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Study
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Group

The Future of Canadian Federalism

November 9-10, 1990

Canadian Study of Parliament Group

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The Future of Canadian Federalism

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Keynote Address

The Future of Canadian Federalism

The Honourable Gordon Robertson, PC

IS THERE A FUTURE for Canadian federalism as we know it? This is the fundamental question. To provide a context for his remarks, Mr. Robertson began by quoting British essayist and travel writer Jan Morris, writing in *The Globe and Mail* in November 1990.

On the map, and on the face of things, Canada is one of the least magnetic places on earth, yet it is one of those two or three countries where half of humanity would prefer to live . . .

Perhaps, however, there comes a time in the lives of nations when a personality is fully formed, creating its own magnetism, generating its own energy, and that time has clearly come in Canada.

This is ironic, for it has come at a juncture when, at least to the outsider's eye, Canada seems only half-resolved to continue as a nation at all.

Robertson agrees, noting that in Quebec there is a readiness to consider separation as a serious option and that in English-speaking Canada, particularly in the West, there is little patience or sympathy for the Quebec position.

The last good chance to preserve a Canada close to what we have was the Meech Lake Accord, which contained a reasonable set of conditions under which Quebec could accede to the *Constitution Act* of 1982. With the failure of the Accord, there is no possibility of achieving any agreement of such moderation and reasonableness again. The failure of Meech means that the status quo is dead. The only questions remaining are how long the current arrangements will last and what arrangements will be established for the future.

Lessons for the Future

The Meech Lake years hold several lessons about Quebec and English-speaking Canada. About Quebec we learned, first, that the five points proposed in 1986 and set out in the Meech Lake Accord were a minimum. No future list of requirements will be so moderate, so reasonable or

so limited. Second, the failure of the Accord produced a tremendous surge in support for sovereignty, although it is not yet clear what this really means and who will benefit from it. Third, the depth of Quebec's distaste for negotiating as just one province among ten is now clear. To quote Robert Bourassa, "Never again."

The lessons about English-speaking Canada are also reasonably clear. English-speaking Canadians are fed up with constitutional debate and want to get on to other issues. But at the same time, the Meech Lake years showed that there is little understanding in English Canada of Quebec's position in the constitutional debate, and little sympathy for its concerns about language, culture, and the relationship between individual and collective rights. (The passage of Bill 178 was a turning point in this respect.) Nor is there support for designating Quebec a "distinct society". The clause became the focal point for criticism of the Accord even though it made no change in the distribution of powers.

Finally, a strongly rooted view that there should be no differences in the constitutional treatment of the provinces became apparent in English-speaking Canada, although this has not been the rule at all in the past. There is a long constitutional tradition of recognizing that Quebec is different; the *Quebec Act* of 1774 and several sections of the *Constitution Act, 1867* recognize Quebec's differences and make special provision to accommodate them. Nevertheless, the result of the equality-of-the-provinces view — if it is strongly held to — will be to impose a certain rigidity on the possibilities for future arrangements.

Après le Déluge

If the status quo is dead, what might replace it? Robertson sees three possibilities:

1. Despite the hardening of attitudes during the Meech Lake years, it might still be possible to work out an asymmetrical federalism in which Quebec was treated differently from the other provinces. This may be the least unacceptable of the available alternatives, but it could not be based on anything as simple as the 1987 Accord. Quebec would seek special powers related to the protection of language and culture; but to make the arrangement acceptable to English-speaking Canada, these would probably have to be balanced, perhaps by changes in the status of Quebec in the central institutions, the Senate and

the House of Commons being the most obvious, but also in other institutions that deal federally with any powers passed to Quebec.

As Robertson and, later, members of the audience pointed out, a number of questions would have to be answered. Could the role of MPs from Quebec be different from that of other members in the areas where Quebec had special powers? Would Quebec MPs see their functions restricted to dealing with the common 'Canadian' concerns such as national defence, and economic, monetary and foreign policy? Would a reduction in their functions discourage Quebec candidates from running for seats in the House of Commons?

What would be the relationship with boards and commissions, such as the Canadian Radio-Television and Telecommunications Commission, that dealt with issues in the areas of Quebec's special powers?

Robertson also agreed with an audience member during the subsequent discussion period that the balance would be difficult to achieve. If the distinct society were recognized, what kinds of trade-offs would be acceptable to the rest of Canada? Quebec might agree to an elected and effective Senate, but not to the 'equal' element of the Triple-E Senate that would satisfy western Canada.

If the special powers were not too extensive, Robertson concludes, this arrangement might work. But the Bélanger/Campeau commission is already looking at expanded powers in areas such as manpower training, immigration, regional development, and native education. If the special powers were extensive, working out the appropriate balancing elements would present difficulties.

2. A second possibility would be to do as was done with Quebec's five points when the Meech Lake Accord was developed from them. Quebec's points, with the exception of the distinct society clause, were generalized and made applicable to the other provinces as well. If this were done with a more extensive range of powers, the result would undoubtedly be attacked as weakening the powers of the central government, leading to even greater decentralization than under Meech Lake, and reducing Canada's capacity to deal with national issues in the future.
3. The third alternative would be some form of sovereignty-association, such that the political unity and integrity of Canada would be altered irrevocably. From one perspective the prospect is "fearsome and worrying", but on the other hand this is where the European Community is moving, establishing a range of common

institutions and other relationships between sovereign states.

Establishing the shared institutions would be more difficult for a community of two than for one of twelve. How could one achieve an acceptable balance between the parts of the community when they were very unequal in population, GNP, or other relevant measures? There would also be serious problems in establishing the individual states themselves — a task that would probably have to precede the establishment of the agencies for the "community", since it is difficult to see who could negotiate for the "rest of Canada" that does not now exist in legal terms.

A Tortuous History

Is there a fourth possibility — a modernization and rearrangement of federalism with new terms acceptable both to Quebec and to the rest of Canada? Logically, this should be possible, but as Robertson points out, this has been the goal for the past 22 years. The following quotation is from the official document published by the Pearson government prior to a conference of first ministers early in 1968:

It is the intention of the Government of Canada, with which it hopes the governments of the provinces concur, that this Conference of February 1968 should mark the beginning of a process of constitutional review that will be both broad and deep. If we are to be sure that we have the best arrangements we can devise to order and to govern the relationships between Canadians in the Canada of the future, we must be willing and concerned to examine all of the facets of our legal framework. The Government of Canada is ready to undertake such a total review.

The deliberations continued for eleven years following that initial conference, without agreement being reached. Changes in the distribution of powers — the same questions under consideration now — were discussed, but agreement was never achieved. When the 1982 amendments were agreed to (without Quebec), they included only one change in the distribution of powers and did not meet any of Quebec's concerns.

Robertson believes that under current conditions, the difficulty and complexity of constitutional issues have reached the point where it will be infinitely more difficult to negotiate comprehensive change than it would be if Canada had not had 123 years of

existence as a country and we were starting from scratch to write a completely new constitution. The years of wrangling have revealed so many loopholes and skeletons in the current arrangements and have created so much entrenched suspicion among the players, that they undermine the potential for effective re-statement. Robertson is therefore sceptical about the chances of a rewritten or renegotiated document as a solution to the present crisis.

The more likely outcome is either asymmetrical or decentralized federalism built on what we have or, alternatively, a totally new arrangement involving sovereignty-association. Robertson would much prefer the former outcome because it is realistic, recognizing Quebec as distinct and creating forums and institutions suited to this reality. It would also preserve what is of value in the current arrangements. On the other hand, Robertson is not convinced that federalism decentralized enough to be acceptable in Quebec would necessarily be better than sovereignty-association. Such a decentralized federalism would be a ramshackle affair while sovereignty-association, if it could be arranged, might produce two effective states and would at least hold the promise of greater co-operation and, conceivably, even unity again in the future.

Question Period

Several members of the audience posited other possibilities, including a regional model and an asymmetrical federalism based on bilateral administrative arrangements such as already exist with respect to the Canada and Quebec pension plans and the collection of income tax. Robertson doubts that a regional model has much chance of success, mainly because of the difficulty of gaining acceptance, from the smaller provinces, for regional groupings of the Atlantic and Western provinces. He also rejected the idea of a relationship based solely on administrative arrangements, believing that Quebec would require constitutional assurances and recognition.

As to whether English-speaking Canada would find sovereignty-association any more acceptable than asymmetrical federalism, Robertson pointed out that they would be the outcome of different processes. One-to-one sovereignty-association negotiations could start possibly after a unilateral declaration by Quebec. Multilateral negotiations on asymmetrical federalism would have to proceed

with completion under the 1982 amending formula.

Another question concerned the relative stability of the three possible outcomes Robertson identified. Robertson agreed that asymmetrical federalism had the potential to create instability because there is no way to test how much decentralization is 'enough' and when the balance has begun to tip too far. On the other hand, if the parties engaged in a full and hard debate on what is really required to protect language and culture, principles could be established as a basis for judging proposed arrangements, and change could be kept within some agreed limits of principle. In any event, any later change would be subject to the provisions for amending the Constitution, which in themselves provide a check.

In summary, the Meech Lake Accord having been lost, there is no party in Quebec likely to accept anything so modest again. Circumstances now force Canada to go further down the Meech Lake road until we see another road that we like better. To date, Robertson has not seen one that he likes better.

Panel I

Visions of Canadian Federalism

Moderator:

Professor J.R. Mallory
McGill University

Panelists:

The Honourable Arthur Tremblay
The Senate of Canada

Dr. J. Peter Meekison
University of Alberta

Professor J. Stefan Dupré
University of Toronto

AT LEAST THREE VISIONS of Canadian federalism, noted Professor Mallory, have existed since Confederation. The oldest is based on the concept that, at the heart of the matter, is the partnership between the two founding cultures. The second, which conflicts with the first, is that a province is a province. Whatever their strength, size or lack of same, provinces are the basic units of the system. Finally, there is the Wilfred Laurier/Henri Bourassa vision of one Canada, a distinctive Canadian community that transcends the cultures from which it started but tries to retain their virtues. This is the vision reinforced by the *Canadian Charter of Rights and Freedoms*.

All three visions are part of our political fabric, but they are often in conflict. The question is whether this conflict will destroy the polity or will be enough to sustain it.

Senator **Arthur Tremblay** was not sure that 'vision' was the right issue to be discussing, especially given Webster's definition of vision as "something seen with other than ordinary sight". It is not the abstract theories or ideal models of federalism that interest Tremblay but the current state of federalism and how it may evolve in the future.

In the wake of Meech Lake, Tremblay observes, first, that Canadian federalism is shakier than it has ever been before and, second, that if Canada survives it will not be anything like the Canada of the past. The failure of the Meech Lake Accord was seen as a victory in some circles. Those who

opposed the Accord wanted to preserve the authenticity and the future of federalism. But they are deluded, Tremblay says, if they think their 'victory' will achieve this.

On the contrary, the future has become more problematic as a result of the failure of Meech Lake. Those responsible for the failure may now be seeing the consequences of their position more clearly, but it is pointless to continue laying blame. Given that the status quo is no longer an option, the challenge is to determine where the next move lies. The survival of Canadian federalism depends on how we decide to change the status quo from this point forward.

Directions for Change

What direction should change take? A federal commission and a Quebec commission are now giving Canadians an opportunity to express their views on this issue, while two other provinces are also expected to establish commissions or consultation processes. To discover what we might expect from the Quebec and federal commissions, it is worthwhile to compare their mandates.

Quebec's Bélanger/Campeau commission has a general mandate to examine and analyze Quebec's political and constitutional status and to make recommendations. It will do so through commissioned studies, consultations with experts, and public hearings, meetings and forums. Although the mandate is broad, the document's preamble lists the assumptions under which the commission is to operate. These assumptions (*freely translated*: Given that the Québécois are free to determine their own future . . . given Quebec's exclusion from the 1982 constitutional amendments and the failure of the Meech Lake Accord . . . given the need to redefine Quebec's status . . .) clearly set the direction for the commission's agenda.

By contrast, the Spicer commission's mandate appears to concentrate more on process, the apparent goal being to promote dialogue among Canadians, and in particular to identify the interests and concerns of Canadians of various regions and language groups. As such it appears to have a more limited mandate, focusing essentially on identifying the common values and characteristics fundamental to the survival of the Canadian polity and taking into account issues such as aboriginal rights, socio-economic conditions, multiculturalism, interdependence and international competition, and individual and collective rights. Tremblay sees this

mandate as more limited but at the same time more 'open' in the sense that fewer assumptions are made about the future.

Thus, in their drafting and in their substance the mandates of the two bodies reveal the different perspectives of the Quebec and federal governments on the issues, on the range of options for the future, and on how to gather information on which to base decisions about the future.

Without prejudging the results that either commission might achieve, Tremblay offered two observations. First, there is a need for both commissions to engage the interest of Canadians in the 35 to 45 age group; this is the generation that will guide the future development of federalism. Second, Tremblay hopes that the commissions' reports will not simply reflect the multiplicity of views expressed to them. The commissions must go beyond diversity to explore and come to terms with the differences and incompatible ideas that divide us. Without this, full and open debate leading to solutions will be impossible.

The Road to Meech Lake

While the notion of vision implies a look into the future, Professor **Peter Meekison** noted the value of beginning with a look at the past, particularly since it reveals that the Meech Lake Accord was not new, it was not radical, nor was it a product of backroom politics or midnight madness. In fact the Accord represented the end of more than 20 years of debate, study, introspection, disappointment and, on occasion, conflict.

Those two decades saw two royal commissions (B&B and Macdonald), a task force (Pepin-Robarts), two parliamentary committees (1970-72 and 1980-81), eleven first ministers' conferences on the constitution, and four first ministers' conferences on aboriginal rights. The issues have received extensive examination, and the concepts in the Meech Lake Accord have all been considered at one time or another. Meekison went on to trace the steps along the winding road to Meech Lake, beginning in 1963.

1. Established by Lester Pearson in 1963, the Royal Commission on Bilingualism and Biculturalism stated in its preliminary report that "Canada . . . is passing through the greatest crisis in its history."

In part because of this growing sense of crisis, Pearson's government initiated a series of constitutional conferences in 1968. The first of these agreed on the following agenda:

- official languages
 - fundamental rights
 - distribution of powers
 - reform of institutions linked with federalism
 - regional disparities
 - the amending procedure and provisional arrangements
 - mechanisms of federal-provincial relations
2. This fundamental review, which asked the basic question of whether the constitution should be amended or a new one promulgated, led to the Victoria Charter of 1971.

It ended when Quebec said that it could not support the agreement. But several of its elements, including some of the Supreme Court provisions, the principle of a provincial role in selecting Supreme Court judges, and the annual first ministers' conference on the economy appeared, in the Meech Lake Accord as well.

3. Following the demise of the Victoria Charter, a 1972 joint committee of the Senate and the House of Commons produced a comprehensive report on the constitution, stating that Canada "is in the midst of the most serious crisis in its history."

This report was one of the best on the issues so far, because it recognized the right of self-determination, it advocated a systematic approach to the division of powers, it included aboriginal rights, and it recognized the importance of environmental issues.

4. Informal meetings during the 1970s led to a constitutional proposal outlined by Pierre Trudeau in a letter to the premiers in the spring of 1976.

The proposed package included patriation of the constitution with the Victoria amending formula and some modest concessions to Quebec precipitated by Trudeau's concern about the growing strength of the Parti québécois.

The parallels between the 1976 process and Meech Lake are strong. Trudeau's letter emphasized that Robert Bourassa was looking for "constitutional guarantees" and that while the other provinces agreed in principle, they "made it clear they would want to consider them in detail once they had been worked out with Quebec and reduced to writing."

The two key provisions were as follows:

- certain guarantees on language "to protect the French language and culture against adverse action by the Parliament and Government of Canada", and
- a mechanism to permit agreements on immigration, communication and social policy [at that time, agreements with Quebec were already

in effect on family allowances and immigration].

This would give the agreements a degree of recognition and permanence.

Also included were the Victoria Charter provisions on the Supreme Court, including three judges from Quebec.

The conditions appeared propitious for success as the provinces responded to Trudeau's proposals. The electoral victory of the Parti québécois in the fall of 1976 interfered somewhat with the process of proposal and response, but in any event, Trudeau argued, the provinces' proposal was either "too little or too much": too little because it was not the result of a comprehensive review, or too much because it expanded the agenda beyond the limits set in his own proposal.

At the same time, the PQ victory and the referendum debate shifted public attention to questions of national unity. The sense of crisis did not diminish but intensified.

5. The next step was Bill C-60 and *A Time for Action*, tabled by the federal government in June 1978.

This time there were two conditions: that Canada continue to be a genuine federation, and that there be a charter of rights. The premiers responded that for the provinces "the division of powers is the key issue in constitutional reform", and they reaffirmed their 1976 position as a starting point (the division of powers, natural resources, the spending power, the declaratory power, and 'culture', among other agenda items). This agenda also had to be examined in light of the fact that one of the premiers, René Lévesque, was already committed to a referendum on sovereignty-association.

The final agenda agreed to for the constitutional discussions of 1978-79 reflected most of the main issues that had been debated in recent years and built on earlier discussions:

- resource ownership and inter-provincial trade
- indirect taxation
- communications
- the Senate
- the Supreme Court
- family law
- fisheries
- offshore resources
- equalization and regional disparities
- a charter of rights
- the spending power
- the declaratory power (later deleted in 1980)
- patriation, the amending formula, and delegation of legislative authority
- the monarchy

The Continuing Committee of Ministers on the Constitution was struck to consider the issues in greater detail, and although no agreement was reached in 1979, the committee's deliberations served as a starting point for the 1980 talks; the process in other words was cumulative.

The federal government soon issued its agenda for the next round, should one occur. The list included

- powers over the economy
- domestic non-tariff barriers
- inter-provincial trade and movement of goods
- movement of people
- competition
- securities
- marketing boards
- minimum wages
- foreign relations
- section 96 judges and their appointment
- natives and the constitution

6. The Pepin-Robarts Task Force released its report in 1979, the third group in a little over a decade with a mandate to hear from Canadians on constitutional issues.

The report, *A Future Together*, emphasized that Canada was in the midst of a crisis and issued a warning: "We recognize that even crises can become tedious and difficult to believe in if they go on too long and if nothing seems to happen."

One of the Pepin-Robarts recommendations, contained in the section on the distribution of legislative and executive powers, sounded remarkably like the distinct society clause of the Meech Lake Accord:

In addition to roles and responsibilities defined in the previous recommendation, an essential role and responsibility of the government of Quebec should be the preservation and strengthening of the French heritage in its own territory.

7. Following the 'no' vote in the 1980 referendum, a series of meetings led to the *Constitution Act, 1982*.

The leisurely pace of the 1974-79 discussions was replaced by an urgency born of the need for movement precipitated by the referendum results and the various pledges that individuals, groups and governments had made. The agenda was the same as that of 1978, except that powers over the economy had been added as the federal quid pro quo for discussions on natural resources.

The apparent agreement that was developing over the summer of 1980 dissolved at the first ministers' conference in September. The federal government eventually decided to proceed unilaterally, a move

that divided the provinces 8 to 2 in opposition. The federal hearings on the proposed amendments were a watershed. Until this point committees and commissions had heard from the public about general constitutional issues; the public had not been asked to react to a specific text, let alone to accept recommendations. The 1980 parliamentary committee was therefore fundamentally different in mandate and approach.

8. The eight provinces opposed to the unilateral process challenged it in the Supreme Court of Canada and won. One last attempt was begun. At the first ministers' conference of November 1981, the *Constitution Act, 1982* evolved after several days of intense discussion. It was a compromise based on the resolution then before Parliament, with several important modifications:

- the notwithstanding clause of the *Charter*, section 33, was added,
- aboriginal rights, section 35, was deleted,
- an affirmative action clause in the mobility rights section of the *Charter* was added, and
- a provincially developed amending formula was substituted for the Victoria formula.

In one of the great ironies of Canada's history, Quebec did not sign the agreement that resulted from so many years of discussion aimed at resolving these issues and accommodating Quebec. Hence Meech Lake.

Shifting Interests in Reform

Also of importance in 1981 were the tremendous lobbying efforts by aboriginal groups and women's groups to restore aboriginal rights and to remove section 28 of the *Charter* (equality of its application to male and female persons) from the ambit of the notwithstanding clause. Their success foreshadowed their later efforts on Meech Lake, and the strength of such groups cannot be ignored in future constitutional discussions.

Thus, Meech Lake was the culmination of the first major series of constitutional reforms since 1867. It represented the minimum necessary for the province of Quebec to accept, and thereby legitimize, the constitutional reforms proclaimed in April 1982.

Historically the objective of constitutional reform had been patriation, but before this could happen, an amending formula was needed. This dominated discussion from 1927 to 1965. From the point where Jean Lesage rejected the Fulton-Favreau formula, believing that it would be a millstone on Quebec's

constitutional aspirations, Quebec's concerns have been central to the reform process.

For a large part of this time, other governments either did not take the process seriously or were prepared to discuss Quebec's concerns in the context of a general review. By the time of the Victoria conference, English-speaking Canada was already concerned about the time and energy being consumed by the process and wanted to move on to economic issues.

By the end of the 1970s, attitudes had begun to shift again, as the West began to chafe at its lack of control over natural resources and its growing sense of a lack of influence at the centre. From this growing interest in the constitutional reform process came the principle of provincial equality. It also led to the decentralizing tendencies that Pierre Trudeau referred to as "the enemy within".

At the same time, the aboriginal peoples were pressing for constitutional recognition; as a result of the 1982 Act, four first ministers' conferences were held between 1983 and 1987. The last, focusing on self-government, ended in failure just a few weeks before the Meech Lake Accord was signed. The reaction of the aboriginal peoples to this perceived double standard found expression in the actions of Elijah Harper in June 1990.

Perhaps the most important lesson of Meech Lake was that the old processes of constitutional reform are no longer acceptable. Until 1982, negotiations had taken place in the absence of an amending formula or other agreed mechanism for change; agreements were then the product of intergovernmental negotiations and public hearings, but the two processes were not really connected.

Once an amending formula was in place, the dynamics changed dramatically as illustrated by the outcome of Meech Lake. The public participation that started in 1980-81 is now a required part of the process; how that participation will evolve remains to be seen. Nor is the Canada of today the Canada of 1968, when the process started. The agenda and the reasons for constitutional change were clear then, but today the dynamics of change are very different, and this may complicate the process even further.

The Centralist Perspective

The centralist vision (that is, the view from the centre) of Professor **Stefan Dupré** is a vision of hell: a future of profound political instability for the next five years and possibly the rest of the decade.

The vision begins with the state of the processes for developing and ratifying constitutional amendments. Before 1982, constitutional amendments were relatively simple, with convention requiring only that a prime minister obtain "substantial provincial consent" to proceed with a major amendment. The amendment would then be ratified by the passage of a resolution in a single parliamentary arena — the one in Ottawa. This is how the *Constitution Act, 1982* and earlier amendments were obtained.

By comparison, the process entrenched in 1982 is byzantine in its complexity. The new process requires that amendments be ratified not only by Parliament but also by provincial legislative assemblies, in most instances at least seven of them, representing 50 per cent of the population, and in some crucial instances — including amendments to the new amending formula — all ten. As a result, the operation of eleven distinct parliamentary arenas, with eleven different party configurations at eleven different phases in the electoral cycle, becomes fundamental to the amending process. As Meech Lake showed,

- governing parties can be replaced during the time allotted for ratification,
- a ratification, once granted, can be rescinded,
- there are no guarantees that any provincial party will deal with ratification in the same way as its federal counterpart, and
- within any legislature the outcome is not assured, even if all party leaders agree. The use of normal parliamentary rules can hobble the ratification process.

The process for producing a common constitutional text to ratify is just as uncertain. First ministers' conferences (FCMs) have been discredited as the accepted vehicle for arriving at texts. Robert Bourassa has made it clear that he will no longer negotiate constitutional issues with the other nine provinces, and FCMs have been roundly denounced by citizens' groups (and even by some of their participants) as closed and anti-democratic means of formulating constitutional proposals.

Dupré's vision therefore rests on a ratification process permeated with all the uncertainties that can beset any parliamentary arena, multiplied by eleven, and a constitutional development process disowned by Quebec and discredited elsewhere.

What Does Quebec Want?

The window of opportunity that opened in 1986 with the definition of Quebec's five concrete

demands slammed shut when the Meech Lake amendments were denied in June 1990. What Quebec wants is again a mystery. The task of unravelling the mystery was assigned to a constitutional committee of the Liberal Party of Quebec in March 1990 [the Allaire committee]. The committee, which also involves the party's riding organizations, is to report in February 1991.

In addition, a parliamentary commission chaired by two members of Quebec's business community, Michel Bélanger and Jean Campeau, has begun its own inquiry. The membership of the Bélanger/Campeau commission is diverse but not comprehensive; it includes business and labour representatives, members of the National Assembly, municipal politicians, and three federal MPs, including Lucien Bouchard of the Bloc québécois. Thus every conceivable option, including independence, will have a spokesperson, but the commission has no direct representation from women's groups, linguistic minorities or aboriginal peoples.

The outcome of these processes is uncertain. The Liberal Party committee may well produce a single version of what Quebec wants — likely some kind of special status, adding to the province's jurisdiction several fields that would remain in federal hands elsewhere in Canada. It is less likely that this special status will be called asymmetric federalism, because federalism is not a popular term. It might be called an economic union or association.

The Bélanger/Campeau commission is far less likely to produce a single version of Quebec's demands. With a membership that includes Parti québécois members of the National Assembly, it is not likely that the commission will coalesce around whatever proposal the Liberal Party committee produces. The more likely result is that the Bélanger/Campeau commission will produce two reports, one recommending independence with a common market, and the other possibly but not necessarily corresponding to the Liberal Party position — 'not necessarily' because the internal dynamics of the initial search for consensus within the Bélanger/Campeau group might well leave it with a majority that does not endorse independence but that would be more unambiguously in the sovereignty-association camp than the Liberal Party. A majority endorsement of asymmetric federalism is also in the realm of possibility; a committee of the Quebec Chamber of Commerce recently unveiled such a blueprint.

Options in the Air

Thus, by the spring of 1991 there could be three or four options in the air, and there still may be no clear answer about what Quebec wants. The options could include asymmetric federalism (special status), sovereignty-association, and independence within or outside a common market. By the autumn, if not before, Robert Bourassa will have to formulate a game plan involving electoral or plebiscitary initiatives. His party's opinion polls may weigh heavily here: an anti-Liberal mood would rule out an election half-way through his current mandate. But a pro-Liberal mood might make the electoral risk worthwhile, particularly if the campaign included the promise of a referendum.

With or without an election, the odds point overwhelmingly to a referendum. But what will the question be? A single question to be answered yes or no, as in 1980? A choice among several alternatives? Again, opinion polling may guide the choice. And there is nothing to rule out more than one referendum; Newfoundland held two in 1949, the first featuring a choice among three alternatives, the second a choice between two.

In any event, it will be 1992 before we have the official version of what Quebec wants. Negotiations will follow; but whether they go on bilaterally with the prime minister of Canada, one-on-one between the premier of Quebec and the other provincial premiers, or both, there is no escape from the byzantine complexity and unpredictability of the constitutional amending process.

Or is escape possible? The escape route, if it exists, can be identified as the UDI — a unilateral declaration of independence by resolution of the National Assembly. A UDI is possible, perhaps by 1993, in the wake of a Quebec election. The rationale for a UDI is that it could be seen as a means of transferring Quebec's future from the realm of constitutional law to that of international law. By laying claim to the status of a person at the level of international law, Quebec can assert the right to negotiate its future in the form of a treaty with the sole government that speaks for Canada on the international stage, the one in Ottawa. However, that government would have to recognize Quebec's independent international personality before embarking upon treaty negotiations.

Who Will Speak for Canada?

To determine the answer to this question, the assumption is that there will be a federal initiative,

conducted through parliamentary or other instruments, to canvass Canada's constitutional options through broad consultation. The lesson of Meech is that mere intergovernmental consultation and conciliation are insufficient. Group attitudes must be canvassed, particularly those of the groups whose condition — be it based on aboriginal status, sex, ethnicity, race or minority language — was constitutionalized in the *Charter* in 1982.

Ottawa's constitutional exercise, whatever its design, will give voice to the *Charter* groups. The outcome will provide the ultimate test of Pierre Trudeau's constitutional strategy, which was to entrench the status of Canadians as constitutional rights-bearers, thereby generating an overarching, unifying sense of Canadian citizenship. During the Meech Lake period, there was evidence that this sense of citizenship transcended Canada's anglophone provinces, but it stopped apparently at Quebec's borders. If events confirm by 1993 that these borders are indeed impenetrable, Trudeau's vision would have failed, but the process of negotiating an arrangement, with or without a UDI, would be simplified.

A different possibility, however, is suggested by the composition of the Bélanger/Campeau commission. In leaving out representatives of aboriginal peoples and groups based on sex, ethnicity and minority languages, the establishment of the commission has already galvanized the co-ordinating Committee on the Place of Ethnic and Racial Minorities in Quebec, elicited the criticism of the francophone vice-president of the National Action Committee on the Status of Women, and drawn fire from the Quebec region of the Canadian Jewish Congress. Trudeau's transcendent vision may yet live and be particularly invigorated if Quebec resorts to referenda in the wake of the Bélanger/Campeau report. The use of such brutally majoritarian instruments surely summons minorities to reach across territorial borders.

Dupré therefore sees Ottawa's constitutional exercise promoting a *Charter*-group consciousness that embraces Quebec. In those circumstances it would not be unreasonable to expect the emergence, by 1993, of a made-in-Ottawa constitutional blueprint in full competition with what would have emerged from Quebec City — a made-in-Ottawa blueprint vigorously supported by Quebec minorities confident that they are not about to be abandoned by their counterparts in English-speaking provinces.

By 1993 the picture will be further clouded by the federal election that must occur before the year runs

out. To project the current mood of the electorate is to project an election that produces a five-party House of Commons with no majority and with the fourth and fifth parties being the Bloc québécois and the Reform Party. Who indeed will speak for Canada then? A coalition government supported by the Bloc québécois or one from which the Bloc is absent? In the event of a UDI, why might a coalition that excluded the Bloc even recognize Quebec's independence so as to negotiate outside the established constitutional amendment process? In any event, could any multi-party coalition government have sufficient staying power to bypass the need for a further federal election in 1994 or 1995?

Ontari-one Hand, Ontari-other Hand

Safely ensconced with a majority government until 1994 or 1995, Bob Rae, who has chosen to keep the intergovernmental affairs portfolio for himself, will be pivotal. That his government will embark on its own constitutional exercise can be taken as a given; that the exercise will smack of Ontario regionalism is also a safe proposition.

Rae leads a party whose record is one of notable sympathy toward special status for Quebec. Should he choose to play the special status card, Rae might time this constructively to coincide with a Bélanger/Campeau report that endorsed asymmetric federalism. The construction of a Rae-Bourassa bridge around such a proposition might sidetrack Quebec from following the referendum-UDI route, at least temporarily. Here there appears to be a ray of sunshine.

Can there be such a thing as made-in-Ontario sunshine? In the scenario just sketched, the byzantine complexity of the constitutional amendment process is still alive and thriving. So Rae must market the text of any proposed amendments to the other premiers, and the text must then survive ratification. If the price includes a Triple-E Senate, is that price not too high?

The price is almost certainly too high if the added jurisdiction that Quebec gains through special status is accompanied by the logical proposition that Quebec's representatives in Ottawa are barred from voting on legislative measures relating to matters on which Ottawa retains jurisdiction in the other nine provinces. Ontario, with 49 per cent of the population, can hardly accept one-ninth of the vote on such matters.

But, Ontari-other hand, it may well be unrealistic to posit Rae playing the conciliatory special status

card. The New Democratic Party that has historically countenanced special status for Quebec is not the Ontario New Democratic Party that Rae now heads. Social democratic sympathies for Quebec's constitutional aspirations were dissipated when the Quebec government and its electorate heartily endorsed the Free Trade Agreement in 1988. The likelihood that the Bélanger/Campeau report will be couched in pro-free trade rhetoric may well scuttle any residual social democratic goodwill.

Rae's capacity to conciliate may be close to nil, then, in a Canada whose federal government is on its way to resting on an uneasy post-1992 multi-party coalition. And if Quebec is being driven to a UDI, the Rae government's constitutional energies — if they do not focus on litigating the constitutionality of implementing an associational treaty with Quebec outside the amendment process — will likely be devoted to ensuring that, in a Canada without Quebec, Ontario's clout will be commensurate with the 49 per cent of the population it contains.

This tour of the central Canadian axis portends a doleful future to the middle of the 1990s. Nor has it taken account of any of these possibilities: an avalanche of privately initiated litigation challenging the validity of a UDI and the capacity of the federal government to implement an associational treaty with Quebec; the bleak economic prospects that accompany political instability; or the potential for civil disruption or violence. When all is said and done, Dupré would far sooner that his forecast proved totally erroneous.

Panel II

Institutions of Canadian Federalism

Moderator:

Professor Clinton Archibald
University of Ottawa

Panelists:

Professor Alain-G. Gagnon
McGill University

Professor Garth Stevenson
Brock University

The Honourable Jean Charest, PC, MP

FEDERATION AND FEDERALISM ARE not synonymous, despite their habitual use as interchangeable concepts. Professor **Alain-G. Gagnon** points out that the concept of *federation* refers to a type of political system — its institutions and the power relationships among them. By contrast, *federalism* refers to the substance of the system. When we speak about federalism, we are concerned with the properties or characteristics of a society; for example, federalism should reflect the diversity of a society.

Federalism and federation do not necessarily go together. A federal society (with all the diversity that implies) might evolve within a unitary institutional framework — that is, a federation that does not respect the needs of its diverse elements (as in the Soviet Union). It is even possible to argue that federalism is dynamic while the concept of federation is static and hide-bound. Gagnon argues that the Québécois and English-speaking Canadians have evolved in the parallel but separate traditions of these two concepts. The 'peace, order and good government' orientation of English-speaking Canadians contrasts with the efforts of the Québécois to escape the yoke of excessively rigid institutions. It may not be that the Québécois reject federalism but that they define it differently.

The influence of the European and American traditions is also apparent in the differing interpretations of the concept. Most anglophone analysts see federalism in the American tradition, as an essential tool for building a nation-state, while their québécois counterparts see it as a tool to

liberate communities and their differences. Unity and diversity are the proposed routes.

The consequence of these divergent analyses is that the English-Canadian interpretation does not allow for Quebec's distinctiveness, while the québécois interpretation allows for the existence of English Canada's unity.

European Tradition

In keeping with this European convention, Laurent Fabius, president of the National Assembly of France, commented while on a visit to Quebec on "the need for democratic nations and states, within the large economic blocs that are emerging, to preserve their culture, their language and their identity and to guarantee to their national legislatures all the powers necessary to do so" [reported in *Le Devoir*].

This interpretation suggests that the right to distinctiveness is accepted and that it should even be encouraged to allow a people to exist and to blossom. Since 1981, with the *Canadian Charter of Rights and Freedoms*, there has been a feeling that all identities should be subsumed within the Canadian identity, without regard to the differences between peoples. The First Nations cannot accept this, and Quebec does not find it acceptable either.

Gagnon suggests, therefore, that the Québécois are the true federalists, while English-speaking Canadians are actually contemptuous of everything that is truly 'federal' about Canadian society. The right to distinctiveness is an absolute right. The right for the Québécois to belong to a *pays légal* as they understand it is inalienable. The right of the First Nations to their own distinctiveness is also inalienable.

Living within a larger political entity (Canada) or within a broader economic sphere (the North American market) does not demand homogenization of the factors that make peoples different from each other. The formation of larger political or economic entities does not reduce the need for national identities to be expressed; on the contrary, national identities require greater cohesion (Robert Schuman and Jean Monnet recognized this in their post-war definition of Europe).

Order Versus Level

The English-Canadian convention is to speak of *levels* of government — suggesting a dominance relationship in decision making, with the federal

government as the 'superior' level, the provincial governments 'created' by the federal government and municipal governments by provincial governments.

In Quebec it is more common to speak of *orders of government*, without assuming that one's powers are superior or inferior to another's. The provincial government may have full jurisdiction in one area and the federal government full authority in another. This influences the terms of political discourse.

To deal with this issue, the Pepin-Robarts task force proposed respecting these orders of government, discouraging overlaps, and defining their respective responsibilities more clearly. In their view, it was a question of recognizing the full sovereignty of the provinces and the federal government in defined sectors and limiting, to the greatest extent possible, anything resembling shared jurisdiction. Unfortunately, this approach was soon forgotten by the powers that be or at least by those on the side of centralization.

Marketplace of Ideas

Commissions of inquiry have been hotbeds of political discourse — Rowell-Sirois, Tremblay, Laurendeau-Dunton, Pepin-Robarts, and Macdonald all played host to innovative political thought. They also revealed the scope of movement available to political actors; they are not simply the captives of external forces but can define the terms of political discourse and lend them legitimacy. We are now at another turning point in our history. As Donald Smiley suggested in the title of his book about Canadian federalism, Canada is always in question. Nothing can be taken for granted.

Perhaps the strength of Canadian federalism has been precisely its ability to engender differences. But the *Charter* aims to eliminate a large part of those differences. Gagnon therefore suggests that solving the federation's problems is a matter of paying greater attention to the tenets of Canadian federalism. Ignoring distinctiveness is a sure recipe for the disappearance of Canada as we know it. Finding a way out will depend on the ability to put a collective vision to work.

Professor Garth Stevenson agreed that the problems of federalism are problems not only of institutions but also of vision, concept and definition. The issue is how to find a way for three competing visions to coexist. Dualism is the prominent vision in Quebec, but there is little

popular support outside Quebec for this vision. The 'ten equal provinces' vision is most popular in the West and in Atlantic Canada, for obvious reasons. The 'one Canada' vision finds its greatest support in Ontario, and its ability to move public opinion has been enhanced by the *Charter* and its effects. Because these visions have different implications for institutions, we need to find a balance or equilibrium among them through our institutions.

The 1981-82 constitutional amendments represented a compromise between the ten-provinces vision of the Gang of Eight and Trudeau's vision of one Canada, but it left out the vision based on dualism. The Meech Lake Accord attempted to rectify that shortcoming by accommodating dualism and the ten-provinces vision, but it left out the one-Canada proponents.

Part of the problem may be that Canada has been the first country to try to combine federalism with the Westminster model of parliamentary government. The problem arises from the need for party discipline in that model, which in turn makes it difficult to respect regional differences. The Senate has failed to represent regional diversity, and the Cabinet does so less and less as issues grow in complexity, ministers are shuffled with increasing regularity, and cabinets grow too large to make them effective decision-making bodies.

Executive Federalism

Meanwhile, executive federalism has developed as a means of trying to make federalism compatible with parliamentary government. This approach is well suited to some situations, such as negotiating federal-provincial fiscal arrangements, but from the 1960s on it has been used for other purposes to which it is less suited, including constitutional amendment and reform. The 1982 amending formula has proved inappropriate precisely because it is based on a model of constitutional change through executive federalism. Adding ratification by provincial legislatures changed the process significantly and added a new dimension to the Meech Lake debate.

In a more fundamental sense, however, Meech Lake simply no longer corresponded to the underlying needs and political culture of Canada. The process was unacceptable to English Canada because it did not reflect the greater complexity and diversity of English-Canadian society and its three emerging strains: populism — the increasing unwillingness of English Canada to accept the elite

accommodation method of resolving constitutional issues; multiculturalism — the growing rejection of the dualistic model, a phenomenon especially widespread in Ontario; and charterism — the extent to which non-Quebec Canadians have adopted the *Charter* as a symbol of their aspirations. Rightly or wrongly, these groups saw their rights threatened by the distinct society clause, by the Meech Lake Accord generally, and by the negotiating process through which Meech Lake was reached.

These feelings are heightened by issues such as free trade and the goods and services tax, which people see as being imposed despite the wishes of the majority. Now executive federalism is dead in Quebec as well, with Bourassa's statement that he will no longer participate in the process.

At the same time, the Triple-E Senate has acquired symbolic value; as such, it is the institutional expression of the 10-provinces vision of Canada and of mistrust for the central Canada power block. While the idea has appeal, neither Ontario nor Quebec would accept it. Moreover, the Australian experience shows that it is not a panacea for regional discontents and has the potential to create serious constitutional deadlock and crisis.

New Solutions

Stevenson believes that the current crisis is in fact more serious than those of the past. The institutional panaceas of the 1980s — the Triple-E Senate and electoral reform — are now irrelevant. The challenge is to find new solutions, new institutional designs to ensure that people feel genuinely represented in national institutions and processes — in short, a way to solve the crisis of dualism and let two nations live together amidst these new forces and social realities.

The failure of Meech Lake marked a turning point, the Hon. **Jean Charest** agreed, in the development of federalism in Canada. We came to a fork in the road and, instead of Meech, chose the unknown alternative route, which is already proving bumpy and whose eventual destination is uncertain.

In Quebec, the strong consensus is that the road must lead Quebec and the Québécois in one direction — toward a more autonomous government. Independence is the extreme, but other options are a matter of degree.

Outside Quebec, however, such consensus has not developed. English Canada is not a homogeneous whole but a mixture of diverse regions, provinces and territories and varying

economic situations. Even so, some tendencies are discernable. The three western-most provinces, British Columbia, Alberta, and Saskatchewan, favour a more decentralized federation. Other provinces, including Ontario, have taken positions that are variations on the theme of a centralized federation.

Since the demise of the Meech Lake Accord, then, Quebec is going in one direction and the rest of Canada is going in many directions. In this context, every option is open. Quebec will certainly seek to meet its concerns, within or outside Canada. Keeping every option is the only way to have the kind of discussion needed to keep Canada together.

For more than 25 years, ever since the Royal Commission on Bilingualism and Biculturalism, we have examined our existence as a country from the angle of francophone-anglophone relations, without ever finding definite answers. But during the same period, the country has matured and changed. We have become a multi-ethnic, pluralistic society. The aboriginal peoples are seeking their rightful place. Western alienation is strong. These realities have added to the complexity of the national entity.

In examining federal institutions, we must take these changes into account, because some of these differences are what distinguish us in fundamental ways from other countries. For example, in the United States there is a common link between individual citizens and their country expressed through, among other things, a common history, common ideals, and a commonality of rights. Canada is quite different. Quebec, for example, has a different history, different symbols and a different perception of individual and collective rights. The same applies, in a different way, for the native peoples.

Institutions for Tomorrow

Many Canadians believe that these differences have not been reflected adequately in federal institutions. The Canada we create for tomorrow must take these differences as given and adapt federal institutions to them. But we must also go one step further, building on our diversity, using it to our advantage, and ensuring that Canadians see themselves reflected in the Canadian mythology.

For example, we might consider allocating seats for aboriginal Canadians in the House of Commons and the provincial and territorial legislatures. It is done elsewhere in the world and seems to allow for native peoples to raise concerns and issues before they reach crisis proportions.

Our challenge is not only to adapt, not only to be responsive to legitimate concerns and aspirations, but also to be creative. We cannot limit ourselves in terms of how we recreate Canada. We must be willing to ask all the pertinent questions and consider all the viable answers.

Canadians interested in the future of Canada must identify and promote the common denominators upon which the country can be built. A few of these are relatively easy to identify:

- **Our geography:** Whatever the political structures we establish, we will always have to co-exist. Constitutions by themselves do not regulate the social and economic relationships that exist by virtue of the simple fact that we live together.
- **Our history** has been dominated consistently by a common trait: rejection of the American option. Whether in Quebec or outside it, Canadians do not want to be part of the United States. Federal politicians know all too well that Canada's relationship with its southern neighbour is an issue for constant attention and debate.
- **Our political structures**, in which we have recognized and accommodated diversity. A federal system is exactly that — an accommodation of diversity. But in our federation this accommodation is rather passive. The future may require a more dynamic expression of our diversity. The genius of the Meech Lake Accord was that in recognizing Quebec as a distinct society it built a bridge that enabled the people of Quebec to be themselves as Québécois and also be Canadians.
- **Role of government:** Canadians want government to take a distinctive role in providing services to its people. The obvious example is our health care system, but Canadians want this to continue in many areas of national interest.

Global Trends

In addition to these and other common denominators we could name, there are global trends that affect the decisions and choices we make. The communications explosion, the diminishing role of superpowers and the emergence of middle powers — these and other developments may have a decisive impact on the debate about our future. They may actually be factors favourable to those who want Canada to stay together.

A made-in-Canada federalism that reflects the diversity of Canada is now the challenge. We need federal institutions that take into account both the

shared values that distinguish us as Canadians and the regional characteristics that we cherish and that Canada's existence allows us to retain, promote, and develop. The concern is not whether we can do this but whether we are willing to do it. The people of Quebec have been considering this matter seriously for more than 30 years. Is the rest of the country ready to make a future for federalism? Is the rest of the country willing to make a future for Canada?

In bringing the panel presentation to a close, Professor **Clinton Archibald** commented on the need to open the process of constitutional change to wider participation. Lobbying is itself discriminatory, as it provides access only to the few. The answer may lie in a new kind of forum to hear the views not of elites but of ordinary interests. The *sommets de concertation* initiated by the Parti québécois government in the 1970s and early '80s provided such an opportunity. According to Léon Dion, all legislation introduced during these years was influenced by the results of these summits. Institutional and constitutional reform must become more open and transparent processes. Otherwise, the issues being discussed today will still be on the agenda 20 years from now.

Question Period

The first comment from the audience concerned the need for educational materials about the parliamentary system of government and for 'experts' to make greater efforts to explain the system and how it works. People need more concrete and complete information about the system before they can determine how best to participate in it.

The panelists went on to debate the relative importance of various americanizing influences on Canadian society and political culture, Charest placing greater emphasis on the *Charter* and the emergence of single-issue politics, and Stevenson and Gagnon attaching more importance to the free trade agreement and the pervasiveness of American culture in Canada.

According to Charest, the Cabinet, once considered a means of accommodating regional concerns, has become a series of committees grouping issue-oriented ministers and ministers of state. Regional concerns tend to find expression more in caucus than in cabinet. The shift in the cabinet role reflects the fact that the 'old' way of getting involved in the political process — joining a political party — is being displaced by membership

in interest and advocacy groups. Politicians are starting to feel that they are the only ones looking at the big picture, that everyone else is driven by single issues. The price of the ministry of state system has been the fracturing of the political system along issue lines, increasing the need for inter-departmental co-ordination and, ultimately, making things harder to achieve.

Panel III

The Future of Canadian Federalism

Moderator:

Professor Kenneth D. McRae
Carleton University

Panelists:

Professor Alan C. Cairns
University of British Columbia

Chief Lawrence Courtoreille
Regional Vice Chief
Assembly of First Nations

Professor Michael D. Behiels
University of Ottawa

EVEN IF IT DISAPPEARED tomorrow, history would judge Canadian federalism a success, argued Professor Alan Cairns. The question now, after thirteen decades of Canadian federalism, is not whether it will survive but in what form and with what provincial membership. Cairns identified three issues requiring examination:

- the consistent failure of academic predictions about the future of Canadian institutions;
- the complexity of asymmetrical federalism and the constitutional concerns it raises; and
- the significance, if any, of Canada's ethnic demography for constitutional change and political organization.

Academic prognosticators, ranging from Laski in the 1930s to commentators on the reforms of 1982, have failed consistently to predict the future of federalism. Laski thought it was outmoded because the divided powers model had been made obsolete by capitalism. In the 1940s and '50s, J.A. Corry said that centralism was the wave of the future. Donald Smiley thought in 1972 that the country might not last long enough for him to finish writing his book, *Canada in Question*. The perception in 1982 was that patriation of the Constitution and the addition of the *Charter* would cause an immediate resurgence of separatism in Quebec. But of course, none of these predictions has come true, although independence-oriented nationalism was subsequently stimulated by the failure of the Meech Lake Accord.

Not a Panacea

Cairns's second concern relates to the complexities of asymmetrical federalism as a way of resolving our constitutional problems. First, can Canadians outside Quebec accept a situation where Quebec has jurisdiction superior to that of other provinces? The norm of the equality of the provinces is a serious hurdle, but even if we could overcome it, it must follow that the powers of MPs and senators from Quebec would have to be reduced in those areas where Quebec's jurisdiction had expanded. Enhanced jurisdiction would not be possible without a concomitant reduction in MPs' authority, but how would responsible parliamentary government work under these circumstances? How could the parliamentary system operate with two tiers of MPs?

A related concern is whether we can accept the asymmetrical application of the *Charter* inside and outside Quebec. The lesson of Meech Lake is that English Canada is profoundly opposed to this proposition.

The third issue requiring examination is the relationship between demographic change resulting from immigration and the type of political system we have. In the past, we have defined the task as generating loyalty to the whole from two numerically and culturally dominant peoples; the issue was therefore to find a *modus vivendi* between French and English. The two-nation principle is now under attack, however, with Canadians of 'British' origin slipping from 60 per cent to 40 per cent of the population since Confederation and 'French' Canadians declining from 30 per cent in the 1960s to 25 per cent now.

By contrast, the 'other' component of the population is at 33 per cent and is expected to rise to 40 per cent by 2000. Members of visible minorities, not counting aboriginal peoples, will account for 10 per cent of the population by the first decade of the twenty-first century. These changes are accounted for, of course, by the shift in immigration flows from 'non-traditional' countries in the Caribbean, Africa, Asia, and South and Central America.

Another aspect of the new demography is its concentration in urban Canada. Montreal, Toronto, and Vancouver have one-third of Canada's population but receive two-thirds of its immigrants. The corollary is that new Canadians are concentrated in Quebec, Ontario, British Columbia and, to a lesser extent, Alberta. The four Atlantic

provinces, Manitoba, Saskatchewan, and the territories received only 6 per cent of all arrivals in 1989.

Consequences for Federalism

The consequences for federalism are, first, that the new demographic composition weakens one of the traditional languages of federalism — dualism — and therefore challenges the hegemony of European 'founding peoples' as the dominant groups around which constitutional structures should be built, generating a competing, non-territorial ethnic agenda. The Meech Lake Accord, an attempt to respond to the old ethnic agenda, was defeated by this new ethnic agenda.

Two outcomes are possible. Ethnic diversity may strengthen the pan-Canadian notion exemplified in Diefenbaker's Bill of Rights, and this may be reinforced by the *Charter*. But the new demography may also be an anti-federal force, because the management of ethnic diversity will generate issues primarily in four provinces. In addition, it affects such areas as education, language, culture, welfare and policing, which tend to be local or community issues. The result might be a 'provincialization' of issues, with the focus of ethnic issues shifting from the federal to the lower levels of government.

Provincial postures at federal-provincial conferences will in turn be influenced increasingly by the ethnic diversity they are trying to deal with. In short, we cannot think about the future of federalism without thinking about these issues and their effect on the concept of dualism.

Unlike those who constitute the new ethnic communities, the aboriginal peoples have a historical relationship with Canada, a relationship set out in but not defined solely by treaties between First Nations and the Crown. The issue, explained **Lawrence Courtoreille**, is therefore how the people of the First Nations fit into the future framework of federalism, not how their issues are to be 'managed' by bureaucrats and politicians.

Canada is at a crossroads in reviewing its past approaches to nation building and setting directions for the future. All Canadians and their governments are making choices about how they will relate to each other in the coming year. This is taking the form of commissions of inquiry in Quebec and at the federal level, which will have a bearing on what happens to Canada in the years to come.

Preferred and Rightful Role

How do first nations people fit in? How will possible changes in the framework and underpinnings of Canada affect them? Most important, how will first nations people make Canadians and their governments aware of the relationship they see between First Nations and Canadian governments and what first nations people see as their preferred and rightful role in the future of Canada.

The people of the First Nations can no longer afford to remain silent or simply to 'wait and see', because events are continuing to unfold that will have a significant impact on their lives, their governments and their future. First Nations' people must play a definitive and substantial part in these events.

To describe how First Nations relate to the rest of Canada, Courtoreille began by considering the historical relationship between the First Nations and the British Crown, which is the basis for the First Nations' perspective on where they fit into Canadian federalism. The peoples referred to by some as 'native' or 'aboriginal' peoples are the First Nations of North America. When the first Europeans arrived, their interests were mainly economic; they wanted to hunt and fish, cut trees for timber, and look for minerals. Land was not the main issue.

The various European nations that sent people to North America considered the societies they found here to be nations. The First Nations had established economic, diplomatic, and military alliances and networks throughout the continent; the Europeans were aware of this and acknowledged and accommodated it.

Naturally, there were conflicts, and conflict sometimes led to overt acts of warfare. At other times, hostilities were not out in the open. But the fact remains that the First Nations were a factor the Europeans could not ignore. The British Crown made treaties with the First Nations to have them as allies or to secure neutrality, a policy that enabled Great Britain to gain a foothold in order to exclude Spain, Denmark and France from gaining access to the continent's vast resource wealth. These treaties and nation-to-nation relationships became the foundation on which Canada was built.

Living Agreements

These events did occur long ago, but the First Nations that made agreements and developed protocols with the Crown did not think they were

entering into temporary relationships. The compacts are meant to be perpetual: "As long as the grass shall grow and the rivers continue to flow". The treaties are living agreements that are still alive today, as demonstrated by the Supreme Court of Canada in June 1990 in its decisions in the *Sioui* and *Sparrow* cases.

The *Sioui* decision involved questions about the existence and relevance of a pre-Confederation treaty of neutrality signed in 1760 between the British Crown and the Huron Nation just prior to the defeat of the French forces at Quebec. The Hurons had been allied with France, and the British wanted to secure their neutrality in the conflict. In return, the British Crown promised that the Hurons would have free exercise of their religion, customs and trade in perpetuity. In rendering the Court's decision, Mr. Justice Lamer stated,

The mother [European] countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.

Shortly after this decision was handed down, the prime minister stated that the First Nations' assertions of an inherent right to self-determination were "bizarre". How can this simple truth, based firmly on historical fact, be called bizarre?

When the Constitution was patriated in the early 1980s, the Queen addressed the Parliament of Canada, reminding the House that the federal government is bound by honour and duty to strive for full compliance with the Crown's responsibility toward the First Nations. But the government of Canada still appears to have other ideas about how to approach first nations rights and issues. They want to forget about the First Nations and extinguish their rights, sweep history aside and tear out a large part of the foundation of Canada.

For more than a century, the government of Canada has considered the First Nations to be their "Indian problem". This happened as soon as Canada got access to the lands and resources of the First Nations. The government tried to eradicate the "problem" by eradicating First Nations' religions and cultures, persecuting their leaders, breaking up families and removing their children. The issue, then as now, was land.

Under the Royal Proclamation, if Canada wanted access to First Nations' land, the government was supposed to make treaties and abide by them. Treaties were made in some parts of Canada, but much of Canada has still not been dealt with through treaties. Even where treaties are in place, the government does not want to live up to their terms.

Unstated Intentions

The "problem", then, has been that the First Nations were an impediment to Canada's assertion of title to lands and resources. Aboriginal and treaty rights are a legal and constitutional fact for Canada, but as recently as 1969, the government of Canada was still trying to ignore that reality by stating the government's intention to make first nations people "the same as all other Canadians" — in other words, to abolish the special status of First Nations. This is still the overriding though unstated intent.

The Meech Lake Accord was therefore fundamentally flawed; it failed to address the role of the First Nations as founding partners in the genesis of Canada. The federal and provincial governments refused to recognize and accommodate that fact throughout the process of developing the Accord. That mistake proved to be a fatal flaw, and thanks to the courage of Elijah Harper, the First Nations were able to kill the Accord. The First Nations had no other option, because as it stood, the Accord would have been the epitaph for the relationship between the First Nations and the Crown.

Shortly after the death of the Accord, the country faced the crises at Kanasatake, Kahnawake and other places across Canada. The crises did not have to occur, because the historical relationship contains the elements of how First Nations and the people and governments of Canada can live and work together. The protocols of the relationship are founded on mutual respect, accommodation, alliance and open communication between partners. When we stray from these precepts we can only expect to encounter difficulties, frustration and anger.

There is no reason why Canada should not continue the nation-to-nation relationship with the First Nations. First Nations' people belong to the lands upon which we all live as Canadians and shall remain there forever. As a fact of Canadian life and history, and as founding partners in the building of Canada, the First Nations will be a part of the future of Canada. The First Nations have a role to play, and Canada has a responsibility to accommodate them.

What we do and say in the next few years will set the tone of our relationship for a long time to come.

We have a wealth of mutual experiences from several hundred years together from which to draw guidance and wisdom. Some of the memories are good ones, while some are decidedly bad. What is most important, however, is that they are part of our history and heritage and should not be forgotten. They are precious to the First Nations and may very well prove even more valuable to all Canadians in the future.

Time for Healing

Trying to make people feel guilty for the failure of the Meech Lake Accord, said Professor **Michael Behiels**, is no way to promote the healing now needed. Meech Lake would not have resolved all our constitutional problems, and it is wishful thinking to believe that it would have. Quebec's intergovernmental affairs minister Gil Rémillard has already said that the Accord was merely the instrument for much greater changes benefiting Quebec, a way to extract more powers from the federal government. Terms such as 'asymmetrical federalism' are really just a way to neutralize more evocative terms like 'distinct society'.

With that perspective in mind, Behiels suggests that a fitting metaphor for the current state of Canadian federalism is that most American of sports, baseball. As dictated by the free-enterprise tradition, the winner takes all, leaving the loser defeated and humiliated. Canada and Quebec are caught up in the final game of a constitutional slugfest that has been going on for three decades.

It's the World Series, the bottom of the ninth inning of the deciding game, and the sovereignists (or independentists or separatists) are at bat, bases loaded, two men out, and the winning run at the plate. The designated hitter, batting .400 and carrying the aspirations of a generation of neo-nationalists on his shoulders, is sent out to face an exhausted, confused and dispirited Canadian reliever, who struggles to summon up the little reserve of adrenalin and desire that remains to save the game. Will the Canadian pitcher strike out the third man and give his nation new hope, or will the québécois slugger succeed in getting the grand slam that leads his nationality to independence? (A member of the audience suggested later that, to be more accurate, the situation would have to be that the sovereignists are about to leave the ball park, while some members of the Canadian team are

trying to persuade them to stay because they're enjoying the game.)

Behiels's understanding of Canadian history leads him to think that the pitcher will summon the wherewithal to strike out the batter but will no doubt face a full count before that occurs. Having our collective backs to the wall will force all Canadians to see starkly and lucidly what is valuable about their country and therefore worth preserving.

Centripetal Versus Centrifugal

The history of Canadian federalism has proved it a highly resilient institution. Much of this resilience stems from the range of interpretations that can and have been placed on the *Constitution Act, 1867*. Since Confederation in the mid-1860s, proponents of a *centripetal* conception of the country and the Constitution have done regular political, economic, social and intellectual battle with advocates of a *centrifugal* conception of Canada.

John A. Macdonald's excessively centralist vision was challenged and eventually set aside. In a different but just as clear manner, the excessively decentralist conception of a truly confederal system, proposed by the leaders of Quebec's Rouge Party, was also rejected by the vast majority of Canadians in the nineteenth century. All these battles helped shape the development of the country, as well as our perception and understanding of a highly functional and pragmatic system of Canadian federalism that could serve the responsibilities and requirements of both levels of government, national and provincial. It could also serve the needs of Canadians coast to coast because it was pragmatic, practical, and open to adjustment.

The various provisions of the *Constitution Act, 1867*, especially the distribution of powers, have also been circumvented in ingenious ways when circumstances required. The Constitution, which includes much more than the Acts of 1867 and 1982, is an organic tree that derives its primary nourishment from the entire fabric of Canadian society. Canada is a federal society, then, even if some members of society regard it from different perspectives.

There was and continues to be an intimate relationship between the political realignment that has been taking place and the constitutional crisis that was reflected so acutely in the rise and fall of the Meech Lake Accord. This political realignment, manifested in the replacement of the Liberal Party

as the governing party, had its origins in the rapidly changing socio-economic and ethno-cultural developments of the late 1970s and the recessionary period of the early 1980s. Until this socio-economic restructuring and political realignment are fully consummated and the situation clarified and stabilized, it is difficult to imagine the achievement of successful and widely legitimate constitutional reform. The current whirlwind precludes consensus on major change for the time being.

But Canada may not have the luxury of waiting for new socio-economic and political stability to take root. The independence movement in Quebec, with new wind in its sails, will try to capitalize on the current instability to advance its cause. To prevent this from happening, one of two things must occur. The Progressive Conservative Party of Canada and the federal government must start behaving as a genuine national party in the tradition of Macdonald, Laurier, Borden, King, Diefenbaker and Trudeau. The Tory government must put forward a new national policy based on the contemporary aspirations and needs of all Canadians.

If the government cannot or will not undertake this challenge, it will be incumbent upon a coalition of opposition forces to articulate such a policy, which must of course include a reformed constitution and reformed parliamentary institutions. It is highly doubtful, however, that either the Liberal Party or the New Democratic Party has sufficient national representation, or could achieve it in the next election, to undertake the task by themselves. But it is only such a development that will ensure that the centre holds and that Canada is able to survive into the twenty-first century.

The Meech Lake debate showed that the country must decide where its primary focus is going to be: collective rights for specific groups, however defined, or individual rights for all. The *Charter* was an ingenious attempt to give the priority to individual rights while giving unspecified rights to specific groups the linguistic minorities, the ethno-cultural communities, and the aboriginal peoples.

The Meech Lake Accord went one step further and attempted to link the rights of the francophone majority of Quebec with the Quebec state. It was this provision that raised the expectations and the frustration of these other groups while angering the majority of Canadians who give priority to individual rights over collective rights. Can appropriate constitutional provisions be found to accommodate both aspirations? If not, Canadians

will have to decide democratically where they wish to place their priority for the twenty-first century.

By the same token, the Québécois will have to decide for themselves whether the best way to ensure their survival within North America is to focus on constitutional issues or to concentrate on day-to-day social, economic and education issues.

— *rapporteur, Kathryn Randle*

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