in section 36, and multicultural rights in section 27. Even the high-profile equality guarantees, such as sections 15 and 28, may be viewed as collective as well as individual rights. Other commentators also rejected the characterization of the language guarantees in sections 16–23 of the Charter as individual rights. This tension between individual and collective rights will bedevil judges in their efforts to give meaning to the Charter.

On the Laponce thesis, collective rights are tied to territory, where there is institutional control over such vital units as schools. On this view, if the province of Quebec does not control the school, it will not be able to protect its language, since a language must have political as well as cultural protection. Magnet disagreed that schools were necessary to the control over one's linguistic future. This debate about schools reinforces the importance of modifications to section 23 of the Charter dealing with minority-language educational rights. As discussed earlier this is a significant item on the unfinished agenda of constitutional reform.

Whether language is regarded as a matter of collective or individual rights will affect how it is dealt with both on its own and in relation to the economy. Sometimes a difficult choice must be made between linguistic and economic virtue.

## Bilingualism versus Dual Unilingualism

In spite of the clear federal policy to promote bilingualism, there are significant regional forces that favour separate but equal unilingual structures. Quebec with its language policies is an obvious example, but the western provinces would have considerable sympathy with divided unilingualism. With the popularity of French immersion programs, the bilingual Canadian of the future may be the anglophone who has learned French as a second language.

The problem with the above approach is that it would likely lead to the

assimilation of the francophone minorities outside the provinces of Quebec and New Brunswick. Joseph Magnet made an eloquent plea, both orally at the seminar and later in a written submission, to preserve the francophone minorities in places like Manitoba. He described such communities as a rich part of the Canadian heritage and he stressed the need for the federal government to protect their existence. The essence of his argument runs as follows:

> In conjunction with economic measures it would be important for the federal government to develop cultural facilities for official language minorities throughout the country. Francophones outside of Québec are especially susceptible to the influence of the American and English Canadian media. The federal government should energetically assume the responsibility to combat these instruments of assimilation, and could do so through cultural bartering with other French-speaking nations. Films and television programmes from France, Belgium, Africa could be broadcast throughout Canada on a nationwide French network. Copies of these should be made and kept in media libraries so as to give schools, community groups and private individuals easy access to them. Also, local French programming needs to be encouraged and shown nationwide at prime times. The National Film Board should be given the mandate and responsibility of developing films in French from regions other than Québec. Of course, all of this would achieve nothing if its potential audience continued to prefer to watch The Love Boat. Accordingly, as part of the process, the government will have to promote the endeavour.
>
> The federal government ought to exert pressure on recalcitrant provinces to accept a system of official bilingualism. The Courts have been asked to rule that Manitoba, Alberta, Saskatchewan and the Yukon are bilingual. The federal government ought to continue to provide support, material and legal, for the Mercure (Saskatchewan), Lefebvre (Alberta) and St. Jean (Yukon) cases. These cases are of immense importance. Should the courts decide in favour of the Francophones in those provinces and territory, it would be easier to persuade the rest of the provinces to opt into the system of official bilingualism.
>
> At the Victoria Conference of 1971, Newfoundland and Prince Edward Island had agreed to a greater degree of official bilingualism than presently exists in those provinces. Article 13 of the Victoria Charter stipulated that all provincial statutes would be published in both languages. In Newfoundland both versions of the laws would have been official. In Prince Edward Island and Newfoundland, Canadians would have had the right to communicate with the provincial governments in either official language. As well, the use of English or French would have been permissible in the legislature of these two provinces, both of which agreed to the Charter.
>
> Canada has regressed in linguistic matters since 1971. A determined federal government could in all probability make up the lost ground. Prince Edward Island and Newfoundland receive large sums in transfer payments from the federal government. This gives Ottawa a great deal of leverage.

Ottawa's financial power is probably used to pressure these provinces to become officially bilingual.

Ontario may well be on the verge of accepting the constitutional entrenchment of French as an official language of the province. The federal government must continue to call for this important gesture. Both British Columbia and Nova Scotia had agreed to the Victoria Charter. Ways must be found to rekindle the spirit of acceptance in those provinces. Certainly all of this is within reach. What is needed above all else is the will to attain it. This the federal government must develop.

All of these propositions would cost a great deal of money. However, the programmes now in operation are not succeeding in stopping assimilation or transforming Canada into a bilingual nation. If we are serious about this aim, as I believe we must be, then we have to widen our scope and be prepared to spend the funds required.

Both the Anglophone minority in Québec and the Francophone minority elsewhere have been fighting for their language rights for more than 15 years. Signs of fatigue are now clearly visible. The federal government must decide once and for all whether it is still pursuing its bilingual policies. If it accepts that the talk of the last 15 years was not empty rhetoric, then it must be prepared to intervene in a very big way. Otherwise, it is only a matter of time until the inevitable occurs, and Canada divides into two unilingual entities.

Drawing upon his considerable experience in fighting language battles in Manitoba, Magnet painted a rather alarming picture of what he considered the failure of the federal policy of bilingualism. He also pointed to a decreasing tolerance for linguistic minorities and the not very subtle ethnic and racial hatred that is not far below the surface of Canadian society. Rather than attempting to paraphrase Magnet on this point we will again quote from his submission:

The federal efforts to protect the linguistic minorities have clearly not been sufficient. The continued rate of assimilation of Francophones outside of Québec as well as the alarming perpetuation of hatred and racism directed to the minorities are irrefutable evidence that new tactics are required.

In his 1983 report, the Commissioner of Official Languages predicted that at its present rate of assimilation the Francophone community in Saskatchewan would disappear in 50 years. Between 1971 and 1981, the number of Fransaskois who spoke French in the home went down to 10,000 from 16,000, a loss of 37%. It is true that Saskatchewan's assimilation rate was the worst in the country. Yet, Saskatchewan poses only the extreme example of an alarming trend. In the same period, the number of Francophones who used French mostly in the home in the eight non-bilingual provinces in the country dropped by 10%. In Québec Anglophones went down from 13% to 11% of the total population.

It is clear that in 10 years between 1971 and 1981 there has been a polarization in the country, with the two language communities becoming more concentrated in distinct regions and increasingly more isolated from each other.

Relations between French and English communities remain volatile and

problematic. It is impossible for someone who did not live through the hysteria generated in Manitoba in the autumn and winter of 1983–84 to appreciate what occurred there.

The offices of the Société Franco-Manitobans (SFM) were burned. Their files were destroyed. The leadership of the SFM received constant death threats. The fear and violence grew to the point that the family of the SFM leader had to be sent out of the province for its protection. The fear engendered by these attacks on the Francophone community was sufficient to limit the political effectiveness of the SFM. When, at a crucial moment, it came time to approach the Prime Minister to secure his help to pressure the Manitoba government, they would not do it. . . .

I suspect that the extreme reaction in Manitoba is not an aberration and that similar phenomena could occur in Saskatchewan and Alberta in the eventuality these provinces are declared bilingual by the courts, and their governments fail to respond with political sophistication.

The events in Manitoba represent a serious setback for linguistic rights in Canada. The political damage suffered by the NDP in Manitoba as a result of taking the initiative to restore language rights in the province may be irreparable. A political party in any other province would be foolish to attempt a similar undertaking. Also, in light of the hatred and threats directed at the Franco-Manitobans, other Francophone groups will refrain from requesting rights which may be due to them, but which they feel would be unacceptable to the majority.

A case in point is the SFM, which is currently debating whether to go to the courts for a judgment similar to the one given by the Ontario Court of Appeal in the ACFO case. Many of the Society's members fear a renewal of the anti-French backlash. On the other hand, Francophone parents are anxious to have affirmed their children's right to an education in their mother tongue.

Division of this sort can only weaken an organization such as the SFM, which is already in the position of a besieged minority.

Ironically, in all of this, it is Premier William Davis of Ontario who emerges as the wise politician. His tactic of granting language rights in niggardly doses in order to palliate Francophones while they are being assimilated suddenly looks very appealing.

A certain portion of the blame for the Manitoba débâcle must rest with the federal government. Ottawa tends to visualize language rights in political terms; language rights are not seen as absolute rights to be protected with the highest priority. In Manitoba, the federal government never promoted bilingualism in the Manitoba community, nor made its presence felt as it did in Québec during the Sovereignty Association Referendum. In fact, the government itself was divided. Key personnel in the Ministry of Justice refused to support the Reference to the Supreme Court. It required Prime Minister Trudeau to order the Reference in the face of strong opposition from bureaucrats and Liberal Ministers. Division within federal ranks sends contradictory signals to the organs of government required to implement federal government policy and leaves an unfocused impression in the public mind.

Language equality in the country was largely the inspiration of

> Mr. Trudeau. It was primarily due to his commitment to the promotion of equality between the linguistic communities that the Official Languages Act and the Charter of Rights and Freedoms became law. Now that Mr. Trudeau has retired, it may very well be that the process will grind to a halt. The Manitoba affair may be the high water mark of language rights development in the country. It may be that sections 16 to 23 of the Charter, which expand language rights, will not be fully implementable in certain parts of the country.

We would hope that Magnet's pessimistic observations are not prophetic. The recent decision of the Supreme Court of Canada in the Manitoba language rights case[18] certainly suggests that constitutionally entrenched rights will be implemented whatever their costs, and even if they offer a second-best solution. Nevertheless, it is hard to disagree with his analysis. The tensions between unilingual and bilingual versions of Canada are as old as the nation itself and they will not be solved by entrenching constitutional provisions on language. The economic implications of adopting a bilingual or dual unilingual approach to Canada are extensive. It is one aspect of maintaining a strong national unit without destroying the diversity of Canada's regions. Language policy must be an important consideration in the evolution of a Canadian economic strategy, and we suggest an even greater federal commitment to bilingualism.

The vicissitudes of French in Quebec and Canada are further explored by Eric Waddell of Laval University in a paper in Volume 34 (*The Politics of Gender, Ethnicity and Language in Canada*) of the Commission's research series and we recommend it for a more detailed analysis of the connections between state, language and society.

## The Federal Policy on Canada's Official Languages

Not until 1969 did Canada officially recognize the fact that it is a country with two official languages. This was an important step forward. The inclusion of many of these same provisions within the Charter of Rights and Freedoms enhances this protection by putting it in constitutional form. There is, however, a significant gap between the declarations and practice.

The *Official Languages Act* of 1969 created the office of the Commissioner of Official Languages with a mandate to oversee implementation of the Act. In the preface to his 1983 report, the Commissioner of Official Languages restated the purpose of the federal language policy:

> The whole purpose of the federal language effort is to resist the blandishment of a Canada split along language lines. The fundamental objective is to construct a society in which minorities can expect to live much of their lives in their own language.[19]

This federal policy has manifested itself in two major areas:

1. the protection and promotion of minority-language rights of francophones outside of Quebec and recently of anglophones in Quebec; and
2. the development of a public service to reflect the country's linguistic duality.

The first manifestation of the federal language policy was discussed in the previous section. In developing a bilingual public service the federal policy has been more successful, but there is still room for improvement. While francophones have been integrated into the federal public service, the record on this front is not as impressive as the statistics would suggest. In those areas of the country where there are few francophones, francophone participation in the federal public service is almost nonexistent; the situation in Quebec is not much better as regards anglophone participation in the federal public service. Federal policies have been even less effective at making French the language of work either at the federal level or in Quebec. While access to services in either official language has improved greatly, it is still not a reality in many parts of the country.

Outside the public service the federal government has attempted to promote its language policy in three major areas: education, the court challenge program, and community development. Magnet suggests that all these programs could be more effective if they were more generously funded and more efficiently operated.

## Quebec's Policy on Canada's Official Languages

The history of language policy in Quebec is complex. Joseph Magnet in his written submission describes the situation succintly and we shall quote selected portions from his paper on this topic.

> As it evolved through Bill 63 (1969), Bill 22 (1974) and Bill 101 (1977), Québec's language policy reflected the growing desire of Francophone Québécois to promote the primacy of French in Québec. The inspiration behind Bill 101 is to transform major components of Québec society. Language was seen as the unifying force bringing Québécois together in one collective project. In his White Paper entitled "La politique québécoise de la langue française", Camille Laurin outlined the very special role which French played in the province. . . .
>
> > Grâce au langage, on reconnaît que l'on appartient un monde, on resesent des sentiments qui consonnent avec ceux d'autrui; c'est par le langage que les dialogues et les conflits prennent forme. La langue est donc un milieu concret. . . . Ici, la langue française coincide avec une société. . . . Il s'agit de protéger une culture originale: un mode d'être, de penser, d'écrire, de se réunier, d'établir des relations entre les groupes et les personnes, et même de conduire les affaires. . . .

In the belief that French was endangered in North America, the Parti Québécois found it necessary to limit severely the linguistic rights of Anglophones and Allophones in the province. The million Anglophones in the province were 'minoritized'. Bill 101 conceives of the Anglophone community as one ethnic minority among many. The special attention riveted on the Anglophone community in Laurin's White Paper was no longer present when the law was presented to the Assemblée Nationale. Overnight the large Anglophone minority in the province lost the right to use English in signs, in communications with working colleagues, in dealings with the public without prior passing of rigid language tests, etc. Some of the more egregious exaggerations have been rectified by Bill 57 passed in December, 1983.

English, however, remains in a disadvantaged position. The language policy of Québec stands in marked contrast to that of Canada in that Québec refuses to recognize English as an official language or to promote the equality of status of French and English. Québec's language policy is conspicuous for its promotion of French as the dominant language in all important emanations of the provincial state.

In his White Paper, Mr. Laurin referred to the inferior role Francophones played in the province's economic life. In 1974, companies owned by Americans or English Canadians accounted for nearly 80% of sales in Québec. Bill 101 was intended to change this situation. The White Paper states:

> "cet usage [en français] s'accompagnera, symbolisera, favorisera une reconquête pour la majorité francophone de Québec de l'emprise qui lui revient sur tous les leviers de l'économie".

The Parti Québécois never utilized language laws to facilitate the takeover of the provincial economy by Québec's Francophones. By the time Bill 1, the first version of Charter of the French Language, was introduced into the Assemblée Nationale the emphasis had moved away from altering the ownership of business and had settled on creating a French image for Québec's business community through the control of notices and signs and through the enforcement of French as the province's language of work.

The Parti Québécois did make use of the provincial Caisse de dépôt et placement to increase the province's holdings in private enterprise. The Caisse was established in 1965 by Premier Jean Lesage to invest and administer the assets of the Québec Pension Plan. Today it receives deposits from several other sources as well. Of the Caisse's assets of over $16 billion, $3.5 billion are invested in the common stocks of Canadian Corporations, including Alcan Ltd., Bell Canada and Canadian Pacific.

The Parti Québécois did not initiate investment of public funds into private corporations. Under the tutelage of the Parti Québécois, the Caisse's activities have become more aggressive. The Caisse now advocates that it should be represented on the boards of corporations in which it has sizeable investments.

In 1982 the Caisse gave signals that it wished to increase its shares in Canadian Pacific Ltd. This promoted a CP-led campaign by the Anglophone private sector to prevent the purchase which culminated in Bill S-31, a federal bill limiting to 10% the percentage of shares which a provincial

government can own in a transportation company involved in interprovincial or international trade.

The attack on the Caisse's financial activities came primarily from English Canada. Francophone businessmen, notably Serge Saucier, chairman of the Montreal Chamber of Commerce and Pierre Lortie, president of the Montreal Stock Exchange supported the Québec government. In testimony before the Senate committee assessing S-31, Mr. Saucier explained that the Caisse represented a means through which French-Canadians could penetrate into the decision-making levels of corporate capitalism.

The alignment of forces for and against Bill S-31 underlines the fact that in Québec there is still a close identification of class and language. Francophones remain excluded from the upper echelons of private enterprise. In its use, of the Caisse's financial power to facilitate the promotion of Francophones, the Québec government is once again indicating that it is prepared to intervene to improve the economic status of the Francophone majority in the province. This is consistent with its intervention through language laws to ameliorate the position of French in the province, and in some sense in an expression of the economic nationalism more fully developed in Mr. Laurin's White Paper and to a lesser extent in Bill 1.

The federal government, by siding with CP and the Anglophone private sector, has once again given to Québécois the impression that it is insensitive to their concerns. Through Bill S-31, the issue has now been joined between Québec and the federal government.

In making French the language of work in Québec, the government of Québec was simply implementing one of the principal recommendations of the Royal Commission on Bilingualism and Biculturalism. An average person spends one third of each day at work. The language with which an individual earns his or her income and through which an individual will improve his or her economic standing in the community has economic value. Before the implementation of Bill 22 in 1974, French in Québec was associated with the shop floor. If one wished to advance, one had to learn English.

Bills 22 and 101 were intended to correct this relegation of French to an economically inferior position in the province and to narrow the division between workers and managers previously defined along linguistic lines. Language of work has remained central to Québec's linguistic policy. Any foreseeable change in the province's government is unlikely to alter this focus. It therefore behooves the federal government to take account of this policy which, in any case, is not inconsistent with its own. As early as 1969, reasoned elaborations of federal policy have emphasized the need to promote the primacy of French as the language of work in Québec. It is therefore surprising that the relation between the two governments should be anything but harmonious on this issue. . . .

With Bill 101, French became the language of education in Québec. Previous to Bill 101, English because of its greater mobility and economic value had proved to be the language that attracted new immigrants to Québec. With s. 72 and 73 of Bill 101, the provincial government limited the previous right of Anglophones and immigrants to send their children to

English schools. English education was limited to the children of the Anglophones then residing in Québec. In the Protestant School case, the Supreme Court of Canada extended this class to include everyone designated by section 23 of the Charter. These do not include new Canadians who immigrate to Québec who must continue to have their children educated in French. Due to the poor economic state of the province, for the time being at least, very few Anglophones will be migrating to Québec. The Supreme Court decision is not, therefore, likely to have a major impact on the linguistic balance in the province. However, if in the future, the economy of the province is such that the province will attract great numbers of Anglophone Canadians seeking employment, it may be necessary to review section 23 of the Charter in order to determine whether the Québec government's fears that the Charter will dilute the French character of Québec unacceptably are well founded.

Unfortunately, at a time when the rest of Canada is beginning to recognize the advantages of being able to communicate in both official languages, Québec has mired itself in unilingual education. Section 72 of Bill 101 stipulates that all primary and secondary education shall be in French. The exceptions listed in the Act do not include English Immersion. A court challenge launched by the Chateauguay Valley School Board may result in the invalidation of the prohibition of English Immersion in Québec. Until then, however, the programme remains unavailable in Québec.

Québec, more specifically, the Parti Québécois has justified measures such as these on the necessity to protect the collective right of Francophones to the survival of an endangered French language in North America. In the name of this right, the Québec government has assumed the right to limit the language rights of a minority of Québec residents. Québec presented this argument to the Supreme Court in the Protestant School Board case when it tried to justify the Québec clause in Bill 101. The Supreme Court rejected Québec's submission.

It is unlikely that the reasoning of the court can be extended to include English Immersion. Unlike the language right at issue in the Protestant School Board case, it is probable that the right to language immersion is only partially protected by the Charter. Francophone Québécois will most likely have to acquire this right through political pressure rather than through the courts.

As Francophone Québécois became increasingly concerned with the status and prospects for survival of their language they intervened through government legislation. French became by law the official language of the province. New immigrants had to adapt to a linguistic environment dominated by French in the school and work place. French was given new economic value through laws regulating language of work. In enacting these measures, the provincial government has attempted to protect the unique position which the province has in North America.

Bill 101 remains popular in the province despite the recent poor showing of the Parti Québécois government. Despite certain exaggerations and obvious Constitutional problems, the thrust of Québec's policy runs along the same track as that marked out by federal policy studies. It would be wise for Canada to take account of the large measure of common ground between

Canada and Québec with respect to language policy and to emphasize commonality of approach in its legislative and administrative initiatives with respect to the linguistic complexion of Québec. In saying this, the federal government should not fear to advance its own clearly defined policy of protecting the security of the Anglophone minority within Québec as well as the Francophone minorities outside of Québec in the face of contrary policy from the government of Québec.

### Concluding Thoughts

We do not agree with Professor Magnet that there is significant common ground between the Quebec and federal policies with respect to language. Furthermore, as Magnet is well aware, francophone minorities outside of Quebec are likely to pursue different interests and policies. Language continues to be one of Canada's most emotional and controversial issues, and there are as many different policies as there are viewpoints on the topic. The challenge facing those who wish to plan Canada's economic future is how to take account of the various language policies in forging a Canadian economic union. A strong temptation would be to enhance the federal policies, as these would appear to best support the strong nationalism which is a prerequisite to an economic union. However, much of Canada's cultural and linguistic strength lies in its regional diversity. We would suggest that it is desirable to think in terms of regional as well as national economies. Language and culture should not be sacrificed on an economic altar.

## *The Treaty-Making Power*

In 1867 when Canada became a nation there was no thought that it would control its own foreign affairs. Section 132 of the *Constitution Act, 1867* made it clear that the treaty-making power resided with the British Parliament at Westminster. Therefore no treaty-making power compatible with a federal state was developed. When Canada became an independent nation with the *Statute of Westminster, 1931*, the federal government took the position that it had the power to conduct foreign policy and negotiate treaties with little concern about conflicting provincial views. This illusion was abruptly shattered in 1937 by the Privy Council in the *Labour Conventions* case[20] when it determined that the power to implement treaties resides with the government that has legislative authority over the subject matter. Thus the provinces by inaction could make Canada breach her international obligations.

The source of the treaty-making power has been the royal prerogative. In Canada the Governor-in-Council acquired the power of the royal prerogative as representative of the monarch in Canada. Therefore it has been the federal executive who acquired the treaty-making power in Canada, although this has not been without challenge. While the federal

executive can make treaties, implementation can occur only through the actions of the legislative body that has jurisdiction over the subject matter of the treaty. Thus to avoid international embarrassment the provinces could not be overlooked when treaties impinged on provincial affairs.

When discussing the treaty-making power, the international environment cannot be ignored. Relations among states are becoming more complex, and the nations of the world have become more interdependent. Canada relies heavily on trade with other countries, and international commerce has become much more specialized. In order to be effective in that environment a country must be able to act quickly and decisively.

At the same time, new developments are taking place in the international legal system. There appears to be a movement from bilateral to multilateral diplomacy with increasing numbers of complex and specialized world organizations, such as the European Economic Community, being created. Lawmaking is becoming more of a function of a collective decision-making process with the end result being multilateral international agreements in many areas of human activities. Examples are the elimination of discrimination and the management of the resources of the seabed.

Canada must play an important role in these kinds of negotiations. When Canada is negotiating at the international level insufficient recognition is given to the internal division of legislative powers within Canada. Nonetheless, the decisions taken may affect provincial powers and need provincial legislative action in order to implement them. When negotiating treaties and conventions the federal executive has been put in the position of having to sign treaties and conventions with the caveat that implementation is subject to the ratifications of the provinces. This is often referred to as a "federal state clause." Such clauses are frowned upon at the international level.

Canada is therefore caught in the dilemma of its own federalism. If a federal state is to operate effectively there must be a recognition of the supremacy of each legislative unit within its own sphere of operation. On the other hand, the trend in the international forum seems to be against making any significant concessions to states with federal systems. The Vienna Convention on the Law of Treaties, which came into force in 1980, contains a number of manifestations of "hostility" between international law and federalism. The combined effect of its provisions is to prevent a federal state from invoking its internal law as a justification for its failure to perform an obligation accepted under a valid treaty. Federal state clauses used in treaty negotiations have been accepted only with great reluctance. However, article 29 of the Vienna Convention permits the application of a treaty to be limited territorially if the treaty so provides. Pursuant to this exception Canada is free to negotiate a clause whereby one or more of its provinces could be included or excluded.

While many nations have both their legislatures and executives involved in the treaty-making process, Canada continues to rely on the royal prerogative, which gives the executive the exclusive power to negotiate treaties. This appears to be out of line with modern state practices. It is clear in Canada that legislative action is necessary to implement any treaties or conventions negotiated by the executive even at the federal level.

While the legal environment has developed at the international level, matters within Canada have not remained static. Both levels of government are strong with neither level being able to dominate the other, yet both levels of government are interdependent. Federal-provincial relations have become increasingly significant in recent years. Many important decisions are made by ministers from each level of government discussing matters ranging from patriation of the Constitution, to Indian self-government, to health care in Canada. Such discussions also encompass issues that may be the subject of an international agreement.

Although the federal presence has been recognized as the dominant presence in international treaty-making, the provinces have not been dormant in this area. Increasingly transborder agreements of a technical or administrative nature are made by provinces on a multiplicity of issues, particularly with the United States. Quebec and the western provinces have been particularly active in such matters.

It is not unusual to see delegations from provinces going to other countries to seek increased trade opportunities. Many provinces have representatives or offices in other countries, such as the United States, to promote their interests. In some instances the initiatives have come directly from the provinces, whereas in others the federal executive has tried to coordinate its efforts with the provinces through obtaining provincial views prior to attendance at significant meetings. While there has been some response from the federal government to increased participation by the provinces in international activities, there has been no systematic consultation with the provinces. No formal mechanisms exist which require or encourage this kind of consultation.

## The Special Position of Quebec

George Szablowski, whose paper on the treaty-making power appears in this volume, emphasizes the special position of Quebec in this area. Quebec's special concern for the preservation of its cultural and linguistic values has been reflected in a growing interest and an increasing demand for participation in international activities. In 1967 the government of Quebec established a Department of Intergovernmental Affairs and in 1974, gave it the power to maintain and establish relations with foreign governments and to conduct interprovincial and international governmental negotiations.

The impetus for greater involvement began in the 1960s and led to some difficult moments when Quebec was given recognition as a foreign government for participation in some educational and cultural matters. As a result of this development, the Canadian government in 1965 concluded an umbrella agreement with France in relation to educational, cultural, scientific and artistic matters. This did not resolve the conflict, since in 1968 and 1969 Quebec unilaterally participated in international conferences, where it was given status as an independent nation. In recent years the two levels of government have reached a modus vivendi without abandoning their respective and conflicting positions on the treaty-making power. Quebec continues to maintain that it has the authority to negotiate treaties on subjects within its legislative competence, while Ottawa maintains that it has full authority to negotiate treaties pursuant to the royal prerogative.

## THE ROYAL PREROGATIVE

The royal prerogative has always formed the constitutional basis for treaty-making in Canada. Although the process of how the prerogative evolved from the monarch to the Governor General to the Department of External Affairs is not entirely clear, the courts continue to show deference to the royal prerogative. Szablowski argues that the royal prerogative is an anachronism in a modern constitution, since it produces uncertainty, diminishes responsibility, and does not provide a mechanism for effective federal-provincial consultations on international affairs.

In addition, its treaty-making powers are outdated in relation to the developments at the international level, since Canada cannot implement treaties where the subject matter is within provincial legislative competence. Canada is thus at a disadvantage when negotiating internationally. Nor is the use of the prerogative for treaty-making reflective of the fundamental principles of responsible government and federalism since it fails to recognize the legitimate claims of the provincial governments for involvement in the negotiating stage of treaty-making. It is not acceptable to have provinces excluded from negotiations that will have an impact on their spheres of social, economic or political activity.

Failure to involve or recognize provincial interests at the negotiating stage leads to less legitimacy for the concluded agreements. Provinces may have only the choice of totally accepting or rejecting a treaty where a middle ground may be more acceptable. While conflict may be beneficial in some areas, it seems that in relation to treaties it may damage Canada's international effectiveness. If foreign countries cannot be certain that Canada is able to fulfill its part of a treaty, respect can be lost. In some cases treaties may not be concluded at all.

## Reform of the Treaty-Making Power

According to Szablowski, Canada's system needs restructuring in order to be successful in the modern style of negotiation. The Constitution should be amended to recognize the legitimate interests of the provinces while at the same time preserving a unified body for negotiation at the international level. Consultation is essential where international treaty obligations may affect provincial interests or policies or federal-provincial relations. In addition, special consultation with the Province of Quebec is necessary wherever international obligations may affect French linguistic or cultural rights. Any reform of the treaty-making power in Canada must recognize these special needs of Quebec relating to culture and language. Treaty-making is one significant area where the special Canadian brand of federalism must influence the creation of a treaty-making power that is uniquely Canadian. While other jurisdictions' treaty-making powers can be examined, ultimately any treaty-making power must encompass Canada's diverse regional and cultural interests as well as its dualist roots.

Szablowski has made a series of proposals with respect to reforming the treaty-making power in Canada. He initially proposes the abolition of the royal prerogative as the source of treaty-making power and the amendment of the *Constitution Act, 1867* to incorporate a treaty-making power, which would vest the authority to conduct foreign policy and to make treaties under international law in Parliament. He also suggests the establishment of a federal-provincial commission on treaties and international agreements. This commission would be an independent Crown corporation with authority to act given by statutes from Parliament and the provincial legislatures. It would consist of representatives at the ministerial and deputy ministerial levels of federal, provincial and territorial governments. It would be accountable to both the federal and provincial governments and would be supported by a trained secretariat of professionals. The purpose of this body would be to negotiate and sign treaties subject to a consensus when the subject matter falls within provincial jurisdiction. This body would appoint representatives from governments and the private sector to attend official international meetings and negotiations. It would also have the power to monitor treaty developments and provincial international activities.

The establishment of the commission would involve a transfer of authorities from present bureaucracies such as the Department of External Affairs and the provincial intergovernmental relations departments to the permanent secretariat of the new commission. However, only the treaty-making power would be transferred, and the general conduct of foreign affairs would be left with the Department of External Affairs. A practical problem for the Szablowski proposal is that in many cases it

would be difficult to distinguish between treaty-making and the general conduct of foreign affairs.

Szablowski cites the decision of the Supreme Court in the *Patriation Reference*[21] as a positive sign that the court will take a more organic approach to the Constitution and leave more room for innovation. His study proposes the adoption of several principles consistent with a renewed Canadian federalism which should guide the process of innovation and change. These principles include: (a) a single and unified Canadian presence as an independent state on the international scene; (b) an appropriate balance between federalism and responsible government in Canadian political institutions, with respect to treaty-making; (c) a better reflection of the diversity of Canadian interests in the making of treaties; (d) an obligatory consultation among governments whenever treaty negotiations affect matters within provincial legislative jurisdiction, and a special recognition of the role of Quebec; (e) government accountability for treaty-making to both federal and provincial legislative assemblies.

The main basis of Szablowski's proposals is that the treaty-making power should be clearly specified in the Constitution itself instead of residing in the uncertainty of the prerogative power. One of the underlying principles of his reform is that treaty-making powers should be based on consensual principles particularly where federal-provincial relations or provincial subject matter is at issue. However, he is not very specific about what happens when there is no consensus. His proposal gives the federal government the lead role in treaty-making, which may not be acceptable to all provinces. He does, however, advocate provincial participation at every level when issues that concern them are at stake.

One body must represent a federal nation when treaty-making is involved. Ten different governments negotiating on an international level would result in confusion and difficulties for the federal state. A nation that does not speak with one voice cannot operate effectively in a tough new international legal environment. However, within the federal domain there is room for conflict between the Department of External Affairs and the new commission. Specific mechanisms would need to be developed to deal with such disputes and efforts made to minimize conflict.

## *The Amendment Process*

Prior to 1982 Canada was unable to amend its Constitution on most significant matters, without approaching the British parliament at Westminster. For over a half a century Canadians have searched for an acceptable formula to permit Canadians to amend their own Constitution. All the federal-provincial negotiations prior to 1982 ended in failure. In the 1970s, negotiations expanded beyond the search for an amend-

ment formula to include a Charter of Rights. Finally, between 1980 and 1982, after a series of federal-provincial conferences, threats of unilateral federal action, and a Supreme Court of Canada decision in the *Patriation Reference*,[22] an amending formula was agreed upon by the federal government and all of the provinces except Quebec. This was the historic November Accord of 1981 and it was followed by the *Canada Act 1982* which patriated the amending formula.

The amending formula was a result of compromise and a general reaction against any formula that would give one of the larger provinces a veto in all matters. It is a mixture of provisions which allow for a range of different amendment procedures, from those that require the consent of two-thirds of the provinces (with at least 50 percent of the population) and the federal Parliament, with an opting out clause for any dissenting province, to those amendments, such as changes to the office of the Queen or representation in the Senate and the House of Commons, which require the consent of the federal Parliament and the legislatures of all ten provinces. To change the amending formula itself also requires the consent of all ten provinces and the federal government.

Stephen Scott, in his paper in this volume, carefully dissects the various amending formulae and speculates on how they might be used. He bemoans the rejection of some element of referendum for constitutional change, which he feels would add an important element of popular participation in the process. He also makes a critical evaluation of how the formulae would work in the political realities of Canada. Included in this analysis is the process for provincial dissent or opting out of constitutional change. The package of provisions is more complex than it might at first appear.

## Quebec's Absence

A serious note of discord rang through the entire patriation process when Quebec declined to become a part of the constitutional accord. Since the Supreme Court of Canada had indicated that only substantial consent was needed for a resolution seeking patriation, entrenchment of a Charter and an amending formula was still constitutional despite Quebec's lack of agreement. In a case that arose after the *Patriation Reference*, the Supreme Court of Canada expressly ruled that Quebec does not have a veto in constitutional change.[23]

Scott notes that Quebec has made a number of demands which have been impossible to meet. Before any plan to patriate the constitution would be acceptable to Quebec it would have to recognize that Quebec was a distinct society within the Canadian federal system.

Scott identifies three major Quebec objections to the amending formula and general constitutional package: (a) the guarantees of minority-language educational rights; (b) the guarantee of mobility rights in the

Charter; and (c) the lack of compensation for provinces opting out of constitutional change except in relation to education and culture.

He gives little weight to the first two objections and regards them as signs of Quebec's intransigence. On the compensation point Scott feels there is some room for movement in Quebec's direction. In light of Quebec's reaction after the 1982 patriation, he is not optimistic about constitutional agreement. The demands have risen to a point where he feels that the chance of agreement is negligible. On a careful analysis of the debates in the National Assembly he concludes that the government of René Lévesque did not really want constitutional agreement. While he stops short of accusations of bad faith on the part of the Quebec government, he does question its motivation.

We are not as negative as Scott about the role of the Quebec government during and after the constitutional accord. While it is true that Quebec was playing politics, so were the federal government and the other provinces. As the political actors change and as the emotions of the patriation exercise die down, it is possible that agreement can be reached with Quebec. Such agreement will not be easy or swift in its making, but it is possible.

In view of developments since 1984 under the new Conservative federal Government it is important to understand the events that transpired at the time of patriation. Quebec's response to the Constitution is a reflection of its quest for a special status within the Canadian Confederation, a quest that was not terminated with patriation. It is an issue that is alive today in discussions between the Conservative federal Government and the Parti québécois Government of the Province of Quebec. Scott's paper offers a useful insight into the entire patriation process and its implications for Quebec's future role in Confederation.

## Formal and Informal Amendments

Amendment is the only formal means of changing a constitutional document, since the purpose of a constitution is to have a structure that cannot easily be changed. Nevertheless, a means of amendment is important in order to accommodate significant changes in values or needs which may occur after a constitution is created. For example, to change the structure of the Supreme Court of Canada would require an amendment. The changing role of the Supreme Court may increase the desire to ensure that the court is a fully entrenched institution. Recognition of the form of treaty-making power suggested by Szablowski would also require a formal constitutional amendment. While the original *British North America Act* had a treaty provision it could not have been anticipated that events would make this provision obsolete. It is for these kinds of amendments that an entrenched formula is significant.

It must be remembered, however, that formal amendment is only one device for making a constitution responsive to the needs of a country. Formal amendment is time consuming and difficult since it requires the agreement of a number of actors. If amendment occurred only through the formal mechanism, a constitution would not remain relevant. There are many instances where formal amendment could not be achieved because of divisions on an important issue. Furthermore, some changes may not be broad enough to warrant the use of the complex amending formula.

Courts through interpretation can develop the meaning of constitutional provisions. This is particularly significant with respect to an entrenched charter of rights. Values embodied in such a charter generally are reflective of the existing norms in a nation. As times change societal norms also change. The U.S. Constitution provides an example of how judicial interpretation has resulted in a Bill of Rights that has been usable for more than two centuries. An examination of U.S. judicial experience shows a history of interpretation that resulted from changing and evolving norms in U.S. society. The courts were able to interpret constitutional guarantees to make them responsive to the needs of the existing society. This can be done in increments and does not require agreements that may become dated in a short period of time.

Stephen Scott predicts that the rigidity of the formal amending formula means that Canadians must look elsewhere for real constitutional change. The major architects of this change will be the courts and ultimately the Supreme Court of Canada. However, the courts cannot take the initiative, and the federal and provincial legislatures must be creative in stretching the present constitutional language. Scott argues that the most important role for the courts will be sustaining constructive legislative initiatives.

These observations are significant for the economic mandate of the Royal Commission on the Economic Union and Development Prospects for Canada, because the major changes needed to promote an integrated economic union will come by way of judicial interpretation rather than federal-provincial agreements. If Scott is correct in this assumption, it reinforces the increasingly important role of courts in Canada. The pivotal role played by the Supreme Court of Canada also underscores the need to think carefully about the structure and composition of that court. As Wayne MacKay and Richard W. Bauman indicate in their study of the Supreme Court in Volume 58 of this research, the Court has an important role to play in the distribution of powers as well as in interpreting the Charter.

When assessing the importance of the new amending formula it must be kept in mind that, while many changes are made through judicial interpretation and will continue to be made in that fashion, major

changes in the structure of any of the institutions of government or the division of powers would require a formal constitutional amendment. The result is a balance which permits the Constitution to remain relevant through rapidly changing times, but also to offer a degree of institutional consistency.

It is clear that the amending formula has been one of Canada's most recurrent constitutional issues. Now that Canada has an entrenched formula the controversy will diminish. However, the present formula is far from perfect and is in some respects distasteful to Quebec. Many of the participants in the August 1984 seminar on Quebec's status expressed a preference for the Victoria Charter. The present formula is a product of compromise and last-minute agreement. Ironically its meaning and significance have been obscured by the glare of the Charter of Rights. We fear that some of the inadequacies of the present amending formula will come back to haunt the Confederation partners. Indeed, the quest for a better amending formula may continue to be a recurring feature of Canadian federation.

### *Concluding Thoughts on Issues of Federalism*

There are many issues of federalism that are not referred to in this overview or included in Volume 57 of the research. Those discussed are classic Canadian questions, which have consistently been on the agenda of reform. Implicit in all these more specific problems are the tensions between regionalism and nationalism which are at the heart of Canadian federalism. Moreover, there is the unique position of Quebec in Canada and the need to clarify the ill-defined dualism of Canadian society.

The next part of this overview and the contents of Volume 58 address the newer issues of the impact of the Charter of Rights and Freedoms and the expanding role of courts and boards as decision makers. Even in this newer terrain there will be a need to balance regional against national interests and dualistic versions of Canada against more pluralistic ones. Thus some of the recurring issues in Canadian federalism will certainly creep into new debates about courts and the Charter of Rights.

## The Courts and The Charter of Rights

To the extent that Volume 57 looks backward to the recurring issues of federalism and the unfinished agenda of constitutional reform, Volume 58 is by contrast forward-looking and speculative. The real impetus for Volume 58 is the Charter of Rights and Freedoms, which became a fact of Canadian life on April 17, 1982, in Part I of the *Constitution Act, 1982*. Only on April 17, 1985, did the second phase of this bold adventure come into play when the equality rights in section 15 of the Charter came into force. At the time of writing (April 1985) there were only a handful of

Supreme Court of Canada cases on the meaning of the Charter and no cases at any level on the new equality provisions. Nonetheless, the Charter has not gone unnoticed in its first three years, as there has been a flood of lower court cases (particularly in the criminal law domain) and more books, articles and research proposals than have previously been seen in Canadian legal circles.

It has been cynically suggested that the Charter of Rights has led to the tenure and promotion of more Canadian legal academics than any other single factor in Canadian legal history. While many legal academics may have trained their sights on the Charter, they have not yet reached similar conclusions about its likely impact. Some have taken a "wait and see" approach and await the wisdom of the early Supreme Court of Canada cases. Others, such as Morris Manning, Walter Tarnopolsky, John Whyte and Noel Lyon have argued vigorously for an expansive interpretation of the Charter's provisions.[24] Yet another camp, led by McGill Law Dean Roderick Macdonald and the late Robert Samek, suggest that the Charter is really a very middle-class document which will have little impact on the lives of average citizens.[25] This division of academic opinion extends to these co-ordinators, with Clare Beckton being more of an optimist on the Charter[26] and Wayne MacKay adopting a view he prefers to call cautious realism.[27]

While there is disagreement about the real impact of the Charter on Canadian society, there is general agreement that significant power has been shifted to the courts. The powers of both legislators and bureaucrats have been limited, but the policy-making role of courts has been enhanced. This shift in the political centre of gravity has led many to describe this as the Americanization of Canada in judicial matters. Aware of the negative overtones to such a description, Chief Justice Dickson has repeatedly called for a distinctive Canadian jurisprudence, and to some extent that has been the flavour of the Supreme Court's early cases.

Since the Charter is so connected to the emerging role of the courts in Canada, we shall begin by examining this document before discussing the implications it has for the judicial structure. So much has already been written about the Charter that we will make no attempt to be comprehensive. Instead we shall build upon the work of the research papers, which focus on the following aspects: the Charter as an instrument of social development (Henri Brun), the implications of the Charter for the Supreme Court as both agent and object of reform (A. Wayne MacKay and Richard W. Bauman), the impact of the equality provisions of the Charter on government institutions (Mary Eberts), and the problem of section 96 of the *Constitution Act, 1867* (Gilles Pépin). In this overview we shall emphasize the major themes that emerge from the marriage of courts and the Charter and speculate as well about the likely offspring of this marriage.

## *The Impact of the Charter of Rights*

The Charter of Rights and Freedoms came into force in 1982 as part of a larger package which patriated and renamed the *British North America Act* of 1867 (as the *Constitution Act, 1867*). This represented the culmination of years of negotiation between the federal and provincial governments concerning the content of reform that would bring the Constitution home to Canada.

The major impetus to put an internal amending formula into the Canadian Constitution began even before the enactment of the *Statute of Westminster* in 1931, which formally made Canada an independent nation. The last vestige of colonialism remaining after 1931 was the power retained by the United Kingdom Parliament to amend the *British North America Act*. This remained because Canadians did not have an acceptable alternate formula for amendment. While the early attempts at reform focussed solely on an amending formula, developments in Canada in the 1960s led to discussions which went beyond an amending formula to changes in the division of powers and the entrenchment of guarantees of fundamental rights.

The ultimate reform package resulting in the Charter was shaped by a number of forces which need to be considered when assessing the impact of the Charter on Canadian society. Henri Brun articulates these factors in his paper on the Charter as an instrument of social development. The first is that the Charter was a compromise between the two levels of government in a federal state. Secondly, it was not a reform requested by the people of Canada. Individual Canadians had only a limited input into the contents of the Charter through presentations made to the parliamentary committee on the Constitution. Those who appeared before the committee largely represented specific interests who sought to find recognition in the ultimate document. The Charter itself is then in part a reflection of the interests in society that command the most political recognition and in part what the provincial premiers were willing to accept as limitations upon their provincial spheres of activities. Thirdly, the inclusion of the "notwithstanding" clause, section 33, embodies the compromise that was made to acquire the consent of a number of the provinces. Yet the ultimate effect of the process was to entrench a document purporting to reflect the values of Canadian society in general and having the potential to be used as a means of reinforcing those values.

## THE IMPACT OF THE CHARTER IN GENERAL

The Charter is a formal constitutional document which is primarily a statement of individual rights, although some argue that the language and education (and, to a certain extent, the equality) guarantees are

collective rights. The rights in the Charter are stated in general terms with the exception of language and educational rights. Because the Charter is an instrument of fundamental rights, it should not be specific since it should remain flexible to meet changing times. Basically the rights guaranteed in the Charter, as Henri Brun states, formulate material standards within which the law must be confined. In other words, human rights guarantees require that laws and everything that flows from them obey certain principles considered to be fundamental.

The significance of human rights, according to Brun, is that they deal with essential matters vital to the individual and therefore to society. As a judicial form, however, they are limited because they only define parameters for the law and in that sense are merely a protective matter. Human rights are a protective mechanism in the sense that they prevent lawmakers from infringing on certain aspects of the lives of individuals. Human rights in general do not require legislators to take positive action to ensure that all individuals are able to take advantage of the guarantees made in a charter. For example, the Charter by itself is not capable of improving the lot of women or other minorities in Canadian society. Its central thrust is aimed at prevention of legislative or governmental action that would put obstacles in the way of an individual's exercise of his or her rights. While, for example, the Charter may guarantee equality for women, it cannot be achieved by requirements that merely prohibit the state from engaging in discriminatory behaviour. Someone who has suffered discrimination in the past is at a disadvantage. True equality would require affirmative action by the government to favour, in essence, the disadvantaged until such time as they are able to take full advantage of the guarantees. With this in mind, it becomes very evident that the legislatures still play a fundamental role in our society. In this respect, the doctrine of parliamentary sovereignty and the impact of the Charter are important matters, which will be discussed shortly.

However, before assessing the impact of the Charter on parliamentary sovereignty, a few more words should be said about the nature of the Charter itself. While it is true that in the judicial sense the Charter's guarantees of fundamental rights are likely to be read as negative (it requires the legislators to limit the parameters of their legislation and this is enforced by the judiciary), fundamental guarantees also serve non-judicial purposes. The Charter, says Brun, can serve to promote certain values in Canadian society since it is both an educational document and a symbol of Canadian nationalism in the same sense that a flag or national anthem is. It may also embody the sense of what values an ideal Canadian society would embrace and serve as a constant reminder of these goals. The U.S. Constitution has served this function since its inception.

In addition, the Charter may have a positive impact on governments. While it may act in some sense as a limitation on lawmaking, it may also

serve as an impetus to social change and reform. If legislatures perceive that the values embodied in the Charter are not yet attainable, they can move all Canadians closer to the ideal through their social programs. While judges may be the ultimate enforcers of the Charter, the legislators and the bureaucrats still have an important role to play in giving the Charter life. An effective partnership of all branches of government would be the ideal.

## The Impact of the Charter on Legislative Supremacy

To return to the essential question of the impact of the Charter on the concept of parliamentary sovereignty. Many commentators have written that the Charter has limited and changed this concept. However, according to Brun, to comprehend the impact of the Charter fully one must remember that it was not accompanied by constitutional amendments relating to the principles under which the Canadian state should operate, such as the division of powers. In other words, Canada remains a federal state with the inherent limitations that are placed on each level of government by these principles. Although the courts were given a tool of intervention in the form of the Charter, it is a tool very much in keeping with the traditional role of the courts, which is to control and sanction.

While parliamentary sovereignty has always been the operating principle of the Canadian federal state, it has never been an unbridled principle. In the past, the courts in enforcing the limitations imposed on parliamentary sovereignty by the federal state were able to declare legislation ultra vires when it exceeded the limits set by the Constitution. When the Charter was enacted, it did place some additional limitations on the concept of parliamentary sovereignty in the sense that the validity of laws passed by Parliament or the provincial legislatures can now be tested before the courts to assess their compliance with the Charter. Now the courts have the power to declare ultra vires legislation that is not in compliance with the Charter as well as that which is beyond the powers of Parliament or a provincial legislature pursuant to the division of powers set out in the *Constitution Act, 1867*. In another sense, while the courts have greater scope for invalidating laws, parliamentary sovereignty remains intact because parliaments are still the bodies authorized to express the higher standards of the state in accordance with the Constitution. Dynamic law, which society needs to thrive, continues to emanate from the parliaments and not from the courts. Legislative bodies are designed to make policy choices in the formulation of laws. While courts have a limited lawmaking role, they are not inclined toward the creation and implementation of social programs. Their lawmaking role tends to result from either the interpretation of legislation or the creation of legal rules to govern situations where conflict has arisen but the state has not intervened through legislative rules.

This is not, however, to understate the potential impact of the Charter on the courts. A blind and unbridled interpretation of the Charter by the courts could act as a brake to social development. If legislators are continually stymied in their efforts to create social and economic programs, they may become conservative and fearful of innovation. The impact of such an approach would be contrary to the stated aims of the Charter since the status quo would be preserved. Those who are least in need of the guarantees in the Charter would have them, while those who are most in need could not be put in a position of taking advantage of them. In that sense, the Charter as interpreted by the courts has the potential to stymie social and economic development. On the other hand, according to Brun, through a more restricted interpretation of the rights applied to a broad range of governmental activities, the Charter may be an effective means of social change, since it would not limit legislative innovations but it could guide legislators to issues that may need resolution. The role of the courts is discussed in more detail later in this overview.

Because of the section 33 override clause, the legislators still have the final word; at most Canada has adopted judicial primacy not supremacy. What would appear to be dictated by the Charter is a constructive dialogue between the courts and the legislatures as to the proper extent of rights protection. In the 1984 Ontario Court of Appeal ruling in *Reference re Minority Language Educational Rights*,[28] the judges emphasized the role of the legislators in promoting the Charter as a pre-emptive strike to judicial challenge. This is highly desirable and was the rationale for the federal and provincial statute audits prepared for the equality provisions of the Charter. Thus legislators will often have the first move and can have the last move by way of the override clause. The supremacy of Parliament is not completely dead.

## Federal-Provincial Relations: A Centralizing Influence

The Charter will also have an impact on the relationship between the federal government and the provinces. First, in assessing the potential impact of the Charter on federal-provincial relations, the dissent of Quebec must be considered. Quebec was the sole province refusing to sign the agreement that preceded the joint resolution to the Parliament at Westminster. Since the Charter has come into force, the Quebec legislature has consistently used section 33 to remove its legislation from the Charter's application. Rather than adhere to the Canadian Charter, it prefers to use the Quebec Charter of Rights and Freedoms, which contains many of the guarantees specified in the Canadian Charter, as well as some additional rights. Quebec cannot, however, remove its legislation from the application of the democratic, linguistic and educa-

tional guarantees. These are probably the guarantees that most conflict with some of Quebec's policies. Therefore, it must be remembered that the Canadian Charter has a special meaning for Quebec which may not be shared by the rest of Canada. This was discussed in more detail in the earlier section discussing recurring issues of federalism.

When the Charter was created, it was argued that it did not affect the balance of powers between the federal and provincial legislatures. However, there was a transfer of power from the legislatures to the judiciary, which can have a centralizing effect. In addition, the Charter itself contains national standards and values which are to be applied uniformly throughout the country. For example, the guarantee of mobility rights affects the provincial abilities to make laws designed to promote only the welfare of the residents of their own province. Linguistic and educational guarantees tend also to restrict the capabilities of a province to deal with the presence of a unique linguistic or cultural majority within its own boundaries. Even more subtle are uniform standards such as "unreasonable" and "unusual," which are contained in sections 8 and 12 respectively of the Charter, and the section 1 reasonable limits clause which is expressed in terms of "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Free and democratic society connotes at least a national, if not an international, standard, which may have the ultimate impact of de-emphasizing regional diversities. While section 27 states that the Charter "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians," if the courts give greater adherence to the national standards contained in the Charter, cultural uniqueness could be de-emphasized in favour of a perceived homogeneous national standard. This is a problem that concerns Henri Brun.

This danger is increased by the individual nature of judicial determinations. It is inevitable that the largest number of cases will emanate from the large population centres, such as Ontario. As of March 1, 1984, according to Brun, 40 percent of the decisions of Canadian courts of appeal in cases invoking the Charter had been rendered by the Ontario Court of Appeal. Since the courts cannot be asked to interpret the Charter differently in different regions of the country, these decisions will have an impact on regions where fewer cases have been decided. *Stare decisis* will exert a strong influence on Canadian courts to follow the jurisprudence of higher courts in other Canadian jurisdictions. Thus, there will be a trend toward homogeneity despite the recognition of the value of cultural diversity in section 27 of the Charter.

Added to this, is the already existing centralization of the Canadian judiciary. At the present time, all of the judges of the superior courts are appointed by the federal government who can, through the choice of judicial appointees, in some sense exert influence over the interpretation

of the Charter. Furthermore, the Supreme Court of Canada, which is the last resort in Charter cases, is a federally created and staffed court. The Court was created by the federal Parliament and its governing rules are contained in the *Supreme Court Act*.[29] Appointments to the Supreme Court are made by the Governor-in-Council on the basis of regional representation with some informal input from bodies such as the Canadian Bar Association. While some legal commentators have argued that by virtue of sections 24 and 52 of the *Constitution Act, 1982* the Supreme Court is entrenched, this is unclear. While it may require the consensus of all eleven legislatures to change the composition of the Supreme Court, there is no express provision to preclude the abolition of the entire Court.

## The Limitations and Applications Clauses

Henri Brun argues that the rights in the Charter should be interpreted with circumspection but that its field of application should be broad. Mary Eberts, in her paper in Volume 58 on the equality provisions of the Charter, also argues that the application section should be given a broad interpretation so that the limitations inherent in the Charter apply to all spheres of governmental operations. Appended to her paper are present statutory definitions of what composes the government. Eberts also analyzes the U.S. cases on state action and the early Canadian case laws on the Charter's application. Brun's circumspection argument seemed supported by the courts in two cases issuing in decisions of Supreme Court of Canada decisions. In both *Skapinker* and the *Quebec Protestant School Boards* case, the Court was careful to interpret the rights that allegedly were being infringed.[30] The Court in both cases had no need to resort to the limitations clause since it was able to resolve the case by an examination of the rights in question. Implicit in both decisions was the caution to the courts that they should approach their task of interpretation carefully in light of the principles and values inherent in the Canadian political system. Neither case raised issues of applicability, because each involved clear government action.

Section 1 of the Charter expresses the principle that none of the rights contained in the Charter is absolute. In essence, it says that all of the rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." If section 1 were not included in the Charter, the courts would have to provide one, since in any society other significant values may impose restrictions on the guarantees of individual rights. If this were not so, rights themselves could become oppressive and inhibit the development of societal goals.

Section 1 in itself presents many interpretation problems because it is difficult to define a standard of reasonableness or what is acceptable in a free and democratic society. Brun suggests that "reasonable" should be interpreted to mean that only those measures affecting the Charter

which would appear in their concrete context to be disproportionate to the goal pursued by the legislator would be contrary to the Charter. Following this, one can argue that the courts must also determine whether the goal is acceptable in a free and democratic society. It is here that the courts may look to other free and democratic countries. However, in the final analysis, it will be the goals and values of Canadian society that should be determinative.

It is in section 1 that the courts will often be confronted with the task of assessing the impact of the limitation on the individual right in question and making a determination of whether individual rights must be restricted to satisfy societal goals. In making these determinations, the courts must develop principles that will permit a dynamic and evolving interpretation capable of flexible adjustment over the years. Since societies' values and goals may change or move in different directions, the courts must be careful not to interpret individuals' rights in a manner that will frustrate the evolution of legitimate societal goals.

One of the significant features of section 1, which has been supported in a number of decisions (including the Supreme Court of Canada ruling in *Hunter v. Southam*),[31] is that the onus of proof rests with the proponents of the limitations. This forces legislators and administrators to grapple with the rationales underlying the proposed limitations and to be prepared to support these when challenged. Arguably this has two positive results. First, it places the onus on the proponent who is best able to justify the limitation. Second, it removes the burden from an individual to show that a justification does not exist, recognizing the greater difficulty in this latter task. Section 1 then is a pivotal section for the interpretation of the Charter.

The second significant section is 32 which states that the Charter applies

> (*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

It is important that the above provisions be interpreted broadly in order to extend the protection of rights. Generally, it is conceded that the Charter was not intended to apply to individual as opposed to government action. However, it is often difficult to distinguish between the two.[32] If this section is interpreted narrowly, it may have the effect of restricting the application of the Charter to areas that cannot be logically distinguished from others where protection is granted. It seems that the Charter clearly applies to the central activities of governments such as legislation, regulations, directives and administration. What is not so clear is whether it applies when the activities are not directly those of

government but the government is involved. For example, while Air Canada is government-owned, it is operated on a commercial basis. Is this sufficient to attract the applicability of the Charter? What of the situations where government funding is granted to a university that in every other way is independent?

In the United States, the courts have evolved the state action doctrine, which permits the courts to focus on the actual transaction. If it can be determined that the government is in any way involved through legislation or the action of its agents in restrictions of rights, the court will intervene. Of course, part of the reason for the expansive nature of the state action doctrine was the specific lack of human rights legislation offering protection to individuals harmed by other individuals. This argument has its limitations, however, because even the existence of such legislation does not satisfy the need for broad protection. Human rights legislation does not generally extend beyond guarantees against discrimination. Furthermore, there is often no requirement to balance the right against other societal goals. In that sense, a broader application of the Charter should be recommended because it enables the courts to look at the infringement of an individual's rights in a broader socio-economic context and to balance them against other fundamental rights.

Both Katherine Swinton and Mary Eberts suggest that we should look to the U.S. cases on state action but not follow them slavishly. As Eberts indicates in her paper in Volume 58 the recent trend in the United States has been a retreat from a broad view of state action. As she indicates, section 32 allows for control not only of parliaments and governments but also their delegates. The real question is how far down the chain we can go and still label an agent part of the government. Katherine Swinton, in a leading article on the topic, suggests two basic questions: is there a clear nexus with the state and does the agency perform a government function?[33]

Early Charter cases have been encouraging on an expansive interpretation of section 32. *Re McCutcheon and the City of Toronto*[34] held that a municipal council was caught by the Charter, and the Federal Court of Appeal in *Operation Dismantle v. The Government of Canada*[35] extended the Charter to the royal prerogative. Mary Eberts argues that any agency presently subject to judicial review should be caught by the Charter. She also contends that existing definitions of the Crown should prove helpful. Finally she makes the important point that the focus should be on the particular function performed by the agency. Some aspects of an agency's work should be subject to Charter challenge while others (such as private management functions) should not. Eberts, and most commentators, reject the view espoused by Dale Gibson and Morris Manning[36] that the Charter applies to private and public actions alike.

There is no specific reason contained in the Charter for giving a narrow interpretation to its application. It should be available for use in any case

where a law would have a disproportionate impact on any of the rights enshrined in it. In other words, infringements, whether found on the face of legislation, in its administration, or as a result of its impact should be actionable under the Charter.

In summation then, several points should be made about the general interpretation of the Charter. The Charter alone is not an effective instrument of social development. Rather it provides a defence for individuals against governments. However, it can also serve as a symbol of unity and an impetus for governments to move toward the goal of permitting all Canadians full benefits of the guaranteed rights.

Interpretation of the rights of the Charter should, in fact, be done in a prudent and serious fashion, in that it should try to go to the essence of Canadian society by balancing values, rights and responsibilities. An omnipresent Charter, if interpreted in absolute terms, could erode the rights it is designed to serve. According to Brun, it has the potential to be used as an instrument to benefit those who are most powerful and secure rather than the more vulnerable. In other words, it could become an instrument to maintain the status quo. The entire responsibility, however, does not remain with the courts. Legislators can demonstrate their commitment to the rights guaranteed therein by positive action to increase the access of the disadvantaged to the full benefits of the exercise of these rights. In the discussion that follows, the focus will be on both the impact of the Charter on institutions and the potential for legislative activity to promote Charter values.

## Equality Rights: Potential for Sweeping Change

More than any other section of the Charter, the section 15 equality rights, which came into force on April 17, 1985, have the potential for significant change. The fact that they were delayed for three years made it clear that the legislators felt that this section would require the greatest readjustment. How extensive the impact of equality rights will be depends in large measure upon how "equality" as a concept is defined and how the courts interpret the words in section 15. The section cannot be read as a simple guarantee against discrimination because the heading "equality rights" was deliberately added to ensure it was read as an equality guarantee.

There is no accepted definition of equality in Canada at the present time. There are those who support the classic liberal definition of equal opportunity, but this requires that all individuals begin on an equal footing, which has rarely if ever been possible. Others argue that it means equality of outcome, which requires more than merely equality of opportunity. It is doubtful, however, whether equality of outcome is possible in the immediate future.

Yet it can be stated that at present equality means at least treating everyone with equal dignity and respect. It does not necessarily require sameness. In fact, equality sometimes means treating a person differently because of his or her differences. To treat a blind person the same as a sighted person for all purposes would not be equality. (However, individuals in similar circumstances generally need to be treated in a similar manner for equality purposes.) Furthermore laws could not operate without distinctions. Rather what is significant is the nature of the distinction made by the law and the justification for making such a distinction. Finally equality should be real, not pro forma. Therefore discrimination should be addressed irrespective of whether it exists on the face of the legislation or in its administration or arises from the impact of the legislation.

Section 15 of the Charter reads:

> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It is quite clear from the opening words of section 15 that the guarantees were intended to be broader than those contained in the *Canadian Bill of Rights*.[37] In fact, wording such as "equal benefit" was specifically added to ensure that *Bill of Rights* jurisprudence was not repeated under the Charter. This was clear from statements made by the Special Joint Committee on the Constitution in 1981 in response to submissions by many groups and individuals.

Difficulties, however, arise with respect to the term "without discrimination," since the opening words in section 15 seem to be qualified by them. It is possible, however, that section 15 will be interpreted such that a finding of inequality could result even in the absence of discrimination.

Nonetheless the term "discrimination" is significant as well as problematic. There is no generally accepted definition of discrimination in Canada. Prior to the entrenchment of section 15, discrimination was primarily discussed in the context of human rights codes. Since codes are guarantees of non-discrimination, it is not possible to totally apply the jurisprudence concerning them to the guarantees specified in the Charter.

It is helpful to look at the jurisprudence of other countries in this regard. In *Courtner v. The National Cash Register Co.*[38] Justice Burton defined discrimination to be "the act of making a distinction in favour of

or against a person or thing based on the group, class or category to which that person belongs rather than on individual merit." A similar definition was articulated by Lord Reid in *Post Office v. Crouch*.[39] Both have as their essence the failure to treat an individual on the basis of his or her merits resulting in adverse consequences. Mary Eberts, however, in her research paper in Volume 58 takes the opposite position, that there should be no burden on individuals to show an adverse impact upon them arising from the distinction.

Obviously this may have a significant impact on the interpretation of section 15. If no adverse impact is required, a litigant merely has to allege a distinction, which results in the necessity for those using the distinction to come forward with a justification. Since this justification, according to Eberts, would occur under section 1, the onus would rest upon those making the distinction. The alternative approach is to require a demonstration that the distinction results in an adverse impact before a resort to section 1 is necessary. In the case of the listed grounds, that may occur fairly quickly, whereas with unlisted grounds more evidence may be necessary to demonstrate the need to offer protection on the basis of that ground. Clearly section 15 is open to either interpretation.

Another issue that arises is whether intention is necessary for a finding of discrimination. In past Canadian jurisprudence it has never been required for discrimination arising on the face of laws or in its administration. Until recently the Canadian case law seemed fairly clear that even facially neutral policies that have an adverse effect upon an identifiable group were discriminatory regardless of the absence of intent on the respondent's part. Support for this was found in cases such as *Griggs v. Duke Power Co.*,[40] where the court held under title VII of the *Civil Rights Act of 1964* that an apparently neutral employment test had a disproportionate adverse effect upon black employees.

This issue is now before the Supreme Court of Canada in two cases.[41] Since both involve human rights legislation, the decisions would not be binding for purposes of the Charter. In the United States, the courts have not extended the *Griggs* analysis to the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. The Supreme Court of the United States has held that disproportionate impact of governmental action is not unconstitutional unless it can be proven to the satisfaction of a judge that the effect was purposeful and that, but for this, the disproportionate impact would not have occurred.

The treatment of disparate impact, by the courts, will be significant in determining how broadly section 15 is extended. In many instances discrimination arising from disparate impact will be invidious. If intention is required it will be difficult to eliminate discrimination and create an egalitarian society. It is also important to consider that, even if intention is not required, it is still possible for the resultant impact to be justified under section 1 of the Charter. Therefore not all such impacts

would result in a finding of unconstitutionality. It is our hope that the courts will focus on the effects of discrimination rather than requiring intention before a prima facie case of inequality can be shown to exist. It is difficult enough to prove the disparate impact without the additional onus of showing discriminatory legislative intention.

There are also questions concerning the interrelationship between section 15 and section 1. Mary Eberts suggests that the three levels of scrutiny test developed in the United States may be useful at the section 1 level but not within section 15 itself. The effect of this multi-tier approach is to create a hierarchy of protected rights. Eberts speculates that the enumerated rights are likely to be more protected than unenumerated ones and that even within the express list there would be a preference. A note of caution should be sounded here. The three-tier approach in the United States was developed in the absence of listed grounds in their constitutional guarantee and as a product of U.S. social history, which differs from that in Canada. As such, any adoption of U.S. jurisprudence should be approached cautiously with consideration to unique Canadian terms and values.

A second section that raises concerns for equality is section 28. It states: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." Section 28 at least guarantees that all the rights in the Charter are equally guaranteed to men and women. Whether it requires a more strict test in assessing distinctions based on sex is unclear at this time. Some commentators argue that it means a stricter test for distinctions based on sex, while some would say that sex distinctions could never be justifiable under section 1 of the Charter.

Another question is whether section 28 would prevent affirmative action programs for women. Mary Eberts says it does not and she makes a convincing case in terms of both purpose and technical law. Certainly one would hope that a section entrenched to protect women would not be used to their detriment.

This point leads to the question of whether section 15 of the Charter requires affirmative action on the part of the government or only restraint from engaging in discriminatory activities. Certainly affirmative action programs are possible pursuant to subsection 15(2) of the Charter. This provision was inserted to ensure that the problem of "reverse discrimination" encountered by U.S. courts would not arise in Canada. There is no doubt that section 15 may require some positive action on the part of governments to ensure compliance with the equality guarantees. However, whether they would be required to create affirmative action programs is highly questionable. Such an interpretation would give the courts a broad role to reshape government policy and would significantly alter the balance between courts and legislatures. Mary Eberts rejects such an expansive interpretation of equality. How-

ever, it is still possible the courts may require affirmative action programs as a remedy where past discrimination has occurred.

There are other provisions in the Charter which, depending upon one's definition of equality, can be seen as adding to or subtracting from equality as defined in section 15. The language rights in sections 16–23 give special rights to Canada's two official language groups. Section 25 guarantees existing aboriginal rights, and section 27 guarantees that the Charter will be interpreted so as to enhance Canada's multicultural heritage. Finally section 29 exempts denominational schools from the prohibitions against religious discrimination.

Equality as a communitarian value may also come into conflict with some of the more individualistic rights affirmed in the Charter and aimed at individual liberty. While the equality of women or Jewish people may be attacked by pornography or hate propaganda, the purveyors of the latter will rely on freedom of expression under section 2 of the Charter to protect their actions. These are essentially value disputes arising from the tensions between egalitarian and libertarian views of society.

Finally the guarantees of "mobility" in section 6 of the Charter and "life, liberty and security of the person" in section 7 can act as buttresses to the broader equality guarantee in section 15. Section 7 in particular is capable of a broad interpretation and has been given a substantive as well as procedural interpretation in a few early cases. Even as a procedural guarantee, section 7 can impose on the bureaucracy significant limitations which could promote more fair and equal outcomes. Due process can be a companion to equality in Canada as it has been in the U.S. Fourteenth Amendment. It is also possible that equality is one of the "principles of fundamental justice" as described in section 7 of the Charter.

We have devoted considerable space in this overview to equality because it has the greatest potential for changing the present balance of power. Depending on how we define equality and whether we take an affirmative or negative approach to it, we may be on the verge of a legal revolution. The possible dimensions of change as a result of section 15 were explored at the National Symposium on Equality Rights held in Toronto from January 30 to February 1, 1985. Even the provincial and federal statute audits have turned up many statutory violations of equality. Mary Eberts suggests the following possible impacts: limitations on military justice, limitations on Crown and diplomatic immunity, limitations on public service employment practices, the prerogative power of appointment, and protection of homosexuals, to name only a few.

The general impact of the Charter on government will be explored more fully in the next section of this overview. Suffice it to say that equality can have a significant, even vital, impact on the ordering of the Canadian economy. Courts may be telling legislators how to spend

public funds through the priorities given to values in court decisions. The question is whether this will be a regular or rare occurrence.

## The Impact of the Charter on Government Institutions and Bureaucracy

To completely assess the impact of the Charter, at this time, would be purely speculative. What can be accomplished is an examination of sections that have a potential for affecting government institutions. In this regard we shall examine the potential impact of the Charter on Parliament and the provincial legislatures, the judiciary, the Crown, the bureaucracy, the spending power, and the Senate.

**Parliament and the provincial legislatures** Among the central institutions in Canadian society are the Parliament of Canada and the legislatures of the provinces. It is these institutions that give force to social and economic policies through legislative programs that influence the direction of Canadian society.

One of the immediate effects of the Charter on these institutions is the requirement that all legislation and programs be in compliance with it. Both levels of government are engaged in an extensive review of their legislation to ascertain which provisions are contrary to Charter guarantees. While the legislative bodies could wait for the courts to strike down any legislation that infringes on these guarantees, the spirit of the Charter requires pre-emptive action. It places the burden and expense on governments rather than on individual litigants, who should not have to bear the cost of invalidating legislation that clearly inhibits the enjoyment of their rights. In addition, the delay in implementation of equality guarantees necessitates such a review with respect to equality questions.

Secondly, Parliament and the provincial legislatures must consider the Charter whenever they seek to enact new legislative policies. If the Charter is interpreted wisely the result can be beneficial, because governments will then be forced to enact policies to meet valid objectives in ways that are least likely to infringe its guarantees. An overly broad interpretation of individual rights could have the effect, however, of hampering governments' abilities to be innovative in social and economic development.

Legislatures should use the Charter guarantees as a signal to shape policies that will operate to enforce guaranteed rights positively. For example, legislatures should not be content to pass legislation that is merely non-discriminatory; rather they should enact legislation and implement programs that will promote equality. Although legislatures need not institute affirmative action programs, equality cannot be achieved without them. While it is unclear that the equality guarantees in

section 15 of the Charter would be interpreted to compel governments to include in any contracts that they let provisions requiring affirmative action or non-discrimination by the contractor, the spirit of equality demands this. If governments and legislators do not take a lead in promoting equality, the guarantees in section 15 of the Charter will never be fully realized.

Since representation in Canada's central institutions is significant to democracy and equality, governments and legislators should consider means to increase the proportion of women and minorities in them. It is easy to say that legislatures do not control the political parties from which members of Parliament or legislatures are chosen. However, through legislation and initiatives, incentives can be created to encourage greater efforts to expand their representative base. Certainly methods of funding could be devised which would encourage broad-based representation. In addition, better support mechanisms could be provided to encourage women and minorities to enter politics. Until they obtain adequate representation in the governing institutions, equality will never be achieved.

Language and education guarantees contained in sections 16 through 23 of the Charter are the only ones that clearly impose positive obligations on governments. Section 20 imposes a burden on the federal government to ensure that services are available in both official languages when there is a significant demand for communications with and services from that office in such languages or where by the nature of the office it is reasonable to expect the provision of services in both languages. Not only does this impose a financial responsibility on the federal government, but it also contains the requirement that the federal civil service be capable of providing bilingual services across Canada. A decision has been made that enhancement of the policy of two official languages in Canada is a value worthy of an expenditure of resources.

Education guarantees place the responsibility of provision of schooling in the minority language on the provinces where numbers warrant. It is clear from early decisions of the Supreme Court of Canada that this will require governments to allocate from public revenues the money to implement this guarantee. What is left for the courts to determine is what numbers warrant in any given area and whether separate facilities will be needed or simply language instruction in the school where the majority language is taught.

The Ontario Court of Appeal on June 26, 1984, gave judgment in *Reference re Minority Language Educational Rights*.[42] In answering the questions, the court indicated that an arbitrary minimum of 25 children for elementary classes and 20 for secondary classes was a violation of the Charter. The court indicated that any arbitrary limitation across a province would be unjustified if it did not have any qualification. The court said that numbers could vary with geographic regions and the type of

instruction to be provided. In this sense, the Charter has given the courts the power to compel provincial authorities to reallocate education spending where it is determined that the minority-language population warrants such action.

**The Crown** The equality guarantees in section 15 raise interesting questions with respect to the prerogative of appointment power. It is clear that the Charter should preclude discrimination in the appointment process. However, does it require that the Governor-in-Council be even-handed in the appointment process? For example, would appointments have to be made equally between men and women? It is unlikely that section 15 would be interpreted to require more than non-discrimination in the appointment process. But the spirit of equality does demand that greater emphasis be given to varying the composition of prerogative appointments.

A second area where equality may have an effect is with respect to Crown privileges and immunities. While it is clear that the Crown may need some benefits and privileges to function effectively, many such privileges cause adverse consequences to individuals. For example, a law that sets a time limit of seven days in which to indicate intention to sue is clearly an inequality, since no individual has this benefit. In assessing these issues the question must be asked whether any of these immunities are justified in the sense that the Crown could not function effectively without them. It may be reasonable to deny the remedy of a mandatory injunction against the Crown where it would be totally unreasonable to have the seven-day limitation period. It is not reasonable that every individual should have the same privileges as the Crown, but those which are maintained must be justifiable, particularly where they restrict the rights of individuals. Many of these privileges relate to immunity from suit or short limitation periods to take action against the Crown.

**The bureaucracy** Another institution of government affected by the equality guarantees will be the bureaucracy. It is clear from section 32 of the Charter that it should apply to the administration of laws, an activity that extends well beyond the promulgation of regulations. Now the administrators will have to be sure that all legislation is administered on an equal basis. For instance, while it is not certain, section 15 may require some form of affirmative action to remedy past inequities. This may be possible under section 24 of the Charter, where the courts have the power to grant any remedy they consider appropriate and just in the circumstances. Certainly those engaged in policy formulation for legislative purposes will have to be aware of the impact of their policies.

One effect of the language guarantees in sections 16–23 of the Charter could be that certain boards at both the federal and provincial level would have to be capable of providing services in both official languages.

This could lead to the expenditure of public funds to meet the constitutional requirements, since the provision of services in both languages is more costly.

It is arguable that the equality guarantees extend beyond the face of the law and the administration of it to encompass disparate impact as well. "Disparate impact" is a term used to describe a law that is neutral on its face and in its administration but that has a disproportionate impact on one of the classes of persons listed in section 15. For example, a regulation that stated that all applicants for the RCMP must be 5'10" tall would have a disproportionate impact on women and minorities whose average height may be far less than 5'10", which is the average height of a white male. Since the bureaucracy plays a major role in formulating regulations and policy it must become more sensitive to the potential for unequal consequences as regards policy recommendations, especially those which will ultimately culminate in some form of law.

The bureaucracy is also a fruitful ground for government demonstration of a commitment to the spirit of equality contained in the Charter. If the government acts to implement meaningful affirmative action programs, these can serve as an example for the private sector. While the letter of section 15 may not require this, the spirit of equality does. Section 7 of the Charter may also affect the bureaucracy, particularly if the section is interpreted to provide procedural guarantees. This, as interpreted by some courts, could have the effect of requiring procedural fairness to be exercised in all dealings where life, liberty or security of the person may be affected. In effect, section 7 may constitutionalize the doctrines of fairness and natural justice that exist at common law. This liberal dose of due process has already had some impact, as parole boards and immigration boards have been required to give affected parties a face-to-face hearing.

**The judiciary** Another agency of the state that is often ignored when discussing who is bound by the Charter is the courts themselves. While the judges are not liable in their personal capacity the state will be liable for their institutional actions. In the *Sunday Times* case[43] arising under the European Convention it was decided that "law" includes the common law as developed by the judges. If the common law is developed in such a way as to violate the principles of equality, then such common law principles could be struck down as being in violation of the Charter. Furthermore, the person aggrieved by such unconstitutional evolution of the common law would be entitled to a remedy, most frequently in the form of an appeal.

While we are of the view that the Charter should be applied to the judiciary in the above sense, the issue is not free from controversy. Indeed, some judges, who will give meaning to the Charter, have not been too receptive to this view. To some it is offensive to refer to the

courts as an arm of the state, and such reference contradicts the historic independence of judges. Other judges have accepted that the Charter applies to the courts. Like so many issues under the Charter this will be resolved in the Supreme Court of Canada.

**The spending power** Another area that raises equality questions is the use of the federal spending power. In the past this power has seemingly been unfettered, although there were questions about the use of it to confiscate powers in areas under provincial legislative jurisdiction. Currently, several issues arise. The first is the use of the power to fund interest groups, the arts and sports. The second involves the use of the spending power to fund programs that are under provincial jurisdiction, such as welfare and education. In the first instance, the question is whether the federal government can distribute money to organizations who discriminate on the basis of one of the listed grounds in section 15. For example, could they refuse to provide money to a minor hockey association that does not permit women to play, or would they simply have to provide equivalent funding to female sports? Could they provide funding to a women's group or a group for the disabled but not to a men's hunting club? It seems that an argument could be made that federal funding could be given to groups providing they do not discriminate, and decisions could still be made that funding is needed more for the disabled than for the men's hunting club. These issues arise because of the guarantee of equal benefit of the law contained in section 15. An alternative argument for funding a disabled or women's group may be found in the affirmative action exemptions contained in subsection 15(2).

When funding provinces, a basically similar question arises. Can the spending power, for example, be used to fund a provincial welfare scheme that provides greater benefits for women than for men? Is there a difference if the legislation is neutral but the administration of it results in discrimination? Or is the answer that the provincial legislation can be attacked separately under the Charter and so there is no need to limit the application of the federal spending power? What if the federal spending power was used to support provincial welfare programs, where a provision, such as section 13 of the Canada Assistance Plan, exists which deliberately permits the provinces to exclude natives even though the federal government does not provide alternative services for them. Is that sufficient to attack the spending power or will it simply make the provincial legislation unconstitutional? These are extremely difficult questions which will require further analysis.

At the provincial level the equality guarantees might be used to mandate the expenditure of funds in certain ways. For example, it could be argued that all women in a province should have equal access to a therapeutic abortion committee, regardless of their place of residence. Since section 15 prohibits discrimination based upon mental or physical

handicap, it could be argued that all school boards could be required to spend funds to set up special education programs in their school district. Subject to the specific provisions of section 6, neither level of government could spend funds in such a way as to benefit only people resident in a particular province, because this could amount to an infringement of mobility rights.

**The Senate** One final institution that should be briefly discussed is the Senate. Currently, the composition of the Senate is far from representative of the various socio-economic interests in Canadian society nor is there any kind of equal representation of women. Suffice it to say here that it is doubtful that the equality provisions would require this kind of equality in representation although it would require that the appointments be made without discrimination. However, any reform proposals concerning the Senate should take into consideration a liberal interpretation of equality. If the Senate is to be a meaningful second legislative chamber, it should be more representative of the groups that constitute Canadian society. While regional representation may also be desirable that is not incompatible with a broad-based socio-economic and gender representation.

## CONCLUSION

In conclusion then, while the Charter may not be, according to Henri Brun, an instrument of social change in itself, it contains the mechanism to move Canadian society ahead in directions that would be beneficial for all. Language and education guarantees permit recognition and continuance of the dualist nature of the country. Mobility rights prevent provinces from building provincial enclaves which would be harmful to the residents of other parts of the country and ultimately to Canadian unity. Democratic and fundamental freedoms permit democracy to continue and prevent governments from repressing the voice of their constituents. Equality rights contain the seed for a society that recognizes the dignity and worth of all individuals.

Equality is not, however, without its costs. If it is to be a reality, society must reallocate some of its fixed resources. To have maternity benefits, equal pay for work of equal value, and equivalent pensions for women and men does not come without a price tag. This is not a reason, however, for denying equality. It is merely a recognition that resources have to be reallocated in order to achieve desirable social goals. In addition, it also means that none of these goals can be accomplished immediately. Equality is a long-term goal which can likely never be completely attained, partially because of the cost, partially because of society's lack of consensus as to the meaning of equality. However, the Charter is a framework for pursuing the goals.

Dale Gibson, in a paper entitled "Remedies and Equality" delivered at the National Symposium on Equality Rights held in Toronto from January 30 to February 1, 1985, made the following insightful comments about the interconnected role of courts and legislatures in the post-Charter world.

> This paper deals primarily with remedies available through the courts. It is based on the conviction that judges must be more than spectators at the Charter Rights Opera. Their active participation is essential to the success of the performance. Usually they will sing in the chorus, or in duets with politicians. Occasionally they will have mere walk-on parts, carrying spears. From time to time, however, they must be prepared to sing solo.

We agree that judges and legislators must be actively involved in the promotion of Charter values if the document is to be more than an empty declaration of intent. Real remedies to those who are disadvantaged will be the only real indication that the Charter has teeth.

In the next section, the courts and their new role as shapers of Canada's basic constitutional values will be examined, but before that we must reiterate the warning that Henri Brun gives us. The Charter can be used as a means of perpetuating the status quo. It can be a guarantee of rights to those who least need them and a bar to participation of the most vulnerable. The onus rests not only with the courts to interpret the Charter in a meaningful fashion but also with governments to promote the goals of the Charter and to reform their institutions to facilitate this process and with individuals to cooperate with their governments in this endeavour.

## *The Role of Courts and Boards*

Courts have traditionally been low-profile institutions in the economic and political life of Canada. Consequently, they have attracted little attention from those concerned about institutional reform and even less from economists. As just discussed, the Charter of Rights and Freedoms will have a significant impact on the nature of courts and judging in Canada as well as on the public perception of judges. As Wayne MacKay and Richard Bauman indicate in their paper on Supreme Court reform in Volume 58, the Charter will have a significant impact on the process of judging but will likely stop short of converting Canadian judges into U.S.–style political activists.

One of the significant changes in the judicial role will be the performance of a more substantive and policy-making role with respect to the fundamental issues that arise under the Charter. In deciding such matters as whether hate propaganda is a reasonable limitation on freedom of expression a judge will have to balance conflicting values and will have difficulty hiding behind precedent and technical law. Attendant upon this

higher-profile policy role will be greater media attention and closer public scrutiny. The personalities and values of judges, particularly the members of the Supreme Court of Canada, are likely to be much more broadly discussed than at present. Judges will be recognized as important participants in the political and economic life of Canada as well as the interpreters of her laws.

A policy role for Canadian judges is not new. The Charter has simply extended a process that was present before but given little recognition. This point was eloquently expressed by the late Chief Justice Bora Laskin in a 1981 address to the Empire Club in Toronto.

> Such is the character of the cases that come before the Supreme Court that its decisions on them may touch you as husband or wife, as businessman, as corporate executive, as shareholder, as policy holder, as labour union member, as civil servant, as teacher or student, as policeman, as member of an administrative agency, as a member of government, whether municipal, provincial or federal, as a person accused of an offence, and so on. All economic activity and all exercises of governmental authority, whether by legislation or by executive order or regulation, are potentially the stuff or, should I say, the staff of our life.[44]

The late Chief Justice's emphasis on the economic impact of judicial decisions is important. Not only is Canada's court structure a part of Canada's institutional structure, which affects the nation's future prospects, but it is also a significant element in the Canadian economic union. The Charter will provide a new vehicle by which courts can have a direct impact on economic matters. Interpretation of mobility rights under section 6, the potential for affirmative rights to "life, liberty and security of the person" under section 7, the definition and implementation of equality rights pursuant to section 15, and the language guarantees of sections 16–23 are all matters that can engender clear economic consequences.

Although the effect of a ruling from the Supreme Court of Canada is most dramatic, all courts in Canada's unitary judicial structure can deal with the broad range of litigous matters. Indeed, the growing tide of litigation and overloaded court dockets give rise to the need for newly structured courts and boards. Administrative agencies and other noncurial dispute-resolution mechanisms have far-reaching effects on the lives of average Canadians. The extent to which provincial governments can assign functions to either administrative boards or provincially appointed courts is limited by section 96 and the related judicature sections of the *Constitution Act, 1867*.

The jurisprudence surrounding section 96 is complex, but the essential problem is clear. To what extent does the federal appointing power in section 96 of the *Constitution Act, 1867* inhibit the provincial governments from redistributing judicial business to either inferior courts or

administrative boards? Except for section 96, the efficient operation of the judicial system is a provincial responsibility as part of the "administration of justice" under subsection 92(4) of the *Constitution Act, 1867*.

There is no doubt about the economic and social impact of the decisions of provincially appointed courts such as family courts and small claims courts. Similarly, provincial boards, such as tenancy boards, rent review commissions, and workers' compensation boards have a significant political, social and economic impact. The constitutional legitimacy of such tribunals depends upon the simple but elusive wording of section 96 of the *Constitution Act, 1867*. Before embarking on this journey we shall examine the Supreme Court of Canada and possible reform in that institution.

## The Supreme Court of Canada and Reform

### *An Emerging National Institution*

The Supreme Court of Canada has been a national institution since its creation in 1875 and has had a growing impact on the shape of Canadian society. As umpire of Canadian federalism, the Supreme Court has had an important effect on the exercise of government authority ever since 1949, when it replaced the Judicial Committee of the Privy Council as the final appellate court. A recent example of the impact of rulings on the distribution of powers is its ruling on ownership of the Newfoundland offshore,[45] which has clearly had a direct economic and political consequence.

Only in recent years, however, has the policy-making role of the Supreme Court of Canada come to the attention of the public. One of the most dramatic examples of this was the 1981 decision on the *Patriation Reference*,[46] in which the late Chief Justice Laskin read the judgment of the Supreme Court on nation-wide television. It is generally agreed that this decision helped pave the way for the November Accord which made the patriation of the Constitution possible. Included in this patriated package was the Canadian Charter of Rights and Freedoms. It is this document which greatly extends the policy function of the Supreme Court of Canada and accentuates its growing public presence. As evidence of this new public persona witness the extensive and front-page coverage of the death of former Chief Justice Laskin in most newspapers, and coverage of the appointment of Chief Justice Dickson in *Macleans*. Furthermore, there is the extensive reference in the media to the Court's role in shaping the Charter of Rights and Freedoms. This media interest continued when the Court handed down its first Charter decision on May 3, 1984, as most newspapers and newscasts commented on *The Law Society of Upper Canada v. Skapinker*.[47]

As a national institution, the Supreme Court of Canada has been relatively free from public scrutiny. Various traditions and customs have

grown up around it to shield it from the public glare and its decorous image has protected it from serious critical scrutiny, except perhaps when law-related professional bodies meet to discuss its work or when provincial governments lament the untrammelled discretion of the federal cabinet to appoint members to this Court.

Although there have been suggestions made in the past to change various features of the Court, the process of evolution has been slow. The efforts at patriating the Constitution, as well as the use of the Supreme Court to determine issues of great social, political and historical significance, have served to quicken the general interest in the background of the Court and the personal qualities of its members. This interest promises to grow when the Court delivers its initial judgments on matters argued under the Charter of Rights and Freedoms. In summary, Canadian "political culture," as a political scientist might refer to it, has altered significantly.

## Broad Themes of Reform

Even as a national institution, the Supreme Court of Canada has attracted little attention as a target for reform. When it did make it to the agenda of constitutional reform in 1980–81, it stirred little interest among either the first ministers or the general public. Earlier discussions of Supreme Court reform have also gone largely unnoticed. However, the 1980 reform proposals did attract the attention of one rather high authority. The late Chief Justice Laskin in his 1981 speech to Toronto's Empire Club[48] made the following forceful comment.

> What was dismaying to me as I watched and read about the constitutional proceedings that took place last year was the total misconception that so many Ministers and First Ministers had about the Supreme Court. They treated it in political terms and, fallaciously, regarded it as a federal institution on a par with the Senate. Let me say, as forcibly as I can, that the Supreme Court of Canada is not a federal institution; it is a national institution and its members are under no federal allegiance merely because they are federally appointed. Just as there is no federal allegiance, there is no regional allegiance and no political allegiance.

Later in this same speech the late Chief Justice concluded that the Supreme Court of Canada should be left largely intact. The only reform he endorsed was the granting of a constitutional status to the Court. While this has been achieved, with respect to the composition of the Court, by virtue of subsection 41(d) of the *Constitution Act, 1982*, more full-blown entrenchment is desirable and is advocated by MacKay and Bauman in their paper on reform of the Supreme Court in Volume 58.

At the outset, MacKay and Bauman stress the importance of perceptions about the Supreme Court and alleged biases of various sorts be they federal/provincial, liberal/conservative, male/female, English/French or majority/minority. Empirical studies have refuted the exis-

tence of most of these biases, but it is important that the ultimate national court appear to be objective as well as act in that fashion. Since the legitimacy and the authority of the Court rest on general public acceptance, perceptions can be as important as realities.

The perception of the Supreme Court's accomplishments and its supposed direction, and of how these relate to the individual members themselves, have already become the basis of proposals for reform. Such rough-and-ready labels as "centralist" versus "decentralist," or "liberal" versus "conservative," do not adequately capture the subtle reasoning that goes into a judgment of the Supreme Court. Yet the desire and disposition to apply such convenient labels is a fair indication that there is a widespread recognition that Supreme Court justices are perceived as carrying with them some intellectual or even ideological baggage. The Court's image (which includes elements of personality; political affiliation; family, religious and professional background; region of origin; age; gender; and judicial experience) lies at the heart of the discussion over the proper share of this emerging national institution.

Another theme emphasized by MacKay and Bauman is that the various components of reform are closely interrelated. Changing one element has implications for another. A decision about the proper jurisdiction of the court will have a significant impact on the proper number of judges, the desirability of regional representation, and the process of appointment. Thus the proposed changes must be carefully integrated.

A final overarching theme, which has been touched on in earlier portions of this overview paper, is the implication of the Charter for Supreme Court reform. One direct result will be a greatly increased workload, which may change the operation and processes of the Court. The installation of cameras in the Court so that some leave applications can be heard by satellite is but one example. Besides raising the profile of the Court, the Charter may produce a greater revolution in the judicial process than in the basic rights of Canadians.

### *Specific Proposals for Reform*

MacKay and Bauman, after an extensive exposition of the traditional arguments for reform and an evaluation of their worth, provide specific reform proposals. These suggestions are as follows.

First, they propose that the Supreme Court of Canada be constitutionally entrenched as one of the primary institutions in Canada's federal structure. Most other countries (the United States is one example) have a guaranteed role for their supreme court written into their constitution. Such a provision in the Canadian Constitution would guarantee the existence of the Court and state its jurisdiction in broad terms. As a recognition of Canada's dual legal system, Quebec's guarantee of three judges on a nine-person court should be constitutionalized as well. The amending provision could also contain guarantees of independence and

tenure but these may already be implicit in section 7 and subsection 11(d) of the Charter.

Their second proposal is the creation of an Appointing Council with full power to appoint Supreme Court justices. This is a rather radical proposal aimed at the need to have first-rate appointments to the Supreme Court of Canada, on the basis of merit. The problem of judicial appointments has generated much discussion and is the subject of a Canadian Bar Association study.[49] It is not new to suggest a nominating council, and indeed many other countries use such a device, as demonstrated in Appendix B of the MacKay and Bauman paper. However, the powers and composition of the council proposed here set it apart from prior reform suggestions. This Appointing Council is not to be advisory but rather to have the final appointing power. The Appointing Council itself would be composed of both federal and provincial appointees, to avoid the perception of the Supreme Court of Canada as a "federal" court. Both levels of government would nominate people to a pool from which the council members would be drawn. In order to get appointed to the council a nominee must be acceptable to the federal government and at least four of the provinces.

Representation on the council would not have to conform to any regional guidelines. A different kind of representation would be mandated. The thirteen-person council should have at least seven women and represent a range of social, economic, cultural, racial and vocational backgrounds. Guidelines for nominating people to the pool would ensure that there would be a sufficiently diverse pool from which to draw. The Appointing Council would operate on a part-time basis, and, after initial appointments with staggered terms its members would have a guaranteed ten-year tenure.

The reason for the diverse composition of the Appointing Council is to promote, without mandating, a diversity of backgrounds on the Supreme Court itself. In making these judicial appointments the only specified criterion is merit. This principle was endorsed by Chief Justice Dickson at the Canadian Bar Association meetings in Winnipeg in late August 1984. While it is hard to disagree with the merit principle, the real difficulty is defining the elements of merit in the context of judging at the Supreme Court of Canada. One of the Council's first tasks, therefore, would be to devise guidelines for assessing merit. The experiences of other countries and the findings of the Canadian Bar Association study on appointments should provide assistance in this regard.[50] Some factors that might be considered, according to MacKay and Bauman, are gender balance on the court and the regional origin of judges. While not affecting the individual merit of the judge, gender balance and regional representation may affect the collective merit and perceived legitimacy of the Court's decisions.

Exactly what groups should be represented on the Appointing Council is a complex problem. Other studies for this Commission, such as that done by Alan Cairns and Cynthia Williams in Volume 33 of the Commission research studies (*Constitutionalism, Citizenship and Society in Canada*), attempt to identify the significant cleavages in modern Canada. The groups delineated by these could be a useful starting point. MacKay and Bauman recommend that at least seven members of the Council be legally trained and from as diverse a background as possible. The Canadian Bar Association and Canadian Judicial Council should either be represented on the council or be consulted on a mandatory basis. However, the exact make-up of the council should be the product of a more in-depth study. MacKay and Bauman emphasize that they only sketch the broad outlines of the Appointing Council and leave it to others to work out the finer details.

It would be desirable to mention the existence and role of the Appointing Council in the provisions that entrench the Supreme Court of Canada. However, MacKay and Bauman feel that neither the exact composition of the Council nor the guiding factors for judicial appointments should be frozen in the Constitution. Values and ideas change over time and a constitutional provision should be broad and flexible enough to accommodate such change.

The Appointing Council is the heart of the MacKay and Bauman proposal. With the growing and changing role of judges under the Charter, it has become even more important that judicial appointments be made on the basis of merit. It is also important to have a diversity of backgrounds represented in Canada's highest court, not just in the sense of regional origin but also with respect to gender, race, socio-economic status, and other factors. Focus on the Appointing Council also emphasizes that an institution is only as good as the people who compose it. While the past judicial record has not been bad, it can be even better.

*Conclusions and Rejected Reform Proposals*

A number of past reform proposals were rejected by MacKay and Bauman. In these areas the authors recommended maintenance of the status quo as most conducive to the efficient operation of the Supreme Court of Canada. The implicit statement is that the present Court works well in many respects.

Hence they would retain the Court's general appellate jurisdiction in both public and private cases. In spite of the Court's growing workload, MacKay and Bauman feel that the Court could deal with this problem via its own leave mechanism. They do suggest changes in the present leave mechanism. The maintenance of the broad appeal jurisdiction allows the Court to serve as an important unifying force in Canada's unitary court structure. Even the special case for keeping Quebec civil cases out of the

Court is rejected because there is no solid evidence that the current operation of the Court in any way distorts the Civil Code of Quebec.

They advise against creating special panels of the Court. At first glance the idea of special panels is appealing as a means of promoting expertise and dealing with the growing workload. However, as a practical matter, most cases cannot be neatly classified as falling within a single subject area. For example, a constitutional issue often arises in the context of a criminal prosecution or a private law suit. MacKay and Bauman also feel that fragmentation of the Court would destroy collegiality.

They suggest that the number of Supreme Court Justices be left at nine. Here again, increasing the number of judges sounds like a sensible way of coping with a growing caseload. However, nine seems to be an effective number and has worked even in the United States, where the number of cases far exceeds those coming before the Canadian Supreme Court. With nine it is still quite feasible to sit all the judges, and this reduces the problem of getting different or even conflicting rulings from different groupings of a larger court.

In one of their most controversial conclusions, MacKay and Bauman recommend that the principles of regional representation be abandoned as a significant factor in judicial appointments. Quebec would not be affected as it would be constitutionally guaranteed three seats, as a recognition of Canada's dual legal structure. Nor would regional origin be entirely ignored since, as indicated above, it would be one factor the Appointing Council might consider as a guideline, but it would not be a crucial one. Of course, it is desirable that there be regional balance, at least as a matter of appearances, but such appearances should not stand in the way of an appointment on pure merit. The reason for the rejection of the regional principle is its lack of relevance to the actual operation of the Court. The authors argue that it was a form of window-dressing which simply served to confuse the public about the proper role of the Court.

Comfort may be drawn from the fact that the late Chief Justice Laskin expressed similar views in his speech to the Empire Club:[51]

> There seemed to be some sentiment by the Ministers engaged in the constitutional discussions that the Court should be regionalized, that appointments to it should be made on that basis and that, moreover, it should be enlarged to accommodate regionalism and dualism in respect of the Quebec civil law system. It saddened me that there was so little understanding manifested either about the nature of the Court's work or about the significance of the fidelity of its members to their oaths of office; so little appreciation of the importance of cohesion and collegiality in the dispatch of the Court's work. That work has no regional and, certainly, no political tie-in. The judges, once appointed have complete independence, verified by security of tenure to age 75.

> If the Ministers and First Ministers had a better understanding of the character of our work, they would have realized that there is very little that is regional in that work. Essentially, we deal with national issues, with matters of general public importance that have no special regional connotation.

MacKay and Bauman do not deny the desirability of having different regional backgrounds represented on the Court as one aspect of diversity, but reject regionalism as a significant appointment criterion.

### *Administrative and Bureaucratic Reforms*

Having rejected various constitutional and structural changes to assist the Court in dealing with an increased workload, MacKay and Bauman advocate administrative and bureaucratic changes as the most flexible way of coping with a growing but uncertain caseload. Revamping the existing leave mechanism (a process already in progress), hiring more law clerks and support staff, and formalizing and streamlining court procedures are prime examples. The advantage of this proposal is that the solution is devised by those who are most familiar with the problem, the judges themselves.

## The Section 96 Problem: Limitations on Judicial Restructuring

To an outsider the preoccupation of Canadian courts with issues raised by section 96 of the *Constitution Act, 1967* has to be one of the most confusing and perverse aspects of the Canadian constitutional structure, especially since most countries do not have an equivalent to Canada's judicature sections. Thus the elaborate judicial construction that Canadian judges have created in the name of section 96 represents a unique Canadian obsession. Perhaps it has become the judicial equivalent of Canada's cultural and recreational focus on hockey. Indeed, the judicial stick-handling around the section 96 problem would be the envy of any professional hockey player.

Part of the complexity surrounding the judicial treatment of section 96 arises from the fact that this seemingly straightforward appointing power has been used to promote three basic constitutional values: (a) distribution of powers with a federal emphasis; (b) separation of powers; and (c) entrenched judicial review. In all too typical Canadian judicial fashion, these values have rarely been articulated expressly. Instead, the courts have become bogged down in a historical analysis of how judicial power was divided in 1867. Although the courts do introduce considerations of new institutional contexts, and thus avoid freezing structures in their 1867 state, this approach is far from adequate to deal with the complex new social problems that have arisen since 1867. The problem is not past institutional structures, or even present ones, but rather future innovations with respect to both courts and boards. In essence, the courts have adopted a static approach to a changing problem.

Historically the section 96 cases have been categorized according to three kinds of situations. Higher court cases explore the limits of provincial government power in organizing their court structures and in creating new courts. The question here is whether provinces in the name of court organization are, in fact, making superior court appointments. This would be a classic example of colourable government action. Inferior court cases raise some of the same issues as the first category as well as questions about which functions these courts performed in 1867. The question is whether the inferior court is performing a function analogous to a section 96 court. Administrative board cases raise the same issues as the inferior court cases, with the additional issue as to whether privative clauses violate section 96. This last category presents issues of institutional context not seen in the inferior court cases.

One of the most fascinating legal debates to emerge from the ongoing section 96 drama surrounds the proper interpretation to be given to the ironclad privative clause that excludes the courts from judicial review. It has been accepted for some time that a properly worded privative clause can prevent the courts reviewing for errors of law. The harder question of whether a tribunal can make unreviewable rulings on its own jurisdiction has traditionally been avoided by construing privative clauses as not applying to issues of jurisdiction.

What is really at stake in this debate is the ranking of the value of judicial review in the Canadian constitutional structure. Does the Canadian citizen have some guaranteed access to the superior courts in which he or she can get an administrative decision reviewed? Whether one views judicial review as good or bad will certainly colour a person's stance on the privative clause issue. Thus it is not surprising that academics have been quite divided on what effect should be given to privative clauses.

### *The Constitutional Sources of the Section 96 Debate*

A careful reading of the judicature sections of the *Constitution Act, 1867* and the related constitutional provisions demonstrate an intention to share jurisdiction over the organization and operation of courts and boards in Canada. With the exception of federal agencies created pursuant to section 101, the broadest power appears to rest with the provincial government by virtue of subsections 92(4) and 92(14). However, a significant subtraction from this provincial authority in the form of sections 96–100 assures that there will also be a federal role. Therein lie the constitutional origins of the section 96 problem.

The starting point for judicial analysis is the historical division of powers between inferior and superior courts in 1867 (administrative boards were virtually unknown in 1867). The relevant date is 1867 not only for the original four members of Confederation but also for the other

provinces who joined later. Unless there is express language to the contrary in the relevant terms of union, 1867 is also the relevant date for purposes of historical analysis. The geographic focus of this historical analysis is less clear.

Another constitutional provision relevant to the section 96 issue is the often-ignored section 129. This provision allows provincial agencies to bring with them their pre-Confederation powers so long as those powers do not offend the distribution of powers set out in the *Constitution Act, 1867*. This reasoning should apply whether the agency is a board or an inferior court, but, as already mentioned, there were few boards in 1867. Nonetheless, there is no constitutional bar to a province transferring an inferior court function to a provincial board. Thus pre-Confederation inferior court powers coupled with section 129 can be a source of provincial jurisdiction.

Pausing briefly at section 101 of the *Constitution Act, 1867*, it should be noted that these courts are not classified as either inferior or superior. As federal creations they would traditionally be regarded as outside the reach of section 96 limitations. However, recent developments suggest that federal tribunals may no longer be immune from a section 96 challenge. Even if federal creations were not immune as a matter of constitutional analysis, it could be argued that the phrase "notwithstanding anything in this Act," which appears in section 101, would effectively override section 96. The scope and number of section 101 courts is another important aspect of court reform identified by Gilles Pépin in his paper in Volume 58.

### *Judicial Interpretation of Section 96*

Gilles Pépin is also highly critical of the judicial treatment of section 96. He suggests that one rationale for the section may have been the need to provide a federal source of patronage. Much loftier objectives have been imputed to the Fathers of Confederation by the courts. Section 96 has been described as one of the "pillars of the temple of justice."[52] It is most frequently cited as promoting either an integrated judicial system or an independent judiciary.

Pépin has several specific complaints about the judicial interpretation of section 96 which makes it much more than a mere appointing power. To base interpretation on a historical analysis of how functions were divided in 1867 is not only anomalous, but also highly unpredictable in its results. This has led to a malaise at the provincial level, as governments are uncertain about what functions they can give to either inferior courts or administrative boards. While the argument that certain powers lose their judicial aura in a particular institutional context may save some tribunals, the conclusion of the analysis is hard to predict.

Another clear difficulty with section 96, as it currently stands, is that it promotes a centralized approach to judicial organization. In spite of recent judicial pronouncements applying section 96 as a limitation on federal as well as provincial acts, it is primarily a check on the provinces. This is particularly offensive to Pépin when it is contrasted with the broad powers of the federal government under section 101 of the *Constitution Act, 1867*.

### *The Present Amendment Proposal*

In August 1983 the federal government published a proposed amendment to section 96: section 96B. The aim was to reduce the challenges to provincial administrative tribunals by creating concurrent federal and provincial domains. It was presumably responsive to provincial complaints and intended to take some of the load off the existing section 96 courts. However, in the view of Pépin and these authors, it does not go far enough down the road to reform.

Inferior courts, whose powers are a major concern in Quebec and other provinces, are completely excluded from the amendment. It plunges the judges deeper in the mire of drawing lines between courts and boards. It raises the thorny problem of what errors are jurisdictional and thus outside the reach of any privative clause.

Another difficulty with the proposed amendment is that it does not address the application of section 96 to the federal Parliament. Until the ruling of the Supreme Court of Canada in *McEvoy*[53] it was assumed that section 96 had no application to the creation of federal courts or boards. The language of that case suggests that it does. This adds a new component of complicated legal analysis. The proposed amendment does not deal with section 96 in the context of the other judicature provisions and would not allow courts to assign functions strictly on the basis of deciding where they can best be handled.

### *Concluding Thoughts on Section 96 and the Need for Constitutional Change*

Where are we left with the elaborate judicial construction around section 96? Does it really promote, as suggested, the basic values of balanced federalism, separation of powers, and judicial review? We think not. First, it is not at all clear that any of these values were the rationale for section 96. The historical record suggests the possibility of a more mundane motive: concern about patronage appointments and the accompanying assumption that these were more likely at the provincial level.

Even assuming that the original objectives of section 96 were the more exalted ones listed above, the judicial construction elaborated by the

courts remains unclear from that point of view. Their patterns of interpretation have been confusing and unpredictable. The architectural design has been that of 1867 rather than 1984, and rather than promoting harmonious federal-provincial relations the courts' interpretations have promoted conflict. Thus their derogation in a wave of reform should not be a cause for weeping.

There is an important mistaken assumption implicit in the section 96 debate. That is that section 96 courts are the real dispensers of justice and that anything less is second class. In fact, part of the rationale for the historical division between superior and inferior courts was to ensure that important matters got decided in the superior courts.

Section 96 interpretation has also worked to the disadvantage of the provinces. In spite of new efforts to apply section 96 to the federal level, it has been primarily used as a limitation on provincial powers. This in part explains why it is a hot issue among Quebec academics. Provincial initiatives with respect to both inferior courts and administrative boards have been frustrated as a result of section 96.

While it is true that the powers of many administrative boards are now justified by an institutional context analysis, there are notable exceptions, such as residential tenancy boards and the creation of appeal boards. Furthermore, the restrictions have been even more rigid with respect to inferior courts. The provinces are very limited in the kind of changes that they can make even if they act with the co-operation of the federal government.

Apart from freezing problems in the terms of a static historical analysis, the objectives that section 96 is designed to achieve are neither clearly articulated nor consistently pursued. There has been no real effort to define in modern terms what is meant by an inferior court, administrative board or superior court. Surely what is needed is an up-to-date functional definition of the relevant institutions and the tasks they should perform. The cases on section 96 provide good evidence of the need for reform.[54]

The cleanest way to avoid the judicial baggage accompanying section 96 and the related judicature provisions is to repeal them. They should then be replaced with a clearly worded appointing power which would not be designed to pursue grandiose goals such as the maintenance of judicial independence. While a guarantee of judicial independence for the Supreme Court of Canada, superior courts, and section 101 courts may also be a desirable constitutional addition, the problem raised by section 96 was less with the language of the *Constitution Act, 1867* and more with the judicial gloss that was added to these words. A clean start might allow courts to be structured on the basis of current functional need rather than past history.

Gilles Pépin argues that the amendment of section 96 is a complex problem involving the other judicature sections and he is cautious about

a specific solution. He links the problem with reform of the Supreme Court of Canada and the general federal appointing power pursuant to section 101 of the *Constitution Act, 1867*. He advocates an express and detailed guarantee of judicial independence and calls for provincial appointment of section 96 judges after mandatory consultation with the federal government. In making this suggestion he is reviving a recommendation of the Pépin-Robarts Task Force on Canadian Unity.[55] This would solve some of the problems, but, as Pépin is the first to admit, the precise solution is far from obvious. The problems of court reform should be considered as a package that includes the Supreme Court of Canada and section 96 and section 101 courts. In particular, the tensions between a unitary and a dual court structure should be examined.

## Conclusion

In some senses the research papers commissioned under the umbrella of "Institutional and Constitutional Arrangements" are a rather mixed bag. It is hoped that this overview has highlighted the connecting themes and the individual importance of the various research topics. In particular, Volume 57 on recurring issues in Canadian federalism is selective rather than comprehensive. By now, we hope it is clear that the selection of issues was not arbitrary. The issue of constitutional amendment has been so much a part of Canadian history that it would be difficult to imagine it has been settled for all time. Treaty-making power is an important aspect of an increasingly integrated international economy in which Canada is both a subject and an object. The issues of Quebec's constitutional status and the ever-controversial questions of language rights are important elements of Canada's unfinished constitutional agenda. Many other issues could have been discussed, but the above seemed most relevant to the mandate of this Commission.

Volume 58, on the Charter and the courts, is more unified in its focus. The central message of this volume is that courts and administrative boards will play an increasingly important and high-profile role in Canadian society. It is the Charter that gives the largest push in the direction of a more judicialized Canadian polity. However, the full impact of the Charter is far from clear, and the writers of the research papers do not advocate a wholesale embracing of judges as the arbiters of basic values. Boards and less judicatory tribunals are touted as experiments in dispute resolution that should be encouraged rather than discouraged by the Constitution, as is currently the case. The courts themselves are not accepted in their present guise, and the researchers suggest changes in both the appointment structure and composition of Canadian courts.

In the rush to enhance the role of judges as policy makers in Canada we should not discard the virtues of the legislative and executive branches of the political structure. Because of section 33 of the Charter

Canada has not abandoned the doctrine of parliamentary supremacy inherited from the United Kingdom. It may still be a land of parliamentary primacy if not supremacy. In the increasingly complex world in which we live there will continue to be a need for delegated power. Thus the executive, whether in the form of cabinets, municipal councils or administrative boards, will continue to be important aspects of the Canadian state. It is a healthy development that these agencies must now abide by the dictates of the Charter, including the new equality guarantees. The challenge will be to balance administrative efficiency with judicially defined fair play.

In addition to the growing political role of courts and boards in Canadian society, there is a growing link between these bodies and the economy. Thus these research volumes form an important part of this Commission's mandate in respect of the economic union and future development prospects of Canada. Whether they like it or not economists will have to put up with judges and lawyers as well as politicians in charting Canada's economic future. Indeed, the need for interdisciplinary analysis is the raison d'être of the Commission's work. Law has become one of the significant partners in the Canadian economic enterprise.

## Appendix A

## Seminar on Quebec's Status in Confederation

### Research Symposium Held by the Royal Commission on the Economic Union and Development Prospects for Canada

Ottawa, August 28 and 29, 1984

**Presentations**

Political Ideas and Constitutional Change in Quebec, 1945–82, *Andrée Lajoie*, University of Montreal and for the Royal Commission

Evolving Constitutional Positions and Strategies of Québec Governments, 1960–82, *Daniel Latouche*, McGill University, Montreal

The Federal Government's Evolving Constitutional Perspective on English/French Relations and Quebec's Position in the Canadian Federation since 1968, *Ralph Heintzman*, Federal-Provincial Relations Office, Ottawa

Federalism, Nation-Building and Majority Rule, *Reginald Whitaker*, York University, North York

Post 1982 Evolution of Québec's Constitutional Position, *Michel Vastel*, Ottawa Bureau of *La Presse*

Post 1982 Canada's View of Quebec's Constitutional Position, *Gordon Robertson*, Institute for Research on Public Policy, Ottawa

The Political Economy of a Bicommunal Society, *Peter Leslie*, Queen's University, Kingston, Ontario

Quebec and Constitutional Reform, *William Lederman*, Queen's University, Kingston, Ontario.

Finishing the Unfinished Agenda (panel discussion),
*Ramsay Cook*, York University, North York
*Claude Forget*, Société d'études et de changements organisationnels (SECOR), Montreal
*John Meisel*, Queen's University, Kingston, Ontario
*Claude Ryan*, MNA, Argenteuil, Quebec
*Donald Smiley*, York University, North York

**Also Invited**

*Stephen Scott*, McGill University, Montreal

**For the Commission**

Commissioners

Donald S. Macdonald, *Chairman*
William Hamilton
Laurent Picard
Michel Robert
Thomas Shoyama

Commission Staff

Clare Beckton
Jamie Benidickson
Jacques Bérard
Ivan Bernier
André Blais
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Lilla Connidis
Michelle D'Auray
Mireille Éthier
Gerald Godsoe
Karen Jackson
Mark Krasnick
Wayne MacKay
Kenneth Norrie
Alan Nymark
Kent Roach
Jacques Shore
Richard Simeon
David C. Smith
Cynthia Williams

## Appendix B

## Seminar on Official Language Rights in Canada

### Research Seminar Held by the Royal Commission on the Economic Union and Development Prospects for Canada

Ottawa, August 29 and 30, 1984

**Presentations**

Collective and Individual Rights Approach to Language Policy in Canada
- Collective Rights Approach to Language in Quebec, *Michel Lebel*, University of Quebec, Montreal
- Individual Rights Approach to Language in Canada, *Joseph Magnet*, University of Ottawa, Ottawa

Assessing Language Policy in Canada
- Statistics of Language Contacts, *Jean Laponce*, University of British Columbia, Vancouver
- Language of Work, *Jean-Denis Gendron*, Laval University, Quebec
- Law and Linguistic Communities, *Alain Prujiner*, Laval University, Quebec
- The State, Language and Society in Canada, *Louis Dupont and Eric Waddell*, Laval University, Quebec

**Other Invited Guests**

Max Yalden, Commissioner of Official Languages, Ottawa
Stuart Beaty, Office of the Commissioner of Official Languages, Ottawa

**For the Commission**

Commissioners

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Gerald Godsoe
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Mark Krasnick
Wayne MacKay
Kenneth Norrie
Alan Nymark
Jacques Shore
Richard Simeon
David C. Smith
François Vaillancourt
Cynthia Williams

## *Notes*

This paper was completed in April 1985.

1. The *Constitution Act, 1982*, is Schedule B of the *Canada Act 1982*, 1982, c. 11, the United Kingdom statute enacted on March 29, 1982, to give effect to the request of the Senate and House of Commons of Canada that the provisions of the *Constitution Act, 1982* be enacted.
2. P.E. Trudeau, "Quebec and the Constitutional Problem," in his *Federalism and the French Canadians* (Toronto: Macmillan, 1968), at p. 31.
3. Claude Ryan, *The New Canadian Federation* (Montreal: Quebec Liberal Party, 1980).
4. R. Romanow, "Making Canada's Constitution: Reflections of a Participant," in *The Canadian Charter of Rights and Freedoms: Law Practice Revolutionized*, edited by W. MacKay (Halifax: Dalhousie Continuing Education, 1981), at p. 105.
5. G. Grant, *Lament for a Nation: The Defeat of Canadian Nationalism* (Toronto: McClelland and Stewart, 1965), at p. 105.
6. The "federal proposals regarding procedure for patriation of the Constitution, accepted by the Constitutional Conference of June 1971," held in Victoria, B.C. See Canadian Intergovernmental Conference Secretariat, *Proposals on the Constitution, 1971–78* (Ottawa: CICS, 1979).
7. Bill C-60, *The Constitutional Amendment Bill*, introduced in the House of Commons in June 1978.
8. P.E. Trudeau, *A Time for Action: Towards the Renewal of the Canadian Federation* (Ottawa: Minister of Supply and Services Canada, 1978).
9. *Supra*, note 1.
10. L.B. Pearson, *Federalism for the Future* (Ottawa: Queen's Printer, 1968).
11. P.E. Trudeau, *The Constitution and the People of Canada* (Ottawa: Queen's Printer, 1969).
12. *Supra*, note 8.
13. Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (Ottawa: Minister of Supply and Services, 1979).
14. Gil Rémillard, "The Constitution Act, 1982: An Unfinished Compromise" (1984), 32 *American Journal of Comparative Law* 269–81.
15. *A.G. Quebec v. Quebec Protestant School Boards* (1984), 54 N.R. 196 (S.C.C.).
16. (1984), 47 O.R. (2d) 1 (Ont. C.A.).
17. *Quebec Constitutional Amendment Reference (No. 2)* (1982), 45 N.R. 317 (S.C.C.).
18. *Reference re Manitoba Language Rights*, August, 1985 (S.C.C.).
19. Canada, Commissioner of Official Languages, *Annual Report, 1983* (Ottawa: Minister of Supply and Services, 1983).
20. *A.G. Canada v. A.G. Ontario*, [1937] A.C. 326.
21. *Constitutional Amendment References, 1981* (1981), 39 N.R. 1 (S.C.C.).
22. Ibid.
23. *Supra*, note 17.
24. M. Manning, *Rights, Freedoms and the Courts* (Toronto: Emond-Montgomery, 1983); W.S. Tarnopolsky, "The Equality Rights," in *The Canadian Charter of Rights and Freedoms: Commentary*, edited by W.S. Tarnopolsky and G.A. Beaudoin (Toronto: Carswell, 1982), at pp. 395–442; J. Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the Charter" (1983), 13 *Manitoba L.J.* 425; N. Lyon, "The Teleological Mandate of the Fundamental Freedoms Guarantee: What to Do with Vague but Meaningful Generalities" (1982), 4 *Supreme Court L.R.* 57.
25. R.A. Macdonald, "Postscript and Prelude — The Jurisprudence of the Charter: Eight Theses" (1982), 4 *Supreme Court L.R.* 321; R.A. Samek, "Untrenching Fundamental Rights" (1982), 27 *McGill L.J.* 755.
26. C. Beckton, "Freedom of Expression," in *The Canadian Charter of Rights and Freedoms: Commentary*, *supra*, note 24, at pp. 75–121; and "Obscenity and Censorship Re-examined under the Charter of Rights," 13 *Manitoba L.J.* 351.

27. W. MacKay, "Fairness After the Charter: A Rose by Any Other Name?" (1985), 10 *Queen's L.J.* 263; and "Judicial Process in the Supreme Court of Canada: The Patriation Reference and Its Implications for The Canadian Charter of Rights" (1983), 21 *Osgoode Hall L.J.* 55.
28. *Supra*, note 16.
29. R.S.C. 1970, c. S-19.
30. *Law Society of Upper Canada v. Skapinker* (1984), 53 N.R. 169 (S.C.C.); *A.G. Quebec v. Quebec Protestant School Boards*, *supra*, note 15.
31. *Hunter v. Southam Inc.* (1984), 55 N.R. 241 (S.C.C.).
32. D. Gibson, "The Charter of Rights and the Private Sector" (1982), 12 *Manitoba L.J.* 213; and "Distinguishing the Governors from the Governed" (1983), 13 *Manitoba L.J.* 505. Gibson argues the Charter does apply to the private sector.
33. Katherine Swinton, "Application of the Canadian Charter of Rights and Freedoms," in *The Canadian Charter of Rights and Freedoms: Commentary*, *supra*, note 24.
34. (1983), 41 O.R. (2d) 652 (H.C.).
35. (1983), 1 F.C. 745.
36. Gibson, *supra*, note 32; Manning, *supra*, note 24, at p. 23.
37. *Act for the Recognition and Protection of Human Rights and Fundamental Freedoms*, S.C. 1960, c. 44.
38. 262 NE (2d) 586 (1970).
39. (1974) 1 All E.R. 229 at 238.
40. 401 U.S. 424 (1971).
41. *CNR v. Bhinder* (1983), 147 D.L.R. (3d) 312 (Fed. C.A.); *Re Ontario Human Rights Commission and Simpson-Sears* (1982), 138 D.L.R. (3d) 611 (Ont. C.A.).
42. *Supra*, note 16.
43. *Sunday Times v. United Kingdom* (1979), 2 *E.H.R.R.* 245 (Eur. Ct. of H.R.).
44. B. Laskin, "What Everyone Should Know About The Supreme Court of Canada," address to the Empire Club, Toronto, March 12, 1981, at pp. 1–2.
45. *Reference re The Seabed and Subsoil of the Continental Shelf Off Newfoundland* (1984), 5 D.L.R. (4th) 385 (S.C.C.).
46. *Supra*, note 21.
47. *Supra*, note 30.
48. *Supra*, note 44.
49. Canadian Bar Association, *The Appointment of Judges in Canada*, Report of a Special Committee of the C.B.A. (Ottawa: Canadian Bar Foundation, 1985).
50. Ibid.
51. *Supra*, note 44.
52. *Toronto Corporation v. York Corporation*, [1938] A.C. 415 (P.C.), at 426.
53. *McEvoy v. A.G. New Brunswick* (1983), 148 D.L.R. (3d) 251 (S.C.C.).
54. W. MacKay and W. MacLauchlan, "Section 96 and Its Amendment: A Report to the Attorney General of Nova Scotia," unpublished (Halifax: September 1984).
55. Task Force on Canadian Unity, *supra*, note 13.

2

# The Canadian Constitutional Amendment Process
## *Mechanisms and Prospects*

STEPHEN A. SCOTT

### Prologue: The Role and Limits of the Formal Amending Process

Law is our principal, and virtually only formal, instrument of social control: personified as "the state," and claiming a monopoly of the legitimate use of force, it acknowledges no rival.

And the Constitution, in turn, is the supreme law.

Hence, in two sentences, the social importance, to every aspect of Canadian life, of the constitutional amendment process. It is the supreme and ultimate lawmaking process, controlling both the speed and the direction of all other lawmaking, and even the continued existence of the Canadian federation itself.

Of course, formal enactment by legislative mechanisms is not the only method of changing law. Revision of existing law through judicial reinterpretation is, obviously, an alternative avenue of legal change; even if, formally, the law itself considers the judicial decision as expository, or declaratory, of "what the law is and was, although it may have been misunderstood in former days."[1] This mode of legal change grows in importance in proportion to the difficulty of employing the relevant legislative mechanisms. Hence, where, as in Canada, a given formal lawmaking process (here, the set of constitutional amendment procedures established by Part V of the *Constitution Act, 1982*[2]) is not able to respond to pressures for change, alternative avenues assume increased significance. In my own view, the nature of the formal amending process in Canada is now such that judicial interpretation of the Constitution will, at the least, rival it as a mode of constitutional change. This, indeed, was already the case while constituent authority still resided at West-

minster. In truth, in major matters of specifically economic concern (for example, removal of barriers to the interprovincial and international movement of goods, services, persons, and capital), it seems to me that the courts (ultimately, of course, the Supreme Court of Canada) will largely displace the formal amending process as the effective avenue of constitutional change. The courts, of course, act, not by taking initiatives of their own in the ordinary sense, but rather by passing on the initiatives of others: in particular, sustaining or striking down federal or provincial initiatives in instances of constitutional challenge.

Consider, for example, the case of barriers to national economic integration. These are normally, though not always, erected by the provinces. Our formal constitutional texts give the courts a very limited basis for striking them down. The constitutional basis for judicial review of such barriers to integration remains limited despite the 1982 constitutional reform, guaranteeing so-called "Mobility Rights."[3] Indeed, it is limited, partly, precisely because of the 1982 reform, which, for the first time, allowed provincial regulation and taxation of certain resource exports.[4] For its part, the new formal constitutional amendment process is likely to discourage, even to impede, the enactment of any further reforms (like the 1982 "Mobility" guarantees) aimed at strengthening economic or other constitutional safeguards. At very least it will tend to dilute them.

The fact that the safeguards in our constitutional texts are few and narrowly drawn means that constitutional evolution through judicial action (assuming that it occurs at all) will tend to take the form less of courts' striking down obstructive, than of their sustaining constructive, initiatives such as those aimed at national or international economic integration. In the nature of things, initiatives of this nature will normally be federal initiatives, even if taken at the behest of provinces or regions seeking to improve their position. Yet judicially determined federal capacity to take such initiatives does not, by itself, suffice. The initiatives must actually be taken by the federal legislature or executive before they can be sustained by the courts. This, in its turn, presupposes the will of the federal political process to act. True enough, the political will to implement such of its recommendations as are considered on their merits to be sound must be assumed by a royal commission of inquiry. Otherwise, a commission cannot offer advice based on its best judgment. But the many, and conflicting, pressures within the Canadian federation which would tend to defeat the operation of a given constitutional amendment process do not disappear simply because an initiative takes the form of an ordinary federal bill rather than a motion for a constitutional amendment. On the other hand, decisive measures are far easier to carry through the ordinary, than through the constitutional, lawmaking process.

## The Amending Formulae

Our constitutional amending process is a product of our recent history. On April 17, 1982, this country became, in terms of its own internal law, a sovereign state independent of the United Kingdom. Through the *Canada Act 1982*,[5] proclaimed in force on that day,[6] the United Kingdom Parliament (acting on a request made by both Houses of the Canadian Parliament, with the concurrence of the executive governments of nine of the ten provinces; in other words, all save Quebec) brought the law into accord with an internationally recognized political reality of at least 50 years' standing. This final Imperial constituent Act, with its scheduled *Constitution Act, 1982*, transferred constitution-making power from the United Kingdom Parliament to Canadian institutions acting through the series of intricate constitutional amendment formulae found in Part V of the *Constitution Act, 1982*.

Part V, entitled "Procedure for Amending Constitution of Canada," gives the general appearance of an exhaustive scheme for amending the law contained in the "Constitution of Canada." For practical purposes, that can probably be assumed to be so; although, strictly speaking, authority to amend some parts of the Constitution may survive elsewhere in the Constitution. Indeed subsection 52(3) of the *Constitution Act, 1982* says merely: "Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada." It does not specify Part V of the 1982 Act.

What, then, is the "Constitution of Canada"? Why, indeed, bother to ask the question? Sometimes, in truth, little turns on the answer. That is so because substantial portions of the "Constitution of Canada" are left respectively to what I shall call the "unilateral" federal (s. 44) and provincial (s. 45) amending powers, which give Parliament, and especially the provincial legislatures, wide powers to alter, by ordinary Act, political institutions at their respective levels of government.

So long as one or other is available, it will rarely matter whether, for example, Parliament is using any of its powers of "ordinary" legislation under section 91 of the 1867 Act, or its powers of constitutional amendment under section 44 of the 1982 Act. Similarly, little will usually turn on whether a provincial legislature is acting under section 45 of the 1982 Act or under (say) section 92 of the 1867 Act, so long as one or other confers the jurisdiction necessary to enact the provincial statute. In such cases, it will usually be needless to ask whether the "Constitution" is, or is not, being affected by the proposed legislation. An ordinary federal or provincial Act suffices on either hypothesis.

As a rule, however, it is vital to know whether a given legal rule, or a body of legal rules, is, or is not, part of the "Constitution of Canada." This determines whether the rule in question is "entrenched": in other words, whether it can be amended otherwise than through compliance

with the elaborate bilateral, and multilateral, mechanisms of Part V, set out in sections 38 to 43 of the 1982 Act.

It may perhaps strike a layman as surprising that the precise scope of the term "Constitution of Canada" is legally uncertain; and surprising, especially, that the draftsman of the 1982 Act left it so, in fact obviously did so quite deliberately. Caution was chosen over certainty. Rather than offering a legally exhaustive definition, and risking leaving something out, the draftsman simply defined the "Constitution of Canada" to "include" (rather than to "mean") certain specified things; and for the rest, left it open-ended. (The draftsman's choice of the word "includes" in preference to the word "means" is normally deliberate and very significant.) By subsection 52(1) of the 1982 Act, the "Constitution of Canada" "includes," first, the *Canada Act 1982* (including the *Constitution Act, 1982*, which forms part of it); second, a scheduled list of Acts and subordinate instruments; and, third, amendments to either of the foregoing. The scheduled list just mentioned begins with what is now known as the *Constitution Act, 1867* (formerly the *British North America Act, 1867*) and continues with various direct and other amendments made by federal and Imperial statutes. *The Statute of Westminster, 1931*, appears in the list, as do the Imperial orders-in-council and federal statutes creating new provinces.

A good example of the serious problems of definition presented by the phrase "Constitution of Canada" arises in connection with the Supreme Court of Canada. The law directly relating to the constitution, jurisdiction, and procedure of the Court is to be found not only in the *Supreme Court Act*[7] and Rules made thereunder,[8] but also in perhaps two dozen federal statutes, including, for instance, the *Bankruptcy Act* and the *Criminal Code*. Are these provisions, or some of them, part of the "Constitution of Canada"? They are nowhere specifically designated as such in the list scheduled to the 1982 Act: but that list is not exhaustive. Before April 17, 1982, Parliament was free to deal with the constitution, jurisdiction, and procedure of the Supreme Court in any way it thought fit; this being so in virtue of section 101 of the 1867 Act: "The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada. . . ." The *Constitution Act, 1982*, while nowhere expressly repealing section 101, provides, in subsection 41(d), that an amendment to the "Constitution of Canada" in relation to "the composition of the Supreme Court of Canada" can be enacted by the appropriate federal authorities only with the unanimous consent of all the provincial legislative assemblies. On the other hand, by subsection 42(1)(d), an amendment to the "Constitution of Canada," in relation to, "subject to paragraph 41(d), the Supreme Court of Canada" is to require, in addition to the concurrence of the appropriate federal authorities, the consent of the legislative assemblies of at least two-thirds of the

provinces having in the aggregate, according to the then latest general census, at least 50 percent of the population of all the provinces. Subsections 41(d) and 42(1)(d) create a powerful implication that at least some of the federal statute law relating to the Supreme Court of Canada is now to be considered part of the "Constitution of Canada."

Indeed, the legislative history of subsection 41(d) points unmistakably in this direction. Subsections 41(d) and 42(1)(d) originate in the eight provinces' "April Accord" of April 16, 1981, which was (with immaterial exceptions) adopted in the federal-provincial agreement of November 5, 1981, as the basis of the *Constitution Act, 1982*. The April Accord contained an explanatory note for subsection 41(d) which read as follows:

> This clause would ensure that the Supreme Court of Canada is comprised of judges a proportion of whom are drawn from the Bar or Bench of Quebec and are, therefore, trained in the civil law. Other aspects of the Supreme Court of Canada are dealt with in section 10.[9]

(The reference to "section 10" is a reference to what is now subsection 42(1)(d) of the *Constitution Act, 1982*.) The assertion that what is now subsection 41(d) would safeguard Quebec's position can be true only if section 6 of the *Supreme Court Act* is to be considered part of the "Constitution of Canada." This reads as follows: "At least three of the judges shall be appointed from among the judges of the Court of Appeal, or of the Superior Court, or the barristers or advocates of the Province of Quebec." If that be so, at least some other statutory rules must surely be regarded as dealing with the "composition" of the Supreme Court within the meaning of subsection 41(d): notably the prescription that the bench shall consist of a Chief Justice and eight puisne judges (*Supreme Court Act*, s. 4); their appointment by the Governor-in-Council (s. 4) and their qualifications (s. 5); and probably also their good behaviour tenure, removability on joint address, and 75-year-age retirement rule (s. 9).

The explanatory note for what is now subsection 42(1)(d) is, on the other hand, consistent with the view that no other statutory provisions dealing with the Court have been "constitutionalized" by the 1982 Act:

> (d) This clause refers to all amendments relating to the Supreme Court of Canada except the composition of the Court which is dealt with in section 9, clause (d). The Supreme Court of Canada is established by a law of Parliament under section 101 of the B.N.A. Act and not by the Constitution itself. This clause anticipates constitutional amendments relating to the Court. Such amendments would apply nationwide.[10]

If so, Parliament's power under section 101 is, save as regards the "composition" of the Court, intact. But such a result could not easily be reconciled with a contrary result for subsection 41(d).

Any attempt at changing any part of the law relating to the Supreme Court of Canada must now, therefore, begin with the threshold question

whether the proposed amendment involves any change to provisions forming part of the "Constitution of Canada." It is difficult to believe that all the statute law dealing with the Court, in force on April 17, 1982, became on that date part of the "Constitution," down to the colours prescribed for the covers on factums (the parties' written briefs of argument). Yet if none of the enactments dealing with the Court at that date are considered part of the "Constitution," not only can the federal Parliament, despite the manifest objective of at least subsection 41(d), continue legislating for the Court exactly as it pleases, but its powers to do so (under section 101 of the 1867 Act) are irremovable save in accordance with the procedures of subsections 41(d) and 42(1)(d). Where the line is to be drawn between that part of the Court's "organic" statute law which does form part of the "Constitution," and that which does not, will ultimately have to be settled by the Supreme Court of Canada itself, on a case-by-case basis. Even increases to the Court's jurisdiction will present difficult questions.

We may now usefully set out the amending formulae established by Part V of the 1982 Act. Somewhat arbitrarily, I propose to treat them as five in number, and to denominate them as follows, the first two descriptions being suggested by the marginal notes to the statute, the others of my own choosing.

*First*, the "general procedure," found in section 38:

> **38.** (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by
>
> (*a*) resolutions of the Senate and House of Commons; and
>
> (*b*) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.
>
> (2) An amendment made under subsection (1) that derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province shall require a resolution supported by a majority of the members of each of the Senate, the House of Commons and the legislative assemblies required under subsection (1).
>
> (3) An amendment referred to in subsection (2) shall not have effect in a province the legislative assembly of which has expressed its dissent thereto by resolution supported by a majority of its members prior to the issue of the proclamation to which the amendment relates unless that legislative assembly, subsequently, by resolution supported by a majority of its members, revokes its dissent and authorizes the amendment.
>
> (4) A resolution of dissent made for the purposes of subsection (3) may be revoked at any time before or after the issue of the proclamation to which it relates.

With section 38, I would include section 42:

**42.** (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

(*a*) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;

(*b*) the powers of the Senate and the method of selecting Senators;

(*c*) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;

(*d*) subject to paragraph 41(d), the Supreme Court of Canada;

(*e*) the extension of existing provinces into the territories; and

(*f*) notwithstanding any other law or practice, the establishment of new provinces.

(2) Subsections 38(2) to (4) do not apply in respect of amendments in relation to matters referred to in subsection (1).

Although the Act itself does (s. 47) speak of section 42 as though it were a distinct procedure, it seems to all intents and purposes merely a variant of section 38, and may conveniently be treated as such. Sections 39 and 40 enact provisions ancillary to section 38:

**39.** (1) A proclamation shall not be issued under subsection 38(1) before the expiration of one year from the adoption of the resolution initiating the amendment procedure thereunder, unless the legislative assembly of each province has previously adopted a resolution of assent or dissent.

(2) A proclamation shall not be issued under subsection 38(1) after the expiration of three years from the adoption of the resolution initiating tmendment procedure thereunder.

**40.** Where an amendment is made under subsection 38(1) that transfers provincial legislative powers relating to education or other cultural matters from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply.

*Second*, the "unanimous consent" procedure, section 41:

**41.** An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

(*a*) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(*b*) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

(*c*) subject to section 43, the use of the English or the French language;

(*d*) the composition of the Supreme Court of Canada; and

(*e*) an amendment to this Part.

*Third*, the "special arrangements" procedure, section 43:

> **43.** An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including
>
> (*a*) any alteration to boundaries between provinces, and
>
> (*b*) any amendment to any provision that relates to the use of the English or the French language within a province,
>
> may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

*Fourth*, the "unilateral federal" procedure, section 44 (replacing, in narrower form, the former subsection 91.1 of the 1867 Act as added in 1949):

> **44.** Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

*Fifth*, the "unilateral provincial" procedure, section 45, which replaces the similar provision in subsection 92.1 of the 1867 Act:

> **45.** Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

The remainder of Part V consists of essentially accessory provisions of general application.

Subsection 46(1) deals with the initiation of the bilateral and multilateral amending procedures:

> **46.** (1) The procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province.

while subsection 46(2) settles a question which would sooner or later have become litigious:

> (2) A resolution of assent made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

Section 47 denies the Senate full coordinate authority in all the bilateral and multilateral procedures:

> **47.** (1) An amendment to the Constitution of Canada made by proclamation under section 38, 41, 42 or 43 may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the adoption by the House of Commons of a resolution authorizing its issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution.

(2) Any period when Parliament is prorogued or dissolved shall not be counted in computing the one hundred and eighty day period referred to in subsection (1).

Section 48 is designed to ensure (indirectly) that an amendment is in fact enacted by the Sovereign's representative, the Governor General, after the necessary resolutions have been passed by the relevant legislative bodies. At the same time, it seeks to respect the proprieties by refraining from imposing a duty to enact the amendment:

**48.** The Queen's Privy Council for Canada shall advise the Governor General to issue a proclamation under this Part forthwith on the adoption of the resolutions required for an amendment made by proclamation under this Part.

Section 49 provides for a review of Part V:

**49.** A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within fifteen years after this Part comes into force to review the provisions of this Part.

## Retrospect

The enactment of the scheme now found in Part V of the 1982 Act followed more than 50 years of intermittent, and unsuccessful, federal-provincial negotiations.[11] For the 1982 constitutional reform, the critical period is perhaps that between October 2, 1980, and December 8, 1981.

On October 2, 1980, the Government of Canada presented to the House of Commons of Canada a draft constitutional text[12] having more or less the scope of (though very different provisions from) the reform which ultimately became law. The October 1980 text was proposed as the terms of a joint address by both Houses of the Canadian Parliament to the Sovereign, praying for the enactment by the United Kingdom Parliament of a statute which would confer upon Canada legal independence with a series of constitutional amending processes and a Canadian Charter of Rights and Freedoms "entrenched" against both the federal Parliament and the provincial legislatures. It was intended to proceed to Westminster without the consent of the provincial legislatures or governments.

This scheme immediately encountered opposition and resistance, most of it sustained and bitter, from the opposition parties (the Progressive Conservatives especially) in the federal Parliament, and from eight of the ten provincial governments: all, that is, save Ontario and New Brunswick.

A special Joint Committee of the Senate and the House of Commons of Canada was appointed to consider the draft. Its report,[13] tabled in the House of Commons on February 13, 1981, proposed a variety of changes. Although various compromises had succeeded in securing the rather unenthusiastic concurrence of the federal New Democratic Party, and of most of its MPs, the revised draft was met with nearly the same obstruction in the House as its predecessor, and no less opposition from the provinces. Only on April 8, 1981, with no end to the debate in sight, was all-party agreement on procedure announced in the House of Commons.[14] Under this agreement a special order was unanimously adopted, fixing a timetable for the disposition of all amendments to the text reported from the Committee, and, ultimately, for the disposition of the final text as it might be amended. This agreement, however, committed the government to await the judgment of the Supreme Court of Canada on pending appeals from decisions of the Manitoba, Newfoundland, and Quebec Courts of Appeal on questions referred to them by the governments of these provinces, both as to the constitutional propriety and the legal validity or consequences of the course of action upon which the federal Houses of Parliament had embarked.

The Supreme Court of Canada's majority decision of September 28, 1981,[15] held that, as a matter of law, the authority of the United Kingdom Parliament survived intact and unimpaired; that is, it could validly and effectively legislate on the Canadian constitution, either on its motion or in response to any request of its choosing. But the Court also held that (extra-legal) "conventions" existed rendering constitutionally improper a federal parliamentary approach to the Imperial Parliament without a sufficient provincial consensus; and that, whatever the "necessary" consensus might be, the two provinces of Ontario and New Brunswick did not suffice.[16]

Even if it had remained politically possible for federal parliamentary majorities to force the measure as it then stood (with amendments approved by the House of Commons on April 23, 1981,[17] and by the Senate on April 24, 1981)[18] through both Houses of the Canadian Parliament, it was doubtful that the Government of the United Kingdom would (even, perhaps, that it could) carry a bill in the terms requested through the Parliament at Westminster.

A negotiated solution became the only alternative. This was achieved on November 5, 1981,[19] the signatories being the governments of Canada and of all the provinces save Quebec. The agreed scheme was based largely on an earlier interprovincial agreement of April 16, 1981 (the April Accord) among the eight "opposing" provincial governments. In particular, the federal-provincial agreement of November 5, 1981, introduced the "legislative override" (reflected in section 33 of the *Constitution Act, 1982*)[20] allowing the Parliament of Canada and the provincial legislatures to override, by express statutory language, most of the

guarantees of the Canadian Charter of Rights and Freedoms. It also adopted from the April Accord a scheme of constitutional amending formulae which Prime Minister Trudeau had repeatedly denounced as tending to create a "chequerboard Canada." These amending procedures had, and have, almost no resemblance on essential points to the federal proposals they displaced.

The Minister of Justice of Canada, by notice of motion of November 18, 1981, accordingly introduced into the House of Commons a resolution[21] for a joint address to the Sovereign conforming to the federal-provincial agreement. Although changes had been made in order to accommodate positions adopted by Quebec, it proved impossible to secure the province's agreement to the project. Quebec has remained steadfastly and intransigently opposed to the ultimate *Canada Act* and has not accepted the issue as settled politically.

On December 2, 1981, the House of Commons of Canada,[22] and, on December 8, 1981, the Senate of Canada[23] adopted the final text of what has now become the *Canada Act 1982*, the ultimate exercise of Imperial legislative authority for Canada, assented to on March 29, 1982, and in force on April 17, 1982.

## The Participants in the Amending Process and the Issue of Popular Participation

Under the federal proposals concerning constitutional amendment procedures, as they were referred to the Supreme Court of Canada on April 24, 1981, provincial consent to constitutional amendments could be given by a majority of provincial legislative assemblies meeting stated criteria to ensure adequate representation of all regions (and concurrence of both Quebec and Ontario).[24] But provincial consent could alternatively be given by the Canadian electorate provided that the national referendum majority included also referendum majorities in provinces whose assemblies' consent would have sufficed as provincial approval. (The consent of the federal Houses would remain necessary in any event.)

By contrast, the constitutional amendment processes prescribed by Part V of the *Constitution Act, 1982* all involve action by the Sovereign, or by the Governor General (presumably as the Sovereign's representative), and by federal and provincial deliberative legislative bodies acting in various combinations.

Participation of the electorate directly through referendum (so prominent in the proposal of October 2, 1980,[25] and its ultimate revision of April 24, 1981[26]) has, in consequence of the November 5, 1981, agreement,[27] disappeared completely. This development is one of far-reaching significance.

During the course of public debate, no aspect of the federal proposal, not even the entrenchment of a charter of rights and freedoms, drew remotely as bitter a response from provincial authorities across the country as did the inclusion of the referendum process. Why?

The amending formula proposed in October 1980 and that which emerged in revised form in April 1981 both imposed stringent conditions as to the number and the grouping of provinces whose consent would be needed to effect constitutional amendments of various kinds. Most notably, these conditions controlled amendments bearing on the distribution of legislative powers as between the federal and provincial authorities. In particular, for a general amendment to become law, the consent of Quebec and Ontario would have been required (each having had, at some time, at least 25 percent of the population of Canada). Such a provision was an obvious euphemism for giving Quebec a veto and for conceding that whatever Quebec has, Ontario, too, must be given.

The federal government apparently expected (and, in my view, rightly expected) the electorate, even in Quebec (perhaps especially in Quebec), to be more pliable than would be any elected provincial assembly in passing judgment on proposals from Ottawa for constitutional amendments. This would be particularly true where the balance of power within the federation was concerned. The voters would more readily give the consent of the province than would their provincial representatives.

After all, the Quebec electorate had, in the May 20, 1980, provincial referendum, refused the Parti québécois Government its desired mandate to negotiate the independence of Quebec. Yet, on April 13, 1981, the same voters returned the same party to power, no less committed to its purpose of independence. This was a recent, and clear, demonstration of the way in which the Quebec electorate, speaking directly, could be expected to be more attached to, and sympathetic to, federal institutions than would a provincial legislature. But such a phenomenon would not be confined to Quebec alone. In any province, provincial legislators would probably cling to provincial jurisdiction with greater tenacity than would their electorate.

A difference in attitudes, flowing from their different positions, may naturally be expected between provincial voters and elected provincial representatives. But beyond this, the electoral system in itself may play an important psychological role in provincial legislators' attitudes toward constitutional amendments.

In Quebec that phenomenon can be expected to work in the following way. Of provincial political parties, the more "nationalist" party or parties will oppose "centralization" on principle. The less "nationalist" party or parties will oppose "centralization" out of fear that their opponents will effectively exploit the "national" or provincial autonomy issue. Moreover, elections often turn on "swing" votes: certain posi-

tions endanger marginal votes. Furthermore, non-French Canadian voters — far more likely statistically to have a "federalist" political orientation — do not find the effect of their votes diluted in referenda, while, given their geographical concentration, their votes are greatly diluted in elections to the provincial legislature. All this points to referenda as being more favourable to "federal" or "national" interests than are provincial legislative assemblies.

Although Mr. Trudeau and his colleagues may not have worked out the theory quite so fully as this, they clearly perceived that: (a) at least in the Canadian political context, a referendum, inserted in the amending formula as an alternative means of securing the necessary provincial consents, would be an element of flexibility; (b) the more rigid the amending formula in other respects, the more this element of flexibility was needed; and (c) the flexibility derived from a referendum would be favourable to "federal" or "national" interests, particularly as no referendum could be held without the consent of the Senate and House of Commons of Canada.[28]

The provincial premiers and the federal opposition leader grasped the implications of the referendum element from the start. Of the eight premiers who opposed the October 1980 package, virtually all made a special point of attacking the referendum specifically, or of attacking the package generally with the referendum obviously in mind. The language was sometimes envenomed, and the complaint was that the referendum was centralizing. It was indeed more centralizing than a formula without it. Provincial autonomy was not safe in the hands of provincial electors — at any rate, it was much less safe than in the premiers' own hands. Whatever in Mr. Trudeau's proposals might by any possibility have survived the Supreme Court's decision of September 28, 1981, the referendum could never have done so. In fact, it did not.

Whether Canada retains the present requirements as to the provinces' consent, or adopts some other arrangement (such as those of the federal proposals modelled on the "Victoria Charter"[29]), a restoration of the referendum as a mode of giving a province's consent, would afford a valuable additional element of flexibility, and should receive serious consideration.

## The General Procedure: A Critical Evaluation

Because the amending process itself can be altered only under the "unanimous consent" procedure (*Constitution Act, 1982*, s. 41(e)) it follows that, with unanimous consent of the federal and provincial authorities, any change in the constitutional system can be accomplished. In other words, if unanimous consent can be obtained, any

desired amendment can be enacted. So the "unanimous consent" procedure is in a sense the dominant one, the master key to the Canadian constitution.

Again, some special arrangements can be effected by means of bilateral or multilateral amendments under section 43 of the 1982 Act, involving the participation of the affected provinces only. Section 43, the Rubik Cube of the 1982 Act, presents intricate problems (which must remain beyond the scope of the present paper), and there is no available pamphlet promising easy solutions. In part, these problems arise from the language in most of the formulae purporting to make them exclusive of one another, thus creating difficult issues as to how a given proposed amendment may, or must, be enacted.

For practical purposes, however, section 38, the "general" procedure, is rightly regarded as the centrepiece of the 1982 scheme of amending formulae.

### *Necessary Number of Consenting Provincial Assemblies*

An amendment under section 38 requires the consent of the legislative assemblies of two-thirds of the provinces. For the moment, that means seven. This at least formally explains the apparent (implied) abrogation[30] of Parliament's pre-existing unilateral legislative power to create new provinces.[31] This power could conceivably have been employed to create additional provinces precisely in order to facilitate passage of constitutional amendments under the new procedure. (American history seems to offer at least one close precedent.)[32] Even so, the provisions of subsection 38(2) would surely have given adequate protection to most of the basic provincial interests. It is a fair guess that the Trudeau government did not resist curtailment of federal legislative power to create new provinces because the federal authorities could henceforth more easily resist pressure for the creation of new provinces in the north. The resources of the north are thus more likely to remain a "national" asset with a bigger share remaining for the existing provinces.

### *Required Character of Consenting Provincial Assemblies*

Since by its terms the provinces whose assemblies' consent is needed for an amendment must include "provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces," population statistics are needed to ascertain compliance with section 38. The 1976 and 1981 census figures are shown in Table 2-1.

**TABLE 2-1 Population of Canada by Provinces and Territories**

| Province or Territory | 1976 Census | 1981 Census |
|---|---|---|
| Alberta | 1,838,037 | 2,237,724 |
| British Columbia | 2,466,608 | 2,774,467 |
| Manitoba | 1,021,506 | 1,026,241 |
| New Brunswick | 677,250 | 696,403 |
| Newfoundland | 557,725 | 567,681 |
| Nova Scotia | 828,571 | 847,442 |
| Ontario | 8,264,465 | 8,625,107 |
| Prince Edward Island | 118,229 | 122,506 |
| Quebec | 6,234,445 | 6,438,403 |
| Saskatchewan | 921,323 | 968,313 |
| Yukon Territory | 21,836 | 23,153 |
| Northwest Territories | 42,609 | 45,741 |
| Total population | 22,992,604 | 24,343,181 |
| Total population, provinces only | 22,928,159 | 24,274,287 |

*Source:* 1976 figures, *1981 Canadian Almanac and Directory* (Toronto: DeBoo); 1981 figures, informally furnished by Statistics Canada.

## *Treatment of Provinces on a Uniform Basis*

The rules governing the number and character of the provinces whose assemblies' consent is needed for an amendment under section 38 can be said, with a plausibility not possible for earlier proposals, to put all provinces on an equal footing or to apply fair or uniform criteria. The veto power previously sought to be conferred upon Quebec and Ontario[33] has been eliminated. It had formerly been accepted that a veto could not be refused to Quebec and that whatever Quebec had, Ontario, too, must be given. Needless to say, this was increasingly resisted in western Canada, where some of the provinces (notably British Columbia and Alberta) began to assert a claim to a like veto. In the end, the power of dissent replaced the veto.

The "loss" of the Quebec veto figures largely in the National Assembly debates[34] leading to the December 1st, 1981, resolution.[35] The Opposition made very heavy weather of the fact that the 1982 scheme "reduced" Quebec to equality with other provinces. Yet the logic of this equality is the logic that results from negotiating on the basis of a requirement of a consensus within the Canadian federation. In fact, any attempt to amend the Part V scheme itself, in any way whatsoever, now requires, by law, unanimous consent in virtue of subsection 41(e).

Could the necessary unanimity now be achieved to give Quebec, alone of all the provinces, an outright veto? Probably not. Would such an additional complication, added to the present powers of dissent or opting out, be desirable even if achievable? Probably not. Could unanimity be achieved on a formula grouping provinces by region, in a "Victoria

Charter"-type arrangement, along the line of the scrapped federal proposals?[36] Again, the history of the 1982 reform suggests not. This is so because at least one province (Quebec) will, almost certainly, not agree to any scheme that allows its powers to be adversely affected without its consent, while at least some other provinces will probably not accept the inequality of status inherent in forming part of a regional, or other, group of provinces in which they can be outvoted while one or more provinces (such as Quebec) are given a preferred position. Of course, one could impose a rule of unanimity in place of dissent or opting out, but section 38 was devised precisely to avoid this much more cumbersome arrangement. My own view is that a return to a Victoria-type scheme is not now a realistic project.

### *Majorities Required under Subsections 38(1) and (2)*

Subsection 38(2) requires that resolutions derogating from "the legislative powers, the proprietary rights or privileges of the legislature or government of a province" be passed by "a majority of the members of" each of the Senate, the House of Commons, and the legislative assemblies required under subsection 38(1). It is notable that no similar express condition is to be found in subsection 38(1), which speaks only of "resolutions of the legislative assemblies. . . ." As a matter of historical fact, it appears that no difference was in truth intended by the federal parliamentary draftsman, but that provincial legal advisers would not agree to the elimination of the extra phrase.

Of course, a majority of some sort is needed to carry any resolution, even one under subsection 38(1). Normally a statutory quorum will be required, and the question will then be decided by a majority of persons present and voting. In the Senate of Canada, the Speaker has an original vote, but no casting vote; elsewhere, he usually has a casting vote to be exercised on equal division only. The addition of the extra words "a majority of the members of" involves a prima facie presumption that they are not superfluous, and that they produce a different legal result from that which obtains where (as in subsection 38(1)) they are not used. If this principle of statutory construction is applied, the question is: what is the special or additional requirement they add? The only obvious explanation can be that a majority of the whole membership of the house is needed to pass resolutions derogating from provincial powers. It remains an open question as to how vacancies are to be taken into account.

The rule of statutory construction is not an inflexible one, and it may be that the courts will decline to construe subsection 38(2) as creating a class of resolutions that require special majorities of the entire membership of the body. Indeed, uniformity could also be achieved (though

justified only with difficulty) by a judicial construction imposing the more stringent, rather than the less stringent, rule in all cases.

Those who may wish to embark on the process of constitutional amendment would do well to secure a judicial clarification at the earliest opportunity. Otherwise lengthy legislative efforts may prove abortive. Indeed, one of the serious practical embarrassments that would result from distinguishing the majority normally required by subsection 38(1) from the majority specially required by subsection 38(2) is that the sponsor of an amendment would be forced, from the very outset, either to secure the special majority in every case, or to judge correctly whether the proposed amendment falls outside the requirements of subsection 38(2) so that the lesser, "normal," majority suffices. If there are two rules and two kinds of majority, one can readily envisage how perplexed parliamentary officers and legal advisers will be when they are faced with a resolution that has been "passed" by the normal majority only, and they must decide what to do next.

I myself would suggest an immediate reference to the Supreme Court of Canada.

## *Dissent or Opting Out as a Substitute for Veto*

Subsections 38(3) and (4) of the *Constitution Act, 1982* create and regulate a mechanism whereby the legislative assembly of a province can "dissent" from a proposed amendment "that derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province" (and can later revoke its "dissent"). Outright veto of constitutional amendments has instead become veto of their application to a particular province: in other words, opting out. The outright veto had been conceded, at least where provincial rights and powers were to be impaired, to all provinces in the "Fulton Formula"[37] and the "Fulton-Favreau Formula"[38] of the 1960s. The veto had been effectively limited to Quebec and Ontario in later proposals.[39]

The implications of opting out were summarized in Mr. Trudeau's phrase "chequerboard Canada." He opposed and resisted it strongly. Although the provision for dissent allows either geographically-selective centralization or decentralization, we shall probably see the former. Were past historical attitudes to be projected into the future, federal jurisdiction would tend to expand with respect to provinces other than Quebec. A "special status" for Quebec could emerge. In Quebec, even among French Canadian nationalists, there seems to be some uncertainty as to whether this would be a good thing. Would it, for example, underscore the necessity, desirability or feasibility of Quebec independence?

It should be noted that the problem, discussed above, as to the meaning of the phrase "resolution supported by a majority of" members, recurs in respect of the passage[40] or revocation[41] of a provincial

assembly's resolution of dissent. While provincial representatives in Winnipeg in March 1981 had worked out a formula requiring a two-thirds majority of a provincial assembly to carry a resolution of dissent, the eight premiers, apparently after late-night negotiations, reduced this in their April 16, 1981, Ottawa proposal[42] to "a majority of the Members." The moving force, it appears, was Premier René Lévesque of Quebec, who, in the April 13, 1981, provincial general election three days earlier had been returned to power with 80 of the 122 seats in the Quebec National Assembly, two seats short of a two-thirds majority. I would propose a return to a two-thirds majority requirement for opting out, though this, of course, would require unanimous consent (s. 41(e)).

### *Compensation to Dissenting Provinces*

Outright veto of a constitutional proposal to transfer a matter from provincial to federal jurisdiction would, *ex hypothesi*, prevent the constitutional change from occurring at all. "Dissent," on the contrary, is simply an opting out, and, given the existence of the present ten provinces, up to three can do so without blocking passage of the amendment. For these "dissenting" provinces there are obvious fiscal consequences, since they will continue to support expenditures that the participating provinces will have transferred to the federation. Section 40 of the 1982 Act serves to minimize such consequences by providing, "Where an amendment is made under subsection 38(1) that transfers provincial legislative powers relating to education or other cultural matters from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply." Section 40 is restricted in scope, covering only "education or other cultural matters." This restriction is a principal point of objection by the Quebec government. Probably it is the essential reason why even a federalist party in Quebec is unlikely to concur in the 1982 reform as it stands. Yet a right of compensation is a serious burden on the amending procedure, whose requirements are in any event quite stringent. Moreover, it creates a strong temptation for economically-advantaged provinces to opt out, so either preventing the two-thirds majority of the provinces, necessary for an amendment, from being achieved, or undermining the practical consequences of an amendment if the two-thirds majority is obtained and the amendment enacted.

## Quebec and the Amending Process

Reconciliation of Quebec to the 1982 constitutional reform, which its government rejected politically in November 1981, stands near the top of the national agenda. Indeed, review of the new amending process itself has been demanded, suggested, promised, or debated, by various actors

in several leading forums. The revisions contemplated have included widening the scope of compensation to be given to provinces opting out of section 38 amendments, and an outright veto for Quebec over some types of constitutional amendment under the section 38 process. Revisions were discussed during the last Progressive Conservative party leadership campaign; the 1984 federal general election campaign; in the Quebec legislature in the months following the federal election; and in the victory speech of a Liberal candidate in a Quebec National Assembly by-election of November 25, 1984.

Quebec's positions, and, in particular, the necessity, desirability or even possibility of a revision of the amending formulae, are matters that cannot easily be understood (perhaps not understood at all) without some further reference to recent constitutional history. This history should also assist in the prognosis as to how the amendment process is likely to work, at least for the near future.

The Quebec government's response to the November 5, 1981, agreement,[43] and to the constitutional reform based on it, are indispensable to an understanding of the process of constitutional change in Canada, not only as it existed before the 1982 reform, but also as it exists now.

There can be no doubt that the agreement signed on November 5, 1981, by the federal executive government, and by all provincial governments save Quebec, departed in material particulars from the April Accord of April 16, 1981, the agreed negotiating position of all the provinces save Ontario and New Brunswick, which two alone supported the federal proposals. Yet, if assessed as the outcome of a negotiation, the November 5, 1981, agreement must, surely, be regarded as an overwhelming success for the provinces party to the April Accord. Their amending formula was adopted in almost every essential respect, and most of the guarantees of the Charter were subjected to the "legislative override." It is scarcely surprising that the eight broke ranks, with the other seven leaving Quebec isolated in opposition to the settlement. Still, it is worth looking with some care at the points which remained in issue between Quebec and the others. There appear to have been three. These were specifically identified and isolated by Premier Lévesque on various occasions: in his "Inaugural Message"[44] of November 9, 1981, at the opening of the session of the Quebec legislature, and again in a letter of December 19, 1981, to the Rt. Hon. Margaret Thatcher.[45] They were also identified by both Government and Opposition Members in the National Assembly debates of November 24, 25, 26 and 30, 1981[46] (leading to a vote of December 1, 1981,[47] to which we shall refer in due course).

What were these three barriers to Quebec's assent?

First, the November 5, 1981, agreement accepted the entrenchment of the minority-language education rights now found in section 23 of the *Constitution Act, 1982*. Even here, an important concession was made to Quebec after the November 5 agreement, in that subsection 23(1)(a),

giving English and French minority-language education rights in every province to children of citizen parents speaking the minority language as their mother tongue, was suspended as to Quebec until such time as Quebec's legislative assembly or government consented to a proclamation to bring the paragraph into force (s. 59(1),(2)). This concession to Quebec left, essentially, only the "Canada clause" still applicable to that province: a right of minority-language education for children of citizen parents who had received their own primary education in the minority language in Canada. (A parent has also the right [s. 23(2)] to have other children educated in the same language as one of the children.)

The reader of the legislative debates[48] may be left to judge whether, given the Quebec government's willingness to negotiate "Canada clause" arrangements with other provinces, and given the rather small number of children involved, the Parti québécois government's inflexibility on this issue should have compelled, or induced, the ten other participants to scrap the reform.

Second, the November 5, 1981, agreement entrenched the "Mobility Rights" guarantee which now appears in the Canadian Charter of Rights and Freedoms (s. 6):

> **6.** (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
>
> (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
> (*a*) to move to and take up residence in any province; and
> (*b*) to pursue the gaining of a livelihood in any province.
>
> (3) The rights specified in subsection (2) are subject to
> (*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
> (*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.
>
> (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

This provision, already of minimal stringency, was further relaxed by the November agreement through the additional qualification which now appears as subsection (4). A basic freedom of movement (as indeed Opposition members repeatedly pointed out in the Quebec Assembly[49]) is elementary in a federation, or even in an economic union (such as the European Economic Community).

The Parti québécois Government's refusal to accept the entrenchment of "Mobility Rights" has, to me, a significance going far beyond the particular terms of the 1982 constitutional reform. That refusal clearly

raises questions as to the Parti québécois Government's acceptance of essential attributes of any serious federal system, and its willingness to participate constructively in any process of constitutional revision not having as its sole object transfers of powers to the provinces or to Quebec alone. The Quebec Government's position on "Mobility Rights" goes far to show that neither the present amending formula, nor any that is likely to replace it, can, at least until radically different attitudes prevail in Quebec, achieve significant constitutional changes where any curtailment of provincial powers is involved. This would tend to be even more true of specifically economic constitutional amendment measures than of proposals addressed to the general quality of citizenship, for example, full entrenchment of fundamental guarantees. If Quebec were given what it has historically sought, an outright veto over at least those constitutional amendments affecting the federal system, Quebec would be able to block a proposed amendment. But even the more restricted power conferred by section 38 of the 1982 Act, the power to opt out of an amendment, can give to every province, including of course Quebec, what may amount, practically speaking, to the same thing as an outright veto. Amendments contemplating economic measures will often be of little practical use unless they can apply throughout the federation. For instance, it is not easy to suppose that some members of the federation will be prepared to see themselves excluded from erecting certain kinds of barriers to movement of goods or services, persons, or capital, while other members of the federation are free to raise such barriers. Moreover, Canada cannot satisfactorily deal with foreign states on the basis that economic arrangements will bind some, but not all, of the provinces. But even where the power of dissent conferred by subsection 38(3) does not permit a single province effectively to frustrate an amendment, its effects might still seem unsatisfactory: if, for instance, the power to override fundamental freedoms (s. 33 of the 1982 Act) were to be repealed as to some provinces but survive as to the rest.

The third, and possibly most important, particular in which the November 5, 1981, agreement departed, in a way unacceptable to the Quebec government, from the April Accord directly concerns the constitutional amendment formula itself. The November agreement abandoned the provision in the April Accord whereunder a province excluding itself from an amendment enacted under the "general" formula (now, s. 38) and affecting the province's powers was to be afforded financial compensation:

> In the event that a province dissents from an amendment conferring legislative jurisdiction on Parliament, the Government of Canada shall provide reasonable compensation to the government of that province, taking into account the per capita costs to exercise that jurisdiction in the provinces which have approved the amendment.[50]

The accompanying explanation in the April Accord was in these terms:

> This provision is designed to prevent a taxpayer, resident in a province to which the amendment does not apply, from paying twice: first, in his or her federal tax bill and second, to the province which continues to exercise the jurisdiction.[51]

It is easy to see that a province that, like Quebec, claimed a right of outright veto on constitutional amendments would not wish to see that veto confined to a power of opting out unless the province could maintain the status quo as to its fiscal position. Even those who, like myself, feel that the formula contains, in the prescribed majorities (two-thirds of the provinces with a majority of the population), adequate safeguards against undue curtailment of provincial powers — even those who perceive a requirement of compensation to be an undue burden on the amending process — must concede that Quebec could, in perfect good faith, view a right to compensation as essential. Here, surely, out of the outstanding three, was the one point of dissent with a claim to be taken seriously.

Here, too, the Government of Canada, with the concurrence of its nine co-signatories, was prepared to amend the November 5, 1981, agreement in Quebec's favour. Section 40, guaranteeing compensation where the jurisdictional transfer involves "education or other cultural matters" was indeed included as early as the November 18, 1981, draft.[52]

While deploring the Parti québécois Government's renunciation, in the April Accord, of an outright veto for Quebec, the provincial Liberal Opposition nevertheless strongly supported the Government as to the indispensability of a right of compensation to accompany the exercise of a province's power to opt out of section 38 amendments. Thus the Opposition leader, Claude Ryan, said this:

> In the context in which we now are, it will be extremely difficult, in the short term, to regain Quebec's right of veto. It is necessary to act so as to ensure that Quebec becomes a full contracting party to this agreement so that at least in fact Quebec's indispensable presence in so important a decision is ensured. Thereafter, it will be necessary to try to regain the territory which was lost by the present government. But for the present, in the circumstance in which we are placed today I think that it is necessary to aim at obtaining, at a minimum, the fullest possible financial compensation for all cases in which Quebec might decide to exercise its right of withdrawal.[53]

In the course of elaborating on his own *démarches* with federal Liberal party leaders to persuade them to restore the right to full compensation, and on his partial success as regards education and other cultural matters, Mr. Ryan continued:

> I declare today, with all possible firmness, that the Government will be able to count on the collaboration of the Liberal party of Quebec to obtain, in the matter of financial compensation, that Quebec will be treated with justice

and that no risk of injustice shall flow from the formula which will ultimately be contained in this chapter.

His demand, after a full review of the situation, was that the Government continue to negotiate. He disputed however that it was doing so:

> I repeat, in conclusion, that the agreement of November 5 is far from being satisfactory in its present form, and it never will be so long as Quebec has not found the conditions needed to adhere to it by the front door and not by the side door and the back door. I say to the present Government that this agreement includes enough positive elements for us to try together in a spirit of good will and of collaboration, to improve it in order to render it acceptable to Quebec, in order to make changes to it which can satisfy Quebec's legitimate claims and which can, at the same time, be acceptable for the rest of the country.
>
> To the head of the Government, I say that he has the duty to move on this question. He has rested immobile on his positions since the 5th of November. He has done nothing, except to threaten the anglophone community of Quebec on a few occasions, to threaten the rest of the country for failing to take account of the consequences of what will be done in the course of the coming weeks. It is easy to threaten when one is speaking among friends, it is all right. But I say to the Prime Minister that he has the job, the responsibility, as spokesman for the whole Quebec community, to explore the avenues of solution which remain open.[54]

A principal preoccupation of the Assembly's debates of November 24 through 30, 1981,[55] was the question of Quebec's historic conventional power of veto of Canadian constitutional amendments. Both sides of the house appeared emphatically agreed that this right of veto had existed. A principal concern of the Opposition[56] was to establish that an outright veto was far more valuable to Quebec than was the narrower right of dissent, or withdrawal, or opting out, granted to every province in the April Accord and carried forward, through the November 5, 1981, agreement, to the final 1982 reform package. The Government, on the other hand, defended the substitution of the legal power of dissent, or withdrawal, for the conventional veto. It also argued that, in any case, since Quebec's terms for surrender of its conventional veto had been rejected, Quebec had not consented either to its removal or to the substitution of anything in its stead. On this reasoning, any conventional veto which Quebec might have had before April 16, 1981, survived the April Accord intact, and was, in particular, now exercisable against the whole 1982 reform package.[57]

If one accepts the assumption upon which both the Quebec Government and Opposition argued, namely that Quebec did have a right of conventional veto upon constitutional amendments, or at any rate a veto upon those amendments affecting the federal system as such, the Government's case on this one issue seems much the stronger as to both

points. Quebec had, it is true, agreed to equal treatment of all provinces, so facilitating an accord. But since Quebec's (i.e., the Accord's) terms had not been accepted, Quebec had, in the end, never consented to any change in the status quo. Moreover, the April Accord had no bearing on the degree of consensus needed for the patriation package itself, but only for amendments after patriation. The Opposition seemed really to be trying to outflank the Government on the side of French-Canadian nationalism. But the Quebec Government then purported, by an order of the Executive Council of November 25, 1981,[58] to veto the revised federal-provincial proposal as introduced into the House of Commons on November 18; [in translation] it spoke thus:

DECREE
GOVERNMENT OF QUEBEC

CONCERNING the objection by Quebec to the proposed patriation and amendment of the Constitution of Canada;

WHEREAS on November 18, 1981 the federal government tabled in the House of Commons a motion regarding the patriation and amendment of the Constitution of Canada;

WHEREAS if implemented, this motion would have the effect of substantially reducing the powers and rights of Quebec and of its National Assembly without its consent;

WHEREAS it has always been recognized that no change of this kind could be made without the consent of Quebec.

BE IT RESOLVED, on the motion of the Premier:

THAT Quebec formally vetoes the resolution tabled in the House of Commons on November 18, 1981 by the federal Minister of Justice.

THAT this objection be officially communicated to the federal government and the governments of the other provinces.

This was announced to the house late on the afternoon of November 25 by Premier Lévesque, who also read a letter of the same date addressed to Prime Minister Trudeau, which stated with great clarity the position of the province as to its right of veto.[59] A reference to the Quebec Court of Appeal followed:[60]

WHEREAS the Senate and House of Commons of Canada adopted a Resolution regarding the Constitution of Canada;

WHEREAS this Resolution requests the introduction in the Parliament of the United Kingdom of a bill entitled the Canada Act which, if adopted by the Parliament of the United Kingdom, will most notably have the effect of enacting for Canada the Constitution Act, 1981;

WHEREAS the proposed legislation has the effect of making significant changes in the status and role of Quebec within the Canadian federal system;

WHEREAS Quebec forms a distinct society within the Canadian federation;

WHEREAS the Supreme Court of Canada stated on September 28, 1981, that the consent of the provinces is constitutionally necessary for the adoption of this proposal;

WHEREAS Quebec has not agreed and has objected to the proposed changes;

WHEREAS no change of a similar significance to that proposed in this Resolution has to date been made without the consent and over the objection of Quebec;

WHEREAS it is expedient to submit to the Court of Appeal for hearing and consideration pursuant to the Court of Appeal Reference Act the question herein below set out.

ACCORDINGLY, it is ordered, upon the proposal of the Minister of Justice, that the following question be submitted to the Court of Appeal for hearing and consideration:

Is the consent of the Province of Quebec constitutionally required, by convention, for the adoption by the Senate and the House of Commons of Canada of a resolution the purpose of which is to cause the Canadian Constitution to be amended in such a manner as to affect:

i) the legislative competence of the Legislature of the Province of Quebec in virtue of the Canadian Constitution;
ii) the status or role of the Legislature or Government of the Province of Quebec within the Canadian federation;

and, does the objection of the Province of Quebec render the adoption of such resolution unconstitutional in the conventional sense?

It is a matter of history that both the Quebec Court of Appeal on April 7, 1982, and, on appeal, the Supreme Court of Canada, on December 6, 1982 (months after the *Constitution Act, 1982* had become law), both answered the question in the negative. No convention existed, the Supreme Court held, giving Quebec a veto, whether on the basis of a rule of provincial unanimity, or on the basis of a special status for Quebec as a distinct society within Confederation. An essential element, requisite for the existence of a convention, was (the Court decided) absent: namely, recognition by the other political actors. It may not be too cynical a conjecture that this judicial result did not wholly disappoint the Quebec Government. On November 25, 1981, referring to the possibility of a reference to the courts, Jacques-Yvan Morin, speaking from the Government benches in the Assembly, had remarked:

> It is not because I have an unlimited confidence in the courts. Those who have read my writings in the past know that on that subject I have my reservations. But at least we will know where we stand; it is important that Quebeckers know where they stand. The situation will be clearer. It would be still more so, whether the Supreme Court declares that Quebec has always had this right of veto and still possesses it, or, on the contrary, that it decides that there is nothing of the sort, in which case Quebeckers would know at least that their illusions were only smoke. Illusions would be fewer if the court left us unarmed before the heirs of Lord Durham.[61]

I have offered this historical retrospect for the light it sheds both on the amendment process as it stood before April 17, 1982, and on that which replaced it on that day. The failure of Quebec to concur in the 1982 reform is perceived as a failure of Canadian federalism. Indeed, though the reform is now law, securing Quebec's political assent ex post facto is still considered a major item on the national agenda. And the amending process is widely considered still to be open to review in order to achieve that assent. (A first ministers' review conference before April 17, 1997, is in any case required by section 49.) Thus the possibilities of a fuller right to compensation for a province opting out of a section 38 amendment, and even an outright veto for Quebec, have been canvassed in federal party leadership campaigns and in the 1984 federal election campaign. Moreover, the events leading to the 1982 reform shed much light on the way in which the new amending processes may work.

My conclusion, frankly stated, is this. Whatever may have been the case before November 5, 1981, after that date the Parti québécois Government was at least content with, and probably positively sought, the failure of the constitutional negotiations, this with a view to establishing the failure of the Canadian federation to satisfy the needs and aspirations of the people of Quebec, and to promoting the party's objective of Quebec independence.

The Canadian Supreme Court's decision of September 28, 1981, in the first *Patriation Reference*,[62] held that the conventions of the Constitution required a federal-provincial consensus as a condition of securing an intervention of the Westminster Parliament affecting the federal system. Both before and after this ruling, Quebec (like seven other provinces) uncompromisingly opposed unilateral federal patriation initiatives, insisting instead on a negotiated consensus. On November 21, 1980,[63] just as the unilateral federal initiative was getting underway, and again on October 2, 1981,[64] immediately after the Supreme Court's decision, the National Assembly, on Premier Lévesque's motion, passed resolutions in this sense.

The threat of a federally sponsored patriation package, far worse[65] from the Parti québécois Government's point of view, than anything that could ever emerge from a negotiated federal-provincial consensus, gave the Quebec government every incentive to make common cause with the seven other "opposing" provinces. This was so even to the point of signature of the April Accord, whatever its deficiencies (if any) from the Quebec government's perspective. Even the apparent refusal of Quebec to make any significant concessions in the negotiations thereafter is not in itself proof of bad faith. On the other hand, especially as regards the mobility and education issues, it showed (in my view) a level of intransigence bordering on refusal to participate usefully in the process. But the National Assembly's resolution of December 1, 1981,[66] adopted on division (70 to 38) set down new conditions for Quebec's consent. These

not merely went beyond its initial negotiating position as set out in the April Accord, but also contained an element that almost certainly made agreement impossible. The resolution was in these terms:

> The National Assembly of Québec,
>
> mindful of the right of the people of Québec to self-determination,
>
> and exercising its historical right of being a full party to any change to the Constitution of Canada which would affect the rights and powers of Québec,
>
> declares that it cannot accept the plan to patriate the Constitution unless it meets the following conditions:
>
> 1. It must be recognized that the two founding peoples of Canada are fundamentally equal and that Québec, by virtue of its language, culture and institutions, forms a distinct society within the Canadian federal system and has all the attributes of a distinct national community.
>
> 2. The constitutional amending formula
>
> (a) must either maintain Québec's right of veto, or
>
> (b) be in keeping with the Constitutional Accord signed by Québec on April 16, 1981 whereby Québec would not be subject to any amendment which would diminish its powers or rights, and would be entitled, where necessary, to reasonable and obligatory compensation.
>
> 3. Given that a Charter of Human Rights and Freedoms is already operative in Québec, the Charter of Rights and Freedoms to be entrenched in the Canadian Constitution must limit itself to
>
> (a) democratic rights;
>
> (b) use of French and English in federal government institutions and services;
>
> (c) equality between men and women, provided the National Assembly retains the power to legislate in matters under its jurisdiction;
>
> (d) fundamental freedoms, provided the National Assembly retains the power to legislate in matters under its jurisdiction; and
>
> (e) English and French minority language guarantees in education, provided Québec is allowed to adhere voluntarily, considering that its power in this area must remain total and inalienable, and that its minority is already the most privileged in Canada.
>
> 4. Effect must be given to the provisions already prescribed in the federal proposal in respect of the right of the provinces to equalization and to better control over their natural resources.

In order to become acceptable to Quebec, the plan to patriate the Canadian Constitution had thus (item no.1) to recognize that Quebec was a distinct society within the Canadian federation with all the attributes of a distinct national community. Particularly given the recital, in the preamble, asserting "the right of the people of Québec to self determination," this amounted to a demand for constitutional recognition of a right of secession; and, in my recollection, it was understood as such. Apart entirely from the extravagance of such a demand, it clearly went far beyond Quebec's initial claims, and, if only for that reason, justifies the inference that it was designed to sabotage a settlement.

I do not go so far as to argue that, if the federal government had in the end offered to submit to the April Accord in its every last detail, or even had met Quebec's objection on the three specific points to which I have already referred, Quebec would nevertheless still have refused to settle on such a basis. Clearly the pressure on it to do so would have been great, perhaps irresistible. Public opinion in the province was at all times understood to favour a negotiated settlement; and this was indeed implicit in the result of the May 20, 1980, Quebec referendum, rejecting the Government's sovereignty-association proposals.

But the addition of this new demand, in a resolution said by Premier Lévesque to represent Quebec's "minimum" demands,[67] was clearly of a nature to make settlement impossible, and must have been understood by the Government to do so:

> What does the motion say? It establishes the conditions which the Quebec Government wishes to see accepted before giving its consent to any constitutional draft whatever. In the name of the Government, I insist on reaffirming for the nth time that these are minimum conditions and not a vague basis for negotiation. Compromises, we have made, we have accepted them up to the extreme possible limit as government of Quebec. For this reason I am obliged to say in advance that we will accept no amendment to our resolution which would risk weakening it as to its substance, that is to say, which would introduce an opening to a pseudo-negotiation which would end up with a diminution of Quebec powers.

A number of Opposition members, in the course of the Assembly's debate on the resolution, made the points that its demands went beyond the three precise points ostensibly still in controversy; that it would tend to subvert negotiations; and even that it was designed to prevent a settlement.[68] They appear with particular clarity, for instance, in the remarks of Michel Gratton. Alleging a Government strategy for achieving independence, the honourable member said:

> I say, Mr. President, very clearly, without ambiguity, that the motion which we are debating today is part of this strategy. The strategy requires that the Government never sign any agreement, an agreement which would oblige it to accept a new Canadian constitution which would apply to Quebec, because that would automatically say that it accepted that Quebec has its place within Canada, hence there is no reason to wish to bring about independence. I said last week, Mr. President, that the best way never to sign any agreement, is still to refuse to negotiate, as the Government has done. That's why we are being spoken to about this motion which, according to the Prime Minister, once again yesterday, is the vital minimum that Quebec can accept. What is curious, Mr. President, is that, on November 5, at the end of the constitutional conference at Ottawa, the Prime Minister identified three subjects which prevented him from granting his support and signing the agreement: the question of access to school in the language of the minority; the question of financial compensation in cases of opting out, and the question of mobility.

> How is it that, if there were three subjects on November 5, we now find fifteen in the Prime Minister's motion? It's the leader of the Opposition who established it clearly yesterday. There were three of them on November 5, and, all of a sudden, there are fifteen. It is easy enough to understand. . . . . . How is the Prime Minister trying to redeem himself? By presenting his motion which he has deliberately drafted in such a way as to force the federal government, to invite the federal government, to proceed without Quebec's consent; because, then, he will be able to play the offended virgin, to cry rape, and what else besides? He will try to inflame passions, by appealing to nationalism, because it is known that this works.[69]

Debate in the Assembly in the aftermath of the November 5, 1981, agreement was punctuated with accusations of treachery from the ministerial benches. Quebec, said the Premier, had been "shamelessly betrayed";[70] it could not accept a new constitution made "in a night of treachery";[71] it was being asked to negotiate with "the thieves of our rights,"[72] to participate in "more of the farce and the trickery from which we have just come out,"[73] it could never accept "the effects of this stab with a dagger."[74] Quebec had "found itself isolated, betrayed — there is no other word — and despoiled at the same time."[75] The Minister of Intergovernmental Affairs, Claude Morin, assessed the situation in these terms:

> With what happened in the course of the constitutional conference, with the trickery and lying which accompanied all these negotiations, with the fact also that Quebec, at the crucial moment, systematically, was excluded, the result was that Quebec suffered, for the moment, the theft of its rights.[76]

The reader of the debates must judge to whose conduct these epithets are in truth appropriate.

With the passage of time, the appearance of new actors on the federal and provincial stages will open new prospects for constitutional reconciliation, particularly if the climate of public opinion encourages such responses.

## *Notes*

This paper was completed in February 1985.

1. *Earldom of Norfolk Peerage Claim*, [1907] A.C. 10 (H.L.), *per* Lord Davey at p. 16.
2. Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K). I shall frequently refer to it simply as "the 1982 Act." It is the United Kingdom statute enacted on March 29, 1982, to give effect to the request of the Senate and House of Commons of Canada that the provisions of the *Constitution Act, 1982* be enacted.
3. *The Constitution Act, 1982*, s. 6, "Mobility Rights."
4. *The Constitution Act, 1867* as amended, s. 92A, and especially ss. 92A(2), (3) and (4).
5. 1982, c. 11 (U.K.).
6. *Canada Gazette Extra* No. 20 of April 27, 1982, appearing also in 116 *Canada Gazette Part I* 2927–28.
7. R.S.C. 1970, c. S-19.
8. At the time of the coming into force of the *Constitution Act, 1982*, these were C.R.C. 1978, c. 1512.
9. Canadian Intergovernmental Conference Secretariat, "Amending Formula for the Constitution of Canada: Text and Explanatory Notes," CICs document 850-19/004, tabled in Ottawa, April 16, 1981, at Premiers' Conference, unpublished document to be published in a forthcoming issue of the (1984–85), 30 *McGill L.J.*
10. Ibid.
11. See *inter alia* Paul Gérin-Lajoie, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 1950), and "Editor's Diary," introducing the symposium on the constitutional amendment process, (1966–67), 12 *McGill L.J.* 337.
12. *Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada* (October 2, 1980), Government of Canada, Document No. 25005-2-10-80.
13. Canada, House of Commons, *Votes and Proceedings*, February 13, 1981, being 32nd Parliament, 1st Session, No. 142, at 1244 ff.
14. Canada, House of Commons, *Votes and Proceedings*, April 8, 1981, being 32nd Parliament, 1st Session, No. 179, at 1677 ff. See also House of Commons *Debates* 9072 ff. (April 8, 1981).
15. *Reference re Amendment of the Constitution of Canada* (Nos. 1, 2 & 3) 125 D.L.R. (3d) 1, 41.
16. Ibid., at 103.
17. Canada, House of Commons, *Votes and Proceedings*, April 23, 1981, being 32nd Parliament, 1st Session, No. 187, at 1741 ff.
18. Canada, *Minutes of Proceedings of the Senate*, April 24, 1981, being 32nd Parliament, 1st Session, No. 117, at 1150 ff. The proposals, as they then stood, are most conveniently read in a consolidation printed by the Department of Justice of Canada, *Text of Proposed Constitutional Resolution Filed by the Deputy Attorney General of Canada with the Supreme Court of Canada on April 24, 1981*, Document No. 25005-24-4-81.
19. The unpublished document recording the agreement was tabled by the Prime Minister in the House of Commons on November 5, 1981; see *House of Commons Debates* for that date, at 12536 ff., and in particular the Prime Minister's statement. The English version of the agreement reads as follows:

    In an effort to reach an acceptable consensus on the constitutional issue which meets the concerns of the federal government and a substantial number of provincial governments, the undersigned governments have agreed to the following:
    (1) Patriation
    (2) Amending Formula:
        — Acceptance of the April Accord Amending Formula with the deletion of Section 3 which provides for fiscal compensation to a province which opts out of a constitutional amendment.

— The Delegation of Legislative Authority from the April Accord is deleted.

(3) Charter of Rights and Freedoms:
— The entrenchment of the full Charter of Rights and Freedoms now before Parliament with the following changes:
(a) With respect to Mobility Rights the inclusion of the right of a province to undertake affirmative action programs for socially and economically disadvantaged individuals as long as a province's employment rate was below the National average.
(b) A "notwithstanding" clause covering sections dealing with Fundamental Freedoms, Legal Rights and Equality Rights. Each "notwithstanding" provision would require reenactment not less frequently than once every five years.
(c) We have agreed that the provisions of Section 23 in respect of Minority Language Education Rights will apply to our provinces.

(4) The provisions of the Act now before Parliament relating to Equalization and Regional Disparities, and Non Renewable Natural Resources, Forestry Resources and Electrical Energy would be included.

(5) A constitutional conference as provided for in clause 36 of the Resolution, including in its agenda an item respecting constitutional matters that directly affect the Aboriginal peoples of Canada, including the identification and definition of the rights of those people to be included in the Constitution of Canada, shall be provided for in the Resolution. The Prime Minister of Canada shall invite representatives of the Aboriginal peoples of Canada to participate in the discussion of that item.

Dated at Ottawa this 5th day of November, 1981.

CANADA/POUR LE CANADA
[signature]
Pierre Elliott Trudeau
Prime Minister of Canada/Premier ministre du Canada

ONTARIO/POUR L'ONTARIO
[signature]
William G. Davis, Premier/Premier ministre

NOVA SCOTIA/POUR LA NOUVELLE-ECOSSE
[signature]
John M. Buchanan, Premier/Premier ministre

NEW BRUNSWICK/POUR LE NOUVEAU-BRUNSWICK
[signature]
Richard B. Hatfield, Premier/Premier ministre

MANITOBA/POUR LE MANITOBA
[signature]
Sterling R. Lyon, Premier/Premier ministre
subject to approval of section 3(d) by the Legislative Assembly of Manitoba

BRITISH COLUMBIA/POUR LA COLOMBIE-BRITANNIQUE
[signature]
William R. Bennett, Premier/Premier ministre

PRINCE EDWARD ISLAND/POUR L'ILE-DU-PRINCE-EDOUARD
[signature]
J. Angus Maclean, Premier/Premier ministre

SASKATCHEWAN/POUR LA SASKATCHEWAN
[signature]
Allan E. Blakeney, Premier/Premier ministre

ALBERTA/POUR L'ALBERTA
[signature]
Peter Lougheed, Premier/Premier ministre

NEWFOUNDLAND/POUR TERRE-NEUVE
[signature]
Brian A. Peckford, Premier/Premier ministre

20. The *Constitution Act, 1982*, is Schedule B of the *Canada Act 1982*, 1982 c. 11 (U.K.).
21. The text, standing in the name of the Minister of Justice and dated November 18, 1981, may be found under "Government Motions" at xiv ff. of the "Notice Paper" appended to Canada, House of Commons, *Order Paper and Notices*, November 19, 1981, being 32nd Parliament, 1st Session, No. 259.
22. Canada, House of Commons, *Votes and Proceedings*, December 2, 1981, being 32nd Parliament, 1st Session, No.268, at 4304 ff. The final text, incorporating amendments, appears at 4308 ff., and is separately printed under the title *Text of the Resolution Respecting the Constitution of Canada Adopted by the House of Commons on December 2, 1981*, document number 25005-2-12-81.
23. Canada, *Minutes of Proceedings of the Senate*, December 8, 1981, being 32nd Parliament, 1st Session, No. 162, at 1722 ff. The final text, incorporating amendments, and approved on division, appears at 1759 ff.
24. The essence of the federal proposals concerning constitutional amendment procedures, as those proposals stood on April 24, 1981 (*supra*, note 18), and as they were referred to the Supreme Court of Canada, may be seen in these two provisions:

    **46.** (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by
    (a) resolutions of the Senate and House of Commons; and
    (b) resolutions of the legislative assemblies of at least a majority of the provinces that includes
    (i) every province that at any time before the issue of the proclamation had, according to any previous general census, a population of at least twenty-five per cent of the population of Canada,
    (ii) two or more of the Atlantic provinces, and
    (iii) two or more of the Western provinces.

    (2) In this section,
    "Atlantic provinces" means the provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland;
    "Western provinces" means the provinces of Manitoba, British Columbia, Saskatchewan and Alberta.

    **47.** (1)An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by a referendum held throughout Canada under subsection (2) at which
    (a) a majority of persons voting thereat, and
    (b) a majority of persons voting thereat in each of the provinces, resolutions of the legislative assemblies of which would be sufficient, together with resolutions of the Senate and House of Commons, to authorize the issue of a proclamation under subsection 46(1).
    have approved the making of the amendment.
    (2) A referendum referred to in subsection (1) shall be held where directed by proclamation issued by the Governor General under the Great Seal of Canada, which proclamation may be issued where
    (a) an amendment to the Constitution of Canada has been authorized under paragraph 46(1)(a) by resolutions of the Senate and House of Commons;
    (b) the requirements of paragraph 46(1)(b) in respect of the proposed amendment have not been satisfied within twelve months after the passage of the resolutions of the Senate and House of Commons; and
    (c) the issue of the proclamation has been authorized by the Governor General in Council.
    (3) A proclamation issued under subsection (2) in respect of a referendum shall provide for the referendum to be held within two years after the expiration of the twelve month period referred to in paragraph (b) of that subsection.
25. *Supra*, note 12.
26. *Supra*, note 18.
27. *Supra*, note 19.

28. The October 2, 1980, scheme marked the first appearance of the referendum in the text of a proposed amending formula. I suggested something similar in September 1964. Wishing to alleviate the rigours of the proposed "Fulton-Favreau Formula" (requiring unanimous provincial consent for most important constitutional amendments), I advanced the idea that, in any amending formula, "provincial consent should be capable of being given alternatively by the voters of the province. . . ." See "Editor's Diary" (1966–67), 12 *McGill L.J.* 337, at pp. 342–43.
29. *Supra*, note 24.
30. See *Constitution Act, 1982*, ss. 42(1)(f), 42(2).
31. See *Constitution Act, 1871*, 34–35 Vict., c. 28 (U.K.), s. 2.
32. The state of West Virginia appears to have been created by Congress to further the cause of suppressing the Confederate rebellion against the United States. See, e.g., A. McLaughlin, *A Constitutional History of the United States* (New York: Irvington, 1935) 634–38. A rump government of "Virginia" at Wheeling was recognized as giving the consent of Virginia to the cession of the territory from which Congress erected the new state of West Virginia in the summer of 1863.

    The Thirteenth Amendment to the U.S. Constitution was proposed by Congress on January 31, 1865. West Virginia, the sixth state to ratify, did so three days later, on February 3, 1865, and it was recognized as one of the 27 ratifying states when ratification was complete on December 6, 1865. In itself, this does not prove that West Virginia was erected specifically to ratify the Thirteenth Amendment. But it seems that West Virginia was erected to cooperate, and did cooperate, with Congressional purposes as regards the Confederacy.
33. *Supra*, note 24.
34. *Infra*, note 46.
35. *Infra*, note 44.
36. *Supra*, note 24.
37. Reprinted in (1966–67), 12 *McGill L.J.* 576.
38. Ibid., at p. 579.
39. This was accomplished through the euphemism of giving a veto to every province "that at any time before" the "issue" of a proclamation of amendment "had, according to any previous general census, a population of at least twenty-five percent of the population of Canada": Art. 49, *Canadian Constitutional Charter*, being a draft produced by the Constitutional Conference at Victoria, B.C., June 14–16, 1971, reproduced as Appendix B to the Final Report of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (Ottawa, 1972) at 106. See provisions to the same effect in the drafts of October 2, 1980 (*supra*, note 12), ss. 41(1)(b)(i) and 42(1)(b); and of April 24, 1981 (*supra*, note 18), ss. 46(1)(b)(i) and 47(1)(b).
40. *Constitution Act, 1982*, s. 38(3).
41. Ibid., subsect s. 38(3), (4).
42. See *Canadian News Facts*, Vol. 16, No. 7, at 2490–91, and No. 8, at 2498 (1981).
43. *Supra*, note 19.
44. Assemblée nationale du Québec, *Journal des Débats*, 3rd Sess. 32nd Legislature, p. 1 ff., at p. 3 (November 9, 1981).
45. Tabled in the Assemblée nationale on January 15, 1982, with the reply as Document No. 181 of Session 1981–82.
46. *Supra*, note 42, at pp. 363–405; 411–39; 447–48; 462–66; 481; 556–91. See, e.g., Claude Ryan, the Opposition leader, at pp. 368–69, and at pp. 375ff.; Michel Gratton, at p. 414.
47. Ibid., pp. 604–606.
48. *Supra*, note 46.
49. Ibid. See, e.g., Claude Ryan, the Opposition leader, at p. 375.
50. *Supra*, note 9.
51. Ibid.

52. *Supra*, note 21.
53. *Supra*, note 44, at p. 372 (my translation) (November 24, 1981).
54. Ibid., p. 378. The translation is, of course, mine.
55. *Supra*, note 46.
56. See, e.g., Claude Ryan, *supra*, note 44, at pp. 371–72; Fernand Lalonde, at p. 388; Herbert Marx at p. 393.
57. The position is stated with particular clarity by Jacques-Yvan Morin, *supra*, note 44, at p. 412. It is also stated by Premier Lévesque in his letter of November 25, 1981, to Prime Minister Trudeau, *infra*, note 59.
58. No. 3214-81. It does not appear on its face to have the authority of the Lieutenant-Governor, the head of the executive, but only that of the Ministry collectively. The Order is reproduced in the report of the decision of the Supreme Court in the second *Patriation* reference, *Re A.-G. Quebec and A.-G. Canada*, (1982) 140 D.L.R. (3d) 385 (in this report there is an English translation).
59. The statement, with the letter and the Order of the Executive Council, was tabled in the National Assembly on November 25, 1981, as Document No. 90 of the 1981 session. The proceedings in the Assembly are reported in the Debates for the same date, *supra*, note 44 at pp. 462–66.
60. Order No. 3215-81 of November 25, 1981, replaced by No. 3367-81 of December 9, 1981, taking note of the federal joint address on the previous day. See the report of the Supreme Court decision, *Re A.-G. Quebec and A.-G. Canada*, (1982) 140 D.L.R. (3d) 385. The latter Order is quoted in translation.
61. *Supra*, note 44, at p. 413. The translation is my own.
62. *Reference re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)*, (1981) 125 D.L.R. (3d) 1.
63. *Votes and Proceedings of the National Assembly of Quebec*, 6th Sess., 31st Legislature, November 21, 1980, pp. 119–20:

    > The National Assembly of Quebec is formally opposed to the unilateral action taken by the federal Government, despite the opposition of the majority of the provinces, to have the Constitution of Canada amended by the British Parliament.
    >
    > Respectful of the will of the majority of the people of Québec who, in the referendum of 20 May 1980, voted to maintain Canadian federalism, and fully aware of the need to adapt it to current conditions, the National Assembly affirms that the Canadian Constitution must be renewed in Canada in accordance with the principles of federalism and, consequently, through negotiation between the two orders of government, and with the mutual consent of the federal Parliament and the provincial legislatures.
    >
    > Considering that the Constitution has, since 1867, defined the rights of Québec as a founding member of the Canadian federation, the Members of the National Assembly request the Members of the Parliament of Canada not to give effect to this unilateral action, which is contrary to the very nature of the Canadian federal system and the well-established rule requiring the consent of the provinces.
    >
    > The National Assembly cautions the British Parliament against any intervention in Canadian affairs by adopting any modification to the British North America Act which has not received the support of the provinces of Canada and, in particular, of Québec.

64. *Votes and Proceedings of the National Assembly of Quebec*, 2nd Sess., 32nd Legislature, October 2, 1981, pp. 9–10:

    > The Supreme Court of Canada having decided that the federal proposal respecting the Constitution of Canada decreases the powers of the National Assembly of Québec and that unilateral action by the federal government, although legal, is unconstitutional, being contrary to the conventions, this Assembly demands that the federal government renounce its unilateral course of action, is opposed to any

action that could impair its rights and affect its powers without its consent, and requests the federal and provincial governments to resume negotiations immediately, with full respect for the principles and conventions that must apply to any modification of the Canadian federal system.

65. Because of the referendum element in the amending formula, and because of the full entrenchment of the whole range of fundamental rights and freedoms.
66. *Votes and Proceedings of the National Assembly of Quebec*, 3rd Sess., 32nd Legislature, December 1, 1981, pp. 143–147.
67. *Supra*, note 44, at p. 366 (November 24, 1981).
68. Ibid., at pp. 371 (Claude Ryan, on the implications of introducing the clause on Canadian duality); pp. 414–16 (Michel Gratton; see esp. the passage quoted in note 69 *infra*); pp. 430–31 (Thérèse Lavoie-Roux); pp. 562–563 (John Ciaccia); pp. 565–66 (Lise Bacon); p. 575 (Gilles Rocheleau). Claude Morin, the Minister of Intergovernmental Affairs, insisted "It is not true that Quebec does not wish to sign. That is a lie which you are engaged in spreading everywhere. It is not true, we already signed an agreement in all good faith with the other provinces. But we will not do so on simply any conditions": p. 421.
69. *Supra*, note 44, at p. 415 and p. 416 (November 25, 1981).
70. "[H]onteusement trahi": *supra*, note 44, at p. 4.
71. "[N]uit de fourberies": ibid.
72. "[L]es voleurs de nos droits": ibid., at p. 5.
73. "[U]ne pareille reprise de la farce et de la tricherie dont nous venons de sortir": ibid.
74. "[L]es effets de ce coup de poignard": ibid., p. 6.
75. "[S]'est trouvé, isolé, trahi — il n'y a pas d'autre mot — et spolie en même temps. . .": ibid., p. 365.
76. Ibid., at p. 417. See also the Premier at p. 466.

3

# Canada as a Bicommunal Polity

PETER M. LESLIE

> What is at stake is the very fact of Canada. . . . The chief protagonists, whether they are entirely conscious of it or not, are French-speaking Quebec and English-speaking Canada. And it seems to us to be no longer the traditional conflict between a majority and a minority. It is rather a conflict between two majorities: that which is a majority in all Canada, and that which is a majority in the entity of Quebec.
>
> Royal Commission on Bilingualism and Biculturalism[1]

> In terms of *realpolitik*, French and English are equal in Canada because each of these linguistic groups has the power to break the country.
>
> Pierre Elliott Trudeau[2]

## Introduction

Many francophone Quebeckers consider that realization of collective goals of a cultural character requires that a fairly wide range of economic institutions and activities be brought under the control of the Quebec government. This opinion, though not consensual, nonetheless has broad implications for the allocation of de jure and de facto powers under the constitution. It raises doubts about the feasibility and the desirability of pressing for full realization of the Canadian economic union. It also challenges an idea that formed the basis of the original Confederation scheme,[3] and was at the core of at least two recent proposals for constitutional renewal:[4] namely, that culturally relevant powers should be allocated to the provinces (and most importantly to Quebec), while broad control over the economy should be vested in the central government. This scheme makes little sense if, as many Quebeckers have come to affirm over the past two decades, the cultural and the economic aspects of social life are ultimately inseparable.

That such a body of opinion exists is a political fact that Canadians outside Quebec must recognize. Of course, they themselves may take a different view of the matter, as one would expect them to, given the extent of controversy within Quebec over the range of political control required to achieve what Robert Bourassa once called "cultural sovereignty." The issue has obvious importance for anyone concerned with the structure and the operation of the Canadian federal system. Specifically, the following questions seem relevant. If it seems desirable on economic grounds to preserve and perhaps to extend the economic powers of the central government, and/or to limit the capacity of the provincial governments to infringe the principles of a common market, what will be the impact on francophone Canadians and their culture? Can one in practice distinguish cultural matters from economic ones, being relatively decentralist in one sphere and relatively centralist in the other? Or conversely, is it necessary or desirable to decentralize across the board, in order to ensure to francophone Canadians, most of whom reside in Quebec, the power of cultural self-determination?

The key concept to be employed in the study and discussion of these matters is bicommunalism: *A polity, or political system, is bicommunal when the structure of governmental institutions, the allocation of public offices, and the exercise of public power are primarily shaped by the relationship between two major territorial or ethnic communities.*

In other words, a bicommunal polity is one that is structured to reflect and to accommodate linguistic and cultural dualism or the existence of two territorially focussed national groups. Is Canada, by this definition, a bicommunal polity? Some of our historians, sociologists, and political scientists appear to have thought so. Although the term "bicommunalism" has not been part of our discourse, the concept has been woven both into scholarly writing and into political debate. That Canada is a bicommunal polity has been a recurrent theme in our history, coming to the fore in moments of crisis. Indeed, in recent years several of our leading politicians, seeing in dualism the source of political controversies imperilling national unity, have paid it more attention than they appear to have given to any of the other problems besetting the country.

The concept of bicommunalism, or rather the question of its applicability to present-day Canada, is a significant one for at least three reasons. First, it touches on the stability of political and social institutions. There is a political science literature suggesting that bicommunal polities are less stable than others, both those that are more homogeneous and those that are more diverse. If Canada is bicommunal, our institutions and our policies — including those in the economic sphere — should be fashioned to minimize the social and political tensions arising from bicommunalism. This implies that political considerations may constitute a significant constraint on the formulation of constitutional goals that one might, on economic grounds alone, be persuaded

to make. Second, the specific form of bicommunalism that appears to exist shapes the institutional and policy responses available. In the case of Canada, the precise character of the constraints referred to above will differ according to whether the communities are defined as "anglophones and francophones" (without reference to place of residence), or as "French-speaking Quebec and English-speaking Canada." Third, bicommunalism is an ongoing phenomenon. It is not merely a condition to which policy makers and the designers of constitutions may have to respond, but rather one they may hope to see reinforced or, conversely, weakened. Where bicommunalism exists, it is not necessarily a permanent and immutable feature of the society and its politics. More likely, it is a historical phase the length of which is doubtless affected by human action. Because bicommunalism is actually a subjective phenomenon (referring as it does to attitudes and perceptions), it may be strengthened through certain institutions and policies and attenuated through others. Are bicommunalism and the cultural dualism associated with it things Canadians value? Or do Canadians regard bicommunalism as an inconvenience and a threat: something to be superseded if possible? Attitudes toward bicommunalism should inform both institutional design and government policy, to the extent that either is genuinely within our control. Bicommunalism as a threat to political stability, the forms of bicommunalism, and bicommunalism as a historical phase are each examined in the sections to follow.

## Bicommunalism and Political Stability

In some societies, ethnicity and/or territory divide the population into identifiable segments which acquire considerable political importance. This is especially likely to occur when the segments are culturally quite distinct one from another. Such a society is variously described as a "segmented," "plural," "fragmented," or "deeply divided" society.[5]

Societies may be diverse (or, as is often said, "pluralistic") in ethnic, religious, or linguistic composition without being segmented. To avoid confusion, I prefer not to use the term "plural society." Long-standing usage equates "pluralism" with the dispersal of power in society among many organizations of which the state, though ultimately controlling, is only one. In its ethical or normative sense, pluralist theory is a reaction to the doctrine of state sovereignty, which was originally formulated to reduce the authority of the medieval church and other social institutions whose traditional privileges were regularly invoked to balk royal power. Today, however, "pluralism" is more commonly used in a merely empirical (non-normative) sense to draw attention to the tremendous diversity of organized and unorganized political interests in modern democracies.

Empirical pluralist theory, in the tradition, for example, of Alexis de Tocqueville's classic *Democracy in America*, virtually equates democracy with local self-government and the proliferation of organized groups. Such organizations (according to the theory), though they compete with each other and create multiple centres of power, also help create consensus and thus promote political stability. It follows that democracy, which institutionalizes conflict and acknowledges the legitimacy of non-violent opposition, is most easily established and maintained within a pluralistic society characterized by religious and ideological tolerance and organizational complexity. These characteristics reflect and indeed are nurtured by diversity of political interests. No one basis of group solidarity and therefore no one form of political conflict predominates over all others. In other words, within a pluralistic society (or, since the emphasis is now on the political aspect of social organization, within a pluralistic polity) there exist multiple cleavages: ethnicity, class, region, and so on. Typically the groups thus delineated overlap, leaving no group isolated from the rest or consistently subordinate to others. A corollary is that the political elite is internally divided, and no one group (whether defined by income, occupation, religion, ancestry, or any other characteristic) may be considered politically dominant. Particular groups may be influential in particular policy areas but none will control the whole policy spectrum.

This characterization of politics and political cleavage patterns, insofar as it is intended to apply to any actually existing society, is rather too lyrical for some tastes. Some people tend to think of politics in terms of dominance and subordination, often along class lines. Be that as it may, what is at issue in the present discussion is not the locus or loci of political power, but the distinction between a pluralistic society and a segmented one.

A segmented society is composed of distinct groups defined according to a single characteristic, such as residence (territory) or ethnicity, which has overriding political significance. Within each segment, individuals recognize themselves as sharing a common historical experience, and see themselves as having a common linguistic, religious or (more generally) cultural heritage. Territory and/or ethnicity are correspondingly important in creating political affinities and, obversely, political cleavages. When the solidarities implied by this situation are pronounced and are not softened by overlapping group memberships, the segments become socially and culturally isolated from each other. Thus, one of the basic conditions of democratic stability, according to pluralist theory, does not obtain. Moreover, the clear delineation of the segments should be established in a way understood by all. The action of the state is likely to be important here. Thus, in a segmented society, politics becomes understood as an activity primarily concerned with perpetuat-

ing, regulating or modifying the interrelationship among the segments. A major task of political leadership, perhaps its most important task, is to maintain harmony among them.

Although a society may have more than two territorially or ethnically defined groups, the essence of bicommunalism is that historical and contemporary conditions in some way highlight the relations between two such groups, while downplaying the political significance of other entities. Each of two major groups, by virtue of sharing a common value system, a common language, and perhaps also other attributes (such as ancestry, religion, myths and historical memory), acquires the character of a community whose members are aware of the bonds among themselves and are conscious, too, of their distinctiveness relative to other communities, or peoples.

Distinctiveness, of course, need not imply the exclusion of other groups or intolerance toward them, but it does foster a sense of solidarity based on shared cultural attributes. Cultural distinctiveness can be powerfully reinforced if the communities within this bipolar grouping, which themselves may be pluralistic, have been able to endow themselves with a network of institutions which they control and whose character they determine. The community or "collectivity" or "nation" becomes a focus of political loyalties. Thus a wide range of issues in virtually every policy field (such as economics, defence, and foreign relations) come to be viewed in terms of their relevance to intercommunal relations. Even more is this true of controversies over constitutional arrangements.

Many bicommunal polities are conflict-laden, but it would present a false picture if one focussed only on those cases that are marked by persisting tension and perhaps violence (as, for example, is Northern Ireland). Some states, including ones based on the consent of the governed, evidently do cope with the existence of marked ethnic, religious, ideological, and/or cultural diversity. Observing this, Arend Lijphart has formulated a theory of "consociational democracy" to explain the success of some continental European and Third World states in devising institutional responses to "the deep social divisions and political differences [that exist] within plural [i.e., segmented] societies."[6] The experience of countries such as the Netherlands, Belgium, Switzerland, and Austria — to take the European cases of consociationalism, which are probably the ones most relevant for comparison with Canada — stands in opposition to pluralist theory about the social preconditions for democracy.

Lijphart comes close to inverting pluralist theory insofar as it may be thought to apply to societies that are essentially composites of "subcultures" associated with distinct ethnic, linguistic, or religious groups. Conflict between the subcultural groups (or segments) may be mini-

mized, he says, when they maintain their distance from each other by forming distinct communities within the larger polity, while at the same time their respective leaders or elites engage in a process of accommodation and compromise through which intercommunal relations are defined and stabilized. Elite accommodation within a formalized, or at least a mutually understood power-sharing arrangement, is the essential feature of a consociational solution to social fragmentation.

Consociational democracy contrasts, as a form of political organization, with majoritarian democracy. The latter is based, as the term suggests, upon the principle of decision making by political majorities, or at least with their informed consent; indeed, "democracy" in its most common usage is equated with the phrase "majority rule." Most people would say that anything else is "non-democratic." On the other hand, most people are likely also to accept and perhaps demand that majority rule should not operate in all circumstances; hence the support for the constitutional protection of individual rights, sheltering every person from the exercise of governmental power even when government is acting under the impulsion of a (perhaps temporary) majority.

There is an implicit principle of "fairness" here, which may also be extended to identifiable minorities. Two main devices exist for doing so:

- the constitutional protection of the rights of individuals as members of a minority group, examples of which include language rights, and rights to religious or denominational schooling; and
- the design of decision-making rules to ensure the participation of specific minorities and perhaps to guarantee them a veto in certain issue-areas.

Lijphart writes:

> Especially in societies that are sharply divided along cultural, religious, or ethnic lines into virtual subsocieties with their own political parties, interest groups, and media of communication, the flexibility necessary for majoritarian democracy is absent. Under such conditions, majority rule is not only undemocratic but also dangerous because minorities that are continually denied access to power will feel excluded and discriminated against and will lose their allegiance to the regime. . . . In deeply divided societies, therefore, majority rule spells majority dictatorship and civil strife rather than democracy. What these societies need is a democratic regime which emphasizes consensus instead of opposition and which includes rather than excludes all the disparate components — that is, consociational democracy.[7]

Consociationalism, then, is a response to social and cultural fragmentation. Consociationalism is the only non-coercive solution to a condition where ethnic or territorial divisions have acquired political prominence. The alternative is political exclusion, if necessary (as in South Africa) through disenfranchisement of the majority.

The consociational solution seems to work in some circumstances and not in others. While it would be inappropriate to review here the many facets of this complex matter, it is important to note that a bipolar structure does appear to make it more difficult to establish a stable power-sharing arrangement among elites. This is noted by, among others, Jean Beaufays:

> It is widely thought that [a bicommunal polity] is much more fragile than one with a higher number of components. The reasons for this are numerous. Essentially, however, the explanation lies in the fact that, in a bipolar structure, no counterweight effect can be felt. In a pluralistic polity, the system of regular conflicts is marked by a subtle play of synchronic and diachronic alliances between different member-states according to the matter under discussion. [Beaufays here is discussing the possible federalization of Belgium along linguistic lines, and more generally the difficulties inherent in bicommunalism.] One is at the same time an ally and an adversary, or has been, or will be. This demands a certain reserve in the midst of conflict and encourages solidarities beyond the present dividing lines. A number of trade-offs are thus possible that help diffuse the intensity of the conflict. [Translation][8]

Within the larger class of deeply divided societies, achieving a consociational solution to social fragmentation is particularly difficult for bicommunal polities, since consociationalism is probably, at least in the long run, unstable or transitional. If fragmentation does not result in the break-up of the political system, as its component parts seek independence, consociationalism is likely either to degenerate eventually into an illiberal regime where one group dominates, or to be superseded by a situation in which the earlier divisions have subsided in importance, becoming less relevant to politics.

This rather abstract discussion has concrete relevance to Canada's situation. If Canada appears to be a bicommunal polity — as some do regard it, though others do not — it would seem desirable to implement some form of consociationalism in order to reduce the intensity of political conflict and to preserve and develop democracy. I shall argue that in fact a form of consociationalism existed in the past. On the other hand, it worked only so long as Quebec francophones were willing to accept an inferior economic status in exchange for extensive — but nonetheless limited — political control. This condition evaporated sometime during the decade 1955–65, requiring the redesign of Canadian constitutional arrangements and/or a set of federal government policies aimed at raising the economic and political status of francophones across the country. Considerable headway has been made with such policies, but they remain controversial and incomplete. If, at some time in the future, these policies do achieve their objectives and become broadly accepted by the Canadian public, Canadian politics could then be said to have entered a new phase, in which ethnic and linguistic

differences have subsided to a relatively minor position as a basis of political affinities and cleavages. Indeed, the phasing out of bicommunalism seems to be a fundamental thrust behind these policies.

In opposition to this goal stands the desire apparently underlying the policies of successive Quebec governments to strengthen bicommunalism in Canada, redesigning constitutional arrangements both as a response to linguistic and cultural dualism and as a means of reinforcing dualism, but now on a basis of economic equality between the two communities.

These remarks, foreshadowing the discussion to come, draw attention to two conflicting political projects for Canada. Each arises from the premise that Canada has historically been a bicommunal polity. The premise, however, is not unchallenged either among academics or among political leaders. Nor is there agreement that the two projects are really in uncompromising opposition to each other. To explore these matters, this study will consider, especially with reference to Canada, different forms of bicommunalism as well as (in a subsequent section) an interpretation of the Canadian situation which argues that Canada has always been pluralistic rather than bicommunal.

## Forms of Bicommunalism

This section examines the view that the essence, or at least the dominant fact, of Canada's national existence is ethnic and linguistic dualism. Not everyone attributes such importance to dualism, but those who do implicitly regard Canada as a bicommunal polity. That, however, is not the end of the matter. There are various forms of bicommunalism, and it is important now to explore some of the variants.

The concept of a Canada whose political institutions have been shaped by the presence of two nations or (in alternative formulations) two "charter groups" or two "founding peoples" — though it comprises as well many other ethnic groups of lesser size and political importance — had its origin in the conciliatory policy of the British conquerors of New France, as illustrated by the actions of the first military governors of the new colony, subsequently confirmed by the *Quebec Act* of 1774. This policy conceded to the French Catholic population the right to their own institutions in most matters pertaining to the relationship between the individual and the state. Though commercial law and the criminal law were imported from Britain, the conquest in most respects did not affect the daily life of the *habitants*. The position of the church was, if anything, strengthened relative to what it had been under the French regime. Although the conciliatory policy was challenged in 1839 by Lord Durham, who proposed the assimilation of the conquered people, and although the union of the two Canadas was effected in 1840 with this aim, the civil rights of the French Catholic population continued to be respected under the Union. It operated under the principle of concurrent

majorities (those of Canada East and Canada West), a principle that eventually made governance of the united colony impossible and helped provide the impetus for Confederation.

Confederation both extended and confirmed the established rights of the French Catholic population and marked official abandonment of Durham's recommended policy of assimilation. It did so through the establishment of a province in which this group constituted a strong majority and consequently controlled the government. Since the provinces retained exclusive jurisdiction over "property and civil rights," with the exception of a number of enumerated federal powers whose combined effect was to ensure the continued supremacy of British commercial law throughout the new Dominion, the French Catholic population was assured the power to maintain its own institutions in all the respects then considered essential to the preservation of a distinctive society and culture. This constitutionally entrenched power was reinforced politically by a succession of Quebec governments which vigilantly protected their autonomy, and by the presence in the federal cabinet of a bloc of francophone ministers who likewise sought to ensure that Quebec's authority to order its internal affairs without interference from the rest of Canada would not be violated.

Under these arrangements, the distinctiveness of Quebec's institutions, and therefore of its culture, were preserved in one corner of an overwhelmingly English-speaking continent. The uniqueness of Quebec was evident not only in matters such as education and marriage laws, but also in arrangements for social security, the legal authority of the father in relation to his children and his wife, land tenure and inheritance, and (later on) labour relations.

Francophone minorities outside Quebec lacked the protection of a provincial government that they controlled, and were accordingly unable to put into place a network of institutions consonant with their culture. At the time of Confederation, some of the leaders of French Canada hoped that the westward expansion of the new Dominion would permit the settlement of surplus population from Quebec within officially bilingual provinces in which there was a rough balance of French-and-Catholic, English-and-Protestant. This aspiration was reflected in the Manitoba Act of 1870. However, the francophone population was quickly overwhelmed in numbers by the influx of land-hungry settlers from Ontario. As the francophone group diminished as a proportion of the whole, linguistic and religious minority rights were extinguished. The powerlessness of this minority, by now a small one, and the incapacity of the federal government to provide effective assistance were revealed during the 1890s, with the dismantling of the French-language school system. This had already occurred in 1871 in New Brunswick. By the time Saskatchewan and Alberta were carved out of the Northwest Territories in 1905, it was evident that the hopes for the creation of a Prairie West which was, in anything like the Quebec

sense, "home" to French Canadians, were vain ones. Even so, an attempt was made to offer constitutional guarantees for Catholic schools (many of which would be French-language) in the new provinces. The attempt eventually proved as vain as that in Manitoba. These experiences confirmed most French-Canadian nationalists — Henri Bourassa being an exception — in the belief that the only effective protection for their religion, language, and culture was constantly to reaffirm the political autonomy of Quebec, and to support it in Ottawa with a solid contingent of French Canadians within the ruling party.

This was a weak form of consociationalism, in the sense that the political leaders of the two most important cultural groups reached an understanding with each other about the areas in which each community was to avoid infringing upon the essential interests of the other. It was an unequal partnership, and even so it broke down at least twice, with the conscription crises of 1917 and 1942–44. The inequality was visible in two important facts:

- anglophones enjoyed rights in Quebec that francophones either never had or quickly lost elsewhere in Canada; and
- anglophones enjoyed economic dominance within Quebec.

The superior position of the latter group had always been obvious insofar as English capital, whether of British, American or Canadian origin, dominated commerce and industry. However, the extent of the economic subordination of French Canadians even within Quebec was not generally realized until it was devastatingly revealed in 1965, by André Raynauld, Gérald Marion, and Richard Béland, in one of the studies prepared for the Royal Commission on Bilingualism and Biculturalism. The findings, summarized in 1973 by Raynauld, demonstrated not only that French Canadians had lower incomes than any other listed group except those of Italian origin, but also that no factor other than ethnicity could be found to explain much of the differential:

> My analysis showed that variables other than ethnicity explained less than 50 percent of the differences in income between French Canadians and Canadians of English and Scottish descent. . . . In 1961, Anglo-Scots earned 1,319 dollars more than the average, and French Canadians 330 dollars less than the average; the observed disparity between these two groups was thus 1,649 dollars per annum. When all other factors were held constant, Anglo-Scots were 606 dollars above the average and French Canadians 267 dollars below the average; the net disparity was reduced from 1,649 dollars to 873 dollars. The figure 873 dollars was the net contribution of ethnicity to the income differential, and the balance, 776 dollars, was the net contribution of other factors such as age and schooling. In other words, even if he heeded the traditional advice to invest in himself through schooling, migration, and so on, a French Canadian could still look forward to an income about 15 percent lower than that of his counterpart of British descent.[9]

Quebec was thus an example, apparently not uncommon in bicommunal polities, of a disfavoured majority that obtains certain political rights in exchange, so to speak, for acquiescing in their condition of economic inferiority.[10] Hence the complaint of certain Quebeckers that French Canadians have been a minority (sociologically speaking) even within their own province.

This situation could not subsist indefinitely, though paradoxically the reason for its lack of durability seems not to have lain primarily in economic inequality. The culture was extolled especially by the clergy as non-materialistic (in contrast to the forces motivating industrialism). This response to economic inferiority later came to be viewed as psychological compensation — crudely but simply, sour grapes. Nonetheless the "messianism"[11] that characterized the culture seems to have prevented traditional French Canadian elites from seeing, or at any rate from worrying about, the economic "price" of a nationalism concerned above all with the protection of provincial autonomy. What evidently did come to concern them, from the mid-1950s onward, was the growing inadequacy of provincial autonomy to provide cultural protection. The uniqueness of Quebec's mode of social organization became visibly eroded. Institutions and policies gradually adapted to patterns already established elsewhere in North America, partly because the isolationism of rural communities broke down[12] and partly because the economic dominance of the English within Quebec and across the continent increased assimilationist pressures.

The factors exposing French Canadians to assimilation were powerfully described by Quebec's Royal Commission of Inquiry on Constitutional Problems, 1956 (the Tremblay Report). The report spoke eloquently on the inadequacy of traditional institutions in a changed and changing world, and on the consequent vulnerability of French Canadian civilization (culture) in an English-dominated continent. The Commission considered that conditions for the development of French Canadian civilization were difficult at best:

> If the French-Canadians succeeded, shortly after the conquest, in ensuring for themselves the free exercise of their religion and the use of their mother tongue, they nevertheless had to accept the political structure and the social organizational forms of the country's new masters. They had, consequently, to submit themselves to an institutional regime bearing the stamp of a genius different from their own and whose spirit they neither possessed nor shared.[13]

However, according to the Commission, all constitutional systems since 1774 have recognized the "special situation" of Quebec. Confederation attributed to the provinces

> legislative and administrative authority over everything which, generally speaking, touches the citizen's life and private business, and particularly

property and civil rights, instruction and education. . . . The 1867 Constitution made the Province of Quebec, which was already historically its national focus, the French-Canadian centre *par excellence*, and the accredited guardian of French-Canadian civilization. Insofar as its own population was concerned, that was a direct responsibility. It also applied indirectly, insofar as it constituted the cultural focus of the French minorities of the other provinces and to the extent that its influence was exerted on over-all Canadian policy.[14]

Thanks to [provincial] autonomy, the French-Canadians have . . . as a majority group, the political initiative of their cultural and social life and partly of their economic life. . . . [However], the advent of large-scale capitalism and the rapid expansion of industry brought them into the embrace of an economy whose control does not belong to them and which, to a large extent, escapes the jurisdiction and possibilities of action of their province and even of their country.[15]

It was not a current of ideas born without it nor drawn from abroad which modified the milieu of French-Canadian culture; neither rationalism nor European secularism, neither scientific positivism nor religious or political liberalism, nor even socialist or totalitarian ideologies. Primarily it was the practice of economic and political institutions of British origin which resulted in the creation of an individualistic and liberal mentality among a people whose religious, intellectual, and social traditions had within them nothing either individualistic or liberal.

Economic factors, by overturning the old social order, were responsible for having taken its practical value away from traditional thinking as an informing principle of daily life. Men think along certain lines, but they are induced to live along certain other lines, and they end up thinking as they live. It is not otherwise that assimilation proceeds.[16]

The Tremblay Report expounded, in a didactic and authoritative style, the values that constituted the core of French Canadian culture. It saw these values as being not inconsistent with those of the Anglo-Protestant culture. Nonetheless it affirmed that the two cultures were "of differing interpretation and genius" and had radically different conceptions of man's relations with society.[17] The particular characteristics of French Canadian Catholic culture made it imperative that the Quebec state be able to establish a set of institutions that differed from those in the rest of Canada. The institutional structure of the 1950s, heavily influenced by the Anglo-Protestant tradition, left French Canadians defenceless in the face of "the new economy" ("an economy born of the application of scientific inventions to production, transportation, communications, etc."), which brought in its train acceptance of materialist and collectivist values[18] — which to the commissioners were anathema. To defend the society against these values, it was imperative that "the whole institutional system . . . be completely remade along new lines."[19] This project of institutional renewal required Quebec to recapture the powers that were originally placed in its hands by the Confederation

settlement, and especially to ensure that the distortion of its policies as a result of fiscal inducements emanating from Ottawa be avoided.

The Commission had, as was evident from its rejection of "the new economy," a social philosophy that many regarded as reactionary. Its report is widely regarded as having been outmoded even at the moment it was penned. However, its assertions that French Canadian culture had a genius differing fundamentally from that of Anglo-Protestant culture, and that full provincial control of all matters pertaining to the development of its culture was a principle on which there could be no compromise, were fully consonant with the ideas that went into the making of Quebec's "Quiet Revolution." The 1962 slogan "*Maîtres chez nous*" (masters in our own house) was used to justify the nationalization of private electricity firms, and thus symbolized efforts to place francophone Quebeckers in control of their own economy and to eliminate their economic inferiority within their own province; on the other hand it was also redolent of a whole project of nation building and cultural renewal for which seizing control of the levers of economic power was instrumental. The political and constitutional project formulated by the Tremblay Commission was, ironically, put in the service of a program of modernization and social development along lines that must subsequently have gravely distressed the authors of the report.

During the late 1950s or early 1960s, French Canadian nationalism, with its emphasis on cultural protection (and to this end, the defence of provincial autonomy), was transformed into a more positive, Quebec-centred "social nationalism"[20] or a "nationalism of growth"[21] that demanded the extension of Quebec's policy responsibilities and fiscal resources. The modernization of francophone Quebec society, which anglophones greeted as heralding a new era of cooperation between Quebec and the rest of the country, turned out to produce new tensions and to demand new institutional adjustments. The earlier quasi-consociational formula of elite accommodation was revealed to be inadequate to satisfy the heightened aspirations of the francophone Quebeckers. A transformed social and political elite in Quebec rejected it. Moreover, the social and institutional separateness of anglophone and francophone within Quebec (expressed in the phrase "two solitudes") began, ever so slightly, to break down.

These changes may be summarized as consisting in the transformation of a bicommunalism of majority and minority, anglophone and francophone, into a bicommunalism of two majorities, French-speaking Quebec and English-speaking Canada. In a bicommunal polity, it is obviously of great importance — particularly when institutional adaptations to the situation are considered — whether the two communities are geographically concentrated or not. Is it ethnicity (an amalgam of characteristics comprising ancestry, language, religion, culture, and historical memory) that forms the basis of bicommunalism? Or is it

territory? Or, more properly, what is the interplay between ethnicity and territory? In Canada, the francophone Catholic minority has always been concentrated in Quebec; thus Quebec has always been the focus of a distinctive French Canadian culture. The Quebec state has been the only political instrument the minority has had fully at its disposal. We have seen how the federal government, for most of Canada's history, was ineffective or half-hearted in protecting the rights of French Canadians outside Quebec, and may even (at times, anyway) have been indifferent toward them. Nonetheless for many years "Canadian dualism" meant anglophone majority, francophone (and Catholic) minority; not Quebec and the rest.

The Quiet Revolution and the political, constitutional and financial demands formulated by successive Quebec governments after 1960 expressed a new form of bicommunalism that gave, relative to earlier periods, greater emphasis to territory in the definition of the two communities. The English language and Anglo-American culture would predominate outside Quebec; the French language would predominate in Quebec, helping a distinctive Quebec culture to grow and flourish. An effort was made to gain for this project the support of immigrant groups and of the traditionally dominant anglophone minority. To this end, the independence movement in Quebec, which is the logical extension of the tendencies described above, seeks to create a pluralistic society within Quebec on the condition that minority groups accept the primacy of the French language and support the expression of an indigenous or original Quebec culture through government policy and an institutional system fashioned to its requirements.

To achieve this objective, the Quebec government would require additional constitutional powers and fiscal resources. It was generally presumed that Quebec needed, in order to realize its cultural goals, wider powers than the other provinces had any reason or desire to claim. Hence the demands for "special status" and later for "sovereignty-association." Both projects envisioned redefining Quebec's relationship with the rest of Canada as a new form of bicommunalism, a bicommunalism of two majorities in which the two communities would enjoy coordinate economic, social and political status. Only those who sought full political independence untrammelled by economic association went beyond bicommunalism in their search for a redesigned consociational (power-sharing) arrangement. They sought a new "equal partnership" of the "two founding races," to employ expressions drawn from the terms of reference of the Royal Commission on Bilingualism and Biculturalism.

## Bicommunalism as a Historical Phase

The bicommunalist view of Canada does not go unchallenged. For many Canadians, probably a sizable majority, the linguistic and cultural cleav-

age is no more salient than many other forms of cleavage. They regard the Canadian polity as pluralistic — that is, in their view no single personal quality, whether region of residence, ethnicity, income level or any other, has political significance overshadowing the rest. To the extent that they regard differences of language and culture as important, it is not dualism but multiplicity of cultures that they see. But such diversity does not stand in the way of political unity. Theirs is "one Canada," pluralistic and multicultural.

The pluralist-multicultural view of Canada downplays the notion that language symbolizes and supports overall culture, viewed as a distinctive set of attitudes, beliefs and values, and a distinctive way of conceiving the relationship between the individual and the collectivity. As one anglophone politician recently said of francophone Quebeckers (trying to be sympathetic), "They want to do the same things as we do, but they want to do them in French." This perception is probably more significant in explaining the rejection of the bicommunalist thesis than are the circumstances described below, which also may be adduced in support of the pluralist-multicultural view.

While an overwhelming majority of Canadians of French origin are Catholic and most Canadians of British origin are Protestant, the coincidence of linguistic and religious differences has never been complete. Some of the Scottish Catholics garrisoned in the new colony after the Conquest settled permanently and tended to assimilate with the francophone population; religion was apparently stronger than language as a factor in personal identities and as a basis of community building. In a later period, there was a wave of Irish immigration, some assimilating to French and some forming their own anglophone enclaves. One measure of the higher salience of religion, in comparison with language, was that the section on education in the *British North America Act, 1867* enshrined the rights of religious rather than linguistic minorities; this was true, too, of comparable sections in the acts establishing the provinces of Manitoba, Saskatchewan and Alberta. Thus, to the extent that language rights in education were constitutionally protected at all, protection occurred only incidentally, through provisions applying to "denominational," "separate," or "dissentient" schools. The weakness of these guarantees, or the absence of an effective enforcement mechanism, eventually resulted outside Quebec in conflicts between francophone and anglophone Catholics. This was especially evident in Ontario, where Irish bishops in the early years of this century mounted an attack on French-language education in order to protect the separate school system against criticisms levelled at the inferior quality of instruction in the French schools. The sharper the distinction between French and Catholic, the less the danger that criticisms of French-language education would spill over onto the whole Catholic system. This was but one illustration, albeit a dramatic one, of the tensions that from time to time

arose along linguistic lines within the Canadian Catholic Church, engendering disputes that Rome was more than once called upon to arbitrate.

Canada contains many local communities, especially in the Prairie region, in which the largest linguistic minority, or in some cases the majority, is neither English nor French. The vision of a bilingual West peopled by settlers from Quebec quickly faded as the Prairies became settled instead by the overflow of rural population from Ontario and later by immigrants recruited from Europe by the federal government. Often these groups formed communities of their own, or became the principal minority in areas where settlers of British origin predominated. As a result, to much of the West today, perhaps to all of it, the only practical language policy appears to be official unilingualism. It may be complemented, however, by a policy of multiculturalism. For example, local school boards may sanction the teaching of ancestral languages. In most communities, these languages are less likely to be French than they are to be Ukrainian, German, Icelandic or Cree.

Aboriginal peoples, though a much smaller minority than the francophones, have a moral claim to recognition as a distinct nation at least equal to that of the francophones. One of the arguments supporting official bilingualism, and generally for according special recognition to the French language, is that all groups other than English or French came to Canada in the expectation that they would abandon their native tongues, or retain them only for use within their own local communities. This has been a commonly stated justification for the "two nations" thesis. On the other hand, aboriginal peoples (in some respects, an artificial category, since it comprises many linguistically and racially disparate groups) also form a majority in some of the more sparsely populated areas of the country. If persons of mixed blood are also included, then they form a sizable minority in certain urban areas as well. The distinctiveness of their culture is not in doubt. These facts support and justify efforts, both sanctioned and required by the *Constitution Act, 1982*, to formulate the extent of aboriginal rights and perhaps to devise, as has been recommended by a parliamentary committee, some form of aboriginal self-government. This, too, suggests that Canada is a pluralistic rather than a bicommunal polity.

For many Canadians, region is as important a factor in personal identity as language, ethnic origin or religion; province of residence is frequently taken for granted as a basis for community building. Recognizing this, the Task Force on Canadian Unity, reporting in 1979, identified duality and regionalism as distinguishing features of the Canadian polity.[22] Though it noted the imprecision of doing so, the task force simplified its job by equating region and province. While divergence of economic interest among the provinces was recognized as being a factor in promoting a sense of regional or provincial identity, the task force also imputed differences in social values and political preferences to the

various provincial populations. This is not uncommon, and of course it is fostered by provincial government leaders who not infrequently have claimed to be the sole authentic spokesmen for "regional" interests and sentiments.

These arguments chip away at the bicommunalist thesis, and offer support for the pluralist-multicultural view. The most fundamental criticism, however, comes from those who believe that social stratification is a lot more important than culture. A now-classic statement of this position is contained in John Porter's *The Vertical Mosaic* (1965). Porter dismisses as "hallowed nonsense" the contention "that each of the provinces constitutes a particular culture which federalism safeguards," adding:

> Quebec without doubt is a special case where there is validity in the notion of cultural particularism, but as Quebec becomes more industrialized it will become culturally more like other industrialized societies. At that time the similarities in social characteristics which its urbanized population will share with other provinces may be far more important in terms of future social development than whatever differences remain. In the past, public sentiments in Quebec, which arise from the particular culture in that province, have been exploited in the interests of power as they have been protected by provincial autonomy. The low occupational level of French Canadians, the rigidity of French-Canadian class structure, and the authoritarian character of French-Canadian institutions are as much a consequence of the power enjoyed by French-Canadian provincial politicians in coalition with "alien" corporate powers as they are a consequence of domination by the British charter group.[23]

The argument here echoes in certain respects some points made more abstractly earlier in the book:

> A distinction has been made between "behavioural assimilation" and "structural assimilation." The first means the extent to which the minority group has absorbed the cultural patterns of the "host" society and even perhaps had an effect on it. Structural assimilation means the process by which ethnic groups have become distributed in the institutional structure of the receiving society, and in particular have assumed roles in general civic life . . . structural assimilation exists when ethnic origin is not a relevant attribute in the allocation of people to positions in the social system or in the distribution of rights.
>
> Structural assimilation, no doubt, leads in time to behavioural assimilation. At least differences in patterns of living between various ethnic groups will be reduced. [However, where such differences persist, and where] there is strong association between ethnic affiliation and social class, as there almost always has been, a democratic society may require a breaking down of the ethnic impediment to equality, particularly the equality of opportunity.[24]

The devaluing of cultural particularism and the opinion that social equality is a morally superior goal are both obvious here. So is the view that economic motives tend to be the most potent explanation of behaviour. This attitude is probably typical among members of a cultural majority, suggesting incomprehension of minority group demands. Incomprehension easily shades off into intolerance. The danger that majority attitudes pose for cultural minorities is all the greater when its materialist basis is evidently shared by a sizable proportion of those belonging to minority groups. There is a corresponding likelihood of cultural hemorrhage, so to speak.

Leaders of minority groups may respond to this threatening situation by trying to strengthen institutional supports for the culture. A mixture of defensiveness and self-assertiveness impels them toward consociationalism. If the main ethnic or cultural groups are territorially concentrated, federalism is an obvious power-sharing device, establishing the minorities' defences against majority rule. Regardless of the institutional arrangements, however, political tensions and misunderstandings easily arise. Any consociational arrangement may therefore be subject to constant readjustment, especially to the extent that its features are not effectively fixed in a constitution. This, of course, explains why, to take the Canadian case, constitutional revision has been of continuing and especial importance to Quebec, and why Quebec has been unable to accede to the partial constitutional accord that was struck in November 1981.

Since the early 1960s, successive Quebec governments have treated Canada as a bicommunal polity of the two-majorities type, and have sought constitutional amendments of a character that would revise the pre-existing consociational arrangements, as supported by the federal system. They have rejected and attempted to counteract the economic subordination of the francophones within their own province and (to the extent feasible) across Canada. They have asserted that the economic and other powers vested in the province by the constitution have been inadequate to the task at hand, which is to foster the "*épanouissement*"[25] of a francophone society in Quebec. Demands for "special status," recognition of the "two nations" principle, "*égalité*" (as in Daniel Johnson's slogan, "*égalité ou indépendance*"), "cultural sovereignty," and "sovereignty association" are all variants on the theme of a bicommunalism of two majorities.

Under former prime minister Lester Pearson, the federal government sought both to implement the principle of equal partnership of the two founding races in its own activities (in its policies, in cabinet appointments and in the civil service) and to accommodate Quebec's demands for greater powers and fiscal resources. Of course other provinces, too, put forward demands in these respects, but it appears that Mr. Pearson was not greatly worried that Quebec would acquire a special status in the

sense that its policy responsibilities might be more extensive than those exercised by the others. The roles of the federal and the Quebec governments were seen as complementary, both of them working toward improving the position, and accommodating the aspirations, of francophones.

Under former prime minister Pierre Trudeau, however, federal policy emphatically rejected special status and treated the Quebec government as a rival for the political affections and loyalties of francophone Canadians. Mr. Trudeau saw the federal government as the preferred instrument for achieving the economic and political equality of anglophones and francophones. In particular, he reinforced the earlier policy of official bilingualism, defining and protecting the rights of official-language minorities; his goal was to make those language rights effective, and to extend them geographically, encouraging the equal participation of anglophones and francophones in politics and business. The emphasis was consistently on individual rather than on collective rights.

Over the past 20 years or so, federal policy has been, in the terms employed by John Porter, to promote the structural assimilation of francophones without entailing their behavioural or cultural assimilation. Mr. Pearson and his successors have wagered that the two goals are not incompatible. The Quebec government, however, has been more sceptical about this and has sought national self-determination for the Quebec people, whether within the federation or as a sovereign state associated for economic purposes with the nine remaining provinces. The route to economic equality and cultural *épanouissement* has been through the affirmation of Quebec's character as a distinct society rather than through structural assimilation within Canadian society.

The two projects are, conceptually speaking, like oil and water; the question is whether, politically speaking, they can be reconciled. For Mr. Trudeau, as for Quebec Premier René Lévesque, they were indeed incompatible. From 1976 to 1984, political action by both governments sought to polarize the Quebec electorate on the bicommunalism issue. Relations between the governments were correspondingly conflictual, being marked by confrontation and unilateralism. Whereas Quebec policy has sought to restructure the Canadian state in a way that would implement a new form of consociationalism, both responding to and reinforcing the ethnic/cultural cleavage, federal policy has aimed for institutional and constitutional reform of a character that would reduce its salience, and would weaken bicommunalism. The logic of federal policy, and the substance of Mr. Trudeau's vision, has been that of a bilingual and multicultural Canadian society without linguistic or other impediments to individual mobility.

Paradoxically, in spite of the Trudeau-Lévesque duel and the head-on clash between their respective goals for Quebec and Canada, their policies may have been leading to the same broad result. The question is,

which result will it be — the one desired by Mr. Trudeau or the one by Mr. Lévesque? The answer to this question (which, of course, may be attempted here only in the most speculative vein), requires first an investigation into the conditions under which ethnicity is likely to subside in importance relative to other forms of political cleavage. The literature is not, so far as I know, very helpful in this matter; so I shall have to formulate some generalizations in the hope that they appear plausible to the reader.

The political salience of ethnicity may be expected to decline when and if:

- the members of a minority group acquire greater confidence in their ability to withstand cultural (or behavioural) assimilation;
- a former grievance of an ethnic or cultural minority, for example, economic discrimination, has been resolved or partially resolved;
- cultural distinctiveness seems to matter less than it did before, either because the minority culture and the majority culture have converged somewhat (that is, cultural differences are less marked than previously) and the stakes do not seem as high, or because the minority group acquiesces, in effect, in its assimilation; and/or
- political challenges arise which affect the groups similarly (for example, depending on the case at hand, this may occur when there is an external security threat, or the country experiences severe economic problems), and the immediacy of these issues has the effect of eclipsing ethnicity as a politically relevant variable.

Do any of these factors apply in Canada? Or is the trend in the opposite direction? Is bicommunalism being strengthened, or is it being phased out?

**Cultural insecurity** Culture helps form a person's identity; it is the collective aspect of one's personal identity. Thus, when some members of a minority cultural community assimilate to a dominant culture, the others feel threatened. Such apprehensions are, of course, all the more strongly felt if the group is shrinking in relative size, for example, as a result of migration or through changing fertility rates in the two (or more) groups. It is therefore typical and understandable that a threatened minority, especially if it controls a network of social and political institutions, will try to reduce or counteract assimilationist pressures. The leaders of the community, in so doing, deliberately heighten the political salience of the ethnic cleavage.

For francophone Canadians, assimilationist pressures are palpable. Francophones form a political majority only within Quebec, and census data demonstrate a trend toward unilingualism (French in Quebec, English elsewhere). Within Quebec, their strong majority position is less reassuring than non-francophones imagine, because (a) francophones

form a minority of about two percent in North America, which increasingly forms a single economic unit, no part of which is immune to the cultural levelling of the mass media and advertising; (b) the one-time "revenge of the cradle" (reclaiming through natural increase of population lands lost through military conquest) has been inverted, as francophone Quebeckers now have almost, and perhaps absolutely, the lowest birth rate of any group on the continent; (c) anglophones have traditionally controlled the economy of the province (encouraging assimilation to English, even if it is the language of a numerical minority); and (d) an overwhelming majority of "allophone" immigrants to Quebec (those speaking any language other than English or French) have traditionally assimilated to English. It is evident that, presumably as a result of these four factors, many francophones have considered that the position of French as the majority language in Montreal is already precarious or may well become so; and as Montreal goes, so goes the province.

Nonetheless there are good reasons for supposing that the French language and francophone culture are in a considerably stronger position now than they were a few years ago. Federal language policies outside Quebec and the action of the courts in affirming the rights of francophone minorities have had positive effects. Perhaps more significantly, francophones are now moving into the top ranks of major corporations within Quebec. They now both own and control important industrial and commercial enterprises.[26] As a result, economic pressures to adopt English as the language of work have diminished. The Quebec government, through Crown corporations such as Hydro-Québec and through agencies such as the Caisse de dépôt, the Société générale de financement, and the Société de développement industriel, has played an important role in supporting the creation of a francophone business class, especially within Quebec but to some extent outside it as well. Language policies have had complementary and perhaps even more potent effect. Quebec's Charter of the French Language (Bill 101, 1977) requires the use of French in private business corporations above a certain size, and of course in the public sector as well.

The position of the French language in Quebec is also made more secure by those portions of the Language Charter dealing with education. This law restricted access to English-language instruction to the children of persons who had received their primary education in English in Quebec ("the Quebec clause") or to the siblings of others already in the system, thus effectively preventing immigrants to Quebec — from whatever province or country, or of whatever mother tongue — from sending their children to English-language schools. Of course, it had a comparable effect for francophone Quebeckers who wished their children to acquire early facility in English. These provisions came into partial conflict with the Canadian Charter of Rights and Freedoms

(1982), since this charter contains a "Canada clause" that extends somewhat the definition of the group eligible to attend English-language schools in the province. Nonetheless, non-Canadians moving to Quebec, even anglophones (Americans for example), must send their children to French-language schools unless those children or their siblings have earlier attended English-language schools in another province. Thus, most immigrants can be channelled into the French-language system.

It remains a matter of controversy whether the law, as modified by the Canadian Charter, offers adequate protection for the French language in Quebec. Nonetheless, it appears that French is in a considerably more secure position than it was a few years ago. One factor supporting this opinion is that anglophones continue to move out of the province, while most of those remaining apparently have accepted the primacy of French in Quebec. In other words, migration patterns — in spite of the exodus of francophones looking for work in other provinces — strengthen the position of the French language in Quebec. Whether or not such facts are increasing the public's confidence in the future of French in Quebec, or will do so as the effects of public policy are increasingly felt in the years to come, is unknown. Nonetheless it seems at least plausible to posit that cultural insecurity is on the wane among francophones in Quebec and the other provinces, and that ethnicity may become a correspondingly less prominent form of political cleavage in Canada.

**Economic grievance** The uncertainty exhibited in the preceding discussion disappears when the focus shifts to other factors relevant to the salience of ethnicity in contemporary Canadian politics. For example, François Vaillancourt has shown that since 1960 the differences in socioeconomic status between francophones and anglophones in Quebec have narrowed considerably. In the case of income, there are no differences between the two language groups when differences in other determinants of income (schooling, experience, weeks worked, and so forth) are controlled for. In the case of access to managerial positions and of the ownership of industry, disparities have narrowed.[27] No doubt this is largely due, as Vaillancourt points out, to the improved market position of francophones as a result of Quebec's language laws. In any case, a major source of economic grievance has now been removed.

Economic grievance persists, but its focus has shifted. There are now two major objects of complaint. One is that francophones are still less than proportionately represented in the boardroom. There has been a considerable improvement in this respect over the past 20 years, but there remains for Quebec, as there does for Canada as a whole, a problem of external ownership and control of industry. A second complaint is that the growth rate of the Quebec economy lags behind that of

the rest of the country; unemployment rates are above the Canadian average. Rightly or wrongly, part of the blame for lacklustre economic performance is placed on the federal government. Its policies, particularly those supporting manufacturing, are said to favour Ontario. Without entering into the validity of this alleged favouritism, the political force of the complaint can be recognized. Strictly speaking, the issue is a regional one rather than one based on ethnicity; but this is a distinction that does not necessarily enter into political argument. If Quebec is the *pays* or homeland of a national community, perceived discrimination against Quebec as an economic region is easily equated with discrimination against the people themselves, for whom ethnicity is a core part of personal and collective identity.

Nonetheless, the specific economic grievances that persist in Quebec are typical of other provinces also. The Prairie West is at least as resentful as Quebec is of the concentration of economic control in Toronto boardrooms; and the Atlantic provinces have much more profound reason for grievance than Quebec has, if low income levels and lack of industrialization are thought to result from national economic policies. Both in Quebec and in other provinces that resent their economic subordination, a response is to try to strengthen the provincial government as an instrument of economic development. In this, they have common cause, though in Quebec the motivation is mixed, expressing partly a regional interest and partly a determination to use the powers of government to support the development of a francophone class of managers, entrepreneurs and financiers. The political salience of regional economic disparities tends to reduce the prominence of ethnicity in our politics, and in this sense to weaken bicommunalism.

**Cultural divergence** Since the onset of Quebec's Quiet Revolution, it has become impossible to identify the main features of the culture of francophone Quebec, as the authors of the Tremblay Report did in 1956, and to specify how it differs from Anglo-Canadian culture. Contrast the following two excerpts.

From the Tremblay Report:

> French-Canadian culture, an American variant of the original type, bears the marks of its double heritage.
>
> 1) Like all cultures, it is *qualitative*, that is to say, it conceives Man, its object, as being ordained to fully realize himself over and beyond the utilitarian purposes of daily life.
> 2) As a Christian culture it is
>
> a) *spiritual*, that is, it accords supremacy to values of the spirit and conceives human values as being ranged and ordered for Man's natural and supernatural vocation. Hence its repugnance for any kind of doctrinal or pragmatic materialism.

b) *personal*, that is, it conceives Man, endowed with intelligence and free will, as being called to a personal vocation of which he is the master-artisan and for which he is alone responsible before time and before eternity. So, by that very fact, Man possesses rights against which no human power can prevail. Hence his concept of liberty and authority and his desire for order; and hence also his refusal of all forms of collectivism and totalitarianism.

3) Like all Catholic Christian cultures, it is *communal*, that is, it conceives society not as a multitude ruled only by the constraint of public order but as an organic entity, ordained for the common good and specifically for the development of the person; with Man inserted in society through the intermediacy of groups and communities which he himself creates through his spiritual need.[28]

Now, from the 1978 white paper *A Cultural Development Policy for Québec*:

> The Québec culture has something elusive about it which seems to defy the usual criteria of coherence and organic unity. . . . But the originality of Québec is an inner quality. To comprehend it, one has to go beyond the signs and grasp the allusions, listen to the songs and poems, perceive the particular tone of attitudes and behaviour which seem to be the vehicle of a certain mentality, a special spirit, something which suggests both quiet strength and resignation, pride and hesitation, enjoyment of life and nostalgia, protest and hope, conservatism and a spirit of daring, a desire for peace and fierce resistance, a love of tranquility and a spirit of adventure, the most pragmatic realism and the most idealistic dreaming — all in one.[29]

I believe that the second statement is as heartfelt as the first. The conviction that francophone Quebec culture differs from all others appears no less strong now than it was thirty or a hundred years ago. But the differences are now less easily defined, where formerly they could be catalogued. Depth of attachment to community, together with inability to define its characteristics other than through shared historical experience, rings through the following passage, also drawn from the 1978 white paper:

> The cohesiveness and unity of the French community in Québec have without a doubt been compromised. It has become a cliché to say that the social, moral and religious values and the very identity of the community have undergone a radical change. The sense of confusion and emptiness which many experience is an indication of the extent to which the sociological and even the geographical factors which in the past contributed to the originality of the culture no longer suffice. It suggests that the borrowing and withdrawal which were once typical of the community's history of survival could well become a sign of the beginning of the end of Quebec's cultural identity.
>
> There is every reason to believe that the cultural development of this society should henceforth proceed by way of creation and innovation. The community will have to discover new ways of adjusting to its condition. It

> must understand that culture is not a reservoir of foreign commodities into which one can dip at need but rather, very basically, a constant endeavour to create and to master one's own destiny. Quebec must create its own cultural image or be drawn into the anonymity of the North American melting pot. It must etch its own vitality into the very visage of its cities and rural areas or that vitality will cease to be. If Quebeckers believe they can develop their identity only within themselves (i.e., as individuals) then all is lost, for there are others who will impose on them the rules and structures of their language, their songs, their media, their institutions and their products.[30]

The statement has a somewhat desperate quality. It acknowledges the cultural insecurity of francophone Quebec, highlighting the danger of cultural assimilation in order to justify an extended role for the state in cultural affairs. However, if its portrayal of the situation is overdrawn — that is, if Quebeckers acquire greater confidence in the resilience or robustness of their own culture (as discussed above) — it may become less important to them to structure the polity along bicommunal lines. I do not mean that they will be less interested in retaining and in some respects extending the powers of the provincial government, but, as regards federal policy and/or interprovincial issues, ethnicity (language, culture) may become less determinant of Quebeckers' political attitudes.

**Non-ethnic issues** As has just been emphasized, whether an issue is "ethnic" or "non-ethnic" may have less to do with the substance of the issue than with the way it is perceived and treated by citizens. As cultural differences become less obvious, the range of issues so regarded may shrink. But it may also happen that issues to which people do not react on the basis of ethnic affiliation increase in relative importance. Thus, overall, the salience of ethnicity in political life diminishes. This would appear to have been happening recently. Economic distress, budgetary deficits, Canada's evolving trade ties with the United States, and a bundle of agonizing foreign policy and defence issues have recently acquired great prominence. There does not seem to be much tendency to react to such issues on the basis of ethnic affiliation; region, class, and ideology seem more pertinent. This trend emphasizes political pluralism (multiple cleavages) over bicommunalism.

## *Summary*

Cultural insecurity, economic grievance, cultural divergence, non-ethnic issues — to review how these factors bear upon the political salience of ethnicity is to raise the possibility that bicommunalism in Canada may be on the wane. A firm prediction is impossible; people do not even agree whether the ethnic cleavage predominates now or has done so in the past. There seems to be little point in arguing about this.

Nonetheless, it does seem useful to observe that, insofar as Quebec's policies are succeeding in removing the causes of economic grievance by francophone Quebeckers and have strengthened the position of the French language in Quebec, they may have the longer-term effect (ironical as this is) of reducing the prominence of the ethnic factor in Canadian politics. The same goes for federal government policies, deprecated though they are by the Parti québécois as being unrealistic in their objectives and largely a sham in execution. The important point is that federal and provincial policies do seem to be complementary in their effects. Perhaps one sign of this is the receptiveness of the Quebec electorate to the invitation of the Progressive Conservative party in the 1984 election to put the referendum behind them and to reheal the wounds of internecine strife.

There is another sense in which the Trudeau-Lévesque policies may have been complementary. In the politics to the past twenty years, the bilingual and multicultural formula has been antithesis to the concept of "bicommunalism of two majorities." On the other hand, both have been opposed by those whose image of the Canadian polity is pluralist, in the specific sense that no one form of cleavage predominates. This view is associated with a political program that would deny any special position to the French language outside those areas where francophones are numerically strong. We have three concepts of Canada, each associated with a particular political tendency. The irony is that there seems to be a curious political interdependence among them. It comes out in the following ways.

First, the extension of francophone rights outside Quebec appears to have depended as much upon the constitutional grievances and the political threats of the Quebec government as it has upon federal bilingualism policies. (In support of this assertion, note the extension of French immersion programs in the schools, and bilingual services at the provincial level.) Bilingualism policies and "French power" are difficult to swallow for many of those who have little daily contact with francophones and who live in areas where the francophone population is small; these policies could not possibly have been made politically acceptable without the independence movement in Quebec.

Second, the protection and the possible extension of Quebec's constitutional powers and/or its de facto policy responsibilities depend upon pluralism within "English Canada." The Quebec government's tendency to see the rest of Canada as a monolith has not only been inaccurate but politically inept. Quebec needs to find allies among the other provinces. Economic regionalism and regional variations in policy preferences support provincial power equally in Quebec and in other provinces.

Finally, federal language policies are achieving some of the desired result. Political elites, and to some extent economic ones also,

increasingly have some bilingual capacity. The interest shown in bilingual education suggests that the number of functionally bilingual persons will probably increase considerably. Much depends upon these people for promoting wider tolerance and understanding of Quebec's special constitutional concerns. If Quebeckers prefer a federal arrangement with extensive provincial powers, as opposed to outright independence, support comes indirectly from federal policies.

## Conclusion

There is no agreement on whether Canada now is or ever has been a bicommunal polity — one in which the structure of governmental institutions, the allocation of public offices and the exercise of public power are primarily shaped by ethnic or cultural dualism, or by the relationship between Quebec and the rest of the country. It is unnecessary to reach a firm conclusion on a matter of definition such as this. Rather, it is important to understand why some people have taken this view of Canada, and want to preserve or enhance bicommunalism in this country; and why others have rejected bicommunalism, both as fact and as a principle for political organization. Bicommunalism may be a historical phase. Federal policy, it was argued, has been actuated by a bilingual-and-multicultural conception of Canada and has been directed toward reducing the long-run salience of ethnicity in our politics; the Quebec government, on the other hand, has aimed to reinforce a "bicommunalism of two majorities," each of which has its own territorial base.

It seems unproductive to continue the Quebec-Ottawa debate in the mode of the past few years. The "Trudeau project" and the "Lévesque project," though conceptually incompatible, are politically interdependent, and indeed both also rely politically on the existence of pluralism within English Canada. There is advantage in recognizing this political interdependence, and in trying to build upon it. This observation leads me to the following conclusions, which obviously are personal ones, but which flow directly from the preceding analysis.

First, the government of Quebec must continue to possess and be able effectively to exercise those powers that have enabled it to improve the economic status of francophones, especially those in Quebec but to some extent those outside Quebec as well. It is essential that anglophones and francophones should enjoy coordinate economic status, whether the objective is to find a stable consociational solution to the existence of a culturally segmented society, or to reduce the political salience of ethnicity and language (that is, to reduce the tendency of Quebeckers to perceive Canada as a bicommunal polity, thus diminishing the pressure for constitutional revision to implement some form of two-majorities consociationalism).

Exercise of the powers referred to may infringe to some extent upon the principles of economic union, particularly as regards the mobility of capital, the location of production facilities, and employment practices. Some such interference is implicit in provincial policies for industrial assistance, particularly where assistance is made conditional upon the locus of ownership and/or control, industrial location, or personnel policies. Conditions of this sort are sometimes applied in the case of grants and subsidized loans; such criteria are acknowledged, for example, to influence the decisions of Quebec's Société de développement industriel. No doubt the same motives influence public equity participation (mixed enterprise) and of course affect the policies of public corporations. Presumably, they also have an impact on decisions to proceed with joint ventures. (The extent of controversy over one federal government attempt to crimp such policies, the celebrated or notorious Bill S-31,[31] shows the sensitivity of this issue.) Provincial policies regarding the incorporation of companies may have similar intent and effect, as in the case of Nova Corporation, structured so as to ensure that control of the firm remains within Alberta.

In my judgment — specifically because of the role of the Quebec government in improving the economic condition of francophones — it would be unwise to try to interfere in the exercise of such powers by provincial governments. There is no adequate rationale for assigning such powers to Quebec and withholding them from other provinces. In this respect, it seems worthwhile, for political reasons, to accept some infringement upon the principles of economic union.

On the other hand, I do not see any comparable argument for relaxing the principle that goods should be guaranteed free movement from one province to another. It may not be feasible to implement rigid free-access guarantees in the case of the provinces' procurement policies, or to prohibit totally the imposition of restrictions on the sourcing policies (for services and for production goods) of firms receiving industrial assistance from a province. Nonetheless it would seem appropriate to aim, whether through a constitutional or a political mechanism, for the widest possible application of the rules of a customs union.

A second conclusion is that federal policy ought to respect the role of the Quebec government in the defence and support of francophone culture in Canada. There are several things to be said about this.

To begin with, the federal government's policy of striving to weaken the Quebec government, seeing it as a rival for the political loyalties of Quebeckers and as an antagonist regarding its own policy objectives, is probably counterproductive. That is, this attitude may well be damaging in terms of the vision of Canada as a bilingual and multicultural society. The roles of the federal and Quebec governments in the defence and

support of francophone culture in Canada are complementary. A more accommodating stance might facilitate the achievement of both federal and provincial objectives in language policy, since they are already mutually supportive in practical impact. Coordination of federal and provincial economic policies could also help more effectively to remove the sources of economic grievance among francophones. Thus greater federal-provincial cooperation in both areas could work to increase francophone Quebeckers' cultural self-confidence, with the consequence (or so I have argued) of making them react to many political issues on a basis other than ethnic affiliation. In sum, Canada would become less of a bicommunal polity.

As well, the federal government's emphasis on the protection of individual rights, especially through the Charter, does provide certain advantages for the francophone population. This approach in itself, however, offers insufficient support for the continued vitality and development of francophone culture. Institutional structures are imbued with, and reinforce, social values distinctive to their respective cultures. This is why the federal government can never be, on its own, an adequate defender of francophone culture in Canada — why Quebec must remain the focus for that culture, and why the government of Quebec must remain a principal instrument for cultural *épanouissement*.

In view of Quebec's role in this respect, federal policy makers (including senior officials) should be sensitive to the objectives of provincial policy and try to avoid interfering in the implementation of provincial policies or counteracting their impact. This principle has implications for all aspects of federal policy, but perhaps especially for the exercise of its spending power. It is not clear whether the federal spending power ought to be restricted by constitutional amendment, as has been proposed and fairly seriously contemplated in the past; but it is perhaps not likely that the necessary agreement could be secured. Accordingly, it seems apposite merely to emphasize that both the federal and the provincial government should respect existing constitutional principles, or should — more fully than in the past — observe what J.A. Corry once called "constitutional morality."[32]

Further, in considering reforms to the central institutions of government, one may wish to consider what mechanisms might help give expression to, and protect francophone culture. By way of example: certain decisions, such as those pertaining to language or to other particularly culturally sensitive matters, might require a different decision-making rule (perhaps a concurrent majority rule); and new institutions might be created, or existing ones reformed, to facilitate this. Reform of the Senate is an obvious candidate for this project. While it is by no means clear that the Quebec government would welcome such an

initiative, preferring to see itself as the sole agency effectively promoting francophone rights in Canada, it would appear that in view of the interdependence between federal and Quebec government objectives (as argued above), any objections from Quebec would be, in an institutional sense, merely self-serving.

Finally, it is a major consideration, in making recommendations on economic policy and the respective roles of federal and provincial governments in economic affairs, that Quebeckers must be convinced that it is easier for them to maintain their cultural distinctiveness within the Canadian federation than as an independent state. To my way of thinking, this condition is more likely to be met if Canada successfully affirms its political sovereignty and its economic independence from the United States.

As George Grant pointed out about twenty years ago in his celebrated essay, *Lament for a Nation*,[33] economic liberalism — a policy giving the widest possible scope to the operation of market forces, and restricting the role of government in the economy — tends to corrode cultural distinctiveness. It is also probable that economic liberalism (and of course, even more, a policy deliberately tying the Canadian economy to the American one through agreements on trade, capital flows, etc.) would reinforce continentalism and powerfully limit the de facto economic powers of the provincial governments (and of the federal government as well). Conversely, policies that preserve Canada's economic freedom of manoeuvre to the largest extent practicable, though not necessarily supporting the economic development role of the provinces, may be a condition for doing so.

It follows that there is probably a link between decisions about Canada's economic relationship with the United States and the likelihood that Quebec will be able to find in Canada a measure of cultural protection it could not obtain outside the federation. As has been repeatedly argued in this paper, it is impossible to distinguish consistently between economic and cultural affairs. The exercise of economic powers may be directed in part toward the goal of cultural protection and development. Care must be taken to ensure that Canada does not unduly restrict its economic powers, and incidentally those of the provinces, through international agreement. However, the most disturbing thing is that, simply through a high degree of market integration on a continental scale, a comparable de facto reduction in the extent of the economic powers of government may occur. If so, not only Quebeckers but also Canadians in every province may eventually have reason to lament the passing of nationhood.

## *Notes*

This paper was completed in December 1984.

1. Canada, Royal Commission on Bilingualism and Biculturalism, *Preliminary Report* (Ottawa: Queen's Printer, 1965), p. 135.
2. Pierre Elliott Trudeau, "Quebec and the Constitutional Problem," in his *Federalism and the French Canadians* (Toronto: Macmillan, 1968), p. 31. (A note on p. 51 indicates that the essay in question was written in early 1965.)
3. Donald V. Smiley, "The Two Themes of Canadian Federalism," *Canadian Journal of Economics and Political Science* 31 (1) (February 1965): 80–97.
4. Canada, Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, *Final Report* (Ottawa: Queen's Printer, 1972); and Canada, Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (Ottawa: Minister of Supply and Services Canada, 1979).
5. Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven: Yale University Press, 1977), pp. 1–24.
6. Ibid., p. 1.
7. Arend Lijphart, "Introduction: The Belgian Example of Cultural Coexistence in Comparative Perspective," in *Conflict and Coexistence in Belgium, the Dynamics of a Culturally Divided Society*, edited by Arend Lijphart, Research Series No. 46 (Berkeley: University of California, Institute of International Studies, 1981), pp.5–6.
8. "L'on affirme couramment [qu'un système dualiste] est beaucoup plus fragile que ceux où le nombre d'unités composantes est plus élevé. Les causes que l'on croit distinguer à ce fait sont nombreuses. Mais, pour l'essentiel, l'explication tient en ceci que dans une structure à deux aucun système de contrepoids ne peut s'exercer. Dans une configuration plurale, le réseau de conflits habituels est marqué par un jeu subtil d'alliances synchroniques et diachroniques selon les sujets entre différents Etats-membres. [Beaufays here is discussing the possible federalization of Belgium along linguistic lines, and more generally the difficulties inherent in bicommunalism.] L'on est simultanément alliés et adversaires, on le sera et on l'a été. Cela exige donc une certaine retenue dans la lutte et provoque des solidarités par-delà le cas qui divise présentement. Nombre de marchandages sont ainsi possibles qui viennent atténuer l'intensité du conflit." Jean Beaufays, "No More Belgium?" Paper presented to the American Political Science Association, Washington, D.C., August 1984, mimeographed, p. 22.
9. André Raynauld, "The Quebec Economy: A General Assessment," in *Quebec Society and Politics: Views from the Inside*, edited by Dale C. Thomson (Toronto: McClelland and Stewart, 1973), pp. 147–48.
10. I am grateful to Kenneth D. McRae for this observation.
11. Michel Brunet, "Trois dominantes de la pensée canadienne-française: l'agriculturisme, l'anti-étatisme et le messianisme," in his *La présence anglaise et les Canadiens* (Montreal: Beauchemin, 1958), pp. 113–66.
12. Gérald Fortin, "Socio-cultural Changes in an Agricultural Parish," in *French-Canadian Society*, edited by Marcel Rioux and Yves Martin, vol. 1 (Toronto: McClelland and Stewart, Carleton Library Number 18, 1964), pp. 86–106.
13. David Kwavnick, ed., *The Tremblay Report, [Abridgement of the] Report of the [Quebec] Royal Commission of Inquiry on Constitutional Problems* (Toronto: McClelland and Stewart, Carleton Library Number 64), p. 28.
14. Ibid., p. 45.
15. Ibid., p. 43.
16. Ibid., p. 50.

17. Ibid., p. 58.
18. Ibid., pp. 59–60.
19. Ibid., p. 50.
20. Jean-Marc Léger, "Aspects of French-Canadian Nationalism," in *Quebec Today*, edited by Douglas Grant (Toronto: University of Toronto Press, 1960), pp. 310–29.
21. Léon Dion, "The Origin and Character of the Nationalism of Growth," *Canadian Forum* (January 1964): 229–33.
22. Canada, Task Force on Canadian Unity, *A Future Together*, pp. 25–31.
23. John Porter, *The Vertical Mosaic: An Analysis of Social Class and Power in Canada* (Toronto: University of Toronto Press, 1965), p. 383.
24. Ibid., pp. 72–73.
25. Literally, "blossoming": implies self-confidence, enabling the society to move beyond defensiveness or self-imposed cultural isolation.
26. Pierre Fournier, "The New Parameters of the Quebec Bourgeoisie," in *Quebec State and Society*, edited by Alain G. Gagnon (Toronto: Methuen, 1984), pp. 201–27, and Jorge Niosi, "The Rise of French Canadian Capitalism," in ibid., pp. 186–200.
27. François Vaillancourt, "Le statut du français et des francophones au Québec 1960–1980," mimeo at Centre de recherche en développement économique (Montreal: Université de Montréal, 1984).
28. Kwavnick, *The Tremblay Report*, p. 27.
29. Québec, ministère de Développement culturel, *A Cultural Development Policy for Québec*, vol. 1 (Quebec: The Department, 1978), pp. 45–87.
30. Ibid., p. 52.
31. See Allan Tupper, *Bill S-31 and the Federalism of State Capitalism*, Discussion Paper 18 (Kingston, Ontario: Queen's University, Institute of Intergovernmental Relations, 1983).
32. J.A. Corry, "The Uses of a Constitution," in *Law Society of Upper Canada, Special Lectures, 1978* (Toronto: Richard de Boo, 1978), p. 3.
33. George Grant, *Lament for a Nation: The Defeat of Canadian Nationalism* (Toronto: McClelland and Stewart, 1970).

4

# Treaty-Making Power in the Context of Canadian Politics

## *An Exploratory and Innovative Approach*

GEORGE J. SZABLOWSKI

Treaty-making power is attracting increasing interest among constitutional lawyers and scholars. Concurrently, the subject has become a source of heated political controversy. When it comes to treaty-making and implementation, is there a way to bring together harmoniously the interests of local and regional communities with the interests of the world order?

This study, as its title states, takes an exploratory and deliberatively innovative approach to that question and develops a comprehensive and consistent argument for major reforms in the mechanisms for treaty-making and implementation. Among the changes suggested are the abolition of royal prerogative and the creation of a federal-provincial High Commission on Treaties and International Agreements.

The study begins by analyzing the international environment and drawing two conclusions: first, that the scope of multilateral treaty-making will continue to expand into areas of policy and activity that fall, in Canada, within the legislative jurisdiction of the provinces; and second, that our present constitution and institutions are ill-equipped to deal effectively with the demands that will continue to emanate from the international environment.

The study next examines Canada's domestic environment, focussing on the structure of intergovernment policy relations, the scope of provincial international activities already on record, and the role of "royal prerogative," an anachronistic source of authority inherited with other British traditions.

Three conclusions emerge from this analysis.

1. The structural pattern of intergovernment relations promotes and fuels adversarial positions and attitudes that make effective consultation and the resolution of conflict difficult and at times impossible. Each government establishment shows increasing competitiveness for political, human, natural and physical resources — resources that any one agency can have only at the expense of another. The lack of cooperative consensual institutions in such an intensely adversarial government context makes Canada less effective as a participant in the international forum.
2. Provincial international activities are at least in part a consequence of autonomy, equality and competition and can be viewed as necessary extensions of provincial domestic jurisdiction. On the whole, they do not pose major constitutional or political problems. A special case is made in this area for Quebec, whose international treaty-making is rooted in its mission to increase and enrich whatever links will create and preserve a vibrant francophone culture and society in North America.
3. Royal prerogative, or the vesting of treaty-making power in the Crown, is anachronistic and unsuitable for a modern federal state because reliance upon it leads to legal confusion, diminished governmental accountability, and greater difficulty in conflict resolution among governments.

The third section, on the normative perspective, deals first with the twin bases of Canadian constitutional theory — the Westminster model of responsible government and the principles of federalism — and points out those features that are contradictory and difficult to reconcile in both theory and practical applications. These competing models of governing are characterized by two different styles of political behaviour (adversarial and consensual) which are incongruent with one another and which are not given a balanced expression in our political institutions and processes.

This imbalance is particularly acute in the foreign policy sector, including treaty-making. Remedies are required, and this study proposes that the necessary innovations and changes should be guided by five principles: (a) the presence of Canada as a single, unified and independent state in the international forum; (b) appropriate balance between responsible government and federalism in our political institutions and processes, including treaty-making; (c) true reflection of the heterogeneity of Canadian interests in the making of treaties; (d) obligatory consultation among governments whenever treaty negotiations affect matters within provincial legislative jurisdiction, along with special recognition of the role of Quebec; and (e) government accountability for treaty-making to both federal and provincial legislative assemblies.

Guided by such principles, I propose two sets of reforms. In the short and medium term, a statutory federal-provincial consultation commission should replace the current, voluntary, and ad hoc consultation between Ottawa and the provinces when international agreements affecting provincial jurisdiction are to be negotiated, signed, ratified and implemented. In the longer term, major changes are needed in the constitutional basis and practice of treaty-making, including abolition of royal prerogative and establishment of a High Commission on Treaties and International Agreements. This commission would be joint federal-provincial in its character and it would recognize a pre-eminent role for Quebec in treaties with francophone aspects.

In choosing reform over the status quo, I share the outlook expressed during Canada's centennial year by Gerald E. LeDain:

> There come times in the lives of men and nations when the dislocations and stresses produced by the changing flux of forces to which we are subject outrun our power of improvised and pragmatic response, and a new synthesis and integration are required.

## Issues and Constraints: The External Environment

### *Specialization, Interdependence and the Expanding Scope of International Agreements*

It is evident that relations among nation states are becoming more differentiated and specialized. The current emphasis in these relations is on producers and purchasers of specific goods and services and on the "cost/benefit" ratio as the most critical motivating factors in the behaviour of states vis-à-vis each other. Increasingly, the international political system reflects the reciprocal specialized socio-economic needs of states, groups of states, and world regions.[1] This development is of particular significance for Canada, a country vitally dependent on the ongoing flow of capital, goods, services and people across international boundaries. It is a development that could improve our opportunity to shift and redistribute at least a portion of our economic reliance on the United States elsewhere in world markets.

The recent reorganization of the Department of External Affairs was no doubt intended, at least in part, as a response to the continuing process of differentiation and specialization of the international system.[2] New areas of expertise within the department include international finance and investment; energy, transport and science; agriculture, fish, and food products; and industries and resources. Clearly, Canada's external relations are undergoing a change. In these still-developing circumstances, our capacity to act decisively and effectively and to

maximize our potential short- and long-term benefits emerges as a key strategic factor.

New developments are also taking place in the international legal system. There is an ongoing shift from bilateral to group diplomacy in the context of complex and specialized international organizations, such as the OECD, GATT, World Bank, IMF, and EEC. International lawmaking is becoming a function of the collective decision-making process associated with negotiating multilateral international agreements (conventions), many of which deal with highly specialized or technical subject matter. These international conventions result in networks of specialized legal links among states with different political and economic systems. In this way, world interdependence is becoming institutionalized. International regulation now covers many areas of activities, such as "international transportation and communications, the protection of industrial and intellectual property, the movement of goods and persons, the management of natural resources, the protection of the environment, the uses of the oceans and outer space as well as the international protection of human dignity and welfare" (Williams and de Mestral, 1979, p. 305).

Obviously, such developments call for a new type of professionalism in international negotiation and diplomacy and for the development of expertise in many fields of social and economic life to meet the challenges of the expanding scope of international agreements (Wildhaber, 1971, p. 13). Modern multilateral conventions deal with virtually every aspect of governmental activity, including, of course, matters within provincial legislative jurisdiction in Canada. It should be expected that in the future an increasing number of treaties will deal, in whole or in part, with such matters. For example, in recent years, Canadian representatives participated in the negotiation of international agreements on civil aspects of international child abduction; recognition of divorce and legal separation, the law applicable to traffic accidents, taking of evidence abroad in civil or commercial matters, the international administration of estates of deceased persons, the law applicable to products liability, and recognition and enforcement of decisions relating to maintenance obligations, uniform law on the form of an international will and contracts for the international sale of goods (Leal, 1983, pp. 27–30). Even more recently, officials of Communications Canada took part in drawing up international guidelines providing protection against misuse of personal data stored in computers, under the auspices of the Organization for Economic Co-operation and Development (OECD), of which Canada is an active member.

The content of these agreements illustrates how little the thrust of international lawmaking and regulation is concerned with such "parochial" issues as the division of legislative powers in federal states such as Canada. It also points up the need for professional, technical and

administrative expertise in negotiating. This expertise is available not only in Ottawa but also, increasingly, in provincial governments, and in the private sector. Many of these conventions have been signed and ratified by authorized representatives of the federal government subject to appropriately worded "federal state clauses"[3] which permit their limited territorial applicability in Canada (Leal, 1983, p. 40). If this is a trend for the future, it demonstrates a disturbing contradiction between our apparent capacity to act in the international forum in concert with other nations and our inability to resolve territorially bound differences within Canada and to formulate a national consensus on policy preferences. As the scope of international activity and regulation grows and modernizes, our internal mechanisms for federal-provincial consultation and conflict resolution appear to be out of step and to lack adaptability.

## *International Law and Federalism*

There is little evidence that the relationship between international law and federalism, aptly characterized as a "love/hate" relationship (Bernier, 1973, p. 269) is likely to undergo marked change. On the contrary, the trend in the international forum appears to be against making any significant concessions to states with federal constitutional systems. The rejection by the 1969 session of the Vienna Conference[4] of a proposed draft article permitting component units of federal states to "possess a capacity to conclude treaties if such capacity is admitted by the federal constitution"[5] supports this view. The position of the Canadian representative, who strongly argued against the adoption of the proposed article, was supported by most Western bloc states, and the proposal was finally defeated by a substantial majority.

The Vienna Convention codified most but not all of the existing customary law of treaties.[6] In general, customary international law will give effect to a constitutional provision of a federal state which grants treaty-making power to its component units. On the other hand, the decision not to include draft article 5(2) in the Vienna Convention may be construed as an intention of the lawmaking states to depart from this customary rule and to limit the legal capacity for treaty-making to fully recognized states, whether unitary or federal. The most widely held position on this issue combines two legal domains: the internal-constitutional and the external-international. Thus, a government representing a component unit of a federal state (such as a Canadian province) would have to meet two preconditions before its claim to treaty-making capacity could be accepted under customary international law: first, the constitution of the federal state must expressly grant either full or limited treaty-making power to the component unit (neither silence nor ambiguity of the constitution are enough); second, the external independence of

the component unit must be recognized in the international forum.[7] Achievement of external independence is a result of determined political action. In international law, it is a question of fact, which, when established, will produce legal consequences, i.e., international personality and the capacity to enter into international agreements.

Articles 27 and 46 of the Vienna Convention contain additional manifestations of "hostility" between international law and federalism. The combined effect of these provisions is that a federal state is unable to invoke its internal law (such as, for example, the distribution of legislative powers) as a justification for its failure to perform an obligation contracted under a valid treaty, except when failure to perform is due to an irregularity known in advance to the other contracting parties and when it concerns an internal rule of fundamental importance. However, as Brownlie (1982, pp. 610–11) points out, "the extent to which constitutional limitations on the treaty-making power can be invoked on the international plane is a matter of controversy, and no single view can claim to be definitive."

For some time, federal state clauses used in international treaty negotiations have been accepted under international law and practice only with great reluctance. Perceived as fundamentally inconsistent with the doctrine of the equality of states, "such clauses create a disparity and lack of mutuality in the respective international obligations."[8] However, adopting a more pragmatic approach, Ottawa apparently intends to rely on article 29 of the Vienna Convention which is "tailor-made for the Canadian situation . . . in that it allows that the application of a treaty may be limited territorially if the treaty so provides" (Leal, 1983, p. 24). This article, first, establishes the general rule that a treaty is binding on the contracting party with respect to its entire territory, and then it allows an exception "when a different intention appears from the treaty or as otherwise established."[9] Pursuant to this exception, Canada is free to negotiate a clause whereby one or more of its "territorial units which have their own rules of law"[10] (i.e., provinces) could be either included or excluded from the treaty by a simple declaration of the federal government. The clause is a highly expedient device.[11] It does not refer to the constitutional limitation of Ottawa's capacity to implement international agreements, nor does it require consultation with the provinces before a declaration is made. Although the declaration is envisaged as a unilateral act of the federal government, presumably Ottawa would obtain relevant provincial consent before a new "territorial unit" was included in the terms of the treaty.

From Ottawa's perspective, appropriately worded federal state clauses are necessary because they permit the federal government to participate in the international forum as if no constitutional impediments existed, and to negotiate international agreements first and postpone the cumbersome process of consultation with the provinces to a later

date.[12] If one or more provinces withholds consent, even after the treaty has been in effect for several years, Ottawa cannot be blamed internationally, either for the obstinacy of provincial governments or for its own inability or unwillingness to engineer a consensus. Internally, such a situation permits balkanization of the law in Canada in a field that has been specifically selected and intended for uniform international treatment. It may also make general consensus more difficult to reach in the face of a fait accompli. In the final analysis, the use of federal state clauses in multilateral conventions, no matter how expedient internationally, is no answer to the fundamental problem — the absence of an effective institutional forum for cooperative federal-provincial decision-making in the area of treaty-making and implementation.

The customary international law of treaties takes its roots from European absolutism, according to which monarchs possessed exclusive personal powers to enter into solemn treaties with each other. Over the years, treaty law and practice have been democratized and simplified. Thus, the Vienna Convention defines a treaty as an international agreement concluded between states and governed by public international law.[13] This definition reflects the modern practice whereby a treaty can be signed by any duly authorized representative of the state, and can deal with any matter, whether political, commercial, technical or other. "Political treaties" between heads of states concluded with "full powers" have been largely replaced by a multitude of intergovernmental agreements which enjoy the same validity and "solemnity" under international law (Brownlie, 1982, p. 603). This process of democratization (Wildhaber, 1971, pp. 9–14) of international treaty law is highly relevant for Canada, which continues to rely on an ancient, unwritten and anachronistic source of authority called "royal prerogative" in all its activities in the international forum. In fact, this British tradition (followed by Canada) of vesting exclusive treaty-making power in the Crown and the executive contrasts sharply with the procedures adopted by most pluralistic democracies where "both the executive and the legislature have a voice in determining the crucial external and internal policies of the nation" (ibid., p. 26).

## Issues and Constraints: The Domestic Environment

The first section presented a glimpse of external forces as they impinge upon Canada's freedom and opportunity to contract with other nations. Although the overall importance of these developments in the international forum must be acknowledged, our domestic political environment exerts a much more direct and forceful influence. This section examines three realities of Canadian political and constitutional life: (a) the structure of intergovernmental policy relations, which sets the stage and defines the limits for conflict and cooperation; (b) provincial interna-

tional activities, which are a function of autonomy and competition; and (c) the remaining constitutional anachronisms, which foster uncertainty, confusion and divisiveness.

### *The Structure of Intergovernment Policy Relations*

In world terms, Canadian government institutions are relatively young; yet they have developed an unmistakable and probably unique pattern of structural relationships. The individual elements of this pattern have been dealt with before in political science literature; however, they have not been brought together in a synthesis, as presented here. A structural pattern implies a certain degree of permanence. Its characteristic elements or features are not mutually exclusive but rather related to each other, overlapping and even contradictory. Taken together, they should tell us something about future prospects for intergovernment conflict or cooperation. The key features of this structural pattern are the following:

- Autonomy. Each provincial government, as well as Ottawa, is autonomous in the sense that it possesses the political capacity to act authoritatively as it wishes for the benefit of its territorially bound constituencies and to define the priorities and objectives for such action. A provincial premier, for instance, is a political leader, not dependent on anyone else, least of all on his federal counterpart.[14]
- Executive-bureaucratic dominance. At each government level, decision making is centralized in a cabinet system integrated with its bureaucratic establishment by a network of coordinating central agencies and secretariats. This central apparatus controls not only the policy-making process, but also the legislative process and the administrative process (Szablowski, 1975; 1977; Szablowski and Campbell, 1979).
- Comprehensiveness. Ottawa and the provincial governments have similar outlooks; they view their respective mandates to govern in comprehensive terms encompassing the entire policy arena. As policy makers, government executives do not feel constrained by the constitutional division of legislative powers (Cairns, 1977; Chandler and Chandler, 1979; Szablowski, 1977).
- Interdependence. At the same time, these governments are acutely aware that the effectiveness of their actions is dependent on the actions of other governments. Thus specific policies and programs administered by one province cannot be understood and analyzed in isolation, because they form part of a network of interdependent federal and provincial activities, which act upon and counteract each other.[15]
- Decisional and administrative equality. Larger provincial governments (Ontario and Quebec) have already caught up with Ottawa in bureaucratic expertise and professionalism. The other provincial gov-

ernments are at various stages of this development, but the direction is unmistakable. In consequence, the past attitude of deference to Ottawa's decisional and administrative "superiority" has been replaced with an attitude of vigilant equality and professional one-upmanship (Cairns, 1977; Szablowski, 1978).

- Competitiveness. This characteristic is a direct consequence of some of the factors identified above. In recent years, however, competitiveness has greatly intensified, fueled by economic restraint and scarcity. Today, all government institutions engage in a fierce struggle for highly valued and essential resources: political, human, natural and physical.

The key to understanding the structural pattern and the way it exerts its long-term impact lies in the interplay of the individual characteristics. Thus, executive-bureaucratic dominance strengthens the sense of autonomy and leads to a comprehensive approach to policy making. Interdependence of policies and programs in the context of autonomous and equal institutions does not enhance cooperative action; rather, it promotes the assumption of adversarial positions. Competition intensifies with the cumulative effect of the other factors.

Autonomy, executive-bureaucratic dominance, and comprehensiveness in policy making are further stimulated by the anachronistic constitutional status of the cabinet, an institution developed in the United Kingdom and adopted in its entirety in Canada. Theoretically, cabinet's power to make policy and to solve problems is unlimited, and this principle, part of our unwritten constitution, applies equally to the federal and provincial levels of government. "Cabinet does not consider the nature of the legal source from which powers are derived. It is concerned only with the problems of government. . . . Cabinet has a life and an authority of its own . . . it acts whether there are already legal powers or not" (Jennings, 1947, pp. 87–88). Provincial cabinets operate under the same principle, which in effect places no constitutional constraint on these institutions. Since the Constitution distributes only legislative powers between Ottawa and the provinces, the doctrine of ultra vires has no relevance to cabinet decision making. Prime ministerial domination of the cabinet structure and process, and the prime minister's control over its personnel, adds further weight to this argument.

An important recent study by Eric Nordlinger demonstrates convincingly that the governments of modern pluralistic democracies are much more autonomous and effective governing systems than has been traditionally believed. Their policies and programs, administered by complex bureaucracies and integrated with powerful socio-economic interests, produce a continuous, lasting and profound impact on their societies. Instead of responding to events, modern governments tend to

initiate and to intervene; sometimes they will act contrary to the demands and preferences of their societies (Nordlinger, 1977, chap. 7 and pp. 207–79). Allegedly non-interventionist ideologies of the so-called neo-conservative governments shift priorities from one policy area to another (for example, from social welfare to defence) but do not in reality arrest or reverse this structural trend.

The Canadian federal system has often been analyzed in terms of oscillation between centrifugal and centripetal forces. Autonomy of the provincial governments was increased at the expense of Ottawa's and vice versa. Such oscillation is no longer possible because "both levels of government are strong . . . [and] neither can dominate the other" (Cairns, 1977, p. 13). Political reality has caught up with constitutional theory.

The structural pattern described above calls for the following observations. (a) It promotes and rewards adversarial positions and attitudes at all levels of government. These in turn tend to intensify conflict among contending bureaucratic and political interests. Mechanisms for conflict resolution or diffusion are lacking. (b) It operates notwithstanding any ideological or partisan affinity that may exist between Ottawa and a particular provincial government, or between two provincial governments. (c) It is permanent in the sense that a reversal of its ongoing development cannot be accomplished in a short or medium term, and would probably be prohibitively costly even in the longer term. (d) The size and administrative and decisional capability of the bureaucracy at each level of government has probably reached a peak level. Any further attempts at "Ottawa-building" or "province-building" would be counterproductive and, in the final analysis, would cancel each other out. The argument currently made against continuing acquisition of more sophisticated nuclear weapon systems by the superpowers applies mutatis mutandis to federal-provincial relations.

## *Provincial International Activities*

Provincial international activities should be seen as a direct consequence of the powerful structural pattern of intergovernmental policy relations already discussed. This conclusion is as valid for the activities of such provinces as Ontario, Alberta and British Columbia, as it is for Quebec. Systematic studies of this topic have begun only recently; consequently, the information presented here is still incomplete and to some extent tentative.

### TRANSBORDER AGREEMENTS

It is not generally realized to what extent Canadian provincial governments regularly engage in activities that often lead to the conclusion of

various types of transborder arrangements. These arrangements represent a natural extension of routine day-to-day interactions on a wide range of matters that have effects across international boundaries. Geographic and economic factors generally encourage states and provinces to engage in technical or administrative consultations on matters of mutual interest. According to T.A. Levy (1972, p. 10):

> given that seven provinces share the international border with American neighbours and the complexity of respective societies, the provinces and states cannot live in isolation with one another. Rather, collaboration for common purposes is natural and inevitable. In a number of cases, the provinces took initiatives because either provincial jurisdiction was paramount or because jursidictional questions were unclear or because Ottawa chose not to exercise its own authority.

Historically, agreements have been concluded between states and provinces on a wide range of matters, such as international bridges, common waterways, forest fire fighting, and other technical areas. Direct relations between provinces and states have increased as the provinces have acquired greater bureaucratic capabilities and expertise and as the international agenda has become dominated by economic and social issues. One student of these relations has discovered that "federal authorities have been aware of the range of relationships between states and provinces for many years, although they have not monitored them closely" (Johannson, 1978b, p. 366).

The most comprehensive study of state-province interactions was conducted for the U.S. State Department in 1974. (Swanson, 1978, pp. 221–65). This study found some 766 existing agreements, understandings or arrangements between provinces and states. Almost a third were of a formal contractual nature. The subject matter ranged widely over most areas of government activity and covered a greater range of activities than might have been expected, including transportation, natural resources, commerce and industry, human services, environmental protection, education and culture, energy, public safety, agriculture, and military and civil defence. The three most populous Canadian provinces accounted for 61 percent of the interactions (Ontario 29 percent, Quebec 19 percent, and British Columbia 13 percent). Most of the contacts took place at relatively low levels, represented ad hoc responses to administrative problems, and were more likely to take place between geographically contiguous partners (62 percent). The study concluded that the inevitable growth of state-provincial interactions would not pose a threat to overall Canadian-American relations as long as states and provinces recognized the limits of their constitutional capacities and did not seek to score points against their respective federal governments, and Ottawa and Washington contented themselves with monitoring rather than controlling these developments.

Other analysts, however, have not shared this optimism and have expressed fears that increased state-provincial interactions may constitute a threat to the integrity of national foreign policy. A study published in 1976 found that the type of international activity engaged in by most provinces was either economic (commercial and industrial) or cultural in nature, and thus came into conflict with the new orientations taking place in the foreign policies of countries. The authors expressed some fear:

> [The] forces that have given rise to greater provincial activity . . . are not short-term ones. Nor are the divergent interests they have in part reinforced and in part created likely to be managed by mere consultation. To the extent that these forces prevail, therefore, we do not think it an exaggeration to say that they point to fundamental challenges to the present patterns of the Canadian federal system and of the country's most important international relationship. (Levy and Minton, 1976, p. 27)

More recent research indicates that earlier reports may have been conservative in their estimation of the degree of state-province interactions. A 1978 study of British Columbia's relations with both federal and state governments in the United States found a total of 649 interactions divided by level of authority as follows: bureaucratic 81 percent, ministerial 15 percent, and premier 4 percent (Johannson, 1978a). The author's conclusions are highly revealing:

> Expressions of frustration with the actions of the federal government were readily offered by provincial officials, and while this is perhaps typical in a province where "fighting Ottawa" is a fact of political life, this frustration should not be ignored. This basic sense of conflict stems from the inability to successfully influence Canadian policies where there has been a demonstrable difference in perceived priorities. . . . The consequences of a lack of effort by the federal government to ameliorate provincial interests within Canadian foreign policy are potentially very significant. Without a recognizable change in Canadian policies, provincial frustrations may be expected to increase, perhaps leading to even more international activities by the provinces feeling slighted. . . . In short, the potential consequences of growing provincial international behaviour, coupled with a lack of federal efforts to reduce tensions, could prove to be of enormous significance for national unity. (Johannson, 1978a, pp. 231–32)

The extent of formal agreements and interactions is greater than expected, partly due to the presence of a variety of regional mechanisms set up to deal with joint problems. Some policy fields lend themselves more readily to informal contacts because bureaucrats belong to the same professional organizations. Yet according to Levy and Minton (1976, p. 26):

> state and provincial governments clearly see an increasing need to interact and co-operate with each other. Generally, the impulse to collaboration has

come from the lower levels of provincial and state bureaucracies. The individuals involved on both sides have been disinclined to view their interactions as "foreign relations" and have seldom undertaken their mutual activities with a view to scoring constitutional points — as distinct from political points — within their respective federal systems. In short, province-state interactions have traditionally been carried out in a businesslike, friendly and informal manner, and stem in good measure from what is perceived to be administrative necessity.

Although the scope of provincial transborder activities appears to be considerable, their political or constitutional significance should not be exaggerated. Provincial governments (particularly those with a favourable credit rating) are free to enter into binding contracts with any corporate legal entity, foreign or domestic, as long as such contracts are subject to domestic private law of contract, either state or provincial. Many of the "agreements" are probably not enforceable before the courts because they do not stipulate the performance of any specific obligations by the parties. To the extent that they do, however, such agreements are clearly enforceable before local U.S. or Canadian courts, and they will normally contain provisions to that effect. Anyone concerned about the foreign policy implications of some agreements should realize that Ottawa can do next to nothing about it, legally or constitutionally. In its 1968 paper on "Federalism and International Relations" (Canada, Department of External Affairs, 1968b, p. 44), the Department of External Affairs admitted that "consideration has been given to the ways in which the provinces themselves can act in matters of an informal, administrative or contractual nature." "Private law contracts" between the provinces and foreign legal entities (mostly U.S. states) may produce minor disturbances, but they constitute no threat to the main line of Canadian foreign policy.

## Representations Abroad and Memberships in International Organizations

Traditionally, most provinces have had some offices abroad. Ontario and New Brunswick had offices in London in 1868, and Quebec had *agents généralis* in Great Britain (1874) and in Belgium (1911). In addition, the Canadian Commissioner General in Paris from 1882 to 1910 acted as financial and commercial delegate for Quebec. Ontario opened its London office in 1908 with the express purpose of encouraging commercial links. The usual function of international representatives was to promote emigration to Canada and to encourage commercial emigration to Canada and to encourage commercial relations, both tasks outside the bounds of the diplomacy managed by the British Empire. The possibility of provinces, particularly Alberta and Ontario, opening Washington offices was the subject of much discussion in the 1970s, though no

province has summoned the courage to challenge directly Ottawa's relations with the U.S. government by establishing a permanent office in the U.S. capital (Jacomy-Millette, 1976a, pp. 35–36).

Several provinces currently maintain networks of international offices — about 40 in all, located in Europe, Asia, Latin America, and the United States. The most important were established in the 1960s. Quebec maintains the largest number of international offices (14), of which 7 are in the United States. In addition, Quebec maintains representation in 6 other foreign locations: immigration officials in 3 Canadian embassies; a tourism office in Washington; a cooperation representative in Abidjan; and a provincial representative in Haiti. Ontario currently has 11 foreign offices, down from its high of 15. Five of these are in the United States and all are primarily concerned with trade promotion. Alberta has 5 international offices, including one in Los Angeles and one in Houston. Nova Scotia has 4 (2 in the United States) and British Columbia has 3 (only one in the United States). Manitoba and Saskatchewan each maintain only one foreign office (Minneapolis and London, respectively). At least 6 provinces have London offices, a situation which took on added importance when the patriation of the Constitution was under consideration by the U.K. parliament. For several provinces, London is the base for all their European activities. Newfoundland, Prince Edward Island, and New Brunswick have no permanent representation abroad.

Not all provincial international offices share the same functions. In general, these offices are staffed by individuals who, like diplomats, facilitate international contacts (for example, visits of provincial officials and ministers abroad, or of foreign individuals to the provinces), monitor and report, and participate in relevant negotiations. Several of Quebec's *délégations générales* have a general mandate and exercise responsibilities in numerous sectors. Ontario's offices in Brussels and Paris and some of Alberta's offices have similar wide-ranging responsibilities. Moreover, Quebec, especially under the Parti québécois, has used its international representation to promote support for its sovereignty-association option among foreign governments. Similarly, many of the provinces opposed to the federal patriation initiative in 1981 used their London offices to try to persuade the British to prevent its passage. However, most provincial international offices have narrower briefs, usually in the areas of trade promotion, tourism, culture and education, or general information. Ontario's external relations are oriented primarily toward expanding markets for the province's manufacturing sector: all but two of the province's international offices report directly to the Ministry of Industry and Trade and not to the Ministry of Intergovernmental Affairs. Alberta's two U.S. offices are headed by officials from the Department of Economic Development.

Provincial offices abroad do not enjoy a uniform legal status. At one extreme, Quebec's Paris office enjoys consular status, but in practice the province's *délégué général* has been accorded quasi-ambassadorial privileges. At the other end of the scale, offices in the United States are considered to be the same as non-profit organizations incorporated abroad and are subject to U.S. foreign agents registration legislation (Jacomy-Millette, 1976a, pp. 36–40).

In addition to having direct provincial representation abroad, the provinces have increasingly come to participate in international organizations. Of course, much activity on this front came as a result of Quebec's participation in the early stages of the Agence de co-opération culturelle et technique (Agency for Cultural and Technical Cooperation). However, ever since the 1960s, several provinces have demanded a role in the determination of foreign policy questions that affect their areas of jurisdiction. In such fields as economic development, social policy, cultural and educational matters and environmental issues, the provinces have exerted a substantial influence on Canadian participation in international organizations.

Most of these efforts, however, have not been systematic, and there are no established standards relating to overall provincial participation. Sometimes, provincial governments are allowed to participate as part of the Canadian delegations to such organizations as the ILO, UNESCO, the UN Human Rights Commission, the OECD, and certain Commonwealth meetings. At other times, Ottawa tries to coordinate its efforts with the provinces through federal-provincial meetings. For example, the views of the Council of Ministers of Education of Canada are often solicited as part of the preparation for a UNESCO or OECD meeting. However, Ottawa is not obliged to express provincial views at these international gatherings.

Only recently has Ottawa seemed willing to consult more extensively with the provinces in the crucial area of international trade. For years, provincial governments have sought a more active role in negotiations of the General Agreement on Tariffs and Trade (GATT), but the federal government has generally considered the provinces to be just one of the several constituencies to be consulted, along with business and other private sector groups. At the same time, there seems little indication that the federal government is willing to entertain an enlarged provincial role in international trade negotiations, and hence a more visible profile for the provinces in the international forum. In other areas, notably energy and natural resources, the provinces' willingness to become internationally involved has not produced an encouraging response from Ottawa. In general, Ottawa's rigidity in these matters does not appear to be in keeping with the spirit of its own proposals for cooperation and consultation made in 1968 (Canada, Department of External Affairs, 1968b, pp. 43–45).

## QUEBEC, ALWAYS A SPECIAL CASE

Since the early 1960s, Quebec has kept up its pressure for greater autonomy in international relations.[16] In 1965, Gérin-Lajoie, then Quebec minister of education, concluded an entente with representatives of the French government providing for a series of educational exchanges and cooperation. This was the first time that a province had initiated, negotiated and signed an international agreement with a foreign government on its own. On the same day, Paris and Ottawa exchanged diplomatic notes approving the entente. Quebec took the position that it had not sought federal authorization to conclude the agreement and that it was free to enter into treaties in areas within provincial jurisdiction.[17]

Later in 1965, the Canadian government concluded an umbrella agreement (*accord cadre*) with the French government whereby any Canadian province was authorized to make individual agreements with France in relation to educational, cultural, scientific and artistic matters, provided Ottawa was notified in advance. Ignoring the Ottawa-Paris *accord cadre*, Quebec's minister of cultural affairs signed another entente with France shortly thereafter. Claude Morin, former deputy minister of intergovernmental affairs in Quebec, commented later as follows:

> we must understand that the federal aim in 1965 was to keep Quebec well under control by locking it into the framework of a general agreement made after the event, and minimize what Quebec was doing by citing past or future acts by other provinces supposedly animated by international concerns which were identical to Quebec's. From this viewpoint Quebec could claim no particularism whatsoever, being only "a province like the others." (Morin, 1976, p. 36)

There was also significant controversy over Quebec's unilateral participation in international conferences. In 1968 and 1969, the conflict between Ottawa and Quebec was brought to a new level of intensity by Quebec's participation in international conferences on education in Gabon, France and the Congo, where it was treated as though it were a fully independent government.[18] In response, Ottawa suspended diplomatic relations with Gabon for more than a year. Although skirmishes between the two governments continued, mostly at the symbolic level, a compromise was finally struck before a conference to create an agency for technical and cultural cooperation among francophone countries. As a result, Quebec and two other provinces were included as part of the Canadian delegation and took an active part in the proceedings.[19] In more recent years, Quebec and Ottawa have reached a modus vivendi without abandoning their respective and conflicting positions on the treaty-making power and the Constitution.

The Quebec *Intergovernmental Affairs Act* currently in force was passed in 1974.[20] The language of the statute was carefully chosen, but it leaves no room for doubt that the National Assembly has authorized the government to establish and maintain relations with foreign governments and to conduct intergovernment, including international, negotiations. These statutory provisions are consistent with the constitutional position expressed in 1969 by the government of Quebec in its "Document du travail sur les relations avec l'étranger" (working paper on foreign relations). At the same time, it appears to challenge Ottawa's exclusive mandate in the area of foreign policy and treaty-making. This challenge may be more apparent than real, if Quebec's external activities are confined to specific subject matters within provincial jurisdiction (such as education, culture, and language) and if the Quebec government acts with Ottawa's authorization and consent.[21]

Looking back, it is fair to conclude that Quebec's international activities were conducted in pursuit of two objectives: first, to link Quebec society more closely with the francophone communities abroad through agreements that were "necessarily incidental" to the carrying out of domestic policy objectives within the provincial jurisdiction; second, to attain external independence and recognition in the international forum, which would produce legal effects in international law similar to those which had led to the achievement of Canada's external independence in the years 1919–31.[22] The first objective was successfully attained and resulted in great enrichment of the relations between Quebec and France and other francophone nations and communities. Attempts to reach the second objective failed.

Even if and when the options of independence and sovereignty association become less desirable and politically less feasible,[23] the position of any future government of Quebec is not likely to change dramatically with regard to its demand to participate directly in the making of international agreements in areas within provincial jurisdiction. The government mandate in Quebec will always be perceived as including an added responsibility which no other provincial government can claim — the historic mission of survival and its contemporary forward-looking counterpart of creating a dynamic francophone culture and society in North America. In the last section of this paper, it is suggested that this unique and vital role of Quebec can be effectively fulfilled through the constitutional innovations proposed there.

## *Royal Prerogative and the Constitutional Authority to Make and Implement Treaties*

Canadian scholars and legal practitioners agree that in Canada, as in theUnited Kingdom, international agreements are made under the con-

stitutional authority called royal prerogative. However, the nature of this authority and the consequences of its exercise are rarely examined. It is important and instructive to take a close look at the characteristics of royal prerogative and to discuss the political and constitutional consequences that arise from its use in the making of international agreements.

Royal prerogative is said to be: "ancient" because it can be traced back to the rights, privileges and immunities enjoyed by the monarch "as the highest feudal lord in the realm"; "inherent" because it derives from the "customary common law" of England; "unique" because it is an exclusive attribute of the Crown "not shared with subjects"; "legal" because it is enforced by courts; "absolute" because "once the existence, scope and form of it is established," the courts will not review it in deference to the Crown; and "residual" because, although it can be abrogated or diminished by statute, some of it apparently always remains.[24]

The devolution of royal prerogative in the foreign policy sector is a strange and mysterious process which, stripped of excessive legalisms, can be summarized in the following steps:

- Step 1. From the monarch to the governor general by letters patent, a peculiar constitutional document which itself is issued pursuant to the royal prerogative and signed by the prime minister "by His Majesty's command."
- Step 2. From governor general to the prime minister and cabinet by constitutional convention. The distribution of authority between the prime minister and the cabinet is not absolutely clear. However, some prerogatives, such as the appointment of ministers and ambassadors, are exercised by the prime minister alone, while others are exercised collectively by the cabinet. Authority to enter into international agreements most likely falls under the latter category.
- Step 3. From the cabinet to the secretary of state for external affairs (or the undersecretary) by practice (cabinet minute) or by order-in-council authorized pursuant to the *Department of External Affairs Act*.
- Step 4. In the case of authority to negotiate and sign an international agreement (plenipotentiary powers), from the cabinet (governor-in-council) to a designated official by order-in-council.
- Step 5. From the secretary of state for external affairs (or the undersecretary) to officials (diplomats) by practice.

"External prerogatives" include the authority to conduct foreign relations in general, declare war and make peace, and enter into international treaties. It is by virtue of external prerogatives that treaty-making, including negotiation, signing, and ratification, is an exclusively executive process in which parliament plays no significant part.[25] The constitutional rule that the "executive cannot alter the law merely by incurring

international obligations" became necessary precisely because parliament was excluded from the process.

The *Department of External Affairs Act*[26] provides statutory authority for the conduct of external affairs. Presumably, prerogative powers are exercised by departmental officials concurrently with statutory powers. However, the precise scope and limit of each are impossible to determine. This difficulty may have practical significance if the government wishes to exempt a specific activity (for example, negotiating a sensitive international agreement) from parliamentary scrutiny on the ground that it is carried out pursuant to prerogative powers.

Judicial deference to royal prerogative is not a matter of the past. In a recent decision of the Federal Court of Appeal, one of the judges wrote in his reasons for judgment as follows:

> It is these privileges and powers which today make up the "royal prerogative" which privileges and powers have continued to be exercised apart from and independently of Parliament — in the sense that, although they continue to exist by the will of Parliament, they do not derive from it — and which, once it was established that the King would act only on the advice of his Ministers, became in reality the privileges and powers of the government, and so of the Cabinet. . . . If the act is really an act of prerogative in the sense that it remains within the limits of the prerogative, the courts have no power to interfere with it.[27]

The interpretation of royal prerogative is a risky intellectual process which often leads to ambiguous, confusing and even contradictory results.[28] A 1956 study at McGill University on the "Creation and Implementation of Treaties in Canada" concluded that the letters patent constituting the office of the Governor General of Canada eliminated any doubt about the federal government's exclusive authority to make treaties. Many legal writers concurred with this conclusion, as books over the next 20 years attest. Between 1963 and 1968, however, a number of Quebec constitutional scholars came to a different conclusion and declared that those external prerogatives necessary for the conduct of provincial affairs devolved on the provinces. The government of Canada counterattacked in a 1968 policy paper that denied "unequivocally" any delegation of such prerogative powers to provincial lieutenant-governors and the existence of any provincial authority to make treaties. A year later, Quebec responded with another interpretation in favour of provincial competence based on the provinces' legislative jurisdiction. In several major comparative studies undertaken both inside and outside Canada in the 1970s and 1980s, such words as "unsettled," "conflicting," "complex" and "obscure" abound.

All prior interpretations of the letters patent and their effect on treaty-making power may have become irrelevant and "academic" in 1984 because of the latest decision of the Supreme Court in the *Newfoundland*

*Off-Shore Mineral Rights* case, in which the Court acknowledged Ottawa's exclusive competence to incur international obligations and to represent Canada on the international forum.[29] In this decision, made on the basis of public international law, the Court chose to ignore the letters patent and the cumbersome question of the devolution of royal prerogative.

The conclusions are inescapable. The royal prerogative is an anachronism in a federal state. Its existence and exercise lead to confusion and uncertainty, promote centralism, formalism and exclusivity in government activity, and diminish accountability. As a source of treaty-making authority, it makes resolution of federal-provincial conflict more difficult and gives contending governments ammunition to maintain their adversarial positions. It should be abolished.

## Guiding Principles: The Normative Perspective

### *Constitutional Conventions and Federalism*

Canadian constitutional theory has its roots in two normative political traditions: the tradition of responsible government (based on the Westminster model), which preceded Confederation, and the tradition of federalism, which was formally inaugurated in 1867.[30] The principles of responsible government were largely imported from the United Kingdom, while those of federalism grew out of the domestic political experience. Although the legal and institutional framework of federalism was established by the former *British North America Act* (now officially renamed the *Constitution Act, 1867*), it is now clear that the fundamental "rules of the game" and the pattern of institutional elite[31] relationships did not take shape until much later.

Most of the "rules of the game" of Canadian federalism have to do with the division of powers between Ottawa and the provinces as fleshed out, particularly, by judicial interpretations of sections 91 and 92. In addition, as time went on, political usages and practices employed by governing elites, both federal and provincial,[32] acting in the contexts of their respective institutions, began to crystallize into constitutional conventions.

In the *Patriation Reference*,[33] the Supreme Court embarked for the first time on a systematic examination of the concept of constitutional conventions[34] and the process of their development. The Court observed that federalism constitutes a particularly "fertile ground for the growth of constitutional conventions" (ibid., p.10) between legislatures and governments. It speculated that, possibly in the near future, a constitutional convention (rather than a mere practice) may require the holding of federal-provincial conferences on specific issues of common concern (ibid). Since conventions are "generally in conflict with legal rules"

(ibid., p. 11), such a new convention would modify an existing legal rule which currently gives Ottawa exclusive power to make unilateral decisions in these matters. More concretely, Ottawa's legal authority to enter into treaties irrespective of the subject matter may be effectively curbed by a new constitutional convention making intergovernmental consultation and consent obligatory. If Ottawa chose to ignore the convention, it would be acting legally but unconstitutionally. The existence of such a convention would, of course, depend on the precedents (past political practices and usages) coupled with the normative intent and a valid reason. Moreover, at some future time, the Supreme Court could very well examine the relevant evidence and, if satisfied with its weight, declare the existence of such a convention.

It is logical to assume that in coming to its decision the Court envisaged a continuous development of constitutional conventions which would, over time, significantly modify the existing legal rules, no longer suited to our federal political system. The object of such "organic" constitutional development is to bring the operation of the Constitution into accord with the "prevailing constitutional values or principles of the period" (ibid., p. 10). It is, equally, no exaggeration to infer from this remarkable decision that the Court was intent upon reaching a better balance between the dominant principles of responsible government rooted in the Westminster model and the less clearly articulated principles of evolving federalism.

## *Canada's Conflicting Models of Governing*

In order to bring forward the principles that ought to guide the constitutional and institutional innovations to treaty-making power, it is necessary to examine the essentials of the two normative traditions of Canadian constitutional theory. The aim in this exercise is threefold: to identify the key characteristics of each model, to sharpen the differences between them, and to describe the styles of political behaviour they tend to produce.

The key characteristics of responsible government (Westminster type) as a model of governing are party discipline, majority decision making, executive-bureaucratic dominance, "neutral" bureaucracy, ministerial and cabinet responsibility, comprehensive and exclusive policy process, centralized elite structure,[35] socio-cultural homogeneity and unity, and parliamentary "supremacy."

These characteristics, operating together in the framework of the central political institutions of the Westminster model (i.e., parliament, prime minister and cabinet, bureaucracy, and political parties), produce an adversarial style of political behaviour characterized by opposing actions, antagonism and divisiveness.

In adversarial politics, the legitimacy of government decision makers is derived from the electoral mandate and belongs exclusively to the winners. The losers, however, are protected by the procedural rules of the game; they have a right to be heard publicly, and to oppose and discredit the government, but they are excluded from the process of governing.

The career bureaucratic decision makers lack political legitimacy and are perceived as the instruments and subordinates of the elected political executive. Since their professional loyalty is to the political executive, and not to the general public, they must maintain an appearance of strict political neutrality, non-partisanship, anonymity, and a limited advisory role in decision making. In this way, they are protected from the heat of adversarial politics and they help foster the belief in fair play between Government and Opposition, notwithstanding the fact that they keep the latter deliberately in the dark about the issues and problems the Government decision makers face.

The doctrine of fair play gives the Opposition the right to maximize their chances of future electoral victory. This can best be accomplished when policy issues and problems are approached and dealt with strictly in an adversarial manner, as if they were susceptible only to conflicting or contradictory solutions. The opposing sides will often increase the intensity of conflict in order to sharpen the differences between them. Since political leaders assume that the general public holds relatively homogeneous values and beliefs, and that it values unity, they do not fear intense controversy over substantive issues. Thus polarization is perceived as a positive device which normally does not threaten the decision makers or their opponents or seriously affect the political stability of the country.

Governmental actors, federal and provincial, engage in adversarial decision making with equal zeal and compete ruthlessly with each other for highly valued resources and benefits. They will often recruit support from powerful clients and interest groups in order to combat their opponents.

This adversarial style of political behaviour makes two contradictory claims: first, that through the majority electoral mandate, the winners can effect major changes in substantive areas of policy in accordance with the wishes of the majority; and, second, that the executive-bureaucratic establishment will concurrently guard and maintain continuity and stability. Since in Canada provincial governments generally play the role of the opposition vis-à-vis the federal government, it is not surprising that the prevailing style of political behaviour in federal-provincial relations is typically adversarial.

In contrast, the key characteristics of federalism as a model of governing are division of powers between coordinate levels of government; decision making by accommodation and consensus; territorially rooted

policy issues and problems; "representative" and politically oriented bureaucracies; socio-cultural segmentation and tolerance of disunity; regional, local and competing elite structures; autonomous, but limited and interdependent, policy processes; inter-party bargaining, with possible coalitions; and divided power with checks and balances among executive, legislative and judicial institutions. These characteristics produce a consensual (i.e., sympathetic, unified or harmonious) style of political behaviour.

In a consensual system, the political legitimacy of governmental decision makers springs from their collective representativeness and their commitment to reach a substantive consensus. Substantive consensus does not always imply agreement by all participants on a specific course of action; those who differ may simply agree not to pursue their opposition any further. Reaching a substantive consensus results from a consensual procedure in which (a) opposition that leads to intense division and conflict is generally perceived as illegitimate; (b) consensus is seen as the only acceptable way to proceed; and (c) if consensus is impossible, the only appropriate outcome is a non-decision.

The political legitimacy of career bureaucrats also emanates from representiveness, a concept that may include coalition political parties, major interest groups, major regions of the country, and ethno-linguistic and other interests. Its pragmatic element is evident in the conviction that policy issues and solutions that affect specific groups and interests in society should be dealt with by those governmental actors most sympathetic to those groups and interests. In the course of decision making, these actors, both federal and provincial, facilitate the flow of information among levels of government, government organizations, and social groups and interests in order to maximize the chances of a consensus. Thus, the consultative process is institutionalized throughout society.

In the consensual model the idea that issues and problems can be resolved only by examining conflicting and contradictory solutions is rejected. Instead, solutions are seen as representing shades of grey, as reflections of social and economic interests in the country as a whole. Since ethno-linguistic and regional heterogeneity is a recognized and highly valued phenomenon, accommodation of these divergent values and interests becomes an essential ingredient of the decision-making process. Disunity is tolerated, but polarization of substantive issues along ethno-linguistic or regional lines of cleavage is not accepted, since it may lead to the destruction of the system.

The executive and bureaucratic decision makers at both levels of government do not claim an exclusive mandate to make policy decisions or to resolve socio-economic problems. Rather they see themselves as partners with key institutional and economic interests in society, whose participation in the decision-making process is equally important. Thus,

a high level of integration between governments and societies at large is an essential precondition for an effective process of consultation and consensus in all major policy arenas.

The consensual style of political behaviour also makes questionable claims and promises. It suggests that representativeness in the decision-making process extends to all groups and interests in society, while in reality dominant groups are overrepresented and peripheral non-establishment interests are underrepresented. It also proclaims that all consensual decision making produces effective policy, while sometimes it simply legitimizes the status quo.

The above analysis demonstrates clearly the degree of potential incongruence between the two models of governing. Yet, both are essential components of the Canadian political system, and both must be accommodated and identified fully with it.[36] It is apparent, as the Supreme Court has implied in its *Patriation* decision, that there now exists a constitutional imbalance strongly favouring the adversarial style and the Westminster model. This is especially evident in the pattern of structural relationships among federal and provincial governments and in the policy processes at the executive and bureaucratic levels (Whitaker, 1982, pp. 13–19). To bring about a better balance, the principles of federalism and consensual decision making must find their way into the fabric of our political institutions.

## *Federalism and Treaty-Making: The Labour Conventions Case Revisited*

The foreign policy sector represents an area of government activity where the constitutional imbalance between responsible government and federalism is probably the greatest. Ottawa's traditional position has been that its mandate to conduct foreign affairs and negotiate treaties must be carried on as if Canadian federalism were only an internal domestic matter without much relevance in the international forum. This position was supported by section 132 of the *Constitution Act, 1867* which, as had been assumed until the Judicial Committee's decision in the *Labour Conventions* case,[37] gave Parliament exclusive jurisdiction to implement "Empire treaties" as well as "Canadian treaties" negotiated by Ottawa after 1931.[38] Lord Atkin's judgment has dealt a severe blow to Ottawa's supposedly unimpeachable position.[39] The view that the *Labour Conventions* case was wrongly decided, that its value as a precedent is strictly limited, and that treaty-making (as a "matter" which has attained national dimensions) properly belongs under the "peace, order and good government" (POGG) clause,[40] has never been abandoned in Ottawa.

Currently fashionable theory has it that the Supreme Court of Canada is willing to reconsider the *Labour Conventions* case. The following Supreme Court decisions are cited in support of this theory: *Johannesson v. West St.Paul*,[41] *Re Ownership of Offshore Mineral Rights (B.C.)*,[42] and *MacDonald v. Vapor Canada*.[43] One writer states, "The judges would be asked to intervene where politicians fear to tread in this volatile political arena" (Leal, 1983, p.18); another demands to know whether, "in the future, the Canadian Parliament would be able to legislate in areas under provincial jurisdiction, stepping in not only where provinces fail to act but also going against the provinces to ensure domestic implementation of treaties?" [Translation.][44]

In my view, such constitutional reversal is unlikely and undesirable for four reasons. First, in the *Anti-Inflation* case,[45] the Supreme Court gave Parliament only temporary (emergency) jurisdiction to regulate inflation on the ground that this subject is too broad and diffuse to qualify for the "national dimensions" test. Since treaty-making is an even broader concept than inflation because it may include any subject matter, from transportation to culture, it appears highly improbable that the Court would permit Ottawa's blanket encroachment on provincial jurisdiction under the POGG clause on the basis of national interest or dimension. It is not improbable, however, that the Court will examine the subject matter ("the pith and substance") of a signed and ratified international agreement and may decide that it (the subject matter) has indeed reached a national dimension, thereby authorizing Parliament to pass implementing legislation even if it would affect provincial jurisdiction. I should expect such rulings to be made rarely and with great caution (Hogg, 1977, pp. 263–64).

Second, in the *Patriation* case,[46] the Court expressed its full support for the federal principle which, it said "cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by unilateral action of the federal authority." This principle would be violated every time Parliament unilaterally acted to implement an international agreement dealing with a subject matter falling within provincial jurisdiction.

Third, a decision to grant Ottawa unilateral and exclusive treaty-implementing power would be inconsistent, in general, with the Supreme Court's innovative approach to the role of constitutional convention in relation to federalism and contrary to "prevailing values and principles," which, in the Court's own view, should govern the operation of the Constitution.

Finally, the constitutional division of responsibilities in treaty implementation that resulted from the decision in the *Labour Conventions* case is consistent with the principle of federalism and in keeping with the current and evolving political values and principles that characterize the

Canadian polity (a suggested summary of these appears below under "Guiding Principles"). In addition, such division of responsibilities is equally consistent with political reality, i.e., the existing structure of intergovernment policy relations already discussed fully under "Issues and Constraints." Consequently, this decision should not be reviewed; rather, it should form the basis for building joint federal-provincial decision-making processes and institutions.

## *Guiding Principles*

The following guiding principles emerge from the foregoing discussion and are consistent with the option of "*le fédéralisme renouvelé*" (Bernier, 1983, pp. 192–99):

- principle of the single and unified presence of Canada as an independent state in the international forum represented by the government of Canada, in conformity with public international law and the Supreme Court's decision in *Re Newfoundland Off-Shore Mineral Rights*;[47]
- principle of balance between federalism and responsible government in Canada's political institutions and processes, including the area of treaty-making and implementation;
- principle of "organic" constitutional development through the growth of constitutional conventions to bring the operation of the Constitution into accord with the prevailing values and principles of the period;
- principle that foreign policy and treaty-making must closely reflect the heterogeneity of Canadian interests — regional, provincial, socio-economic, ethno-linguistic and cultural;
- principle of congruence between domestic political reality (such as the structure of intergovernment policy relations) and Canada's active and effective participation in the international forum;
- principle of consultation between Ottawa and the provinces whenever international treaty negotiations may affect provincial interests or policy objectives;
- principle of consultation between Ottawa and Quebec whenever international treaty negotiations may affect francophone culture, traditions, institutions, education, and civil law, or the Quebec government's policy objectives in these areas;
- principle of consensual decision making whenever joint federal-provincial interests or policy objectives are affected by treaty-making and implementation;
- principle of accountability for treaty-making policy and activities to both federal and provincial legislative assemblies.

## Future Directions

This study was begun with a deliberate commitment to innovation. The discussion of both empirical and normative issues in the preceding three sections was intended to develop a consistent and comprehensive argument demonstrating the need for change. It is appropriate now to emphasize three concluding observations as the key imperatives for change and innovation in treaty-making.

First, developments in the international environment clearly indicate a continued expansion of treaty-making into areas of policy and activity that fall within provincial legislative jurisdiction in Canada. As the scope of international activity and regulation grows and modernizes, Canada's internal mechanisms for federal-provincial consultation and conflict resolution are out of step and lack adaptability. Canada is ill equipped, constitutionally and institutionally, to deal effectively with future demands emanating from the international environment.

Second, the structural pattern of intergovernment relations promotes and fuels adversarial positions and attitudes and renders effective consultation and conflict resolution difficult and at times impossible. Cooperative consensual institutions are lacking, and each government establishment demonstrates increasing competitiveness for finite human, natural and physical resources, as well as political ones. Such an intensely adversarial structure of intergovernment relations in Canada is inconsistent with effective international participation.

Third, as described in the previous section, the two normative models of governing in the Canadian political tradition (federalism and Westminster-type responsible government) exhibit many internal contradictions and are incongruent with each other in their respective styles of political behaviour (consensual and adversarial). Federalism is weakest and the normative constitutional imbalance in favour of the Westminster model is most acute in the foreign policy sector, including treaty-making. It is here, then, that the barriers of tradition and past practice should be broken to permit innovation and change to take place.

In such a major task of reform, one must take into account existing institutional arrangements and commitments and the political and bureaucratic costs that will have to be incurred. It is also essential to anticipate adverse consequences and dislocations, and to take appropriate measures to prevent them. Above all, such a reform requires a receptive climate and a congruent set of attitudes and beliefs shared by the key political and bureaucratic decision makers in both Ottawa and the provincial capitals. Attitudinal change takes time, but it can be encouraged and accelerated when the implementation of a major reform (perceived as radical and threatening) is preceded by a minor step in the

same direction, a transitional modus vivendi that prepares the ground for the future course of action.

I suggest that change might take place in two phases. In phase one, to be implemented in the short and medium term, the present voluntary, ad hoc, consultation between Ottawa and the provinces would be replaced by an institutional forum where all international agreements dealing with matters within provincial legislative jurisdiction would be discussed in advance. During phase one, the existing constitutional basis for treaty-making and implementation would remain undisturbed, but the new institution (which might be called "Federal-Provincial Consultation Commission on International Agreements") would be expected to undertake additional studies and engage in preparatory work leading to phase two. The commission should be created by joint legislative action of the federal and provincial governments and given a sufficiently broad, yet compelling, mandate. It should permit full discussion of the making, execution, ratification and implementation of international agreements dealing with provincial matters, including the use of appropriate federal state clauses if and when necessary. It should also provide for a small professionally staffed secretariat to provide continuity and assistance in its work.

Phase two, to be implemented in the longer term, would entail a major change in the constitutional basis and in the practice of treaty-making. It would consist of three specific reforms.

First, the royal prerogative would be abolished as the constitutional source of the treaty-making powers. The broader justification for this reform resides in the need to modernize the Constitution and to bring clarity and explicitness to the source and content of executive authority. The Constitution Amendment Bill of 1978[48] made a step in that direction but fell considerably short of what is required. While the task of reforming the executive powers in general is clearly beyond the scope of this study, it must be acknowledged that effective abolition of the royal prerogative with respect to treaty-making is probably inseparable from this larger task. Implementation of our second reform would accomplish the more limited objective of subjecting royal prerogative to the express provisions of Canadian constitutional law and to the new federal and provincial statutory laws.

First, a joint federal-provincial High Commission on Treaties and International Agreements would be established with full powers to negotiate, conclude, and sign for and on behalf of Canada all treaties and international agreements dealing with any subject matter. This goal would be implemented in two stages.

In the first stage, the *Constitution Act, 1867* would be amended by joint federal-provincial legislative action to give express legislative authority

to the Parliament of Canada and to the provincial legislatures to establish the High Commission with full powers.[49]

In the second stage a joint enactment of legislation by Parliament and provincial legislatures would provide specifically for: (a) the composition, membership and rotating chairmanship of the commission, including its representative, federal-provincial character; (b) the permanent situs of the commission to be in Montreal, with regular meetings to be held in Ottawa and provincial capitals; (c) the appointment of plenipotentiaries and the use of the Great Seal of Canada by the commission; (d) an obligatory consensual decision-making process in matters that fall within provincial legislative jurisdiction and other decision-making procedures that the commission may from time to time adopt in other matters; (e) the joint accountability of the commission and of its secretariat to Parliament and to the provincial legislatures; (f) the permanent secretariat of the commission to be composed of professional personnel drawn from the Department of External Affairs, from provincial bureaucracies, and from the private sector, and to be exempt from either the federal or provincial public services; and (g) the reporting and making of recommendations to Parliament and provincial legislatures on the ratification and legislative implementation of treaties and international agreements.

Such federal and provincial legislation would provide also that the establishment of the high commission involve a transfer of authority, activities and personnel from the present federal and provincial bureaucracies (in particular the Department of External Affairs and provincial intergovernmental relations departments) to the permanent secretariat of the commission. Furthermore, it is not intended that the commission become a "third level of government," but rather a new executive-bureaucratic institution capable of taking over the existing functions and activities now performed by Ottawa and the provinces. In this sense, the creation of the high commission should result in some overall reduction of governmental budgets and personnel.

Completing the process would be the execution of an agreement between Ottawa, Quebec and the other provinces, recognizing the special role of the government of Quebec in the deliberations and activities of the high commission when the subject matter of a treaty directly affected francophone culture, education, language, institutions or civil law.

While Quebec's full and active participation in the high commission and its secretariat would guarantee that province a considerable degree of influence in the treaty-making process, absent under the present circumstances, this is not enough. Quebec's unique essential and historic responsibility of preserving and fostering a dynamic francophone

culture and society in North America ought to be recognized by the high commission in a special arrangement. The suggested reform would guarantee Quebec's pre-eminent role (but always as a participant in the high commission) whenever the subject matter of an international agreement affected Quebec's vital interests.

## *Notes*

This study was completed in September 1984.

It is 30 years since Maxwell Cohen and Frank Scott of the law faculty at McGill University first encouraged me to consider treaty-making as the subject of my major final-year paper. The topic was not receiving much scholarly attention at that time, but under their guidance I prepared a study that was published, in revised form, by the *Canadian Bar Review* in 1956 under the title "Creation and Implementation of Treaties in Canada." During a visit to York University in the summer of 1983, Ivan Bernier whetted my interest in re-examining this topic in the light of increasing legal and scholarly debate and in the heat of still unresolved political controversy. I thank all three for the "heat" and "light" that they brought to bear on this study by way of inspiration and encouragement.

Special thanks are due to my research assistant, Donald C. Wallace of York University. He has contributed most of the material on the provincial international activities and compiled the bibliography.

Finally, I want to thank Ruth E. Hood for her editing of the manuscript.

1. On this topic, see especially W. Levi (1976); Bertsch (1982); Evan, (1981).
2. In 1981/82, the Department of External Affairs underwent a major reorganization in order to develop an "integrated policy approach and resource allocation process" in the foreign policy sector. The Department inherited 1,000 new employees (and expertise) from the old Department of Industry, Trade and Commerce plus an additional 200 from the Canadian International Development Agency. Gordon Osbaldeston, as a newly appointed under-secretary of state for external affairs, presided over the lengthy process of reorganization.
3. In a federal state (e.g., Canada) with divided legislative jurisdiction, when the central government does not have full authority to implement treaties, a "federal state clause" normally accomplishes two objectives. First, it limits the applicability of the treaty to those constituent units (i.e., provinces) which have consented to implement it. Second, it protects the federal state against charges of non-compliance when some constituent units have refused implementation.
4. The Vienna Conference was held in two sessions, 1968 and 1969. The final session produced the Vienna Convention on the Law of Treaties consisting of 85 articles and an annex (Brownlie, 1982, p. 600).
5. Draft article 5(2) as quoted by Di Marzo (1980, p. 18).
6. The Vienna Convention on the Law of Treaties came into force on January 27, 1980, after ratification by 35 states, including Canada. See Leal (1983, p. 21), and Brownlie (1982, p. 601).
7. Wildhaber (1971, pp. 264–65). Jacomy-Millette is of the same opinion: "Deux critères sont applicables. La capacité des états fédérés doit être établie par la Constitution. Elle doit être aussi reconnue par la communauté internationale (autonomie effective ou reconnaissance par les États tiers). Les deux ordres juridiques s'interpénètrent." Jacomy-Millette (1984, p. 5).
   [Translation: "Two criteria apply. The capacity of the federated states must be established by the Constitution and also must be recognized by the international community (effective autonomy or acknowledgment by third states). The two legal domains are interwoven."]
8. Wildhaber (1971, p. 343). Bernier (1973, p. 271) echoes similar objections, but chooses to be more charitable by stating that "federal state clauses offer the only example so far of a specific concession being granted to such states in international law."

9. Article 29 of the Vienna Convention as quoted by Leal (1983, p. 23).
10. The entire clause, drafted by Canadian and American negotiations for the purpose of The Hague Convention on Products Liability, reads as follows: "If a Contracting State has two or more territorial units which have their own rules of law in respect of products liability, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time" (Leal, 1983, p. 29).
11. Expressing strongly what must be the prevailing view of some federal officials, Leal (1983, p. 40) writes: "unless and until the treaty-making power in Canada is changed, we must not allow ourselves to be driven off the forumla that is a *sine qua non* for us in our ventures into the international field and which is acceptable to our colleagues in other contracting states. The matter is legally critical for us."
12. On the Australian opposition to the federal state clauses and the controversy arising from judicial interpretation of the "external affairs" clause of section 51 of the Australian Constitution, see Doeker (1966), pp. 181–97); *Koowarta v. Bjelke-Petersen*, 1982, 56 A.L.J.R. 625; Finnis (1983, p. 126); Leal (1983, pp. 30–40).
13. Article 2(1)(a) of the Vienna Convention. See also definition of a "treaty" prepared by the International Law Commission, quoted by Brownlie (1982, p. 601).
14. Increasingly, governments at all levels try to play a "steering" or "*dirigiste*" role in their respective societies; they "are not neutral containers, or reflecting mirrors, but aggressive actors steadily extending their tentacles of control, regulation, and manipulation into society" (Cairns, 1977, p. 13).
15. A recent report of the Economic Council of Canada describes the governmental institutional framework as follows: "(a) Major scale of operations by the federal and provincial governments relative to the economy as a whole; (b) Autonomous and independent role played by the federal and the provincial governments in the determination of an extensive and complex range of social and economic programs; (c) Extraordinary degree of interdependence among governments" (Economic Council of Canada, 1982).
16. An excellent summary of the controversial events can be found in Bernier (1973, pp. 51–64).
17. The validity of provincial international agreements is wrapped in controversy. I propose the following interpretations of agreements involving Ottawa, the provincial governments and foreign or state governments. (a) Transborder agreements concluded between provincial governments or agencies and state governments or agencies are subject to the private law of contract of the place of execution. They are valid and legally binding only to the extent that they stipulate enforceable obligations; they are not subject to international law of treaties. (b) Agreements concluded between provincial governments or agencies and foreign governments or agencies pursuant to Ottawa's express authorization contained in an *accord cadre* are subject to international law of treaties, unless the *accord cadre* provides otherwise. They are valid and binding on Ottawa, unless the *accord cadre* provides otherwise. In the latter event, they may still be valid under the private law of contract. (c) Agreements concluded between provincial governments or agencies and foreign governments or agencies signed either without Ottawa's express authorization or contrary to the existing *accord cadre* and which purport to be subject to international law of treaties are invalid and not enforceable in international law. However, in the absence of a direct legal challenge, the parties can continue to act as if they were valid. In addition, such agreements may still be valid under the private law of contract and thus enforceable before local domestic courts.
    For the position of the Canadian Department of External Affairs on this matter, see "Traités et arrangements", extrait d'une opinion qu'exprimait le Bureau juridique, le 19 octobre 1981 (1982), 20 *C.Y.I.L.*, pp. 298–99.
18. At the request of Claude Ryan, then publisher of *Le Devoir*, I have expressed my opinion on the controversy in an article entitled "L'incident du Gabon et l'avenir du fédéralisme canadien," *Le Devoir*, March 14, 1968, p. 4.

19. The government of Quebec enjoys full membership in the agency as a "*gouvernement participant*." Bernier (1983, vol. 2, p. 191).
20. *Intergovernmental Affairs Department Act*, assented to on December 24, 1974 (Éditeur officiel du Québec, March 1975).
21. *The Alberta Federal and Intergovernmental Affairs Act* of 1972 contains provisions similar to the Quebec *Intergovernmental Affairs Act*.
22. Szablowski (1956, pp. 32–35). See also Slattery (1982).
23. These options are discussed in Bernier (1983, pp. 204–14).
24. These characteristics of royal prerogative are drawn from De Smith (1971, pp. 114–22, 131).
25. See "Treaties — Parliamentary Approval," information provided by the Legal Bureau, Department of External Affairs, May 21, 1981 (1982), 20 *C.Y.I.L.*, pp. 289–92.
26. R.S.C. 1970, G. E-20. The Act grants the following powers and duties to the minister: "official communications between the Government of Canada and the government of any other country in connection with the external affairs of Canada; such duties as may be assigned by the Governor-in-Council in relation to external affairs or to the conduct and management of international negotiations in so far as they may appertain to the Government of Canada."
27. *The Queen et al. v. Operation Dismantle Inc. et al.*, Federal Court of Canada, Appeal Division (November 28, 1983), pp. 19, 22 (Mr. Justice Marceau). In this case lawyers acting for the federal Department of Justice argued that an executive act of the government which arises directly from the exercise of royal prerogative is exempt from the authority of Parliament and not reviewable by the courts under the Canadian Charter of Rights and Freedoms. If such an argument were to prevail, negotiation of treaties would fall under the same category of non-reviewable acts.
28. This is perhaps best illustrated by the following sequence of events: **1947** Letters patent constituting the office of the Governor General of Canada are issued. **1956** A study done at McGill University entitled *Creation and Implementation of Treaties in Canada* concluded that the letters patent eliminated "any existing doubt as to the federal government's exclusive authority to make treaties irrespective of subject matter" (Szablowski, 1956, p. 32). Later, this interpretation was called "conclusive" (Lederman, 1981 p. 351), and a number of legal writers concurred with this view (Bernier, 1973, p. 54). **1963–68** Several Quebec constitutional scholars reinterpret the effect of the letters patent and come to a different conclusion: those external prerogatives necessary for the conduct of provincial affairs devolved on the provinces as a corollary of their legislative jurisdiction. (Di Marzo, 1980, pp. 206–10, and Bernier, 1973, pp. 56–59). **1968** Government of Canada in its policy paper "Federalism and International Relations" counterattacks with its own interpretation of the letters patent. It denies unequivocally "any delegation of such prerogative powers to lieutenant-governors of the provinces" or the existence of any provincial authority to make treaties (p. 15). **1969** The government of Quebec produces a "Working Paper on Foreign Relations" in which it states (p. 17) that the letters patent "cannot prevent provincial governments from exercising executive powers corresponding to their legislative competence" and that consequently provinces can enter into treaties on subject matters within their legislative jurisdiction. A number of Quebec scholars support this interpretation. **1971** A major comparative study entitled *Treaty-Making Power and Constitution* prepared at the Yale Law School and the Law Faculty of the University of Basel concludes that "the constitutional situation in Canada in this regard remains unsettled" (Wildhaber, 1971, p. 289). **1973** Another study under the title *International Legal Aspects of Federalism* prepared at the London School of Economics forcefully presents the two conflicting positions and leaves readers to draw their own conclusions. According to the author, this issue has "more to do with politics than with law" (Bernier, 1973, p. 64). **1980** A major work entitled *Component Units of Federal States and International Agreements* discusses the letters patent and the royal prerogative at length without coming to a clear conclusion. In author Luigi Di Marzo's opinion, "the situation in Canada is complex and obscure and one cannot say definitely whether the provinces have, or do not have, treaty-making capacity" (p. 49). **1980** The Supreme Court of Canada states that the word "Canada" used in subsection

91(1) of the *British North America Act, 1867* "does not refer to Canada as a geographical unit but refers to the juristic federal unit . . . as distinct from the provincial governments" (*Reference re Legislative Authority of Parliament to Alter or Replace the Senate* (1980), 1 SCR 54). If this definition of "Canada" applies as well to section 9 (executive power) and to the letters patent, then the interpretation put forward by the government of Quebec and supported by Quebec scholars may have additional weight. The Supreme Court's ruling would appear to support the view that the letters patent delegated to the Governor General only those prerogative powers directly appertaining to "the federal juristic unit" — i.e., Ottawa. Hence, the letters patent may not contain a comprehensive devolution of the royal prerogative.

29. Supreme Court of Canada decision of March 8, 1984: In the matter of reference by the Governor-in-Council concerning property in and legislative jurisdiction over the seabed and subsoil of the continental shelf, offshore Newfoundland and set out in Order-in-Council P.C. (1982) 1509 dated the 19th day of May 1982. The Court, however, did not reopen the issue of treaty implementation decided in the *Labour Conventions* case (see *infra*, notes 37 and 39).
30. See Smiley's (1980, pp. 11–16) discussion of this issue.
31. I refer here primarily to the relationships between federal and provincial politicians and federal and provincial senior bureaucrats.
32. That is, federal and provincial cabinet ministers and senior officials.
33. *Attorney General of Manitoba et al. v. Attorney General of Canada et al.*, in the Supreme Court of Canada, September 28, 1981. The Question of Convention. Majority decision rendered by Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer.
34. It may be useful here to clarify the distinctions among three types of constitutional norms: *constitutional law* (e.g., the *Constitution Act, 1867*) — enacted by a recognized political authority (such as Parliament), written, obligatory, and enforceable by the courts; *constitutional convention* (e.g., that the government must resign if it is defeated in the House of Commons on a matter of confidence) — has developed slowly by repeated political practice, and has become generally recognized as obligatory (it has "crystallized" into a norm); but it remains unwritten and will not be enforced by the courts; however, the courts may "declare" its existence and define its content; *constitutional practice* (e.g., the holding of regular "first ministers' conferences") — normally born from political necessity or convenience; it may or may not "crystallize" into a constitutional convention in the future; it remains unwritten and non-obligatory but persuasive and politically sound; the courts will neither enforce it nor declare it.
35. I refer here to the ongoing process of how individuals gain, hold, distribute and relinquish political power. This process can be either centralized for the entire country or decentralized such that there are in fact several (regionally or provincially rooted) political elite "centres."
36. See Whitaker (1982). In my view, this paper contains the best theoretical discussion of federalism and its adaptation to the Canadian political reality.
37. *A.G. Canada v. A.G. Ontario*, [1937], AC 326.
38. See Slattery's (1982) innovative argument.
39. The *Labour Conventions* case has established two principles: first, that section 132 of the *Constitution Act, 1867* (which gave exclusive authority to Parliament to implement treaties) became obsolete when the Canadian state achieved external independence from the United Kingdom and full legal personality under international law; and second, that, in consequence, legislative jurisdiction to perform (implement) treaties and international agreements is divided between Ottawa and the provinces according to the scheme of distribution embodied in sections 91 and 92 of the *Constitution Act, 1867*.
40. Section 91, *Constitution Act, 1867*.
41. (1952) 1 SCR 292.
42. (1967) SCR 792.
43. (1977) 2 SCR 134.

44. ". . . le Parlement canadien pourra, demain, légiférer dans un domaine de compétence provinciale, non seulement en cas de défaillance des provinces mais également à leur encontre, pour la mise en oeuvre interne des traités?" Jacomy-Millette (1984, p. 12).
45. (1976) 2 SCR 373.
46. *Attorney General of Manitoba et al. v. Attorney General of Canada et al.* The Question of Convention. Majority Decision.
47. See, *supra*, note 29.
48. Proposed sections 42 to 55, *The Constitutional Amendment Bill*, Bill C-60, First Reading, June 20, 1978, Text and Explanatory Notes.
49. It should be noted that the Canada West Foundation has proposed a permanent federal-provincial trade commission in a brief recently presented to the Royal Commission on the Economic Union and Development Prospects for Canada. The foundation argued that such a commission could resolve many of the conflicts that fragment Canada's economy and provide a formal mechanism for controlling, regulating and implementing national and interprovincial trade policy.

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Institutional and Constitutional Arrangements

# Recurring Issues in Canadian Federalism

CLARE BECKTON and A. WAYNE MACKAY, Research Coordinators

This is the first of two volumes dealing with **Institutional and Constitutional Arrangements** (see list in back of book) included in the Collected Research Studies of the Royal Commission on the Economic Union and Development Prospects for Canada.

In this volume, the question of Quebec's status in Confederation is the theme that unites the several papers on recurring issues in Canadian federalism. The question of "bicommunalism" as it applies to Canada, the need to devise an amending formula acceptable to Quebec as well as the other provinces, and the need for provincial involvement in treaty-making are all considered in a new and creative way.

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