Centre for Constitutional Studies

CONSTITUTIONAL FORUM CONSTITUTIONNEL

Volume 4, Number 2 Edmonton, Alberta Winter 1993

REFERENDUM REFLECTIONS

Centre d'études constitutionnelles

CONSTITUTIONAL FORUM CONSTITUTIONNEL

Editor:
Kate Sutherland

Design and Layout:
Christine Urquhart

Alberta Law Foundation

Constitutional **Forum** Constitutionnel is a quarterly publication of the Centre for Constitutional Studies / Centre d'études constitutionnelles published with the financial support of the Alberta Law Foundation.

The opinions expressed herein are those of the individual contributors only. Contributions and replies are invited in either official language. Notes and articles should be limited to 3,000 words in length. The Editor and Management Board reserve the right to edit any submissions. Inquiries and contributions should be directed to the Editor, Kate Sutherland, 459 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5 or by telephone at (403) 492-5681 or Fax (403) 492-4924.

Associate Memberships to the Centre for Constitutional Studies are available at $25.00 per year (entitlements are: newsletter, notification of Centre publications, lectures and events.) Retroactive memberships are still available for an additional fee. Retroactive membership for 1989-90 Volume 1 (3 issues) $10.00; Retroactive membership for 1990-91 Volume 2 (4 issues and Index) $10.00; Retroactive membership for 1991-92 Volume 3 (4 issues) $10.00. Make cheques payable to: The Centre for Constitutional Studies.

Constitutional **FORUM** Constitutionnel is indexed in: **Index to Canadian Legal Periodical Literature, and Index to Canadian Legal Literature.**

ISSN: 0847-3889

LEARNING FROM FAILURE: LESSONS FROM CHARLOTTETOWN

Kathy L. Brock

INTRODUCTION

The defeat of the Charlottetown Accord in the October 26th referendum has raised once again the issue of whether Canada is governable as a nation. Two questions are central to this debate. Does the rejection of the Accord represent a profound disenchantment among the public with the political leadership and decision-making elite in Canada? Is the demand for greater participation in the constitutional reform process inconsistent with good or effective government?

To answer these questions, this commentary is divided into three sections. The first provides a context for analysis of the failure of the Charlottetown Accord by noting the ways in which Canadian political leaders attempted to revise the 1990-92 constitutional process to satisfy criticisms of the Meech Lake process. The second offers an assessment of the 1990-92 round of constitutional negotiations. The third speculates on the lessons taught by Charlottetown. The writer cautiously concludes that Canada is not ungovernable but warns that the lessons from Charlottetown must be taken seriously and simplistic accounts of the Accord's failure justifying political complacency must be rejected or Canada may indeed become ungovernable.

RESPONDING TO MEECH LAKE

Four criticisms of the Meech Lake constitutional reform process were widely accepted.[1] First, the process was viewed as constituting an attempt by governments to further their agendas at the expense of the citizenry. It was criticised as being exclusive and unrepresentative of the societal interests of women, Aboriginal organisations, various ethnic and racial communities, and the disabled, among others. The outcry raised sufficient doubts about the process to require future bouts of constitutional reform to extend beyond the practice of executive federalism and to be more reflective of the diversity within Canadian society. Second, the lack of public information on the negotiations and the absence of justificatory papers heightened suspicion of the Accord and spawned the demand for a more open process in future. Third, the widely held view in central Canada that Québec had been slighted in this round (especially by Manitoba, Newfoundland and the Aboriginal peoples), as in 1982, required attention to its concerns. Fourth, leadership during Meech Lake was criticised as arrogant, pusillanimous, weak and self-interested. The need to reconceptualise the role of political leaders in the constitutional policy process was apparent.

The above four criticisms guided the Charlottetown process. The governments engaged in the most extensive round of public consultations on the constitution ever conducted in Canada. Québec began the process with the Allaire (Liberal Party) report and the Bélanger-Campeau Commission on the Political and Constitutional Future of Québec. The federal government responded with the Citizen's Forum on Canada's Future which alone consulted over 400,000 Canadians, and the Special Joint Committee of the Senate and House of Commons on the Process for Amending the Constitution of Canada which heard over 200 witnesses and received over 500 briefs. To review its constitutional proposals, the federal government established the Beaudoin-Dobbie Committee on the Renewal of Canada which heard over 700 individuals, received over 3,000 briefs, and culminated in a series of conferences involving ordinary Canadians and experts. The provinces and territories followed suit, to varying degrees of representativeness, with their own hearings processes and reports. By the end of this phase of constitutional reform, the governments had heard from a vast array of Canadians, read thousands of pages of briefs, and collected numerous hours of testimony. The process was open and inclusive.

The second phase of the Charlottetown process was also different from Meech Lake despite the fact that negotiations again were conducted in private. Officials appeared to proceed more deliberately and openly. To the public, not privy to the pre-Meech negotiations, the Meech Lake Accord appeared to be devised in two sessions, at Meech Lake and the Langevin building, while the Charlottetown Accord resulted from extensive talks between March 12 and August 28, 1992. The public was also kept abreast of developments in the talks through press releases.

The Charlottetown talks appeared more inclusive and representative. Negotiators included the federal government, nine provincial governments, the governments of the Northwest Territories and Yukon, and four of the major national Aboriginal organisations, the Assembly of First Nations (AFN), the Metis National Council (MNC), the Native Council of Canada (NCC), and the Inuit Committee on National Issues (ICNI). Québec chose to be absent until the latter stages but was kept informed throughout. Women's organisations were consulted during the process. Although the Native Women's Association of Canada (NWAC) was not formally represented, the AFN and the NCC made provisions for the representation of women within their delegations.

The third stage of the Charlottetown process was drastically different from Meech Lake. The governments included the public in the ratification stage through a non-binding referendum for a number of reasons. To the negotiators, the agreement appeared representative of the public's concerns expressed in the hearings and rejection of it seemed inconceivable. The referendum substituted a less potentially divisive vote on the constitutional proposals for the vote on sovereignty scheduled for no later than October by

Bill 150 of the Québec National Assembly.[2] It also served as a substitute for public hearings in Manitoba,[3] and for referenda required by provincial legislation in Alberta and British Columbia. Further, the requirement of a national referendum subjected all jurisdictions to the same standards of public scrutiny thus preventing some provinces from privileging their positions in the negotiations.

Perhaps above all the governments were attempting to address the problem of political legitimacy. A federal government with poor standing in the public opinion polls could not command the requisite authority to go forward with wholesale constitutional reform. Public ratification deflected charges of elitism and illustrated the confidence of the leaders in the deal.

In sum, a brief comparison of the Meech Lake and Charlottetown processes indicates that the political leaders had responded creatively to public criticism. The Charlottetown process was more open, inclusive, representative, and deliberate. An attempt was made to reconcile the demand for greater participation with the need for strong leadership, and to find a compromise among the interests of societal groups, the various governments, and Québec.

AN ASSESSMENT OF THE CHARLOTTETOWN PROCESS

Although the Charlottetown Accord was defeated in the referendum, to assert that the process was a failure would be misleading. Careful analysis of the process reveals that it constituted an improvement over the Meech Lake process but was still deficient in some key respects.

The first two stages of the process were clearly better, if not perfect. As shown above, Charlottetown met the demands articulated during Meech for a more open, inclusive and representative process. Public consultations conducted across Canada were extensive. The reports of the various constitutional commissions seemed to reflect public opinion on constitutional issues within their jurisdictions. The only serious fault in the first stage of the process was that the sheer number of committees and their various mandates and objectives caused a seeming lack of direction in the public consultations, and engendered a sense of constitutional fatigue among the Canadian public. Thus it was not surprising that the Beaudoin-Dobbie Committee hearings ground to a halt in Manitoba or that it faced the resignation of Senator Castonguay early in its mandate. As a result of this flaw in the process, the more fundamental concern of ordinary Canadians with economic issues, expressed during the constitutional hearings and conferences, was obscured.

Similarly, the negotiations phase of the Charlottetown process constituted an improvement over Meech Lake by meeting the criteria of being more open and inclusive, but it harboured two deficiencies. The closed door negotiations rendered the process vulnerable to accusations that the elites at the table were attempting to redirect the reforms to favour their interests despite the comprehensiveness of the final package. This raised public suspicion of the process. Further, the absence of Québec in the early part of the negotiations process weakened its bargaining position. By the time it entered the talks, many accommodations had been made between the various actors which affected its ability to achieve its initial demands. The Québec delegation was placed in the position of conceding to many of the gains already won by the other delegations.[4] Thus, the final package was easily subjected to criticism in Québec when it was compared with that province's constitutional reports.

Despite these weaknesses in the two phases, this part of the process met the criteria set down during Meech and made significant progress in meeting people's expectations. The critical reasons for the failure of the Charlottetown Accord cannot be located there. It was during the ratification phase that the real problems with the process surfaced. These problems may be divided into two categories: the content of the deal and the referendum campaign.

First, the content of the package illuminated a serious flaw in the process. It had failed to reconcile the demand for greater public participation with the requirement of effective leadership. The proposed reforms were more broadly representative of societal interests than the Meech Lake proposals but, like that set of reforms, they failed to provide a coherent vision of Canada. For example, the Charlottetown "Canada Clause" was more inclusive of various societal interests than the Meech Lake "Distinct Society" clause but neither clause offered a cohesive statement of Canadian identity. More extensive enumeration of fundamental characteristics still seemed to exclude some groups and to divide Canadians.[5] Similarly, although the package contained provisions on Senate reform for the west, the division of powers for Québec and self-government for Aboriginal peoples, it failed to integrate these diverse elements into a coherent plan for the development of Canada as a nation.

In sum, while the Charlottetown Accord delivered on specific demands, it failed to provide direction to the reforms. Given that a major objective of a constitution is to serve as a statement of a nation's identity and fundamental values, this was a significant weakness. In the effort to accommodate various societal interests, two hallmarks of effective political leadership, vision and direction, were sacrificed.

Second, the conduct of the referendum campaign contributed to the defeat of the Charlottetown Accord.[6] The negotiators underestimated the strength and credibility of the potential sources of opposition to the deal. At the point of release of the Accord, public ratification seemed likely given that the main opponents of the Meech Lake Accord (namely Clyde Wells, Gary Filmon, and Ovide Mercredi) were among its supporters. Significant public opposition seemed unlikely. Contrary to these expectations, opposition was effectively mobilized by the Trudeau intervention and by the concerted efforts of individuals such as Judy Rebick, Deborah Coyne, Sharon Carstairs, Mary Eberts, and Mary Staniscia, and by organisations such as the National Action Committee on the Status of Women (NAC) and NWAC. Among the most convincing arguments put forward by these women were those relating to economic and social concerns raised by citizens during the hearings. They contended that the deal was insensitive to the immediate worries of Canadians during a recession such as the state of the economy,

childcare, child welfare and income support. This line of argument was rendered more powerful by linking these faults to the lack of vision demonstrated in the Accord and by portraying it as a trade-off between various elite interests.

The release of information to the public also was flawed. The slow mobilisation of the Yes side allowed the No side to have the first word and thus to define the terms of debate. While this delay was inevitable given the extensive consultation process embarked on by the Yes coalition, it put their campaign at a disadvantage. Further, the late release of explanatory material, and the release of the legal text on October 9 only after substantial public demand, allowed time for suspicion to be planted in the public mind that the text harboured secret deals.

The nature of the information released to the public was also questionable. Members of the public complained that, once released, the draft agreement and the legal text were complex and too convoluted to be understood by the average citizen. Similarly, the explanatory material released by the government was criticised as being confusing and without historical context.[7] Lack of comprehension fuels anger and impatience, so the poor reception given an agreement which appeared abstruse and obscure was understandable.

The suspicion of elites and disillusionment with political leaders now prevalent in western liberal democracies also influenced public opinion of the deal. The Yes campaign was vulnerable to criticism because of the elite and moneyed interests behind it. Attempts by political leaders to accommodate criticisms of the agreement in the early phases of the campaign were regarded as opportunistic. For example, the changes made in August and early September in response to the NWAC decision and Aboriginal peoples' concerns with the self-government provisions were charged as being vain attempts to stave off a No vote rather than genuine gestures of goodwill.[8] Accusations of elite accommodation plagued the agreement from the negotiations phase throughout the campaign. The deal also was characterized as a desparate bid by the Mulroney government to hold power. Despite the efforts of the Yes campaign, these complaints could not be refuted decisively.

The strategy of the campaign was misdirected. Initially, the rhetoric of the Yes campaign and of the federal government in particular was at variance with public opinion. Citizens in provinces outside of Québec resented being told that a deal had to be reached or Québec would separate and the Canadian economy would be destabilized. As data was released indicating that the dollar was unlikely to plummet following a No vote and that opinion in favour of the sovereignty option was weakening within Québec, these selling tactics used by the Yes campaign became increasingly offensive to a large segment of the public.[9] The public residing outside of Québec also questioned the Yes side's argument that the deal was necessary to redress Québec's grievances. Giving special consideration to Québec's concerns was inconsistent with the claim also being made that this round of constitutional discussions was different from Meech Lake because it was intended to be a more inclusive Canada round. Finally, in the initial stages of the campaign the rhetoric used by the Yes side was aimed at Canadians' feelings of national pride and patriotism. It was intended to give Canadians the "warm fuzzies" so to speak instead of being a rational discourse on the details of the deal. Polls had indicated that this was the best strategy for selling the deal.[10] However, this kind of rhetoric was out of step with the public mood and its desire for hard information. It underestimated the interest of the public in seeing the deal defended on the specifics as well as the whole.

A major selling tactic was the claim that, by embracing the Accord, Canadians could feel that they were "doing the right thing." For example, by accepting Aboriginal self-government, non-Aboriginal Canadians could redress the wrongs of the past; by accepting a revised Senate, central Canadians could respond to western feelings of alienation; by accepting revisions to the division of powers and the distinct society clause, non-Québeckers could remedy past oversights. As Shelby Steele has argued, if a majority or privileged population is made to feel guilty for its treatment of a disadvantaged group, then it will feel reassured about itself when it acts to correct that wrong.[11] Thus when the support within the target communities began to break down, the sponsoring community felt betrayed; it had done the right thing and these groups were not responding with the appropriate measure of gratitude. Resentment mounted among the citizens initially inclined to say Yes as criticism of the agreement emerged from various interests (NWAC, Mohawks, Treaty Chiefs, Manitoba Chiefs) within the Aboriginal community over the self-government provisions, as the public became privy to the reaction of Bourassa's advisors to his stance, and as the B.C. public attitude to the Accord, especially to Harcourt's concession regarding Parliamentary representation, shifted. Canadians could not help but feel confused and angry since they believed that they had responded in good faith to the needs of these communities.

The reasons for the failure of the Accord are multitudinous. The above represent only a few of the problems in the process. While it is important to note weaknesses and failings in the process, it should not be overlooked that the process constituted a significant improvement over Meech Lake. The political leaders seemed to make a genuine and concerted effort to achieve constitutional reforms which, in their opinions, were necessary and desirable. Some problems in the process were inevitable and irremediable as well as unforeseeable. However, others can be attributed to the failure of the leaders to understand the extent of change entailed by a demand for greater public involvement in the process of constitutional reform.

THE LESSONS

Despite the failure of the Charlottetown Accord on October 26, it should not be concluded that Canada is ungovernable as a nation or that the demand for greater participation in constitutional reform is inconsistent with good or efficient government. Rather, the improvements in the process reveal some ways in which this demand may be accommodated. The weaknesses or reasons for failure point to important considerations which must be taken into account to develop a future model for macro-constitutional change. The lessons are both positive and negative.

First, in future any rounds of macro-constitutional change must necessarily be inclusive and open. A new threshold for public participation and influence has been set. It will not be possible to lower this expectation. Interest groups can be expected to lobby to maintain if not expand their influence. Groups not included in the Charlottetown process may be inclined to argue for formal inclusion in macro-constitutional reforms. For example, NWAC is unlikely to relinquish its request to be represented alongside the other national Aboriginal organisations in future talks. The mechanisms for constitutional change have been altered. Public hearings are the basic minimum requirement for a more open and inclusive process. As Meech Lake and Charlottetown revealed, this is a positive outlet for public grievances and the expression of opinions. Commission reports must be sensitive to these opinions if they are to gain credibility among the public. Similarly, negotiations must be conducted with these opinions in mind. Where departures occur, they must be defended in concrete terms. The referendum is also a fact of constitutional reform in Canada now. The precedent has been set. While a referendum would not be necessary for housekeeping amendments, amendments affecting citizen's rights will most likely require public ratification.

The second lesson to be drawn from this experience is perhaps the most important. The roles and responsibilities of the political leaders must be significantly altered. At the conclusion of Meech Lake, I analysed the demand for greater participation and, using Robert Reich's *Power of Public Ideas*, concluded that it would not be sufficient merely to tabulate preferences and construct a deal on that basis.[12] Effective political leadership in this period of public participation involves three equally important steps. First, public concerns must be identified and ranked in terms of their importance and intensity of support. This can be accomplished through the public hearings and Committee report stage. Second, the leaders should negotiate a package of amendments based on the committee positions and the general interests of the Canadian community. Third, they must be prepared to defend their proposals before the public. This means that the deal cannot appear to be a self-interested bargain among elites. Instead it must embody a vision of Canada's future. Since the Constitution serves as a fundamental statement of the nation's identity, beliefs and principles, changes must honour and enhance this statement and be defendable as such. In other words, to achieve maximum acceptance, an amendment should embody a principle or objective Canadians embrace and should make political or economic sense to the average citizen. For example, Aboriginal self-government may be defended in lofty terms as necessary for the self-actualization of peoples long oppressed, and in practical terms as being cost-effective since it could be argued that it will institute a system of control and responsibility among local communities. If reforms are defended in this way, they will make Canadians feel good about themselves while seeming logical and acceptable. However, the explanations must be substantive and genuine; they cannot be platitudinous.

Charlottetown failed in this respect. While the leaders struck a deal that was responsive to specific demands articulated by the public during the hearings process, the Accord failed to provide a vision or coherence to the reforms. As a result, the No side could convincingly question whether it provided direction for the nation, or even answered its needs as it moves into the twenty-first century. Further, the debate over the Accord seemed remote from the daily concerns of the average Canadian and was incomprehensible on a practical level. No clear rationale was given explaining how the reforms would improve the lot of the average Canadian in daily life, or what it is to be a Canadian.

Hence, in the period of greater public participation, the roles and responsibilities of political leaders also change. Leaders must be responsive to public demands but willing to make independent decisions and then to defend those decisions before the public in terms that are meaningful to them. This is a much more challenging form of leadership than one which tabulates preferences and then defends them on that basis while abdicating responsibility for those decisions or the direction of reform.

The final lesson from Charlottetown to be noted here concerns the predisposition of Canadians to constitutional change. The Yes campaign observed throughout the referendum that Canada was ranked as the number one nation in which to live by the OECD. Canadians seem to accept this as a fact (despite the occasional glance of envy at the United States). However, instead of being an impetus to change, this may serve to reinforce the status quo until it becomes obvious how a change would improve the lot of Canadians, or how a lack of change would be detrimental to the well-being of Canadians. Any amendments intended to respond to the needs of specific groups or provinces within the Canadian community must strengthen the nation as a whole. Perhaps the *Economist* summed up this aspect of the Canadian mind-set when it observed that Canada is the only country that could have a popular revolution in favour of the status quo.

Charlottetown was not a futile exercise. Granted, the Accord failed. However, during the process some valuable lessons were learned, the most important of which are that the demand for greater participation is here to stay and that definitions of political leadership must be revised. Macro-constitutional reform is unlikely to occur again in the near future unless a threat is posed to the integrity of the Canadian community by some of the problems left unresolved with the failure of Charlottetown. However, the lessons should not be ignored or lightly dismissed. They are not just confined to the constitutional arena. If Canada is to be governable, then the lessons must be applied to other areas of political decision-making and leadership. They may provide an avenue to countering public disenchantment with public officials by strengthening a central tenet of our political system: representative and responsible government.

Kathy L. Brock, Political Studies, St. John's College, University of Manitoba.

AUTHOR'S NOTE:

An earlier version of this paper formed the basis of the remarks which I delivered at the Institute of Intergovernmental Relations, Annual General Meeting and Seminar on the Lessons of the Canada Round, Queen's University, Kingston, November 30, 1992.

1. For discussions of these criticisms of the constitutional process, see A. Cairns, *Disruptions: Constitutional Struggles, from the Charter to Meech Lake*, Douglas E. Williams, ed., (Toronto: McClelland and Stewart, 1991); D. E. Smith, P. MacKinnon, and J. C. Courtney, eds., *After Meech Lake: Lessons for the Future* (Saskatoon: Fifth House Publishers, 1991); R. Watts and D. M. Brown, eds., *Options for a New Canada* (Toronto: University of Toronto Press, 1991); Robert Young, ed., *Confederation in Crisis* (Toronto: Lorimer, 1991); Andrew Cohen, *A Deal Undone: The Making and Breaking of the Meech Lake Accord* (Vancouver and Toronto: Douglas and McIntyre, 1990); D. Coyne, *Roll of the Dice* (Toronto: Lorimer, 1992); P. J. Monahan, *Meech Lake: The Inside Story* (Toronto: University of Toronto Press, 1991).

2. Bill 150 was amended on September 1, 1992 to allow the substitution.

3. The rules of the Manitoba Legislative Assembly stipulate that public hearings must be held on constitutional amendment bills. This rule may be waived by a simple majority vote in the House if a two day notice of motion to waive the rule is given. If no notice is given, then unanimity is required.

4. Participants in the talks have confirmed this observation.

5. This line of thinking was prompted by numerous questions I received during the public forums on the Charlottetown Accord. Citizens did not disagree with the intent of the clause, they seemed to disagree with the privileging or recognition of specific groups and not others. This was also pointed out by organisations like NAC.

6. These comments are based on my interpretation of the public reaction as represented in media coverage of the referendum in September and October, 1992.

7. Again, this was a recurring point in the public forums. Many questions centred around the reasons for the inclusion of certain provisions in the agreement. When they were placed in a historical context, they seemed more reasonable.

8. These changes concerned the applicability of the Canadian *Charter of Rights and Freedoms* to Aboriginal governments.

9. *The [Toronto] Globe and Mail* (14 October 1992) A1-2; *The [Toronto] Globe and Mail* (22 October 1992) A1-2.

10. M. Adams, Address, ("The Constitution: Year of Decision" Conference, York University, Centre for Public Law and Public Policy, 24 September, 1992) [unpublished].

11. Shelby Steele, *The Content of Our Character* (New York: St. Martin's Press, 1990) at 10-12.

12. See "The Demand for Greater Participation" in R. Simeon and M. Janigan, eds., *Toolkits and Building Blocks: Constructing a New Canada* (Toronto: C.D. Howe Institute, 1991) at 71-74; and R. Reich, ed., *The Power of Public Ideas* (Cambridge, Mass.: Harvard University Press, 1990) at 1-12.

STEPPING STONE OR PYRRHIC VICTORY? REFORM AND THE REFERENDUM

Trevor Harrison

INTRODUCTION

While the outcome of the recent referendum raises interesting questions regarding the future of constitutional reform, at the same time it raises questions regarding the long-term political effects of the vote. Insofar as Canada's two major regionally-based parties —the Bloc Québécois and the Reform Party — opposed the deal, one might initially conclude that they will obtain substantial benefit from the negative result. In this paper, I want to examine the accuracy of this conclusion with respect to the Reform Party.

I will compare the Reform Party's role in mobilizing popular discontent towards both the Meech Lake and Charlottetown Accords, and in doing so, will suggest subtle but significant differences in Reform's performance in opposing each. In particular, I will suggest that, unlike its actions in the period leading up to the Meech Lake Accord, in the recent referendum campaign Reform engaged in a high risk strategy of polarization without obtaining genuine political benefits. Finally, I will suggest that, in the wake of the referendum vote, Reform is riding the whirlwind of political discontent no less than any other party, and that the party's fortunes are therefore similarly uncertain.

REFORM AND THE MEECH LAKE ACCORD

The Reform Party's founding convention in the spring of 1987 occurred only days before the signing of the Meech Lake Accord.[1] The juxtaposition of the two events was not entirely coincidental. Many Reformers, and western Canadians in general, opposed the Accord, viewing it as unacceptably giving special status to Québec.[2] In a more general sense, the Accord was viewed by many party supporters, including party leader Preston Manning, as continuing a Central Canadian preoccupation, dating back to the 1960s, with Québec's constitutional concerns to the detriment of other issues, including the legitimate political and economic aspirations of Canadians in other regions. In effect, Reform opposed the Meech Lake Accord, but not constitutional amendments *per se*. Indeed, a central plank in Reform's political platform was a call for constitutional change. Primary among proposed changes was the idea of an equal, elected, and effective (Triple E) Senate.[3]

However, Reform's opposition to the Accord was sidetracked in the 1988 election by the issue of free trade. Although polls taken in the spring of 1988 showed that the Accord had lost considerable support since its signing a year earlier,[4] the polarization around the Free Trade Agreement largely negated discussion of this and other issues. This polarization, in turn, likely blunted Reform's electoral success. Although the party did reasonably well, taking 275,767 votes, or 7.3 percent of the all votes cast in the western provinces, it failed to elect a member.[5]

This situation changed shortly after the election upon the death of a Conservative MP. Running in the subsequent Beaver River by-election, the Reform Party candidate, Deborah Grey, gained a resounding victory. A key element in her victory was opposition to the Meech Lake Accord.[6]

By this time, opposition to the Meech Lake Accord was on the rise. A Gallup poll in January, 1989, showed that, nationally, 18 percent of Canadians opposed Meech Lake while 31 percent approved of the Accord.[7] By June, opposition nationally had risen to 31 percent (versus 30 percent who supported the Accord). Opposition to the Accord was especially high in the regions of Reform Party support. The June survey showed that in BC, 48 percent opposed the Accord versus 15 percent who supported it, while, on the Prairies, 36 percent opposed the deal compared with 23 percent who supported it.[8]

Despite these results, it is important to note that neither Preston Manning nor Reform dwelt excessively on the Accord during the Spring and Summer of 1989. That is, whatever opposition to the Accord was growing throughout the West does not seem to have been unduly fomented by the party or its leadership. Rather, the party appears to have treated the Accord, and constitutional matters in general, as only one of several issues that needed to be addressed.

It was not until Reform's Edmonton convention in October, 1989 that Manning shifted opposition to the Meech Lake Accord to the centre of the party platform. In his keynote address to that convention, Manning made his most strident attack, to that time, upon the Accord and Québec's desire for "distinct society status" within Canada:

> Either all Canadians, including the people of Québec, make a clear commitment to Canada as one nation, or Québec and the rest of Canada should explore whether there exists a better but more separate relationship between the two.... Our clear preference is for a united Canada in which Québec is prosperous and culturally secure.... If, however, we continue to make unacceptable constitutional, economic and linguistic concessions to Québec, at the expense of the rest of Canada, it is those concessions themselves which will tear the country apart.[9]

Thereafter, Reform called for the withdrawal of the Accord based upon several perceived flaws, among them "the top-down,

closed-door approach to constitution making," "the rigid amending formula," the Accord's "lack of substantial assurances that real progress would be made" regarding Senate reform, and the "distinct society" clause.[10]

Manning's speech received front-page coverage and propelled him, and the party, to the centre of the national debate that ensued throughout that winter and the spring of 1990. Because the traditional political parties had supported the Accord, Reform was able to "stake out" an independent position that, moreover, coincided with growing popular opposition to the Accord. What was the effect of Reform's opposition to the Accord upon the party's political support?

Correlation does not, of course, prove causation. Nonetheless, Gallup polls conducted in February, March, April, and May, 1990 showed a steady slippage in support for the Meech Lake Accord.[11] During this same period, the Reform Party gained one percentage point each month in national support.[12] In June, 1990, the month Meech Lake went down to defeat, Reform stood at seven percent support nationally, 25 percent on the Prairies and 16 percent in British Columbia.[13]

Within months, Canada's body politic was riddled with a series of other crises, notably Oka and the onset of a grinding recession. Reform, too, faced challenges. At the party's convention in April of 1991, Reform moved to become a national party, the slogan "The West wants in" becoming only a faint memory. It was the party's high-water mark. That month, Reform reached 16 percent in the polls, 43 percent on the Prairies.[14] But with growth also came problems.

Throughout late 1991 and early 1992, a series of reports linked extremist, even racist, elements to the party. A well-publicized attempt at corporate fund-raising fell short of its goal. The party was further embarrassed by leaked memos that seemed to hint of political dirty tricks. Finally, the party was also buffetted by a series of resignations by members claiming that Manning and the Calgary head office were increasingly acting in an authoritarian manner.

Meanwhile, the constitutional train kept moving. Spicer, Bélanger-Campeau, Allaire, Beaudoin-Dobbie: during the two years following the failure of the Meech Lake Accord, numerous hearings were held and reports produced, each attempting to make sense of the myriad visions of Canada held by its citizens. Finally, in August, 1992, Prime Minister Mulroney and the premiers announced that they had concluded a deal on constitutional reform that would now be put to the Canadian people for ratification.

For the Reform Party, the announcement of a constitutional referendum could not have come at a better time. Since 1990, the party had steadily lost support in the national polls, and now stood at only 11 percent. Even in BC and Alberta, the party trailed behind the Liberals and NDP.[15] As the referendum debate got under way, some party supporters wondered if Meech Lake II — as they quickly dubbed the Charlottetown Accord — could rekindle the party's sagging fortunes.

REFORM AND THE CHARLOTTETOWN ACCORD

Within days of the August 28 agreement, the opposing sides in the debate began to crystallize. Like Meech Lake, the contours of both support and opposition to the Charlottetown Accord defy simple political analysis, but it is perhaps worthwhile to name some of the major actors on either side.

The Accord was, of course, supported by the elected political elite who had signed it, although during the course of the referendum some appeared more willing than others to reiterate this support. To this support was added that of the federal Liberals and NDP, and most provincial opposition parties. Influential former politicians, such as Peter Lougheed and William Davis, also supported the agreement, as did much of Canada's business and financial establishment, led notably by the Business Council on National Issues and the Royal Bank. The YES side also received endorsements from some environmentalists (for example the Green Party), some non-native ethnic groups, and various leaders in the cultural community, such as June Callwood and Pierre Berton.

The NO side presented a more variegated group. The opposition of Parti Québecois leader Jacques Parizeau and Bloc Québecois leader Lucien Bouchard was expected, as might well have been that of former Prime Minister Pierre Trudeau. Equally, political opposition from the opposition Liberals in Manitoba and BC and the CoR party in New Brunswick might have been anticipated. Less so was that of the Status Indian Chiefs in the Assembly of First Nations, who turned against the agreement signed by their leader, Ovide Mercredi. Also surprising to some was the opposition of the National Action Committee on the Status of Women. And while left-wing intellectuals, such as Phillip Resnick, urged rejection of the Accord, so also did several right-wing organizations, such as the Northern Foundation and the National Citizens' Coalition.

Reform's position on the Charlottetown Accord proved to be equally complex. While the party's populist image required that it get a "reading" as to its members' opinions on the issue, prominent members within the party's executive were urging various positions based on largely political motives. For example, at least one member of the party's national executive, Richard Anderson, is reported to have urged Manning to support the YES side, because a) the Accord would probably pass, at least in English-speaking Canada; and b) it wasn't altogether demonstrably a bad deal and, indeed, did contain provisions for a substantially reformed if not Triple E Senate. On the other side, some party insiders urged Manning to support the NO side, because a) the agreement might not pass; b) opposing the agreement, no matter the referendum outcome, would solidify Reform's right-wing constituency; and c) because the deal was not demonstrably good enough.[16]

On September 10th, Manning announced the party's decision: Reform would oppose the Charlottetown Accord. Manning would later state four reasons for Reform's opposition. First, the Accord did not, in the party's view, resolve the sovereigntist threat in Québec. Second, it further divided Canadians "into such categories as French-Canadian, English-Canadian, aboriginal-Canadian, and other Canadians, rather than advancing equality of all Canadians."

Third, the agreement weakened "a reformed Senate by allowing it to be overridden by an enlarged House of Commons on all subjects other than French language and culture, and perhaps natural resource taxation." And fourth, because it gave every province a veto over future institutional changes, it made future reform of the Senate, House of Commons, and Supreme Court "virtually impossible."[17]

Unlike its somewhat peripheral position in opposing the Meech Lake Accord, Reform's opposition to the Charlottetown Accord placed the political spotlight directly upon the party. The heat of that spotlight somewhat tarnished Reform's image. For starters, the days following Manning's announcement of the party's decision brought complaints from some party members that the decision had been hastily made by Reform's executive without listening to the people. Indeed, some members complained that they had only received their ballots on the day the decision was announced.[18] Later reports that Manning had considered supporting the deal, but changed his mind after receiving advice from the party's American pollster, further damaged Reform's populist image.[19]

Reform's image of honesty and integrity slid further as the campaign proceeded. Early on, Manning urged his followers not to attack personalities or any part of the country in opposing the deal.[20] Yet, mid-way through the referendum campaign, Reform launched a series of television ads and speeches in which the Charlottetown Accord was referred to as "the Mulroney deal." This rather transparent attempt to render the agreement guilty by association with an unpopular leader was condemned by many people, even within the party.[21]

Manning may also have lost some credibility in suggesting that the Accord, if passed, would hurt the Canadian economy.[22] The assertion seemed as out of place as similar hyperbolic threats made by the Accord's supporters warning of economic disaster if it was defeated.

In the end, the NO side won, of course. The Charlottetown Accord went down to defeat in six provinces, including all of the western provinces, and the Yukon. Nationally, 54 percent of Canadians voted against the Accord.[23] The question remained: what effect would the referendum results have upon Reform Party support?

REFORM'S UNCERTAIN FUTURE

As we have seen, Reform received an initial "bounce" following the failure of the Meech Lake Accord. Within two years, however, this support had levelled off and was in actual decline when the referendum of 1992 came along. Would the referendum results bring Reform renewed political support?

Those believing that the referendum result would politically benefit Reform claimed three reasons for their contention:

1. If you want to be elected, you must be different from your opponent. By positioning itself on the NO side, Reform distinguished itself from the other leading political contenders in English-speaking Canada.

2. By correctly "reading" the mood of the electorate, Reform was able to align itself with the winning side in the referendum, thereby gaining in public credibility and support. A corollary of this is that the other parties, as a result of supporting the losing side, lost credibility and support.

3. The referendum result particularly damaged the already embattled governing Tories. To the extent that the majority of Reformers were, at one time, Conservatives, the Reform Party constitutes a natural "home" for those fed-up with the Mulroney government.

Within days, however, of the referendum, these assumptions were thrown for a loop by an Angus Reid poll showing that the Reform Party had risen only marginally, to 13 percent of the national vote. More damaging was the poll's finding of a rise in Preston Manning's disapproval rating among voters from 34 to 44 percent.[24] Finally, even the marginal gain in national support vanished the following month when a Gallup poll showed Reform once again at 11 percent.[25] What had gone wrong? Despite apparently favourable conditions, at least two factors appear particularly salient in negating any potential gains for Reform resulting from the referendum vote:

1. Unlike the situation with the vastly more disliked Meech Lake Accord, public opinion on the Charlottetown Accord was mixed. At least some Reform members voted YES, while many non-Reformers voted NO. Hence, Reform was unable to stake out an unambiguously "winning" position.

2. The party's head office was itself riven with conflict over the party's decision to oppose the agreement.[26] These divisions were exacerbated by Reform's performance during the referendum, a performance that also damaged the party's greatest asset: Preston Manning's credibility. Immediately following the referendum vote, and apparently linked to these internal conflicts, Reform was stunned by the departures of several key party insiders, including communications manager Laurie Watson, speech writer George Koch, and policy director Tom Flanagan.[27]

In short, the referendum debate damaged existing support for the Reform Party while gaining few new supporters and, indeed, perhaps even harming Reform's credibility among potential supporters who had previously viewed the party as less politically motivated than other parties. In effect, Reform won the referendum battle, but may have lost the political war. Where does the referendum vote now leave the party?

CONCLUSION

Throughout 1989 and 1990, the Reform Party by and large rode the political coattails of general discontent accompanying the Meech Lake Accord. Under Preston Manning's tutelage, Reform pursued a low-risk strategy in opposing the Accord that, moreover, reinforced perceptions of the party as an otherwise politically

disinterested and honest representative of the people. By contrast, Reform's hard-line position opposing the Charlottetown Accord involved considerably more risk insofar as the party was placed at the center of the debate. In the end, Reform's performance during the referendum reaped the disfavour of those put off by either the party's position, strategy, or tactics. At the same time, the party received few, if any, political benefits from its stance.

In the short term, the internal conflicts and damage to the party's public image resulting from the referendum campaign may abate. More problematic for the party, however, may be certain long term effects of the referendum. First, the mere holding of the referendum, combined with general public fatigue, has sidelined the Constitution as a major plank in Reform's political platform.[28] Second, Reform also expended considerable scarce financial and other resources in waging the NO campaign, even while alienating many in the business community whom Reform had hoped to win to its side.[29]

Finally, Reform may be harmed by a third factor: voter unrest. Popular forces once unleashed are not easily contained. Since the party's inception, and certainly throughout the referendum campaign, Reform has attempted to run as the consumate outsider, the "non-political" political party. This was the essence of the inverted logic that Manning conveyed to voters during the referendum when he said: "If you vote YES, you are following the politicians. If you vote NO, you will be leading them"[30] implying that he was not a politician. In this season of political discontent, however, there is no safe haven, as shown by one ironical result from the referendum: Although the Charlottetown Accord was passed in only one Alberta riding, that riding was the one in which Preston Manning will be running in the next federal election.[31]

Trevor Harrison has recently completed his doctoral thesis in Sociology, University of Alberta, dealing with the Reform Party, and will be convocating in the Spring of 1993.

1. For a general history of the party, see M. Dobbin, *Preston Manning and the Reform Party* (Toronto: Lorimer and Company Ltd., 1991); and S. Sharpe and D. Braid, *Storming Babylon. Preston Manning and the Rise of the Reform Party* (Toronto: Key Porter Books, 1992).

2. See, for example, F. Winspear, *Out of My Mind* (Victoria: Morriss Printing Company Ltd.) at 188.

3. See P. Manning, *The New Canada* (Toronto: Macmillan Canada, 1992).

4. *Gallup Poll* (28 April 1988).

5. *Report of the Chief Electoral Officer of Canada on the 34th General Election* (Ottawa: Chief Electoral Officer of Canada, 1988).

6. Manning, *supra* note 3.

7. *Gallup Poll* (16 January 1989).

8. *Gallup Poll* (22 June 1989).

9. Quoted in Manning, *supra* note 3 at 223-24.

10. *Ibid.* at 239.

11. *Gallup Polls* (8 March, 24 March, 26 April, and 18 May 1990).

12. *Gallup Polls* (22 February, 22 March, 19 April, and 17 May 1990).

13. *Gallup Poll* (28 June 1990).

14. *Gallup Poll* (25 April 1991).

15. *Gallup Poll* (13 August 1992).

16. *The [Toronto] Globe and Mail* (24 October 1992) A5.

17. *The Edmonton Journal* (22 October 1992) A4.

18. *The St. Albert Gazette* (26 September 1992) 6.

19. *The [Toronto] Globe and Mail* (24 October 1992) A5.

20. *The Edmonton Journal* (2 October 1992) A3.

21. See analysis by Chris Cobb in *The Edmonton Journal* (16 October 1992) A3; and the apologetic comments of Reform's director of communications, Laurie Watson, in *The Edmonton Journal* (24 October 1992) A4.

22. *The Edmonton Journal* (9 October 1992) A3.

23. Results reported in *The Edmonton Journal* (27 October 1992) A1.

24. See Norm Ovenden's column in *The Edmonton Journal* (14 November 1992) G1.

25. *The Edmonton Journal* (4 December 1992) A12.

26. See, for example, *The Edmonton Journal* (26 October 1992) A3.

27. *The Edmonton Journal* (5 November 1992) A3.

28. Prior to his departure from the party, Reform's policy director, Tom Flanagan, stated that, because of the referendum: "We've now got to put the constitution aside." Quoted in *The Edmonton Journal* (24 October 1992) B8.

29. For example, both Jim Gray, co-founder and vice-president of Hunter Oil, a long-time Reform supporter, and Elmer Brooker, former president of the Edmonton Chamber of Commerce, broke with the party during the referendum. *The Edmonton Journal* (26 October 1992) A3 also relates Reform's financial troubles to the referendum, particularly the drying up of corporate funding.

30. *The Edmonton Journal* (6 October 1992) A3.

31. *The Edmonton Journal* (28 October 1992) A4.

THE CANADA CLAUSE THAT WAS: HOW COURTS USE INTERPRETATIVE CLAUSES

Shirish P. Chotalia

INTRODUCTION

The death of the Charlottetown Accord was due to many factors, one of which was the objections of some members of the public to the Canada Clause. Some asserted that it created a hierarchy of rights; others argued that it subverted gender equality provisions; still others felt that it subjugated individual rights to collective rights. It is my contention that the Canada Clause, while not ideal,[1] failed largely because of the public's lack of knowledge of how courts have used interpretative clauses in the past, and how the Canada clause might have been used by courts in the future.

BACKGROUND

> Coming to terms with our history, we believe, means coming to terms with the distinct societies which make up Canada's society and culture. Not to acknowledge that Quebec is distinct from the rest of Canada seems to be an attempt to rewrite Canadian history; not to recognize Canada's unique commitment to multiculturalism seems to be an attempt to ignore our history; not to acknowledge Canada's debt to its Aboriginal people, we believe, is to deny our history.[2]

The Canada Clause was to "guide the courts in their future interpretation of the entire Constitution, including the *Canadian Charter of Rights and Freedoms*." Both the stated purpose and the clear wording of the clause confirmed that it was to be interpretative and not substantive:

> 2. (1)The Constitution of Canada, including the *Canadian Charter of Rights and Freedoms*, shall be interpreted in a manner consistent with the following fundamental characteristics:
>
> (a) Canada is a democracy committed to a parliamentary and federal system of government and to the rule of law;
>
> (b) the Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies, and their governments constitute one of three orders of government in Canada;
>
> (c) Quebec constitutes within Canada a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition;
>
> (d) Canadians and their governments are committed to the vitality and development of official language minority communities throughout Canada;
>
> (e) Canadians are committed to racial and ethnic equality in a society that includes citizens from many lands who have contributed, and continue to contribute, to the building of a strong Canada that reflects its cultural and racial diversity;
>
> (f) Canadians are committed to a respect for individual and collective human rights and freedoms of all people;
>
> (g) Canadians are committed to the equality of female and male persons; and
>
> (h) Canadians confirm the principle of the equality of the provinces at the same time as recognizing their diverse characteristics.

The Canada Clause provided constitutional recognition of the Canadian reality. The interpretative value of the Canada Clause would have been important in providing a larger vision of the country to appointed judges in their traditional analysis of the *Charter*, not unlike interpretative clauses already existing in the *Charter*.

Indeed, many of the clause's provisions are well accepted legal tenets of Canadian society such as Canada being a democracy and being committed to the rule of law. The Supreme Court has recognized the fact that the "rule of law" is a "cornerstone of our democratic form of government" and that it "guarantees the rights of citizens to protection against arbitrary and unconstitutional government action."[3]

Others are already explicitly provided for in other portions of the Constitution. For example, the affirmation of commitments to gender equality and to racial and ethnic equality are encompassed within s. 15 of the *Charter*.

Some appeared to slightly and subtly expand our existing vision of Canada. For example, the notion that "Canadians and their governments" are committed to the vitality and development of official language minority communities throughout Canada is entrenched to some extent in the "Official Languages of Canada" and "Minority Language Educational Rights" provisions of the *Charter*. For example, s. 16 (3) provides: "Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English or French." Here, some argue, there is no commitment to advance the use of English or French by gov-

ernments; whereas the Canada Clause advanced this linguistic right. However, other Charter provisions such as s. 23 commit Canadian governments to specific action.

Other provisions of the clause provided novel acknowledgements of the Canadian reality which do not presently exist explicitly in the Constitution. For example, the recognition of the Aboriginal peoples of Canada as the first peoples to govern this land, with rights to promote their languages and cultures and traditions, to ensure the integrity of their societies, and a recognition that their governments constitute one of three orders of government in Canada was a positive acknowledgement of the contribution of Aboriginal peoples to Canada. It surpassed the rather begrudging tone of s. 35 which recognizes and affirms "existing and aboriginal treaty rights". The Canada Clause provided a context for the self-government provisions which appeared in other portions of the Charlottetown Accord.

The recognition of the distinctiveness of Quebec in light of its language, unique culture and civil law tradition validated Quebec's historical contribution to Canada.

A commitment to both individual and collective rights was perhaps the most dramatic departure from an individualistic society. It marked an attempt to acknowledge the concerns of Aboriginal peoples, women, unions and other groups who wish to make systemic discrimination and class complaints.

THE POSSIBLE INTERPRETATION

The clear wording of the Canada Clause prevented it from supplanting existing Charter rights and freedoms. Instead, it would have provided an interpretative guide to Courts — a national context for interpretation. However, given the range and diversity of items prescribed by the clause and the range of rights and freedoms encompassed in the *Charter*, it was difficult to definitively state how various provisions of the clause would have been interpreted by the courts in various contexts. Clearly, a case by case analysis would have developed.

i. General Principles of Charter Interpretation

Still, analysis of the Canada Clause would not have departed from the principles of Charter interpretation as they have developed to date. For example, it has been held from the early Charter days that the *Charter* is a purposive document. The rights and freedoms it enshrines are to be defined by an analysis of the purpose of the guarantees, through an understanding of the interests they were meant to protect.[4] This analysis is to be undertaken and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined and, where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*.[5] The courts have consistently espoused the position that the *Charter* was not enacted in a vacuum. Both the purpose and effect of intrusive legislation or governmental action are to be examined in determining whether Charter rights or freedoms have been infringed.

Accordingly, had the Charlottetown Accord been passed, courts could have considered the provisions of the Canada Clause in three ways: 1) in the definition of the right or freedom itself; 2) in the analysis of whether a breach had occurred; or, more likely, 3) in the section 1 analysis. Given that the interpretation of the right or freedom is to be a generous one rather than a legalistic one, aimed at fulfilling the purpose of the guarantee,[6] the use of the Canada Clause would probably have received consideration in the delineation under s. 1 of "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

The Canada Clause would have served as an addition to existing interpretative clauses within the *Charter*, such as ss. 27 and 28 of the *Charter*. An examination of the use of such interpretative clauses provides guidance in understanding some of the potential effects of interpretative clauses such as the Canada Clause.

ii. Section 27

Section 27 states: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." This wording is parallel to that of the Canada Clause with the omission of the phrase "fundamental characteristics", the multicultural heritage presumably being a fundamental Canadian characteristic.

In the case of *R.* v. *Big M. Drug Mart Ltd.*,[7] the Supreme Court used s. 27 in finding a breach of freedom of religion. It held that the *Lord's Day Act* was of no force and effect by reason of its violation of the guarantee to freedom of conscience and religion enshrined in s. 2(a) of the *Charter*. To accept that Parliament retains the right to compel universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multicultural heritage of Canadians as expressed in s. 27. For non-Christians, the practice of their religion at least implies the right to work on Sunday if they wish. Any law which is purely religious in purpose surely infringes religious freedom. Further, the protection of one religion and the concomitant non-protection of others imports a disparate impact destructive of religious freedom in our society.

Dickson J. used s. 27 to find that the federal statute infringed freedom of religion and only thereafter dealt with the s. 1 analysis. Of course this early case was the beginning of the "pioneering" in Charter interpretation.

Subsequently, in *R.* v. *Edward Books and Art Limited*,[8] the Court again used the s.27 interpretative clause as it did in *Big M. Drug Mart*.[9] It was held that freedom of religion as guaranteed by s. 2(a) of the *Charter* is to be interpreted in light of Canada's multicultural heritage. A law infringes freedom of religion if it makes it more difficult and more costly to practice one's religion. Such a law does not help to preserve and certainly does not serve to enhance or promote that part of culture which is religiously-based. Section 27 recognizes that Canadian society is an open and

pluralistic one which must accommodate the small inconveniences that might occur where different religious practices are recognized as permissible exceptions to otherwise justifiable homogeneous requirements. Wilson J. dissented in part, using the s. 27 interpretative clause in her s. 1 analysis, finding that the Ontario legislation did not constitute a reasonable limit.

More recently, in *R.* v. *Keegstra,*[10] the Supreme Court has indicated a preference for using interpretative clauses in the s. 1 analysis, rather than in the definition of the rights and freedoms. Dickson C.J., for the majority, there held that communications which wilfully promote hatred against an identifiable group are protected by s. 2(b) of the *Charter* and, accordingly, s. 319(2) of the *Criminal Code* is an infringement of freedom of expression. The argument was made that ss. 15 and 27 of the *Charter* provide interpretative aids "...that inextricably infuse each constitutional guarantee with values supporting equal societal participation and the security and dignity of all persons."[11] Dickson C.J. rejected the argument by indicating that it is preferable to use such sections in the s. 1 analysis, rather than in defining the guaranteed right or freedom. He stated:

> Suffice it to say that I agree with the general approach of Wilson J. in *Edmonton Journal, supra*, where she speaks of the danger of balancing competing values without the benefit of a context. This approach does not logically preclude the presence of balancing within s. 2(b).... I believe, however, that s. 1 of the *Charter* is especially well suited to the task of balancing, and consider the Court's previous freedom of expression decisions to support this belief.[12]

His position is in keeping with the minority position that these sections do not reduce the scope of expression protected by the *Charter.*[13] Subsequently, Dickson C.J., in his s. 1 analysis, found that Canada's commitment to the values of equality and multiculturalism in ss. 15 and 27 strengthen the "legitimacy and substantial nature of the government objective".[14] The court also referred to the work of many study groups, to historical knowledge of the potentially catastrophic effects of the promotion of hatred, and to international commitments to eradicate hate propaganda. In finding that the section meets the proportionality test, he referred to the objectives of protecting target group members and of fostering harmonious social relations in a community dedicated to equality and multiculturalism. Thus the interpretative clause is one of the factors used in the s. 1 analysis.

In *R.* v. *Zundel,*[15] the Court considered the constitutionality of section 181 of the *Criminal Code* (wilful publication of a false statement). McLachlin J., writing for the majority, confirmed the broad purposive interpretation of the freedom guaranteed in s. 2(b) and used the s. 27 interpretative clause in her s. 1 analysis.

The Court held that the section infringes the guarantee of freedom of expression because s. 2(b) of the *Charter* protects the right of a minority to express its views, however unpopular.[16] Section 181, which may subject a person to criminal conviction and potential imprisonment because of words he or she published, undeniably has the effect of restricting freedom of expression, and therefore imposes a limit on s. 2(b).

Subsequently, in her s. 1 analysis, McLachlin J. distinguished s. 319 (considered in *Keegstra*) from s. 181 and found that the latter section is not justifiable under s. 1 of the *Charter*. The greatest danger of s. 181 lies in the phrase "injury or mischief to a public interest" which is capable of almost infinite extension. To equate the words "public interest" with the protection and preservation of certain Charter rights or values, such as those enshrined in ss. 15 and 27, is to engage in an impermissible reading in of content foreign to the enactment. The range of expression potentially caught by the vague and broad wording of s. 181 extends to virtually all controversial statements of apparent fact which might be argued to be false and likely to do some mischief to some public interest, regardless of whether they promote the values underlying s. 2(b). It is overly broad and chooses the most draconian of sanctions to effect its ends — prosecution for an indictable offence under the criminal law. In fact, there is a danger that s. 181 may have a chilling effect on minority groups or individuals, restraining them from saying what they would like for fear they might be prosecuted.

In contrast, the minority used s. 27 in its s. 1 analysis, but used it rather innovatively to define the meaning of the legislation which was under attack. Cory and Iacobucci JJ., in a joint-decision, held that the section does infringe s. 2(b) but is sufficiently precise to constitute a limit prescribed by law under s. 1 of the *Charter*. The citizen must wilfully publish a false statement knowing it to be false. Further, the publication of those statements must injure or be likely to injure the public interest. They stated that the fact that the term "public interest" is not defined by the legislation is of little significance. The courts play a significant role in the definition of words and phrases. They postulated that the term is to be interpreted in light of the legislative history of the section and the legislative and social context in which it is used. In the context of s. 181, the term "public interest" refers to the protection and preservation of those rights and freedoms set out in the *Charter* as fundamental to Canadian society. A democratic society capable of giving effect to the Charter's guarantees is one which strives toward creating a community committed to equality, liberty and human dignity. The term should thus be confined to those rights recognized in the *Charter* as fundamental to Canadian democracy. It need not extend beyond that. Section 181 is contravened only if the false statements are deliberate and likely to seriously injure the rights and freedoms set out in the *Charter*. This test for defining "injury to the public interest" takes into account the changing values of Canadian society. Those values encompass multiculturalism and equality. The dissenting judges found that s. 181 is justifiable under s. 1 by using s. 27 to validate government objectives of preventing harm caused by wilful publication of injurious lies.

In *R.* v. *Gruenke,*[17] the Court used s. 27 to interpret the common law as it applied to privileged communications *vis à vis* freedom of religion. In reaching the conclusion that a privilege for religious communications is available on a case-by-case basis, Lamer C.J. specifically referred to s. 27 to note that the privilege is not limited to Christian denominations.

Accordingly, there has been a progression of development in use of the s. 27 interpretative clause as it relates to the *Charter of Rights and Freedoms*. A trend has developed of avoiding its use in the definition of the Charter rights and freedoms, as in the early cases, and of using it instead in the balancing task necessitated by s. 1. Further, the courts have found innovative, sometimes result-oriented, ways of using the interpretative provisions to bolster challenged laws, both statute and common law.

iii. Section 28

Section 28 states: "Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

In *R.* v. *Red Hot Video Ltd.*,[18] Anderson J. A. stated that determining whether the criminal prohibition against obscenity contained in s. 159 of the *Criminal Code* violates freedom of expression, or satisfies s. 1 of the *Charter*, should not be done in a vacuum. Regard should be had to the *Charter* as a whole, including s. 28. If true equality between male and female persons is to be achieved, it would be quite wrong to ignore the threat to equality resulting from the exposure of male audiences to violent material which degrades women. Such material has a tendency to make men more tolerant of violence towards women, and to create a social climate which encourages men to act in a callous and discriminatory way towards women.

In *Re Blainey and Ontario Hockey Association*,[19] the lower court decision held that s. 28 does not override the other sections of the *Charter* such as ss. 1 and 15(2). Rather, it was intended merely to emphasize that, under s. 15 and the other sections of the *Charter*, men and women are to be treated equally.

Similarly, in *Re Shewchuk and Ricard*,[20] the British Columbia Court of Appeal rejected the appellant's argument that s. 28 supports his argument that the *Child Paternity and Support Act* violated equality provisions by placing the state on the side of the mother against the interests of the putative father. The Court held that s. 28 does nothing more than emphasize and ensure that all of the rights and freedoms in the *Charter* are granted equally to male and female persons. It was not intended to require that a greater measure of equality be afforded on the basis of sex than on the basis of other potential grounds of discrimination.

In *R.* v. *Nguyen*,[21] Wilson J. in her s. 1 analysis discussed the role of s. 28, stating that it does not prevent the legislature from creating an offence that as a matter of biological fact could only be committed by one sex. But it does mean that it is not open to the legislature to deny an accused who is charged with such an offence rights and freedoms guaranteed to all persons under the *Charter*.[22]

In *R.* v. *Seaboyer*,[23] L'Heureux-Dubé J., in dissent, used s. 28 as additional "support for a broader analysis of the rights invoked by the appellants". She writes: "In the context of this case, this section would appear to mandate a constitutional inquiry that recognizes and accounts for the impact upon women of the narrow construction of ss. 7 and 11(d) advocated by the appellants."[24] She used the interpretative clause in a larger discussion favouring a broad view of the rights to a fair trial and against the deprivation of fundamental justice as not being confined to the interests of the accused. Accordingly she found no breach of the Charter rights.

A similarly broad-based approach was used by Mahoney J. A. in *Native Women's Association of Canada* v. *The Queen*[25] in dealing with the issue of whether the exclusion of the plaintiff (NWAC) from the constitutional negotiating process infringed its freedom of expression. He held that ss. 2(b) and 28 were violated by the government in inviting and funding the participation of groups opposed to application of the *Charter* to Aboriginal self-governments, but excluding NWAC. The government had thereby accorded advocates of male-dominated Aboriginal self-government a preferred position in the exercise of expressive activity within the meaning of s. 2(b) which, under s. 28, is to be guaranteed to males and females equally. It is my contention, however, that it would have been more appropriate for the court to have found a violation of s.2(b) and then used s.28 to find the limit not reasonable within the meaning of s.1 of the *Charter*.

In summary, s. 28 has been interpreted as emphasizing existing s. 15 rights rather than creating independent rights. However, as illustrated by the comments of L'Heureux-Dubé J. and Mahoney J.A. above, s. 28 has the potential of expanding the interpretation of existing Charter rights.

iv. Section 29

Section 29 states: "Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools."

In *Reference Re: Bill 30 An Act to Amend the Education Act (Ont)*[26] this interpretative clause was used to protect constitutionally guaranteed denominational school rights from Charter review. Statutory rights concerning denominational schools granted pursuant to the Province's plenary power in relation to education under s. 93 of the *Constitution Act, 1867* are also protected by s. 29.

However, the constitutional context of the case distinguishes this use from the manner in which other interpretive clauses have been used. Wilson J. held that since it was never intended that the *Charter* could be used to invalidate other constitutional provisions, ss. 15 and 2(a) of the *Charter* have no application to special or unequal treatment specifically provided for by the Constitution. Both rights and privileges protected by s. 93(1) of the *Constitution Act, 1867* and legislation enacted pursuant to the province's plenary power in relation to denominational, separate or dissentient schools are therefore immune from Charter review, and s. 15 has no application to legislation providing full funding to Roman Catholic separate high schools. Canada was founded upon the recognition of special or unequal educational rights for specific religious groups in Ontario and Quebec. The educational rights granted specifically to Protestants in Quebec and to Roman Catholics in Ontario at Confederation render it impossible to treat all Canadians equally in this respect. But Wilson J. emphasized that, in her view, s. 29

was not required in order to achieve this result.[27] Accordingly the case did not turn on the interpretive clause.

Further, there are other Charter sections, such as s. 23, which specifically provide for the special promotion of French and English rights. Advocates of other heritage language instruction are no doubt distressed by the decision of *Mahe* v. *Alberta*[28] in which Dickson J., in interpreting s.23, held that it was not helpful to consider ss. 15 or 27. Section 23 provides a comprehensive code for official language rights; it has its own internal qualifications and its own method of internal balancing. The section is an exception to the provisions of ss. 15 and 27 in that it accords special status to the English and the French in comparison to all other linguistic groups in Canada.

Regardless of whatever legitimate concerns that multicultural language advocates have, it is difficult to see how the Canada Clause, in and of itself, would have debilitated multicultural language rights.

CONCLUSION

Based upon the foregoing review of the use thus far made by the courts of interpretative clauses, I conclude that the Canada Clause would not have threatened existing Charter rights and freedoms. Rather, it would have provided a national context for their interpretation. I believe that the use of the Canada Clause would have been progressive and largely centred on balancing competing visions of Canada through the definition of "reasonable limits" in Canadian society under s. 1. The risk of result-oriented decisions existed under the Canada Clause. But this is true of any interpretative clause, present or future. Perhaps the most immediate and progressive change resulting from the Canada Clause would have been a broader interpretation of Charter rights and freedoms from a collective perspective.

Unfortunately, lack of legal certainty is inherent in any legal document subject to the scrutiny of the courts. It may be of concern for those who are afraid that an affirmation of collective rights can only be to the detriment of individual rights, that a commitment by governments to minority language education can only be to the detriment of such commitment to heritage languages, that a commitment to Aboriginal governments can only be to the detriment of existing governments, and that a commitment to Quebec can only be to the detriment of the rest of Canada. In fact, the contrary is true. The potentially more forceful affirmation of some aspects of Canadian society in the Canada Clause would not, of itself, have been a detriment to others affirmed in the clause. The Canadian Constitution is an evolving entity. Even the most ideal Constitution on paper does not guarantee that the enshrined rights and freedoms will be protected in practice. The Constitution of the former Soviet Union is a testament to this fact.

Rather the translation of legal rights into "living rights" is subject to the good-will of the citizens of the country who work individually, and collectively with their elected representatives and other communities, to ensure that all persons are treated with dignity, respect and fairness. Canadians, more than their Constitution, are the ultimate guardians of equality and justice.

Shirish P. Chotalia, B.A., LL.B., LL.M., Alberta Bar, Commissioner to Alberta Human Rights Commission.

1. For example, it excluded a reference to persons with disabilities.

2. Charter of Rights Coalition, *Report of the Manitoba Constitutional Task Force* by J. Bjornson (28 October 1991) at 11.

3. See *Canadian Council of Churches* v. *Canada*, [1992] 1 S.C.R. 236, in which Cory J. interpreted the enshrinement of the "rule of law" in the preamble of the *Charter*.

4. *R.* v. *Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

5. *Ibid.*

6. *Ibid.*

7. *Supra*, note 4.

8. [1986] 2 S.C.R. 713. Four Ontario retailers were charged with failing to ensure that no goods were offered for sale by retail on a Sunday contrary to the provincial *Retail Business Holidays Act*.

9. *Supra*, note 4.

10. [1990] 3 S.C.R. 697.

11. *Ibid.* at 733.

12. *Ibid.* at 734.

13. *Ibid.* at 833-837.

14. *Ibid.* at 758.

15. [1992] 2 S.C.R. 731.

16. All communications which convey or attempt to convey meaning are protected by s. 2(b) unless the physical form by which meaning is conveyed excludes protection (for example, a violent act). The content is irrelevant. The purpose of the guarantee is to permit free expression to the end of promoting truth, political or social participation, and self-fulfilment. That purpose extends to the protection of minority beliefs which the majority regard as wrong or false.

17. [1991] 3 S.C.R. 263.

18. (1985), 18 C.C.C. (3d) 1 (B.C.C.A.).

19. (1985), 21 D.L.R. (4th) 599; reversed on other grounds, 54 O.R. (2d) 513 (C.A.).

20. (1986), 28 D.L.R. (4th) 429 (B.C.C.A.).

21. [1990] 2 S.C.R. 906. In this case the Court found that s.146(1) of the *Criminal Code*, which makes it an offence for a man to have sexual intercourse with a female under the age of 14 who is not his wife, violated the *Charter* because it expressly removed the defence that the accused *bona fide* believed that the female was 14 or older.

22. *Ibid.* at 932-933.

23. [1991] 2 S.C.R. 577. The majority held that s. 276 of the *Criminal Code*, which prohibited the accused from adducing evidence concerning the prior sexual history of the complainant in specified instances, violated the accused's ss. 7 and 11(d) rights, and was not saved under s. 1 of the *Charter*.

24. *Ibid.* at 698-699.

25. (20 August 1992), (Fed.C.A.) [unreported].

26. [1987] 1 S.C.R. 1148.

27. *Ibid.* at 1197-1198.

28. [1990] 1 S.C.R. 342.

TREATY INDIGENOUS PEOPLES AND THE CHARLOTTETOWN ACCORD: THE MESSAGE IN THE BREEZE

Sharon Venne

INTRODUCTION

When the October 26th constitutional referendum was over and done, questions remained regarding the position of the Treaty Indigenous Peoples. Why had the Treaty Indigenous Peoples rejected the Charlottetown Accord negotiated by the Assembly of First Nations? Prior to the October 26th vote, many Treaty First Nations had announced their intention to boycott the vote. The National Chief of the Assembly of First Nations expressed his confidence that the First Nations' citizens would support the Accord despite the position taken by the Chiefs and Headmen. This proved to be a completely wrong assumption.

In the final analysis of the Alberta results, the breakdown of Treaty Peoples that voted for and against the Charlottetown Accord was merely a breeze across the prairie. Of the people who chose to vote, 74.4 percent voted against the Accord. For example, among the four bands (Samson, Ermininskin, Montana and Louis Bull) at Hobbema, one hour south of Edmonton, with on-reserve populations reaching into the thousands, 42 persons voted "no" while 14 persons voted "yes". The four bands at Hobbema are in the riding of Wilton Littlechild, the only Treaty member of the House of Commons. Mr. Littlechild, a member of the Conservative Party, attended a meeting with Joe Clark when Clark met with some of the Treaty Chiefs of Alberta at Nisku prior to the vote. Joe Clark tried to convince the Chiefs to support the Accord. Mr. Littlechild chaired the meeting without commenting upon the Accord. Despite the pressures put upon the general citizenship of the First Nations, the Indigenous Peoples chose not to vote.

In Southern Alberta, the Blood Tribe, with an on-reserve population of over 7,000, had 60 persons voting "no" while 26 persons voted "yes". Out of a population of several thousand eligible voters, 86 persons voted. Is there a message in the breeze?

The Elders of the Blood Tribe had reviewed the Charlottetown Accord some weeks prior to the referendum. After discussion of the provisions contained in the documents, the Elders directed the Chief and Council of the Blood Tribe to boycott the constitutional process. In an attempt to get their message across to the general population of Canada, the Blood Tribe along with the Chiefs of the Treaty Six Area of Alberta took a full-page advertisement in the *Globe and Mail* to declare their position. In a message addressed to all Canadians, the Treaty Peoples outlined their concerns about the Treaties and called upon all Canadians to respect the Treaty position of the First Nations.

There was also notice served that the Assembly of First Nations did not represent the Chiefs. The notice stated that the Chiefs would not be bound by any agreements which were negotiatied by the Assembly or its leaders. The reason: The package "did not honour the binding sacred trust obligations set out in our sacred Treaties".

The Blackfoot did not sign the advertisement. Chief Strator Crowfoot was the only Chief in Alberta to publicly support the Charlottetown Accord. With an on-reserve population reaching into the thousands, he managed the following vote: 261 persons voted against the Accord while 242 persons voted in favour. In total there were 503 voters out of an eligible list of approximately 2,500 eligible voters.

Treaty Indigenous Peoples knew the consequences of voting for the Charolottetown Accord. They chose to stand for their Treaty Rights. In Indigenous Country, silence speaks volumes.

I have used Alberta statistics, but similar results can be seen across the country with the exception of the Inuit in the Eastern Arctic. The Inuit have a different reality than the Treaty Peoples of the southern part of Canada.

The Mohawks of Kahnawake took the following view, as expressed in their newspaper *the Eastern Door*:

> The Constitutional amendments now offered to Canadians gives the Canadian Government authority to recognize us as a third order of government. It recognizes an inherent right to self-government for Natives which must be defined in five years. Our laws must conform to their laws in matters of peace, order and good government and no new land rights would derive from this deal. The Mohawks, as People who have never given up our lands, our constitution, our government nor have we given anyone the authority to negotiate on our behalf, would feel that this deal is less than the Nation to Nation relationship that has been the cornerstone of our relations with other Governments.

The question remains — why did the Treaty People reject the Charlottetown Accord? The answer lies in the nature of the Treaties. If one understands the Treaty reality, then one can easily understand the position of Treaty Peoples.

TREATY RIGHTS

The issue of the treaty rights of Indigenous Peoples is one of the most clouded and distorted in the entire colonial history of Canada. Failure to comprehend it in its correct perspective has caused historical, political and legal confusion. Canada is a product of imperialism, colonialism, foreign occupation and rule by non-indigenous settlers. Through these forces led by France and Great Britain, the Indigenous Peoples were relegated to the footnotes of colonial history.

In the attempt to perpetuate the colonisation of the Indigenous Peoples, many methods have been used: military suppression, economic exploitation, political oppression, distortion and mutilation of the country's history, the Indigenous institutions and culture and the manipulation of international law.

One of the most notorious distortions invented by some European historians and other settler writers is that the Indigenous Peoples did not really own the lands. The lands were "discovered" by the Europeans. Early in the period of discovery of the new world, the papacy articulated the doctrine of discovery, which announced that Christian princes discovering new lands had a recognized title to them. This papal bull remains, in effect, to this date.

Using the European settler concepts of *terra nullius* (land belonging to nobody) and discovery, the settlers have tried to secure their title to our lands and resources. All methods are defective in the face of Indigenous Peoples' rights.

In the alternative, it was claimed if Indigenous Peoples did occupy some of the lands, they did not occupy all of the lands. European settlers then impose another form of definition upon the term *terra nullius*. The European settlers said that the term "terra nullius" meant not only land belonging to no one, but also lands without a sovereign as understood in Europe. Indigenous Peoples without a sovereign could not really own lands. The Indigenous Peoples could not really enter into treaties with "civilized" sovereigns. Who defines civilized? Who defines sovereign?

It has been a commonly held notion that the Indigenous Peoples have no land rights because they did not till and use all the soil. This is an argument which was used in the *Gitskan* case. The judge was heard to say that the Gitskan had no beasts of burden and no wheeled vehicles which implied that they did not till and use all the soil. As a consequence, the assertion was made that the Indigenous Peoples had an imperfect title to the lands.

Henry Reynolds, an Australian professor of law, in *Law of the Land* writes:

> Common sense, let alone the law itself should tell us that this argument can't be justified. Only about half of Britain was farmed. There was much forest, mountain and coastal wetland in England. There was land with very few residents —waste and unfenced. But it was [very] (sic) all owned. Title to waste land in Britain was as secure as title to the best farm land. There was absolutely no obligation to cultivate...

Reynolds goes on to argue that the Australian Aboriginals possess their country; they made use of it and took from it and lived on the lands in their own manner of life.

C. Wolff, one of the most respected jurists of the first half of the 19th century, regarded as the founder of a reasoned approach to international law, writes in his book, *The Law of Nations*, about the place of nomadic or Indigenous peoples and the issue of land.

> He said that if the people in question had no settled abode but wander through uncultivated wilds... They are understood to have tacitly agreed that the lands in that territory in which they change abodes as they please, are held in common, subject to the use of individuals, and it is their intention that they should not be deprived of that use by outsiders... They are supposed to have occupied that territory as far as concerns the lands of their use.

It is clear that even nomadic people who move from place to place cannot be legitimately dispossessed of their lands merely because their method of using land differs from that of the Europeans. Mr. Von Martens explains:

> From the moment a nation has taken possession of a territory in the right of first occupier, and with the design to establish itself there for the future, it becomes the absolute and sole proprietor of it and all that it contains; and has the right to exclude all other nations from it.
>
> International law dictates that the settlers cannot acquire title to the territory of indigenous peoples by merely asserting sovereignty or their legal system or idealogy upon the Indigenous Peoples.

TREATIES

In the historical context of settlement by the non-indigenous people in the Americas, Great Britain and other European states began a system of signing treaties with the Indigenous Peoples. These treaties took many forms. Some treaties were for the establishment of peace and friendship while other treaties set aside lands to establish posts for farming and trading. Still other treaties set up boundaries and dealt with a number of issues which arose as a result of contact between Indigenous and non-indigenous peoples.

One well-known treaty signed between Indigenous Peoples and non-indigenous peoples is the two row wampum treaty signed in 1645 between the Dutch and the Iroquois Confederacy. The two rows represented their relationship: each independent and sovereign, never to interfere with one another.

The Treaty of 1645 set down the principles of Indigenous Peoples' sovereignty which would guide the signing of treaties with Indigenous Peoples. The treaty signing set out the boundaries and

the political system of each signatory. The treaty was to guarantee non-interference in one another's affairs. This is a basic principal of international law.

Another basic principle of international law is: *all peoples have a right to self-determination.* Indigenous Peoples have the right to freely determine their own political and legal status without interference by another state. When Indigenous nations entered into treaties, they did not surrender their rights to self-determination. Indigenous nations did not through the treaty process allow for the implementation of and interference by an alien legal system.

It is clear from the negotiations of treaties between Indigenous Peoples and non-indigenous governments that there was no intention on the part of Indigenous Peoples to relinquish their governments and legal systems to the settler governments.

In almost every treaty, the concern of the Indigenous Peoples was to preserve and ensure the continuing existence of the Indigenous Peoples for the future. It is this basic concept that non-indigenous people do not understand nor attempt to understand. Each treaty, for Indigenous Peoples, was a sacred undertaking made by one people to another which required no more than the integrity of each party for enforcement. That the Government of Canada insists that the treaties should be interpreted rigidly as strictly legal documents within the non-indigenous legal system has provoked disputes between the Indigenous Peoples and the settler government for the last hundred years.

THE STATUS OF CANADA IN RELATION TO THE TREATIES

Canada did not sign any pre-confederation or any numbered treaties with the Indigenous Peoples. Canada did not posses the authority to enter into international treaties until after the 1931 *Statute of Westminster.*

The colony of Canada was a creation of the United Kingdom Parliament in 1867. Canada was subordinate to the Imperial Parliament and the legal system of Great Britain. Canada often refers to itself as a dominion. Under international law, there is no term nor concept for dominion. In *Webster's Dictionary*, dominion is defined as: "[A] self-governing nation of the British Commonwealth other than the United Kingdom that acknowledges the British monarchy as chief of state."

Under international law, Canada is a municipal government of the United Kingdom despite the *Statute of Westminster*. H.J. May, a constitutional lawyer, declares that "on strictly legal grounds the dominions were subordinate to Great Britain". He also points out that the term came into usage at the 1907 Imperial Conference when the colonial territories evolved from colonial to "dominion". It is a non-indigenous manipulation of the language to give apparent authority where none existed within international law.

There is no valid reason why Great Britain should be deemed to have been correct in international law in designating her colony of Canada a "dominion", supposedly "independent", and thus confusing international law with her municipal law concepts.

International law would be abetting British colonialism, and its consequences of genocide and theft of resources and lands, if it were to lend any legal validity to the status of Canada as an "independent" state based upon the abuse and manipulation of international law by Great Britain and Canada. Indigenous Peoples have long maintained that the *only* time Canada will be an independent state in international law is when the vast dispossessed Indigenous Peoples have regained control of our territories and political power in accordance with the international law principle of *our inalienable right to self-determination.*

Under international law principles, Canada is a colony that was never decolonized. This case should be brought to the attention of the United Nations' Committee on Decolonization. When a colony is decolonized its control reverts to the Indigenous Peoples who were colonized. It does not remain in the hands of the settlers who were the instruments of colonization. Decolonisation is for the colonized peoples not for the settlers of the colonial power. Canada is the Americas' equivalent to South Africa on the African continent.

There are many tenets of international law which Indigenous Peoples can accept to help them regulate their lives. But there is one tenet of international law which cannot be accepted in the twentieth century, that is, support for the colonial powers assertion of their sovereignty over our peoples and territories in complete violation of our international treaty rights.

THE STATUS OF INDIGENOUS PEOPLE UNDER INTERNATIONAL LAW

Our treaties must be recognized. Strictly speaking, recognition is a matter of political or state policy rather than of law. It is not a legal act or a requirement. Recognition may be *de facto* (by fact) or *de jure* (by right). Our governments exist as *a matter of pure fact.* Our governments entered into treaties with non-indigenous people upon contact. That is a fact. It is a legal fact. Indigenous Peoples did not need any settler sovereign to give us a government to enter into treaties. The governments existed because we existed as Peoples.

Under Article I of the 1933 *Montevideo Convention*, in order for a nation to be recognized under international law, it must possess four characteristics:

1. A permanent population;

2. A definite territory;

3. A government; and,

4. A capacity to enter into relations with others.

When Canada, in 1982, formed itself into an independent state, the Indigenous treaties were not dealt with by the Government of Great Britain. Canada has tried to unilaterally assume jurisdiction

over the treaties. This is not acceptable and is contrary to the principles of international law. When Great Britain and Canada failed to deal with the treaties at an imperial conference prior to patriation, as required by British constitutional convention, control over the lands and resources should have reverted to the Indigenous Peoples as a matter of international law.

Indigenous Peoples are still maintaining their treaty rights. These rights have obligated the State of Canada to provide certain benefits to the Treaty Peoples. However, Canada has increasingly characterized the rights enjoyed by Treaty Indigenous Peoples as a result of Canada's benevolent actions rather than as an obligation.

THE FUTURE OF INDIGENOUS TREATIES

We do not want to have our international treaties entrenched under the municipal laws of Canada through the constitutional process. We do not want to have our treaties subjected to interpretation by a system based upon oppression and outdated European notions of settlement, conquest and discovery. We want to set up something outside of the constitutional process to deal with the issues related to the treaties.

The provinces of Canada do not possess any international law status to enter into or sign international treaties with Indigenous Nations. First Nations do not want the provinces to be part of the treaty process. It would seem that the legal position is that the First Nations with treaties must first come to some agreement with Canada on the recognition and implementation of the treaties prior to involving any of the provinces. Why would Indigenous Peoples want to elevate the status of the provinces from their municipal law position in international law to that of being equal partners with Indigenous Peoples? It seems clear that the Indigenous Peoples are the ones possessing the real legal power under the treaties. It remains for us to determine how best we want the treaties protected.

The position is clear. Implementation of the treaties as signed by our forefathers requires no constitutional change. First nations' citizens know their treaty law. Hence, the opposition to the Charlottetown Accord. The breeze could turn into a real storm if the treaties remain unimplemented.

Sharon Venne is a citizen of the Blood Tribe within the Treaty Seven area of Canada. She graduated in 1979 from the University of Victoria Law School. For the last twelve years, she has been active at the United Nations promoting the rights of Indigenous Peoples. In July, 1992, she was the first Indigenous Person invited to teach at the International Institute of Human Rights in Strasbourg, France.

SOLUTIONS TO THE FUTURE OF CANADA AND QUÉBEC AFTER THE OCTOBER 26TH REFERENDUM: GENUINE SOVEREIGNTIES WITHIN A NOVEL UNION

Daniel Turp

INTRODUCTION

Although there have been attempts to downplay the result of the referendum, the overwhelming and overarching "No vote" is of great significance for the future of Canada and Québec. More than ever before, it puts into question the very possibility of constitutional reform in Canada. It should be noted that the Fall referendum was the first occasion on which the people of Canada were directly involved in a decision relating to the political status and future of Canada as a whole. Yet, at this first and unique participation in nation-building, which, furthermore, evolved around an Accord that had been achieved through consensus by all governments of Canada and was presented as the best compromise possible for the nature and structure of the Canadian polity, the people of Canada and Québec clearly rejected this compromise, thereby expressing very divergent views on the future of the Canadian federation.

From a Québec perspective, it would not be erroneous to interpret the content of the Charlottetown Accord and the result of the October 26th referendum as a refusal to further decentralise the Canadian federation, as well as a rebuttal to Québec's traditional claim to additional powers to determine its own political, economic, social and cultural future. The content of the Accord revealed little concern for this claim. It did not even meet with the limited expectations of several promoters of federalism in Québec, proving once again the inability of the Canadian people to accept a model of federation that would concede to the people of Québec additional powers, powers that it has repeatedly sought through the past thirty years of constitutional negotiations.

Although the proposed amendments to the division of powers appeared insufficient to a major constituency in Québec, those amendments were rejected by Canadians at the ballot box as giving too much to Québec. The amendments were seen as inconsistent with the respective role of the federal and provincial authorities in the governing of Canada. Quebecers rejected the Charlottetown Accord because the issue of division of powers had not been settled in a satisfactory manner. Many other motives underly the "No vote" of Canadians and Quebecers, but this interpretation for rejection by Canada and Québec is heavily supported by polls conducted after the 26th of October and cannot easily be discounted.[1]

This episode in the political and constitutional history of Québec and Canada reveals again a struggle to reconcile irreconcilable visions of the federation. On the one hand, the contemporary struggle for more autonomy for Québec has met a subtle yet decisive disapproval on the part of Canadians. On the other hand, Canada's will to give a national agenda to the federation in all fields of human endeavour has been impeded by Québec's unwillingness to concede any significant additional powers to the central authorities of the federation in the economic, social and cultural fields. These irreconcilable visions of Canada were entrenched in the Charlottetown Accord and that explains in great part why success in accommodation was more apparent than real, and why the Accord was rejected by the people of Canada and Québec.

Despite numerous calls for constitutional moratoria, the demise of the Charlottetown Accord will not prevent new initiatives towards constitutional reform, new attempts to "save" Canada and prevent Québec from achieving statehood. Many will promote the preservation of Canada's unity and uniqueness and reiterate the need for maintaining Canada's political independence and territorial integrity. As Canadian and Québec elections approach, some political leaders and parties will be given the opportunity to put forward new constitutional proposals. These leaders might well acquire the legitimacy required to initiate new constitutional talks.

It is nevertheless the belief of many, particularly in Québec, that new attempts at constitutional reform will lead to another failure and prevent both Canada and Québec from carrying on the challenging role of providing their people with good government. This belief will likely be reflected in the results of the next federal and Québec elections where a very significant number of promoters of sovereignty for Québec will be elected. Indeed, the new Québec leadership will, in all likelihood, initiate a process which will not be aimed at constitutional renewal, but will be focused both on the achievement of sovereignty for Québec and on the building of a very novel union between Canada and Québec.

GENUINE SOVEREIGNTIES FOR QUÉBEC AND CANADA

There is a growing consensus in Québec that sovereignty is a legitimate goal for the Québec people and that its achievement will be yet another step in its quest for self-determination. Yet it should be made clear that sovereignty for Québec does not equal a greater degree of autonomy for Québec within Canada, but rather a new international status for both Québec and Canada that entails the emergence of two sovereign states.

In this respect, the ambiguities that have been sustained in the past two years, principally by Québec's Premier Robert Bourassa, should be clarified and give rise to a more rigorous and honest presentation of the desired status of Québec. The references to the

notion of "shared sovereignty" and to the evolving experience of the European community as well as to the formulation of the infamous "Brussels question" by Premier Bourassa,[2] have contributed to great confusion and should no longer be instruments used by political leaders to mask their real intent with regards to the status of Québec and the nature of its relationship with Canada.

Although Premier Bourassa and his Liberal Party have clearly set aside their sovereignist platform and are less likely to resort to the vocabulary used before the October 26th referendum, it is not unlikely that they will make reference to the same ambiguities in order to attract the vote of Quebecers during the next Québec election. Again, this would constitute a refusal to define in clear terms what they really mean by sovereignty. It is also to be hoped that the Network of Liberal Dissidents, chaired by the former president of the Liberal Party's Constitutional Commission (Jean Allaire), will put forward some formula that makes clear the future status of Québec and avoids the confusion of their former party.

The leader of the Parti Québécois, Jacques Parizeau, shares this problem of clarity and should avoid statements that give rise to conflicting interpretations of the nature of Québec's sovereign status. Comments by Parizeau on the maintenance of Canadian citizenship and passports for Quebecers, as well affirmations on the use of the Canadian currency by Québec, however legally accurate they may be,[3] have nurtured confusion and should not be presented in contexts that give rise to diverging interpretations on the desired status for Québec.

In fact, what is needed for Québec and Canada are genuine sovereignties, sovereignties that are clearly rooted in international law, making them two sovereign and equal states. A status that falls short of international sovereign status, and which would be at the very outset a *sui generis* formula of coexistence within a same body politic, could be even more confusing than the existing federal order (which at times seems very complex). The emergence of a sovereign State of Québec and the continued existence of the sovereign Canadian State would dissipate confusion within the international community and allow Québec to become a full-fledged member of that community, and Canada to maintain its current status.

The unambiguous status of Québec and Canada as legally sovereign entities would also permit the negotiation, between them, of a relationship that would stem from the common will of two sovereign states to achieve together a novel union.

A NOVEL UNION OF CANADA AND QUÉBEC

The historical, economic and political ties that have been woven by Canada and Québec in the past centuries have led promoters of Québec sovereignty to seek to establish a mutually beneficial association with Canada. As early as 1968, the most prominent leader of the sovereignty movement in Québec, René Lévesque, invited Quebecers to opt for sovereignty-association and thus to maintain close association with Canada. The 1980 referendum tied this idea of sovereignty with association and the government of the Parti Québécois then sought a mandate to negotiate a new deal that would have created close links between a sovereign Québec and Canada.

After the long parenthesis on the issue on sovereignty, which closed with the rejection of the Meech Lake Accord, the question of the relationship with Canada rose again, in parallel with the renewed debate on sovereignty. Hence, while a great majority of Quebecers argued in favor of sovereignty before the Bélelanger-Campeau Commission, they also clearly stated that Québec should seek an association with the rest of Canada. Moreover, the Bélanger-Commission and the Commission on Matters Relating to the Accession of Québec to Sovereignty analysed in depth the legal and economic aspects of Québec's re-association with Canada.[4]

The recurring debate on the Canada-Québec relationship appears to be caused not only by the will of Quebecers to prevent economic instability and to permit an orderly transition, but also by the idea that Canadians and Quebecers should, albeit in a different format, share in their future. Although this is not acknowledged in a very public manner by either party, Canadians appear to share similar views and are willing to maintain an association with a sovereign Québec.

It should not be surprising therefore that proposals for a novel union with Canada could gain momentum in the forthcoming months. These proposals will certainly focus on the economic dimension of a union between Canada and a sovereign Québec. Proposals to preserve and improve the economic union will certainly be formulated, although some groups will prefer looser forms of economic association with Canada, be it a free-trade zone, a custom's union or a common market.

All these diverse forms of economic association will entail a certain degree of freedom of movement of goods, services, capital and persons and will render necessary the adoption of measures to translate these freedoms into legal norms and to permit the creation of implementation mechanisms. Here, promoters of a continued association between Canada and Québec will have to devise mechanisms to allow for sound management of the association. Some will prefer the creation of administrative and intergovernmental mechanisms and will argue that to have their supervision measures adopted by national authorities (Parliaments and governments) will suffice. Others will champion political and parliamentary institutions to manage the association and will seek distinct powers for these institutions, relinquished by the two new sovereign states.

A very stimulating debate will occur within political parties and groups interested in the future of Québec on these different issues. The debate will likely focus on the ability of administrative and intergovernmental mechanisms to manage efficiently a closer economic union. Discussions on the need to create common institutions will stem from this debate and will also bring to light, as is still is the case in the European Community, the democratic legitimacy of members of common institutions. This in turn will bring about heated debates on the need for an elected Parliament and the problems of representation, modes of decisions and votes in all common institutions, including a common Canada-Québec Parliament.

It is my belief that the political leadership in Québec will meet the challenge and will present to Quebecers and offer to Canadians a novel form of union. These proposals will certainly endeavour to maintain a mutually beneficial economic association, but will also go a step further to pursue the common destiny of the peoples of Québec and Canada. This common destiny could certainly be implemented by a union which could have an international identity in its own right. This union would have not only an economic mandate, but also a mission to assist the new sovereign countries in their goals of promoting rights of minorities, of managing the special relationship of the Canadian and Québec peoples with the Aboriginal peoples, and to accompany (and represent at times) Canada and Québec in international organisations and conferences. Such a union could be based on a common union citizenship that would superimpose itself on the Canadian and Québec nationalities and that would make the union not only an institution for its member countries, but also for its citizens.

* * *

It is time to acknowledge the irreconcilable views of the nature and structure of their federation held by Quebecers and Canadians. It is time to reconcile Canada and Québec in a novel union of genuine sovereign states that will foster the possibility of going beyond the very unsuitable and inappropriate federal structure that has bound the peoples of Canada and Québec for the past 125 years.[5] The challenges which will then face Quebecers and Canadians will be nation-building, affirming and consolidating the unique personalities of their two countries, and union-building, promoting and defining their common destiny within their novel body politic and also within the international community. These new challenges will replace the old divisions and allow both Canada and Québec, their nationals and common citizens, to play a significant role in the next century.

Daniel Turp, Professor, Faculty of Law, Université de Montréal, Visiting Professor, Faculty of Law, University of Alberta.

1. See R. Laver, B. Wallace and M. Nemeth, "The Meaning of No: A Maclean's/Decima Poll Looks at Reasons Behind the No vote and what Canadians Expect Will Happen Next" *Maclean's* (2 November 1992) at 166 and accompanying footnotes. Among the reasons given by Canadians outside Quebec for voting No, the fact that Quebec got too much came first (27%) and the fact that provinces should not be given more power came third (15%). In Quebec, 44% of those who voted No said they did so because their province failed to get enough concessions from Canada.

2. The question that was put forward by Premier Bourassa in Brussels, on the occasion of his visit to the European Communities headquarters, was as follows: Do you agree to replace the existing constitutional order by two sovereign states associated in an economic union, responsible to a Parliament elected by universal suffrage? For a comment on the formulation of this question, see D. Turp, "Au Québec comme en Tchécoslovaquie? De la révolution tranquille à la partition tranquille: l'intêrêt supérieur de rassembler les Québécois" *Le Devoir* (8 July 1992) at 13.

3. On the legal accuracy of Parizeau's comments on issues of citizenship and passport, see D. Turp, "Citoyenneté canadienne, citoyenneté québécoise et citoyenneté commune selon le modèle de l'Union européenne" in W. Kaplan, ed., *Belonging: Essays on the Meaning and Future of Canadian Citizenship* (Toronto and Montreal: McGill-Queens University Press, 1992) at 164-177. On this issue of the use of the Canadian currency by a sovereign Québec, see C. Gendron and D. Desjardins, "Le dollar canadien et un Québec souverain: certains aspects juridiques" in Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, *Les implications de la mise en oeuvre de la souveraineté, les aspects économiques et les finances publiques (deuxième partie), Exposés et études*, vol.4, at 335-369.

4. For a synthesis of the findings of the latter Commission on these aspects, see Committee to Examine Matters Relating to the Accession of Québec to Sovereignty, *Draft Report* (16 September 1992) at 84-178.

5. For a similar conclusion, see the recently published article of G. Marchildon and E. Maxwell, "Quebec's Right of Secession Under Canadian and International Law" (1992) 32 Virginia Journal of International Law 583 at 623.

BANQUO'S GHOST AND OTHER CONSTITUTIONAL INCUBUSES: SOME LESSONS FROM THE CHARLOTTETOWN PROCESS

Brian L. Crowley

The sleep of every person who participated, as I did, in the charlottetown negotiations is haunted by nightmarish images of the errors that were committed during that process. In an effort to exorcise some of these demons — Québec as both banquo's ghost and count dracula, the two-headed monster of the federal delegation, the pandora's box of issue linkage — I have attempted to bring the cold light of day to bear on them. On the principle that those who do not learn from the past are condemned to repeat it, what follows is a short catalogue of suggestions as to the lessons which might be drawn from the charlottetown process.

There are six points which a post-mortem focussing on process *must* consider. In making these observations, I am purposely leaving aside several questions — for example regarding electoral behaviour, the referendum campaign, interpretation of the vote and media involvement — in order to focus on the ways in which the failure of the Charlottetown Accord may require us to recast our thinking about constitutional reform and how it can and should be carried out. In the short space available I intend merely to touch on these points, indicating some directions for further reflection and research. They are presented in no particular order and are not intended to be exhaustive of the matters which might be considered from a "process" point of view.

1. The first point is a kind of disclaimer with respect to what a consideration of process questions can achieve. Nothing that we can do in playing with the constitutional process can change the fact that the relation of trust between politicians and the general public is in a state of disrepair. This disrepair reaches far beyond the unpopularity of individual politicians, even though all of us involved in the negotiations were painfully aware that one of the biggest obstacles to ultimate success was the fact that the prime minister would be associated with any eventual deal.

We can speculate on the causes of this breach but that is not what is important here. What is important is that without a fund of trust and goodwill, without an established tradition of politicians winning grudging respect for tough stances, a large part of the population will always obstruct proposals for far-reaching reform because they do not trust those who will be charged with carrying them out.

2. In part because of the ill-advised and opportunistic populism of a number of politicians, we may well now be stuck with a referendum rule for constitutional change. At least two provinces are now required by law to hold referenda on any proposed change before legislative approval can be given. While it may be the case that this can be amended for truly minor constitutional changes, it seems unlikely in the extreme that this power of public review, once granted, can ever be withdrawn without consequences any politician would be loath to face. And once changes must be submitted to popular approval in one part of the country, it becomes difficult to deny the same opportunity to the rest.

If this is the case, and this practice is combined with the low level of respect for politicians already alluded to, the consequences for the constitutional reform process are truly far-reaching. I would go so far as to suggest that the only way to reintroduce into any (highly hypothetical) future constitutional discussions that element of elite accommodation necessary for reform to succeed may be to take the constituent assembly route. No one is more aware than I of all the drawbacks that this represents, and I suggest it reluctantly and with great trepidation. On the other hand, politicians have made such a disastrous showing and so discredited themselves in the public mind that they may well need to relinquish a good degree of control over the process. They could do so secure in the knowledge that the Constitution guarantees them the final word and a right of veto, via the legislative process, as a protection against unacceptable reforms.

Such an assembly would have to be fully open and conducted under the watchful eye of television cameras. My sense is that it would be a salutary experience for Canadians to see a group of non-politicians struggle with these questions and return with solutions that will probably bear a striking resemblance to those previously arrived at by politicians.

If, however, in a triumph of hope over experience, the politicians decide to persevere in their role as chief architects of constitutional reform, serious thought should be given to opening even those negotiations up to the cameras. Of course there is a risk of distortion, of playing to the gallery and of trivialization, but there is also a greater chance of better public comprehension and sympathy. No one can dispute that television changed the House of Commons, but the Commons had to change, to modernize itself, and the political process is gradually adjusting to counter some of the abuses caused by the camera's unblinking gaze.

Here again we cannot escape the consequences of the referendum rule for constitutional amendment. If the people must approve the fruit of the politicians' labour, it is well to bear in mind that they now seem disposed to reject almost out of hand anything that smacks of one-way communication. This calls for a slower, more stately process, with ample time for public reaction and feedback to reach the politicians and manifest itself in the negotiations.

3. My third point is that from the view of sensible and, dare I say it, rational constitutional arrangements, linkage of wildly disparate issues in the negotiations has proven simply disastrous. This is so for three reasons.

The first reason, and this is a judgement with which many will no doubt disagree, is that when we allow such linkage, hardly any of the resulting reforms taken individually can really be defended on their merits. The Senate reform, not to put too fine a point on it, was a complete dog's breakfast, as was the Aboriginal self-government package, the Canada Clause and so forth and this arose in large part because of the "trade-offs" which were made against other issues which had little or no intrinsic relation to the matters under discussion. No doubt *some* linkage is unavoidable, but if we are seeking to write a constitution with which we can live in the long run, and not just to solve some passing problem of the moment, linkage on the scale we practise it is counter-productive. We would be well-advised here to take a leaf from the book of international trade negotiations, where diplomats strive mightily to avoid linkages, knowing that they produce either stalemates or trade-offs which tend to be in no one's long term interests. Far better to resolve each question on its merits.

The second reason for avoiding linkage is that in so doing one lessens the power of individual interest groups and, of course, governments. The fact that many of the governments and groups that gained the most from linkage in the Charlottetown negotiations such as Alberta (on Senate reform) or various national Aboriginal organizations (on the self-government package) are deeply hostile to "de-linkage" is in itself suggestive of the power that they understand flows from linkage as a negotiating tactic.

Finally, linkage must be avoided in a country where referenda are part of the approval process. People (rightly) felt manipulated by being asked a hundred questions on October 26th yet being given only one yes or no with which to answer the lot. The complexities and inter-relationships, the "seamless webs" linkage introduces between the elements of a constitutional package cannot survive the sceptical public "deconstruction" involved. Referendum research, again, shows clearly that simple questions on relatively clear-cut issues (for example, capital punishment) lend themselves best to decision by referendum. I repeat, linkage *on the scale of Charlottetown* brings *any* constitutional deal into the world with at least two and a half strikes against it.

It may be objected that dealing with the questions individually rather than as part of a larger package simply invites their rejection *seriatim* rather than at a go. In response, I would merely remark that the literature on constitutional referenda in other countries suggests strongly that few enough such votes succeed in any case. If we wish to improve the chances of success from "almost hopeless" to (a much better) "poor", the lesson seems to be that once a constitution is in place, the population looks much more kindly on small incremental improvements taken one at a time than on wholesale reforms. Nor does the Meech Lake experience invalidate the point: while we never had a referendum on Meech, even the most cursory examination of the polling data reveals that there was a strong national majority in support of the deal for almost two years after the Langevin Block meeting. This support only dwindled after Québec's Bill 178.

4. Process questions may well be linked to the question of the point at which the Charlottetown Accord went adrift from public sentiment. It seems right to say that the public followed the negotiations in a detached but supportive way until some point quite far along. Where the divergence arose is thus important to identify.

Let me suggest that the divergence arose between the Pearson Building meetings of June and July and the Charlottetown Accord of August. This was the point at which we moved on from the "Clark Process" which, in the public mind, was credible and shaped the fundamental reform, but did not yet include Québec. This constitutional chrysalis was quickly wrapped in a cocoon of Mulroneyish hue; the public perception was that the process moved behind the scenes, to bargaining in smoke-filled rooms, most obviously to convince Québec to buy into the Accord. The crucial question then became how much was conceded to Québec in order to entice them to join a deal that the rest of the country had already accepted? This suggestion is given some credence by the concentration in a great deal of the public debate on what Québec "got" between those two stages of the process.

5. This brings me to the next point: the way the process was irreparably damaged by the absence of Québec from the table, hovering, as one minister aptly put it, like Banquo's ghost over the whole negotiations. The damage this caused took two principal forms.

First, there was damage from the point of view of Québec itself. Notwithstanding all the telephone calls and briefings by various federal, provincial and Aboriginal delegations, Québec was by no means at the heart of the negotiations. They were always behind, always only partly aware of developments, and different delegations had fundamentally opposed readings of what Québec wanted. Oddly enough, almost every delegation came away from meetings with Québec firmly convinced that Québec wanted, or at least did not oppose, what that delegation itself sought in the negotiations. We all knew something was dreadfully awry when both Ontario and Alberta could claim that Québec supported their position in the Senate reform talks.

As a result, Québec was unable to shape many of the fundamental elements of the Accord, even once they had returned formally to the table, for by then it was all but a done deal. At best they could tinker on the margins which, at the end of the day, was insufficient to make the Accord saleable to a dubious Québec electorate and gave credence to the charges made against Bourassa in the Wilhelmy-Tremblay tapes.

The second way that Québec's absence damaged that process was that it unavoidably cast Québec, in the eyes of many outside the province, in the role of "backroom negotiator". The appropriate analogy, I suppose, was that Québec was seen as the Dracula of the constitutional talks, fleeing the sunlight, skulking in dark rooms, coming out only at night to suck "extra concessions" out of the country. Those "extra concessions" were granted, damagingly,

under Mr. Mulroney's auspices. The net result was a number of arrangements with Québec (for example, the 25% guarantee in the Commons) which were deeply and bitterly resented elsewhere in the country, however reasonable and defensible they may have been to anyone familiar with the unfolding of either the negotiations themselves or Canadian history.

6. Finally, a word regarding the federal role within the talks themselves. Much as I share the respect and admiration that many of us feel for Mr. Clark's chairmanship of the negotiations, it is worth reflecting for a moment on the basis for that respect. We all thought that he chaired difficult and often fractious negotiations with great calm, good humour and mastery of the issues. In this role, he was an ideal choice. Unfortunately, Mr. Clark played a double role: he was also the chief spokesman for the federal government at the table. These roles are not obviously compatible, and I think a good case could be made that Mr. Clark placed the role of conciliating chairman above that of forceful spokesman for national interests.

Clearly the federal government felt that their political survival hinged on a successful deal, so that splitting the roles between two different personalities *might* not have helped. On the other hand, many provincial delegations were under the strong impression that Mr. Clark's desire to strike a deal resulted in the abandonment of any serious federal effort to shape the final package in many of its aspects. Federal positions on the Triple E Senate, many aspects of Aboriginal self-government and on the economic union were only the most obvious casualties.

The practise at the officials' level of always having federal and provincial co-chairpersons (and an Aboriginal co-chairperson on Aboriginal issues) seems the better route here. It might even be wise to reach beyond practising politicians for such co-chairpersons for constitutional conferences as a whole, recruiting from retirement prestigious and impartial figures such as former Supreme Court judges, governors general, federal ministers and provincial premiers. Then, at least, the federal government would have to accept full responsibility for its policy successes or failures at the table, rather than having the easy out of saying that the federal representative had to make concessions in order to maintain the chairperson's credibility. There is a serious conflict of interest between these two roles that must be fully examined and thought out.

As these few reflections suggest, *how* we undertake constitutional reform not only shapes the content of such reform, but also deeply influences its chances for ultimate success. I will not make the claim that if we had had a different process, the substance of Charlottetown would have passed; that is too hypothetical. On the other hand, it is perhaps time to reflect seriously on the fact that the only one of our interminable attempts at constitutional reform to succeed in the last thirty years is the one that broke radically with the established rules. It is a whole new political world out there; constitution-makers, like any other endangered species, must adapt or give way.

Brian Lee Crowley, Political Science Department, Dalhousie University. Throughout the Charlottetown Accord negotiations he was Constitutional Advisor to the Nova Scotia government and in 1991 was Secretary to the Nova Scotia Working Committee on the Constitution (the Kierans Committee).

AUTHOR'S NOTE:

This text is an expanded version of a talk given at the annual meeting of the Institute for Intergovernmental Relations of Queen's University, Kingston, Ontario on 30th November, 1992.

AMENDING THE CANADIAN CONSTITUTION

David Beatty

The Charlottetown Accord is dead. So what's new? It's not as if we haven't been here before. Charlottetown joins Victoria and Meech Lake as graveyards of constitutional tombstones which clutter so much of our history.

So what should we do? It is clear that the problems — the constitutional issues — will not go away. They remain as pressing and irritating as ever. The questions we have been struggling with for the last thirty years — the status of Québec, Aboriginal self-government and the Senate — cannot just be ignored. Sooner or later we will have to start down the path of constitutional reform again.

In the past, whenever we have tried to pick up the pieces of earlier failures, we have always gone back to the same process of constitutional renewal. Each time we have put our faith in a process of "executive constitutionalism" in which the Prime Minister, his provincial counterpart and their closest cabinet colleagues and advisors closet themselves behind closed doors to hammer out a new constitutional framework for the country. Even though this time large numbers of other Canadians were superficially involved, in the end, the essential components of the agreement were produced by intense negotiations among our political elites.

This time we must do things differently. If we continue to ignore the lessons of our history we will, as the saying goes, be doomed to repeat them. It is time to consider the possibility that to a large extent our failures in the past have been caused by the way we have gone about constitutional reform.

Admittedly, there is a sense in which executive constitutionalism is the most natural way of trying to work out new constitutional arrangements. If you think that a constitution is like a social contract between different interests and groups, negotiation and compromise — swapping and horse trading — is the obvious way to play the game. Encouraging people to give and take, to agree to things they dislike, is the way contracts are made.

However natural it is for people to barter and bargain when they think of constitutional reform, it is important to recognize that when we design new constitutional arrangements in this way, we are strongly biasing what their substance and shape will be. Like any method of constitutional change, executive constitutionalism exerted a powerful influence on what terms and conditions were included in the final settlement.

Characteristically, bargaining procedures give priority to those interests and ideas which people care about most. Self-interest dictates the terms of a deal. Bargaining procedures are notorious in discriminating against interests and ideas which have no one to champion their cause.

The bias of the bargaining process against more objective and detached approaches is dramatically illustrated by the Charlottetown Accord. Interests and ideas which did not figure high on anyone's shopping lists generally did not fare very well.

Undoubtedly the most prejudiced groups were Aboriginal women and democrats whose Charter guarantees were put at risk in exchange for the approval of the patriarchs of the Assembly of First Nations to the rest of the deal. No one can doubt that had Aboriginal women been given the seat at the bargaining table to which the Federal Court of Appeal said they were entitled such a serious threat to their constitutional rights would never have been proposed.

Other issues dealt with in the Accord, like the nature of the Canadian economic union, or the role of the third (judicial) branch of government, also suffered from the focus on self-interest, although in a slightly different way. Rather than being resolved in a way which prejudiced particular interests or ideas, Canada's economic union and the Supreme Court were, for the most part, ignored.

Even though there was widespread agreement within the academic and professional communities that our constitutional arrangements in these areas could benefit from meaningful reform, practically nothing was done. In both areas there is a substantial consensus that our political leaders missed good opportunities to shore up what are central pillars in the constitutional framework of our country. Because neither issue was pressed hard by anyone at the table, the Accord effectively constitutionalized the status quo.

As well as distorting the shape and substance of the Accord by leaving out or ignoring various interests and ideas, the focus on self-interest also skewed what the parties ended up putting in.

One of the most striking features of the Accord was that a lot of what was included would have had virtually no effect on the constitutional make-up of the country. Symbols and pious declarations cost very little and so were relatively easy to accept.

Part three of the Accord dealing with Canada's social and economic union was the most striking example of the parties' preference for empty phrases over meaningful reform. Rather than remove barriers and inequities which interfere with the freedom of Canadians to pursue their economic interests and social needs equally across the country, the negotiators were satisfied with the weakest expressions of political intent.

The Canada Clause was another example of how caught up the negotiators were with words. Everyone wanted their most important interests and ideas to be recognized in the strongest possible terms. This was so even though, in the view of many experts, the clause would have added virtually nothing of substance to the Constitution.

The fear that the Canada Clause would create a hierarchy of rights and compromise the protection which the *Charter* provides was, in reality, quite unfounded. The fact is the Supreme Court has already ruled that governments in Québec can act to protect the distinctness of their society so long as they do not rely on policies which are too heavy-handed. There was nothing in the Canada Clause to suggest that this fundamental principle of judicial review should or would be relaxed.

It is important for Canadian to see the linkage, to understand that the way we have gone about constitutional renewal has had a profound impact on the quality of the reforms that have been proposed. The fact is that the weakest and most dubious parts of the Accord are very natural and logical ways for people who are wheeling and dealing, and subjected to intense psychological pressure, to express themselves.

If we are going to do things differently this time and avoid the weakness of the Charlottetown Accord and the earlier failures of our past, we must think of new ways of changing the constitutional framework of our government. We must search for other methods of amending our constitution which are not motivated by such self-interested and emotionally charged behaviour.

One possibility would be to create a specialized constitutional assembly or convention whose only task would be to discuss and deliberate questions of constitutional reform. The idea would be to design a body which would conduct its proceedings in a principled and analytical way. Rather than thinking of constitutional renewal as a process of cobbling together a long list of competing and often conflicting ideas, it would explore the possibility of organizing the constitutional framework of our country around a set of very basic and widely accepted first principles.

We would not need very many. If, for example, the members of a constituent assembly began their deliberations with a commitment to the principle of equal autonomy — to the idea that every Canadian has an equal right to control as much of their lives as possible — it is virtually certain that issues like gender and voter equality in our Aboriginal communities, the nature of Canada's social and economic union, and the organization of the Court would be resolved very differently than they were in the Accord.

Recognizing a principle of equal autonomy would certainly protect Aboriginal women and democrats from the risks of discrimination that plagued the Accord. In the economic and social sphere, studies already exist which show how the principle of equal autonomy leads naturally to the idea of economic citizenship around which most, if not all, of the interests of the federal and provincial governments could be rationalized. Similarly, if we began our discussion about the Supreme Court of Canada with a reaffirmation of the values of personal autonomy and democratic accountability, we could be confident of finding a better method of selecting Judges for the Court, one which would favour the appointment of human rights activists in a way the process recommended by the Charlottetown Accord would not.

It will require some imagination and considerable energy to figure out how such an approach to constitutional renewal could best be operationalized. If rational dialogue and debate are going to replace high-pressure tactics and backroom deals as the order of the day, we will need a completely new *modus operandi*. Every institutional dimension of how such a body would be constituted and would conduct its affairs would have to be carefully considered to ensure that when it turned its mind to the difficult issues such as Aboriginal self-government, our economic and social union and the Supreme Court, reason and cool deliberation would carry the day.

The fact that there are no ready made solutions which could be substituted for the current method of executive constitutionalism should not lead to despair. There is much we can learn from the experience of other countries, and during the next two to three years we have some time to consider which alternatives best suit our needs. Until Québec has gone through its next provincial election and possibly another referendum on some form of independence or sovereignty association, all of the substantive issues of constitutional reform will be on hold.

We should see the next two or three years providing us with a valuable window of opportunity. Rather than trying to solve all of our constitutional difficulties at once, as we have in the past, we can concentrate our attention on the institutional and procedural aspects of constitutional reform. As well, by giving the job to a specialized body, our politicians could concentrate their energies on the social and economic disabilities under which our country is labouring.

David Beatty, Faculty of Law, University of Toronto.

CANADA'S QUEST FOR CONSTITUTIONAL PERFECTION

J. Peter Meekison

INTRODUCTION

This paper is entitled "Canada's Quest for Constitutional Perfection" because this accurately characterises our odyssey of constitutional reform. The referendum debate highlighted this reality. Perfection with respect to constitutional reform is not only an elusive objective but also probably something that will always remain just over the horizon. Why? Because what is perfection to some is deficient to others. Constitutional reform of necessity is based on compromise or accommodation which contradicts the demand for perfection.

The failure of both Meech Lake and the Charlottetown Accord have created a constitutional impasse in Canada with respect to constitutional change. The public are totally disenchanted with the subject and feel that governments must deal with more pressing subjects such as the economy. Despite the fatigue or disinterest with the Constitution, the problems that generated these discussions over the last 25 years have not disappeared and remain unresolved. There are three principal concerns:

- Québec's role in Canada
- Western Canada's sense of alienation from the center
- Aboriginal self-government

Of these three matters two have made headlines recently: for example, "Parizeau maps out route to sovereignty," "PQ predicts independent Québec by 1995," and "Natives look to themselves for new deal: Less talk more action in 1993."[1] Other news stories such as the prediction of 60 seats for the Bloc Québécois and the question of the authority of reserves in Manitoba to regulate gambling are further evidence that these issues remain smoldering. Less has been heard about Western grievances as these now appear to be championed by the Reform Party and more recently by the National Party. The call for Senate reform will probably be heard once more after the Prime Minister fills the current vacancies but this time the call may not be for a Triple E Senate but for its abolition. Despite our fatigue or disillusionment with the constitutional question, it must be recognized that this matter will resurface; when and under what circumstances are unknown. In my opinion this recurrence is not in the distant future but in the immediate future. A recent column in the *Edmonton Journal* includes the following comment: "Those who believe the October 26 referendum put an end to the national unity problem will soon have a rude awakening."[2]

Accordingly how are Canadians to deal with constitutional change in the future? The following remarks are based on two assumptions. The first is that the majority of Canadians want the country to stay together BUT they are tired of hearing predictions of imminent catastrophe if the issue is not resolved; that is, they no longer accept the notion that Canada is in the midst of a great crisis. They have heard this assertion more or less constantly since 1965. The second assumption is that if formal reform, for whatever reason, is not possible then Canadians will be forced to consider alternative means of achieving the same objective.

THE CHALLENGES AHEAD

Let me turn now to some of the challenges which face governments and the governed in the immediate future with respect to constitutional reform.

A. The first challenge I call the question of timing. If my first assumption is correct, constitutional reform will recur. The question is when. It must be remembered that when discussions first began they were in anticipation of a certain course of events taking place in Québec. In other words, discussions have been preventive or pre-emptive in nature. After so many failures and since the country has not broken up, many now believe a more prudent policy is to wait until Québec decides what it wants to do. The difficulty with this approach is by that time it may be too late and we will end up negotiating the terms of the divorce as opposed to constitutional renewal. There is a very real lesson to be learned from the events leading up to the partition of Czechoslovakia on January 1st this year.[3]

B. The second challenge is the mega-amendment versus the mini-amendment. Both approaches have been attempted and both have failed. Charlottetown was a mega-amendment while Meech Lake was more limited in scope. The dilemma is that over the past 25 years the agenda has constantly expanded. The idea of constitutional queuing was defeated with the demise of Meech Lake. If we are going to have reform on the scale previously contemplated it is difficult to see how one can avoid a mega-amendment because there are so many linkages and trade-offs amongst the three concerns I identified at the beginning.

An alternative is to accept the fact that amendments that are properly characterized as reforms are unlikely to find favour. Therefore the amending formula should be used for less grand purposes, for example, to solve a very specific problem such as inserting a clause protecting intergovernmental agreements similar to the one found in the Charlottetown Accord (s.126A).[4] Another example is s.92A of the *Constitution Act 1982* that was precipitated as a result of two Supreme Court of Canada decisions on natural resources.

C. The third challenge relates to process. Our recent failures suggest that the amending formula is flawed. I respectfully disagree with this argument. The real issue is that of public involvement and when and how that involvement manifests itself. A referendum, as we know, is one very real method of public participation. I am not convinced that referenda will automatically be used in the future although it should be remembered that Alberta continues to have referendum legislation on the statute books. A referendum is a process for ratification only and not a means for negotiation or for seeking compromise. It is in these latter areas that the public wants greater and consistent involvement. It is now perfectly clear that for any chance of success in the future the public must be involved throughout the negotiations. What is more important, they must feel that they have had an opportunity to discuss all the issues before an agreement is considered final.

There may be many reasons advanced for the failure of Charlottetown but the one that is continually emphasized is the fact that late in the negotiations new ideas were advanced and accepted by First Ministers and Aboriginal leaders. The example most frequently cited is the guarantee of 25% of the seats in the House of Commons for Québec.[5] Whether or not this compromise was necessary to secure an agreement is irrelevant, as is whether or not it was a good idea; what mattered was that the public felt excluded from that particular decision. Until the final days of the negotiations there had been few criticisms of the process. Indeed there had been wide consultation until the end. The compromises reached in the final days, which meant an overall agreement was reached, had not been given public scrutiny and herein lies the problem.

The final package was again seen as a seamless web that needed to be ratified by October 26 because of pressures from Québec. The primary lesson of Meech Lake was ignored. That lesson is that before any final agreement is reached and the champagne bottles uncorked, the public must be given one final opportunity to examine critically its content. Most individuals are less concerned with ratification, which remains with the legislatures, than with specific provisions that require either explanation or justification. After due consideration on the part of the public, I would argue that most changes will be perfectly acceptable to the vast majority. Those that are not should be subject to reconsideration.

A final question which falls under process is the role of special interest groups. They have had a significant impact thus far. An analysis of their role in the weekend assemblies held in early 1992, their participation in the various public hearings and in the referendum would provide valuable insights into their influence. That they will play a part in future deliberations can be taken for granted.

D. The fourth challenge is to consider the answer to the following question. If the formal amending process has become impossible to use, what other alternatives are available to change the constitutional boundaries? One must consider the means by which the Constitution been changed in the past. What are the instruments of flexibility? There are essentially three ways in which the constitutional frontiers can be shifted: convention, statute, and judicial decision. Let me examine each of these in greater detail.

i. Convention

If parliamentary reform is thought to be desirable then change here can be brought about very easily by modifying the basic conventions by which parliamentary government operates. It should be recalled that this subject was addressed in the federal government's position paper published in September 1991.[6] Despite this reference, the Charlottetown Accord had no provision for change in this area. It should be understood that there is no reason why, other than political unwillingness, the rules on votes of confidence, budget secrecy, or the functions of parliamentary committees cannot be changed. Indeed, the Liberal Party of Canada recently made a number of proposals in this area.[7]

ii. Statute

Here a number of possible changes come to mind. The leading contender is reform of the electoral system, something discussed by the Lortie Royal Commission on Electoral Reform in its report of June 1992. There is nothing in the Constitution that requires single member districts and a single non-transferable vote. We could institute a system of proportional representation or an alternate ballot. Either change could fundamentally alter the composition of Parliament and presumably how it functions.

Another example would be to take the Charlottetown Accord and see which of its many provisions Parliament could incorporate into statutes. The *Supreme Court of Canada Act* could be amended to provide for a provincial nominating process. The *Bank of Canada Act* could be amended to have the Governor's appointment ratified by either house. Another possibility is an act guaranteeing the sanctity of intergovernmental agreements.

There is one other matter that deserves mention and that is constitutional amendments made by Parliament acting alone using its authority under s.44 of the *Constitution Act, 1982*. The one that comes to mind is an amendment to s.51 of the 1867 Act that changes the composition of the House of Commons. Parliament last amended this section in 1985 and I am willing to bet that few were aware that as this proposal went through the legislative process it was in fact a constitutional amendment. I raise this particular example because the composition of the House of Commons received considerable attention during the referendum debate.

iii. Judicial interpretation

While the first two proposals pertain to the operation of the federal government and Parliament, judicial interpretation had a profound impact on shaping the federal system when there was no amending formula. Will it have the same impact in the future when the amending formula appears not to be the instrument of choice?

While one cannot be certain, it is probable that, if we are either unwilling or unable to amend the constitution by using the amending formula, the courts may then be turned to as the dispute resolution mechanism. Do the courts wish to assume this role? There is simply no way of predicting at this point. Besides they

have their hands full with the *Charter*. Let me mention four examples to give you a better appreciation of the issues involved.

Canada Health Act (1984)

There was no direct challenge to this Act by the provinces even though provinces such as Alberta had traditionally challenged the federal spending power. Moreover the Act prohibited practices such as extra billing which Alberta then permitted. Despite the concern, it was not in the provinces' interest to go to court. Why? Because it was a lose-lose situation. If the provinces won the case they might have succeeded in dismantling the national health care system and ending up by paying 100% of the costs. If the provinces lost the case, a more likely scenario, then the federal spending power would have been permanently established within whatever limits were set by the courts. It should come as no surprise therefore that the topic of limits to the federal spending power was a controversial one during the recent constitutional discussions.

The Free Trade Act (1988)

While there were federal-provincial discussions leading up to the Free Trade Agreement between Canada and the United States, the Agreement itself was implemented by means of a federal statute. Speaking to this issue in 1987 the then Attorney General of Ontario, the Honorable Ian Scott, said: "In short, whether or not the agreement amounts to a constitutional amendment in any formal sense it represents, in my view *de facto* constitutional change and a constitutional change of very significant magnitude." Despite his concern, there was no court challenge. Why? While there may be a number of reasons, the most likely one is that there is a good chance the 1937 Labour Conventions decision might have been overturned and this would not have been in Ontario's interest. In other words political sabre rattling was as far as Ontario was to go.

The Canada Assistance Plan (CAP)

In the 1990 federal budget the government introduced a ceiling on CAP for the three wealthy provinces of Ontario, British Columbia and Alberta. Parliament approved this policy by statute. The provinces affected took the federal government to court and lost.[8] The difference between this situation and that of the *Canada Health Act* is that the decision to reduce payments was made. The provinces could either accept it or take the federal government to court. The genius of post-war Canadian federalism has been the development of a series of federal-provincial agreements covering a wide range of policy fields, from health care to social assistance. The federal decision has seriously undermined the sanctity of these agreements. It should come as no surprise that throughout the negotiations leading to Charlottetown the provinces pressed for a provision that would protect such agreements from unilateral changes.

The Oldman Dam decision (1992)

My reasons for raising this case are twofold; first, the decision is an excellent example of the courts coming to grips with the difficult jurisdictional questions of the environment and second, the parties to the case are of signifigance. The full citation is *Friends of the Oldman River Society* v. *Canada (Minister of Transport)*.[9] The case was initiated by an interest group which was saying to the Government of Canada—Do your job! Thus intergovernmental understandings or agreements may no longer provide adequate assurance of a firm policy foundation.

E. The fifth challenge is to consider or, perhaps more appropriately, rediscover and, where necessary, redesign the various instruments of flexibility of our federal system. To a great extent the federal system has evolved as much by convention as through the courts. National policies have been developed, not always harmoniously, but they have emerged: health care, energy pricing, and tax-collection agreements to mention three. As one observor remarked a few years ago: "This leads us away from the preoccupation with the lawyer's constitution to some analysis of the politician's or administrator's constitution."[10] The Charlottetown Accord had several provisions that could provide a basis for a fruitful federal-provincial dialogue. These include matters that formed part of the legal text as well as others that can be found in the political accord. I would strongly encourage governments and other interested individuals to examine the following:

i. The Canadian common market and the removal of interprovincial trade barriers

Agreement supporting this principle was reached last summer; what needed more discussion was the exceptions. I would also recommend close examination of the proposal for a dispute resolution mechanism which was patterned after the one contained in the Canada-US Free Trade Agreement. That this topic remains a very real problem is reflected in some remarks by Premier McKenna of New Brunswick in late November. He said: "Those provinces that want to put up barriers will have barriers put up against them. . . . We can't wait to have unanimity from 10 provinces, so let's introduce inter provincial free trade with those who want it."[11] Such language is the basis of a legal conflict.

ii. The Spending Power

If anything characterized the Charlottetown Accord it was the limitations to the federal spending power that were found in a variety of provisions including the following: the limits to new national shared-cost programmes,[12] the so-called six policy fields such as forestry,[13] and most importantly the agreement to establish "a framework to govern expenditures of money in the provinces of Canada in areas of exclusive provincial jurisdiction."[14] If one doubts the importance of the spending power and the increasing apprehension of the provinces they should pay close attention to Premier Rae's recent remarks in which he claimed the federal government owes Ontario $2 billion for welfare payments under CAP.[15] Nor should one ignore Premier Klein's comments about user fees for health care.[16] While one can dismiss both statements as only politics, they reflect the rather precarious nature of our social safety net and a potential area of federal-provincial conflict. If for no other reason than to restore public confidence, a review of the spending power appears timely.

iii. Labour market development and training

With the failure of the referendum the federal government was very quick in reasserting its authority over this field. Indeed of all the proposed changes to the division of powers this one was the most profound. To illustrate that there are alternative ways of achieving change this subject was discussed at a recent meeting of ministers responsible for labour market training and the need for cooperative and coordinated action was stressed.[17] It is a modest beginning.

iv. Duplication of services

Given the current pressure on all governments to reduce their deficits it comes as no surprise that there is also pressure for them to eliminate duplication of services. This issue was raised in the September 1991 federal document.[18] Care must be taken that neither order of government simply off-load its responsibilities under the guise of eliminating overlap.

Over the next few years economic pressures will force governments to cooperate and harmonize their policies. It is not inconceivable that some form of intergovernmental secretariat will emerge to act as the coordinating organization reporting to a First Ministers' Conference. Does this sound far-fetched? Not really if one considers that Senate reform is unlikely in the near future. Alternative structures or institutions to a secretariat do not come readily to mind. Devices such as administrative inter-delegation, mirror legislation and new areas for intergovernmental agreements such as telecommunications should be pursued. Two precautionary notes should be sounded; first, after the CAP experience, thought will have to be given to a means of protecting intergovernmental agreements and second, the question of transparency needs to be addressed. After recent experiences with constitutional reform the public will expect to be kept informed and possibly involved in some fashion.

F. The sixth challenge relates to Aboriginal self-government. Charlottetown almost made that dream a reality. Recent reports in the news indicate that expectations amongst the Aboriginal peoples are high. The Royal Commission on Aboriginal Peoples can focus its attention on this matter and presumably will make a number of recommendations.[19] A variety of models of self-government are available for consideration. The framework for negotiations developed during the recent negotiations can serve as the basis for future discussions.

G. There is a seventh challenge and I am almost afraid to mention it given the constitutional fatigue syndrome. In the *Constitution Act, 1982*, s.49 provides for a constitutional conference 15 years after proclamation. The purpose of this meeting is to examine the operation of the amending formula. That gathering is scheduled for 1997. In my opinion it is not too early to begin planning for that window of opportunity.

CONCLUSION

If reform through the amending formula will be as difficult as I believe, then it is prudent for Canadians to pursue and consider alternatives, because if anything is certain it is that change is inevitable. Central institutions can be changed to reflect current political realities. When considering the division of powers one may tend to think in terms of water-tight compartments. The reality is that most federal and provincial policy fields are becoming increasingly interdependent. Accordingly governments can compete or they can cooperate. While I feel economic pressures will lead to cooperation, political pressures may lead in an opposite direction. Recent musings by Mr. Parizeau about political paralysis in Ottawa if the Bloc Québécois wins a large number of seats in the next federal election paint such a picture.[20]

In either event I believe the courts will become more involved in these questions than they have been in recent years. It may be a result of: a lack of political will, interest group intervention, governments feeling they have no other alternative or the constitutional boundaries becoming too blurred. For whatever reason no one can avoid examining constitutional questions.

Instead of contemplating the mega-amendment, other avenues need to be explored. As a result our quest may take us in different and new directions. Change will probably be incremental, and the grand design so recently pursued will be shelved while the country explores new instruments to accommodate constitutional change.

J. Peter Meekison, Belzberg Chair of Constitutional Studies, Centre for Constitutional Studies, Faculty of Law, University of Alberta.

AUTHOR'S NOTE:

An earlier version of this paper formed the basis of the remarks which was delivered at the Canadian Bar Association, Alberta Branch Mid-Winter Meeting, January 30, 1993.

1. *The [Toronto] Globe and Mail* (22 December 1992) A6; *The [Toronto] Globe and Mail* (25 January 1993) A1; and *The Edmonton Journal* (2 January 1993) A3.

2. Jean-Claude Leclerc, "No National party a match for need" *The Edmonton Journal* (12 January 1993) A7.

3. See William Johnson, "Canada has much to learn from the failure of Czechoslovakia" *The Edmonton Journal* (2 January 1993) A7.

4. References are to various sections contained in the *Draft Legal Text* of the Charlottetown Accord (9 October, 1993) at 27-28. Referred to hereafter as *Accord*.

5. *Accord*, s.51A (2)(b) at 13.

6. *Shaping Canada's Future Together* (Ottawa: Minister of Supply and Services, 1991).

7. See "Chretien proposes reforms" *The [Toronto] Globe and Mail* (20 January 1993) A7. See also an editorial in *The Edmonton Journal* criticizing their proposals, "Grits flunk Commons reform" (23 January 1993) A14.

8. *Reference Re Canada Assistance Plan*, [1991] 6 W.W.R. 1 (S.C.C.).

9. [1992] 2 W.W.R. 193 (S.C.C.).

10. D. V. Smiley, *Conditional Grants and Canadian Federalism; A Study in Constitutional Adaptation* (Toronto: Canadian Tax Foundation, 1963) at iii.

11. "McKenna takes aim at barriers" *The [Toronto] Globe and Mail* (24 November 1992) A3.

12. *Accord*, s.16 at 27. This section incorporates the same provisions as found in Meech Lake.

13. *Accord*, s.11 at 17-18. This section includes: urban and municipal affairs, tourism, recreation, housing, mining and forestry.

14. *Accord*, s.37.

15. "How Rae plans to get rid of the Tories in Ottawa" *The [Toronto] Globe and Mail* (22 January 1993) A9.

16. "Medical User Fees Pushed" *Calgary Herald* (13 January 1993) 1.

17. "Ottawa, provinces vow to improve job training" *The [Toronto] Globe and Mail* (21 January 1993) A5.

18. *Shaping Canada's Future Together* at 39.

19. See their publication called, *Overview of the First Round* (October 1992), especially at 36-48.

20. See "Vote Bloc to Weaken Ottawa: PQ Chief" *The [Montreal] Gazette* (18 January 1993) 1. The exact quote is: "It will be the weakest government Ottawa has ever seen, and all on the eve of elections in Quebec." See also "BQ doesn't want chaos in Ottawa Bouchard says" *The [Montreal] Gazette* (19 January 1993) B1. Mr. Bouchard said: "The best governments that we've had in Ottawa have been minority governments."

CENTRE PUBLICATIONS

TITLE	PRICE (GST INCL.)
• The Canadian Senate - What Is To Be Done? (1988)	$12.00
• Constitutional Studies 1989 / étues constitutionnelles 1989	$12.00
• Constitutional Studies 1990 / études constitutionnelles 1990	$12.00
• Constitutional Studies 1991 / études constitutionnelles 1991	$12.00
• Language and The State / Langue et État (Montréal: Les Éditions Yvon Blais, 1991)	$45.48
• Freedom of Expression and The Charter (Toronto: Carswell, 1991)	$84.53
• Conversations: Women and Constitutional Reform (1992)	$10.00
• Social Justice and the Constitution (Carleton University Press, 1992)	$17.95

Associate membership fee: $25.00 per year.

Associate members of the Centre receive:

- Constitutional Forum Constitutionnel (quarterly)
- Points of View / Points de vue (occasional paper series)
- Notices of upcoming events and discounts on certain publications

Back issues of **Constitutional Forum constitutionnel**, and Index for Vols. 1&2, are available.

Contact:

The Centre for Constitutional Studies
456 Law Centre
University of Alberta
Edmonton, Alberta
T6G 2H5

or telephone at (403) 492-5681 or Fax (403) 492-4924 for further information.