

BLUFFING ALL THE WAY

by Guy Laforest

As Canadians are about to embark upon the fascinating journey of a referendum to ratify the constitutional agreement reached by the 17 partners at the multilateral table, many are looking for the definitive conclusion of this debate. They want peace for our times, for a thousand years. I suspect that they will be disappointed. Robert Bourassa, despite all his skills, will not be able to deliver more than a temporary truce.

BOURASSA'S POST MEECH STRATEGY

Two years ago, when the Meech Lake Accord fell apart, Robert Bourassa solemnly proclaimed that Quebecers formed a distinct society free to choose its political and constitutional status, that his government would never again enter into multilateral negotiations on fundamental matters. In Spring 1991, following a process initiated and encouraged by Robert Bourassa, the Allaire and Bélanger-Campeau Reports gave the rest of Canada 18 months to formulate a binding offer leading to a profound renewal of the Canadian federation, capable of satisfying the traditionally decentralizing demands of Quebec. In the absence of such an offer, the government of Quebec would put in place the machinery of a referendum on sovereignty. In June 1991, the National Assembly ratified Bill 150, a piece of legislation embodying the spirit of these reports. Those were the tools that Bourassa's government put together to move beyond the conflict of national visions and aspirations

western provinces have 29.0 percent of the 1991 national population and 29.2 percent of the seats in the House. Now, the west's share will drop to 27.3 percent in the primary legislative chamber, the one that will determine the composition of the federal cabinet. Quebec's share will increase from 25.4 to 27.6 percent, and Ontario's from 33.6 to 34.7 percent. Thus the power in the legislative chamber that counts, shifts to the centre.

If we move to greater representation by population in the House, the situation is unlikely to improve for the west. Most of the available seats for redistribution will be locked up in Quebec, and Ontario, even with its "signing bonus" of 18 additional

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In summary, the Senate reform package can only be seen as a humiliation for the west, but one that will be presented as a response to western Canadian concerns and as a compromise by Quebec. It is neither.

The lesson from the Senate reform saga should be painfully clear. When the next "Canada Round" is opened up in a few years to respond to renewed demands from nationalists in Quebec, western Canadians should not come to the table. To participate again in our humiliation would be too much.

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seats, will still have the most compelling claim for more seats. Alberta and British Columbia may be able to cannibalize Manitoba and Saskatchewan, but there will be no significant shift of seats to the region as a whole.

THE 0.1 PERCENT SOLUTION

So it all comes down to joint sittings in the new blended Parliament which will combine House and Senate votes. Here the west, with 29.0 percent of the Canadian population, will have 29.1 percent of the seats in the combined Parliament. This, then, is the regional counterweight, the outcome of a prolonged search for institutional reform — a 0.1 percent edge. It is a wonder that western Canadians are not dancing in the streets!

between Quebec and Canada, to repeat the words of the Bélanger-Campeau Report.

### THE RETREAT BEGINS

In the past year, Robert Bourassa has dismantled piece by piece the strategy that he had orchestrated after the failure of Meech. From a clear rejection of negotiations with 11, the Liberal government has moved to the following positions: a return to the constitutional table if all the elements of Meech were included in the new package; later on, the return was conditional upon securing the "substance" of Meech; then, negotiations not only with 11, but with 17 partners around the table became acceptable if the "substance" of Meech was granted. When all the partners except Quebec reached an agreement on July 7 in

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Ottawa, Mr. Bourassa asked for clarifications on the distinct society and on the creation of new provinces; he also expressed reservations about the parts of the deal that concern the Senate and the native peoples. In the absence of documents, it would be an act of pure faith to affirm that Mr. Bourassa had been given these "clarifications," when he chose in late July to return to the constitutional table.

At the constitutional conference in Ottawa, August 18 to 22, Mr. Bourassa retreated on four major fronts. As I argued in the first issue of *Canada Watch*, Mr. Bourassa was condemned to agree with the others once he had committed himself to the negotiating process of the Canada Round. On Wednesday, August 19, Mr. Bourassa accepted the principle of an equal

Senate, thus giving his indirect assent to the vision of those like Jim Horsman who believe that there are ten equal provinces in the Canadian nation. The principle of an equal Senate is the institutional supplement of a political culture insisting on individual and provincial symmetry, cherished by Pierre Trudeau and fostered by the *Charter of Rights and Freedoms*. The Allaire and Bélanger-Campeau reports stated the opposition of Quebec to this vision of Canadian federalism.

On Thursday (August 20), Mr. Bourassa accepted that the Supreme Court of Canada will be the ultimate judge of the relationship between Quebec and the native governments. This position contradicted squarely the official statements of his own minister of intergovernmental relations, Gil Rémillard, made in January and February 1992, in Anjou and Whistler, respectively. On Friday, becoming more and more a prisoner of the logic of the Canada Round, Mr. Bourassa failed to obtain any significant modification to the July 7 package on the crucial issue of the division of powers. The sigh of relief of the federal bureaucrats could be felt as far as Québec City. On Saturday, to complete the deal, Mr. Bourassa gave his assent to a Canada clause that affirms, let us be frank about this, the fundamental characteristics of the Canadian nation. National norms, national standards, national objectives, national referendum: this language is omnipresent in the constitutional documents since the federal proposals of September 1991. In the final analysis, Mr. Bourassa has chosen to accept a restricting definition of the distinct society clause, compatible with the sense of Canadian nationhood of his partners around the table.

### THE SALES PITCH BEGINS EARLY

A week later, after two more days of negotiations in Charlottetown, the partners in the Canada Round have

yet to publish the text of their agreement in principle. Mr. Bourassa did not wait for such formalities. He rushed back to Québec City to sell the deal to his cabinet, to his caucus, and to the Liberal Party. In a matter of a few hours, without producing the shadow of a document, Mr. Bourassa appears to have been successful in convincing most of his fellow Liberals. Having attended the special congress of the Liberals in Québec City, I had the opportunity to smell the atmosphere of Gaullism. The Liberals were asked to give a blind vote of confidence to their leader and they delivered accord-

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ingly. Not all of them did. Jean Allaire, the author of the now-defunct constitutional position of the party, and Mario Dumont, the president of the powerful youth-wing, dared to express their dissent in public.

Their role in the upcoming referendum campaign could be a prominent one. To assuage the Liberal delegates in Québec City, they were not told immediately that their leader had committed himself in Charlottetown to the principle of the pan-Canadian "national referendum." Responding to questions from delegates, Mr. Bourassa went as far as admitting that he had abandoned his Brussels scenario, a referendum question asking citizens to support the idea of Canada and Quebec forming two states associated in an economic union. He suggested that the

Canadian partners would never consent to such a major restructuring of the relationship. With these words, the game was over. Robert Bourassa's bluff had been called once and for all.

The August deal will be a tough sell in Quebec. Considering that citizens are tired and that the agreement will be supported by the machinery of two governments, it is quite possible that the "Yes" side will triumph. Canadian federalists would thus have obtained their peace, until the next election in Quebec when the Liberal Party of Robert Bourassa will seek, once again, the trust of the people.

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## LEGAL REPORT

### EXPANDING THE CHARTER ARSENAL: READING JUDGE- MADE PROVISIONS INTO LEGISLATION

by Jamie Cameron

Should an unelected judiciary read new provisions into democratically enacted legislation that does not comply with the Charter? Courtwatchers have waited for an answer since August 30, 1988, when Justice Strayer of the Federal Court, Trial Division, extended unemployment benefits intended for adoptive parents to natural fathers.

#### SCHACTER V. CANADA: THE TEST CASE

Mr. Schacter invoked section 15's guarantee of equality to challenge section 32 of the *Unemployment Insurance Act*, which at the time, granted unemployment benefits to adoptive parents but not natural fathers. At the Supreme Court of Canada, the government conceded that section 32 violated section 15's guarantee of equality, and appealed only on the issue of remedy.

On July 9, 1992, the court held that the Constitution authorizes the courts to add judge-made provisions to legislation. In doing so, Chief Justice Lamer stated that there is no difference, in principle, between reading provisions out of legislation and reading judge-made provisions in.

The question, in the Chief Justice's view, was not "whether courts can make decisions that impact on budgetary policy", rather it was "to what degree they can appropriately do so." Mr. Schacter was denied relief because the court concluded,

in the circumstances, that unemployment benefits intended for adoptive parents should not be extended to natural fathers.

*Schacter* rests on an assumption that any distinction between reading in and reading out, or severance, is arbitrary. How then should "reading in" be seen alongside the remedial choices the court has made in other contexts?

#### REMEDIAL CHOICE AND INSTITUTIONAL CONSEQUENCES

In the past the court has not hesitated to strike down legislation found inconsistent with the Charter. *Hunter v. Southam* declared that "[i]t should not fall to the courts to fill in the details that will render legislative lacunae constitutional." *R. v. Big M Drug Mart* stated that legislation that violates the Charter is *per se* invalid — regardless whether the provision is unconstitutional vis-à-vis the claimant.

An outcry followed the court's decision last year to invalidate Criminal Code provisions that prohibited any examination of sexual experience in sexual offence cases. The statutory framework was struck down in *R. v. Seaboyer* because the exceptions to the general rule of prohibition were incomplete.

Because of its all-or-nothing consequences, invalidating legislation can be a more aggressive remedy than curing its defects through interpretation. Striking section 32 down would have negated unemployment benefits for adoptive parents, without providing Mr. Schacter a remedy.

And, as *R. v. Askov* demonstrates, Charter decisions that do not invalidate legislation can have enormous implications. There, a decision that appeared to establish an absolute six to eight month timeline for hearing criminal charges caused extraordinary social and financial upheaval: as governments scrambled to com-