CANADA WATCH

Practical Analysis of Constitutional and Other Key National Issues

Rocky Road Ahead for Constitutional Proposals

Fall Referendum May Be Used to Break Logjam

by Patrick Monahan

Even as Prime Minister Mulroney announced a meeting with the premiers for June 29, the spectre of unilateral federal action loomed large on the horizon.

An official "Status Report" on the talks, released by the negotiators on June 11, suggests that there has been very significant progress in a number of areas, most notably aboriginal self-government, changes to the division of powers, and recognition of Quebec's distinct society. (See "Constitutional Proposals at a Glance," page 4.)

But it is clear that large areas of disagreement remain. The primary trouble spots include:

Senate reform: While it has been agreed that the Senate should be elected, the allocation of seats and the precise nature of the Senate's powers remain undecided.

The amending formula: There is no agreement yet on whether Quebec (or the other provinces) should get a veto over changes to national institutions; the "veto" issue appears to be linked to prior agreement on Senate reform.

The common market: There is no agreement on a legally binding commitment to eliminate trade barriers between the provinces; all that has been agreed to is a *non-binding* statement of the "policy objectives" underlying the social and economic union.

Aboriginal self-government: Ottawa and a number of the provinces are reportedly uncomfortable with the aboriginal package and are seeking changes that would clarify the jurisdiction of aboriginal governments.

Senate Reform Still Elusive

The tabling of a compromise Senate proposal by Saskatchewan on June 11 appeared to hold the promise of resolving the provincial differences on the issue. Under Saskatchewan's proposal, each province would elect eight Senators, but on most issues a system of "weighted voting" would apply, giving more votes to Senators from larger provinces. All provinces expressed some interest in the proposal, and the federal government has reportedly drafted a Senate scheme that incorporates the idea of weighted voting. The federal plan is said to be the mirror image of the Romanow proposal — while larger provinces would have more seats, on certain issues the votes would be weighted so that each province had an equal number of total votes.

But close analysis of the Saskatchewan and federal proposals suggests that they are an unlikely

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basis for long-term peace on the Senate front. Not only are the proposals extremely complicated, they seem to highlight provincial inequality rather than reduce it. The basic problem with any system of weighted voting is that it offends the basic democratic principle that one person's vote should count for as much as anyone else's.

Even if most governments around the table buy either of the weighted voting schemes on offer, the idea of weighted Senate voting would appear to be a tough sell in the country as a whole. In any event, it seems unlikely that either of these proposals will secure unanimous provincial consent. Although Senate reform only requires the consent of seven provinces representing fifty percent of the population, the dissenting provinces could (and probably would) block the proposal to grant Quebec a veto over future changes to national institutions. Securing this veto has been a "bottom line" demand of Quebec's Robert Bourassa since the Meech negotiations began in 1986.

Common Market Clause Essential to Package

Agreement on a legally-binding common market clause has also remained elusive. But it is an essential component to a balanced package, the quid-pro-quo for any transfer of powers to the provinces.

The current package contemplates the transfer of powers to the provinces in areas such as labour market training, housing, mining and culture. A common market clause would provide a balance to this decentralization. It would ensure that provinces exercising enhanced constitutional powers will not abuse them to the detriment of Canadians in other parts of the country. Thus the failure to include a legally-binding commitment on the common market would be an important omission, leading to an imbalance in the whole package.

"The idea would be for Ottawa to table its own set of compromise proposals in the House of Commons on July 15 and hold a national referendum at the end of September."

National Referendum to Break Logjam?

With Parliament scheduled to return to debate a constitutional package on July 15, perhaps the only ace up the federal government's sleeve is the threat of a national referendum to go "over the heads" of the premiers and appeal directly to the people of the country. The idea would be for Ottawa to table its own set of compromise proposals in the House of Commons on July 15 and hold a national referendum at the end of September.

There are numerous problems with the strategy, but one of the most significant is that it is entirely dependent on the federal proposals being approved in the national vote. The thinking in Ottawa appears to be that the public is so tired of the national unity issue that it will approve virtually anything in order to get the issue off the political agenda. But it seems more likely that the public will recoil when asked to vote on a very complicated and unpredictable package of constitutional reforms, particularly if they are opposed by premiers such as Clyde Wells and Don Getty.

What then? A "no" vote on a unilateral federal package would almost certainly put an end to the current "Canada round" effort to amend the constitution. But it would not necessarily be fatal to the country, particularly if the vote in Quebec was identical to that elsewhere in the country.

The choice for Quebeckers would then be relatively clear. The effort at *comprehensive* constitutional renewal would be in tatters. The most that could be hoped for at that point would be some kind of incremental or limited package of constitutional amendments.

The choice for Quebeckers would be between the existing constitution (perhaps with some modest, incremental adjustments) or else taking the plunge toward full sovereignty. Given that choice, it is not at all clear that Quebeckers (or Canadians in general) would be prepared to reject the status quo out of hand.

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Introducing Canada Watch

Welcome to the inaugural issue of *Canada Watch*, a publication that provides timely and practical analysis of the country's continuing national unity debate. This publication tells you what is happening, analyzes why it is important and discusses what it will mean for the future of the country. The editorial board also provides authoritative analysis of other key national issues as they emerge on the political agenda — such as the possible North American Free Trade Agreement currently being negotiated with the U.S. and Mexico. Whether you are in government, universities, the private sector, the legal community or the media, we believe that *Canada Watch* is the indispensable publication that will help you make sense of constitutional and national affairs.

Kenneth McRoberts, Patrick Monahan

Two Big Hurdles Facing Constitutional Renewal

Incorporating Quebec's Concerns and Securing Public Ratification

by Kenneth McRoberts

By some readings, the recently concluded multilateral constitutional talks fell just short of success. In only three areas, albeit important ones, was there no agreement: Senate reform, the amendment formula and strengthening the economic union. Thus, one might be tempted to conclude that Canada came close to a resolution of its constitutional crisis. By this same reasoning, if Ottawa should somehow be able to resolve these outstanding issues at the First Ministers' meeting on June 29, then our problems would be over. Unfortunately, Canada's constitutional predicament is much more complex.

Any accord stemming from this process would be under attack on two fundamental counts. From one perspective, firmly rooted in English-Canadian opinion, this is just one more instance of the old way of doing things: negotiations among officials behind closed doors. Yet, from another perspective they are not even that: there were no participants from the Quebec government, either at the multilateral talks or the First Ministers' meeting.

Negotiations "Behind Closed Doors"

In recent years, many English Canadians have become wedded to the argument that the constitution should no longer be the preserve of politicians and bureaucrats. Thanks in particular to the repatriation of the constitution and adoption of the Charter of Rights and Freedoms, in 1982, large numbers of Canadians feel a new ownership of the constitution. After all, the Trudeau government had presented these changes as no less than a "people's package."

This new public sense of constitutional proprietorship was a major element in English-Canadian opposition to the Meech Lake Accord, widely castigated as the product of "eleven men in suits behind closed doors."

To be sure, the recent multilateral accords improved somewhat on the Meech process: the two territories and four aboriginal groups were directly represented. Yet, other interests were not — and the doors were still closed. (This came on the heels, moreover, of five public, nationally televised constitutional conferences in which a wide variety of groups did participate.) The National Action Committee on the Status of Women and multicultural spokespeople openly protested their exclusion from the multilateral talks. Groups such as these can be expected to be highly suspicious of any new accord and to attack its legitimacy.

Taking the Constitution "To the People"

Beyond that, there is now strong support for the notion that constitutional talks alone are not sufficient, however they may be constructed. Any agreement must be submitted to the people—through a referendum. Quebec is not the only province committed to holding a referendum on the constitution. The British Columbia government is legally bound to hold a popular referendum on any proposed constitutional change. Alberta has introduced referendum legislation. Last year, the Saskatchewan electorate overwhelmingly approved the notion of constitutional referenda. For its part, the federal government has just passed legislation for its own national referendum.

It is now virtually certain that any constitutional accord will be submitted to a referendum in some provinces, if not all of Canada. Never before has this happened in Canada. The outcome of such a vote is hard to predict. Not only may symbolic elements of an agreement produce strong popular reactions that politicians cannot anticipate (as the Meech Lake debacle demonstrated) but a referendum could be heavily influenced by popular feelings about the government itself. The Mulroney government may try to intimidate recalcitrant provincial governments with a threat to go "over their heads" and take its constitutional package to the people. After all, precisely this threat worked for the Trudeau government in the fall of 1981. But times are different. Canadians are exceedingly dissatisfied with the present federal government; many of them might well use a constitutional referendum to give vent to these feelings.

Incorporating Quebec's Concerns

The second challenge to the multilateral talks lies in the fact that Quebec officials did not participate in them. In the wake of the collapse of the Meech Lake Accord, Premier Robert Bourassa declared that Quebec would no longer participate in constitutional discussions. Instead Quebec would wait for the rest of Canada to formulate an "offer" of a renewed federalism. As a result, Quebec feels in no way bound by an accord produced by the multilateral discussions. There will be a suspicion in Quebec, given its absence

from the talks, that its concerns have not been met and the consensus reflects English Canada's agenda.

In point of fact, the consensus does seem to fall short of even Premier Bourassa's conditions for a renewed federalism, let alone the far more sweeping demands of the Quebec Liberal Party's Allaire Report. Bourassa has stated that renewal must include all the elements of the Meech Lake Accord plus a significant devolution of powers to the Quebec government. Yet, a key element of the Meech Lake Accord, the "distinct society" clause has been considerably reined in. And a veto for Quebec, and the other provinces, over constitutional change involving federal institutions is not assured. As for the multilateral consensus on the division of powers, it merely reinforces existing provincial jurisdictions rather than adding to them. In effect, it falls within the parameters of the Beaudoin-Dobbie parliamentary committee's report, which Premier Bourassa felt compelled to rebuke publicly in March.

Clearly, francophone public opinion in Quebec will expect a substantial modification of the areas of consensus in order to meet Quebec's objectives. Such changes might well require formal negotiations between the Quebec government and the various parties to the multilateral talks. Yet in all likelihood these parties will be most resistant to renegotiate with Quebec the matters upon which, often with considerable difficulty, they managed to come to terms. Even if they were prepared to do so, public opinion in English Canada probably would not stand for it.

In short, even if in the coming days Ottawa should tease a complete consensus out of the multilateral talks, such an agreement would face two major hurdles: finding legitimacy in Quebec and securing public ratification by referendum. Moreover, the effort to clear the first hurdle might well weaken its hope of clearing the second. Alternatively, going to a national referendum without a prior agreement from provincial and aboriginal leaders would be a risky venture for such an unpopular government. Papering over Canada's constitutional cracks has become a daunting exercise indeed.

Kenneth McRoberts is Director of the Robarts Centre for Canadian Studies and Professor of Political Science, York University.

Constitutional Proposals at a Glance

by David Johnson

Highlights of the Federal Status Report

The Status Report summarizes the results of the Multilateral Meetings on the Constitution which began on March 12 and concluded on June 11. The Meetings were chaired by the Right Hon. Joe Clark, Federal Minister of Constitutional Affairs and were attended by Intergovernmental Affairs Ministers from nine provinces (excluding Quebec), the two territories, and leaders of four national Aboriginal organizations. Generally, these proposals had support from at least seven provinces representing fifty percent of the population and the federal government. With respect to Aboriginal issues, consensus was considered to have been achieved only where there was substantial support from Aboriginal delegations.

Canada Clause

The constitution should be amended to recognize fundamental Canadian values and characteristics such as: parliamentary government, federalism and provincial equality; Aboriginal rights; Quebec's distinct society; linguistic duality and multiculturalism; the equality of men and women.

Distinct Society

An interpretative clause should be added to the Charter to ensure that future Charter review takes into account Quebec's existence as a distinct society within Canada, and the vitality and development of the language and culture of French- and English-speaking minority communities throughout Canada.

The Social and Economic Union

A constitutional provision should describe the commitment of all governments to the policy objectives underlying the social and economic union, including: maintenance of the current health care system; provision of reasonable access to housing, food and other necessities; protection of the environment; the free movement of persons, goods, services and capital nation-wide; the goal of full employment.

All these commitments, however, would be non-justiciable and thus could not be legally enforced should a government depart from them.

The Senate

The Senate should be elected with all Senators elected at the same time

to fixed terms of five years. Senatorial elections should be based on proportional representation, with the system designed to reflect the diversity of Canada's population. The Senate should not be a chamber of confidence; it should possess a 30-day suspensory veto only over revenue and expenditure bills.

The Supreme Court of Canada

The federal government will name judges to the court from lists provided by the provinces and territories. If such lists are not provided on a timely basis, the Constitution should provide for the appointment of interim judges.

Federal Spending Power

The federal government must provide reasonable compensation to the government of a province that chooses not to participate in a new Canada-wide shared cost program in an area of exclusive provincial jurisdiction provided that the province carries on a program or initiative compatible with national objectives.

The Division of Powers

The following subject matters should be identified in the Constitution as matters of exclusive provincial jurisdiction: labour-market training; culture; forestry; mining; tourism; housing; recreation; and municipal and urban affairs. In these fields provincial governments may require that the federal government withdraw from program delivery. In such cases, reasonable fiscal compensation is to be negotiated with the provinces. Alternatively, provincial governments may request that federal initiatives and spending be maintained in such fields.

Nothing in these proposals is to limit federal responsibility for the administration of unemployment insurance or for the maintenance of national cultural institutions.

Aboriginal Self-Government

The inherent right of self-government of the Aboriginal peoples of Canada should be recognized in the constitution. This amendment would also contain a "context clause," which would describe the nature of Aboriginal governments' legislative authority. Aboriginal governments would be described as one of three constitutionally recognized orders of government.

The Charter should apply immediately to Aboriginal governments, but Aboriginal governments should have access to s. 33 of the Charter.

The inherent right of self-government should be capable of being justiciable upon entrenchment, but justiciability should be delayed for a three-year period.

In order to clarify the relationships among governments there should be a constitutional commitment by governments and Aboriginal peoples to negotiate the details of self-government, including the issues of jurisdiction, lands and resources, and economic and fiscal arrangements.

Unfinished Business

A significant number of issues remain as yet unsettled, including:

Veto Power: No agreement has been reached regarding whether Quebec is to be granted a veto over amendments affecting national institutions. Such an amendment would require the unanimous consent of all governments.

The Senate: The allocation of representation among the provinces remains as yet undecided. This issue pits the advocates of a Triple E Senate against those in support of a more equitable institution.

The precise nature of the powers which a reformed Senate may exercise over ordinary pieces of legislation from the lower house have also to be resolved.

The Common Market: While there is consensus on the principle of the free movement within Canada of persons, goods, services and capital, there is no agreement on expanding the current s. 121 of the *Constitution Act, 1867* into a justiciable statement of this principle.

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Whither the Economic Union?

by George Fallis

One of the great challenges Canada faced in 1867 was to create a national economy. This challenge was met and Canadians have benefited greatly, enjoying the second-highest standard of living in the world. Ironically, as most of the world moves toward greater economic integration and barriers to the flow of goods, services and capital are falling, we have made little progress in further integrating our provincial economies. Indeed, the current round of constitutional negotiations seems poised to decentralize power and to create a new system of aboriginal self-government without any strong mechanism to maintain economic integration. There is a grave danger that our economic union will fragment.

Why an Economic Union?

An economic union is the most complete form of economic integration. Within an economic union, there is free mobility of labour, goods, services and capital. This is referred to as negative integration. But an economic union involves more. It implies positive integration through the harmonization of government policies, including social policies, business framework laws, environmental policies and fiscal policies.

The benefits of an economic union are many. Most importantly, it increases incomes through increasing productivity; production is structured to serve broader markets allowing exploitation of economies of scale, and increased competition holds down prices. As a trading nation, we are better able to compete internationally.

The Canadian economic union is quite complete in terms of negative integration, although some barriers remain. For example, provincial government procurement policies and agricultural marketing boards are barriers to the mobility of goods; local licensing rules prevent the movement of people, and controls on land purchases restrict the movement of capital. Not all barriers are created by the provinces. The federal government also erects barriers, such as the regionally differentiated benefits under unemployment insurance. However, our union is much less complete in terms of positive integration. Many of our social and economic policies are not harmonized, which greatly reduces labour mobility and raises the costs of doing business in several provinces.

The European Community has a less thorough economic union than Canada, but is moving much more quickly to complete it. The Community is to be "without internal frontiers" by December 31, 1992. In some areas, their union is stronger; for example, all forms of assistance to industry by member nations are prohibited unless approved by the European Commission.

The Economic Union in the Constitution

The constitutional basis for our economic union was originally the "common market clause" (section 121 of the *Constitution Act, 1867*) which prohibits tariffs against imports from other provinces, and the federal government's "trade and commerce power" (section 91.2, of the *Constitution Act, 1867*). The latter has not been used aggressively to preserve the economic union. During the 1970s there was growing concern that the Canadian economic union was fragmenting and needed stronger constitutional protection. This was very much part of the constitutional negotiations during the early 1980s, but all that emerged was the mobility rights section (section 6) of the *Canadian Charter of Rights and Freedoms*, which gives every citizen the right "to pursue the gaining of a livelihood in any province."

Worries about the Canadian economic union grew over the 1980s. Canada was out of step with the rest of the world. Provincial and federal governments were unable to negotiate the removal of barriers or to harmonize policies. Increasingly, provinces charted separate courses. Especially troubling was the balkanization of the tax system. For example, the federal government implemented the Goods and Services Tax, but could not achieve harmonization with provincial sales taxes.

The Dangers of Decentralization

Of course, the greater are provincial responsibilities and autonomy, the greater the danger of fragmenting the economic union. This was recognized at the beginning of this constitutional round. The Allaire Report and the proposals from the Group of 22 were extraordinarily decentralist, but both advocated a strong economic union. (Unfortunately, the Allaire Report did not say how the economic union could be secured.) The 1991 federal proposals, *Shaping Canada's Future Together — Proposals*, contained detailed recommendations to secure the economic union, including a new head of power in section 91 that "the Parliament of Canada may exclusively make laws in relation to any matter that it declares to be for the efficient functioning of the economic union." There were strong monitoring and enforcement mechanisms to be carried out by the proposed Council of the Federation. The federal proposals were not explicitly decentralist, but provided very flexible procedures for future decentralization. The economic union provisions were set out as an offset to future decentralization.

The federal proposals were tremendously controversial. They were seen as a massive federal power grab; the provinces resisted any constraints on their current or future sovereignties. Also, there were many who argued that securing the economic union in the constitution was entrenching a specific, market-oriented approach to economic policy.

The Beaudoin-Dobbie Approach

The Beaudoin-Dobbie Report offered a compromise, but much weakened position on the economic union. The common market clause would be replaced with the statement that Canada is an economic union within which goods, services, persons and capital may move freely. There was no commitment to policy harmonization. The economic union would be the joint responsibility of the federal, provincial and territorial governments and they could not by law or practice impose restrictions inconsistent with the economic union, although a long list of exceptions was allowed especially for regional equalization and development. Disputes would be settled by a trade tribunal with power to make binding decisions.

"The latest multilateral round of constitutional negotiations adopted the Beaudoin-Dobbie approach, but has weakened the economic union still further."

In an important innovation, the Beaudoin-Dobbie Report recommended a separate declaration in the constitution committing governments to the economic union, to be paired with a social covenant committing governments to providing, inter alia, health care, adequate social services and benefits, and primary and secondary education. The Report asked: why have we come together as a nation and what unites us and should be common to us all? The Report answered that we have come together to form an economic union and that some of the extra wealth generated should provide basic services as outlined in the social covenant. The Report links economic integration and sharing.

The Multilateral Round

The latest multilateral round of constitutional negotiations adopted the Beaudoin-Dobbie approach, but has weakened the economic union still further. The expanded common market clause would not be justiciable, and no dispute mechanism is proposed. New commitments to the social and economic union would be paired, but each is merely a statement of policy objectives and explicitly would not be justiciable. No mechanism for monitoring the social and economic union is proposed; it would be determined by a first ministers' conference. Furthermore, as the economic union provisions are weakened, the explicit commitments to decentralization, regional equalization and aboriginal self-government are strengthened.

But we cannot have it both ways. Decentralization of powers allows more autonomy and diversity, but economic integration means a loss of sovereignty and a degree of economic and social policy harmonization. International experience suggests that coordination of a decentralized system will be difficult and the economic union will fragment. Ironically, if Canada were to follow the current world trends, the parts would seek to bring themselves together again. We would have to recreate national authority. But we will be poorer in the interim.

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QUEBEC REPORT

Understanding the Dynamics of the Canada Round

by Guy Laforest

Seen from Quebec, the results of the multilateral negotiations on the constitution are meagre at best. It looks as if the sixteen groups have agreed on the formulation of the distinct society clause suggested by the federal proposals back in September 1991, and adopted by the Beaudoin-Dobbie Report. The clause will be in the Charter, defined and, thus, limited to language, culture and civil law; it will be placed in a sub-section of a clause dealing with the ancestral rights of the native peoples; moreover, it will not include any specific reference to the obligations of promotion of the distinct society by the government and National Assembly of Quebec such as those that could be found in the Meech Lake Accord. Those obligations are likely to be mentioned somewhere in the Canada clause if a deal on its legal formulation can be arrived at sometime before the end of this century.

Compared with the centrality of the distinct society provision in the Meech Round, this is very disappointing for Quebec nationalists, for the large coalition of forces that recognize themselves in the Allaire and Bélanger-Campeau reports. This will provide additional ammunition to those who think that Canada is fundamentally unable to recognize, even indirectly, the national dimension of the Quebec question. I am convinced that when, and if, Quebec's own Commission on renewed offers of federal partnership studies the new formulations of the distinct

society clause, it will find them profoundly unsatisfactory. But, as the Premier of Quebec, Robert Bourassa, is likely to ask his fellow citizens in the upcoming weeks, would you break up a country for the sake of a few words in a distinct society clause? Would you ignore the imperatives of geography and economic security for the sake of symbolic recognition? I see in the repetition of interrogations like the previous ones by governmental figures such as Premier Bourassa the current predicament of Quebec in the Canada Round.

Going Back to the Table?

Gil Rémillard, the minister responsible for Canadian intergovernmental affairs, has stated recently that Quebec has not consented to any of the specific points agreed to by the various players in the multilateral negotiations. I have every reason to believe that Mr. Rémillard meant what he said. Whenever Quebec goes back to the table, it is bound to ask for modifications on all fronts. I am sorry for Bob Rae, Ovide Mercredi and their innumerable advisers, but their work so far amounts to no more than the end of the beginning.

While Quebec is not pleased by any of the agreements reached at the table, its leaders ponder with great circumspection the consequences of failure. The propositions on the division of powers are almost a farce, confirming provinces in some of their jurisdictions, thereby tacitly condoning federal interventions in other provincial fields. But would you destroy a country for a few more lines in section 92 of the *Constitution Act, 1867*? An elected, more effective and almost equal Senate could reduce the legitimacy of provincial institutions such as the National Assembly. But in the final analysis, "in the crunch," would you risk the "adventure of independence" merely on the ground of your opposition to a second federal legislative chamber? The addition of new provinces following the simple procedure of an agreement with Ottawa could further reduce the weight of Quebec in the institutions of executive federalism. However, if you are prepared to be one in eleven, wouldn't you prefer to be one in thirteen or fourteen, rather than secede from one of the best countries in the world according to the United Nations?

"I am sorry for Bob Rae, Ovide Mercredi and their innumerable advisers, but their work so far amounts to no more than the end of the beginning."

The Quebec Boycott Continues

There will be no referendum on independence or "strong sovereignty" in Quebec in 1992. Robert Bourassa has decided that he does not want to be remembered in history as the person who caused the demise of Canada and the permanent division of the Liberal Party in Quebec. Whenever Mr. Bourassa has gone to a major constitutional negotiation, he has given his own agreement to the compromise at hand: Victoria in 1971, Meech Lake in 1987, Langevin Building in June 1987, and Ottawa in June 1990. The Victoria Charter was destroyed by the intelligentsia and public opinion in Quebec; the Meech Lake compromise was shattered for all sorts of reasons, but certainly not because of Mr. Bourassa's own actions. Robert Bourassa knows in his bones that if he goes back to the table, he is condemned to agree with the others. Because of Victoria, he does not know whether or not he will be able to sell the deal to Quebec; because of Meech Lake, he does not know whether or not Canadian leaders will respect their signatures or follow their own constituencies. Surrounded by such doubts, I take it that the Premier of Quebec will continue to boycott, at least formally, the constitutional table. He will wait for the new developments in the unfolding of the Canada Round, secure in the knowledge that a federal referendum, whatever its results, will not solve the constitutional anxieties that are, possibly, the fundamental characteristic of both Quebec and Canada. Would you behave any differently?

Guy Laforest is Associate Professor of Political Science/Département de science politique, Université Laval. His Quebec Report is a regular feature of Canada Watch.

WESTERN REPORT

Constitutional Politics as Seen From the West

by Roger Gibbins

Discussions of western perspectives on Canada's constitutional crisis invariably focus on Senate reform. That is unavoidable, but regrettable, for it causes people to misread the constitutional landscape.

It is possible to tease out a western Canadian constitutional vision that extends well beyond a long-standing preoccupation with institutional reform. Despite, or perhaps because of the region's multicultural roots, the vision is based on the mythology of the American melting pot, on individual rights and equality within a social order that respects, but does not constitutionally enshrine ethnic and linguistic diversity. It is a vision based on enterprise, on economic development more than on cultural protection and appears, therefore, to be based on the low ground of money rather than on the high ground of culture. It is an ahistorical vision that looks outward to a rapidly changing international environment and which gives little weight to founding peoples and founding cultures. Finally, it is a vision based on inclusion — "the West wants in" — but with a price tag of institutional reform attached.

Westerners, however, have had no success in bringing this vision into play during the present constitutional process. The central problem, and I use this adjective advisedly, is that Canadian myths and national creeds have been built and continue to be built around the preeminence of Quebec and implicitly around the notion of two founding cultures and peoples. Visions which neglect the centrality of Quebec are given no credence among Canadian political, social and cultural elites; they are deemed illegitimate, if not dangerous. Although it looked for a while as if the growing popularity of the Reform Party would create an opening for western visions, this opening has been largely closed now that the Progressive Conservatives have decided to attack rather than co-opt the Reform platform.

Senate Reform as Symbol

As a consequence, western constitutional aspirations have been herded by the rest of the country into the narrow issue of Senate reform, an institutional pariah that is treated with hostility in Ontario, annoyance in Ottawa, and something between indifference and contempt in Quebec. Even within the West itself, there is no clear evidence that support for either Senate reform or the Triple E model, in particular, is wide or deep. Yet, because Senate reform has been forced to carry the totality of western Canadian aspirations, the issue has become the symbolic key that many western Canadians will use to unlock the regional implications of any constitutional deal.

There is a troublesome irony at work. To date, the West's interest in more effective regional representation, and in Senate reform more specifically, has not been taken seriously by the key players in Ottawa, Quebec and Ontario. Their strategy has been to run out the clock, to wait until the last moment to address Senate reform and then to assume that its supporters would knuckle under in order to achieve a package acceptable to Quebec. In short, it has been assumed that Senate reform need not be taken seriously, that the national unity trump card could be played in the last hand. Thus, the supporters of Senate reform have faced an unrelenting barrage of pleas to compromise, to be flexible; never is the suggestion made that any compromise should or would be forthcoming from the other side.

The Romanow Compromise

The irony is that if the supporters of Senate reform do not fold, if they force a deal, they may end up with a Senate that could be even worse than the status quo. The final stages of the Senate reform debate have been marked by ideas that range from the silly to the unworkable and absurd. The fact that the "consensus" model proposed by Saskatchewan's Roy Romanow is based on equal provincial representation and unequal Senators demonstrates the mess that we are on the verge of creating. That the West might be shouldered with the responsibility for creating such an institutional abomination would be a bitter irony, indeed.

There is one simple fact that the western Senate reformers have got right. If Senate reform or, indeed, any institutional reform that would produce more effective regional representation is not achieved in this round, then the issue will disappear from the constitutional agenda for generations to come. Any promises to the contrary are not to be believed and, hence, the dilemma. If Senate reform supporters such as Don Getty do not fold, they will be accused of risking the survival of Canada. If they do fold, any western leverage on the constitutional process will be lost. The knife is, indeed, at the regional throat and, at the very least, the western supporters of Senate reform deserve our sympathy for the very difficult choice they face.

Roger Gibbins is Professor and Head, Department of Political Science, The University of Calgary.
Western Report is a regular feature of Canada Watch.

LEGAL REPORT

LEVELLING THE PLAYING FIELD

Referendum Spending Limits and the Charter

by Jamie Cameron

In early May, it was questionable whether intergovernmental bargaining would produce a breakthrough in constitutional negotiations. The federal government responded, on May 15th, with national referendum legislation. Final reading of Bill C-81 and royal assent was received on June 23.

Up to now, Prime Minister Mulroney has insisted that Bill C-81 is precautionary. In the event of deadlock, a national referendum on a federal government proposal might be held, and then only to pressure any recalcitrant provinces to pass resolutions ratifying a package of amendments, as required by the *Constitution Act, 1982*.

Whether a national referendum will be held, either alone or in conjunction with provincial referenda, remains to be seen. Meanwhile, as Bill C-81 moved through the Commons committee and the Senate, debate about the referendum was overshadowed by the struggle to close on a deal.

Charter Constraints

In Parliament, the federal government claimed that limits on the number and expenditures of "registered referendum committees" would be unconstitutional under the Charter of Rights and Freedoms. The government then refused to disclose the legal opinions which supported that unequivocal position.

As introduced, Bill C-81 would require any person or group intending to spend more than $5000 to be registered under the legislation. The Bill otherwise placed no limits on the number of committees which could be formed, or on their expenditures.

Opposition MPs who believe that the 1988 election was influenced by private spending in support of the Free Trade Agreement were outraged. Could the federal government be taken to court, to test the assertion that spending limits are unconstitutional?

And what was the government's real agenda? Would an open referendum campaign legitimize unlimited spending in the next federal election? And didn't that fly in the face of the Report by the Royal Commission on Electoral Reform (the Lortie Commission)?

Proclaiming that "[t]his American style of elections is threatening us," Liberal MP Andre Ouellet declared that "what is at stake here is the Canadian political culture."

The American Model

In the United States, a free-wheeling style of electioneering is endorsed by the Constitution. There, the U.S. Supreme Court has consistently invalidated restrictions on campaign expenditures which would "equalize" debate. That is because "there is no such thing as too much speech" in American political culture. Because government cannot be trusted to ensure the fairness of the democratic process, it is not allowed to shape political debate by "insulating the electorate from too much exposure to views."

The Charter and the government's legal opinions to the contrary, it is likely that Canadian courts would uphold some limits on campaign expenditures. Much would obviously depend on the scope of the restrictions. And, in the context of a national referendum, a mandatory structure which would stream all expenditures through two umbrella committees might be problematic.

It is likely nonetheless that, at least in principle, the Supreme Court of Canada would follow the path of the Lortie Commission and endorse the legitimacy of spending restrictions in election campaigns.

Unanswered Questions

Aside from the Charter, a national referendum would raise other issues. What about government spending? If the federal and provincial governments could spend without restraint, what would be the point of limiting the expenditures of registered referendum committees? To be effective, limits must be comprehensive. However, both legally and politically, any attempt to impose spending limits on the provinces would be extraordinary.

Also problematic is the relationship between any national referendum and any provincial referenda which may be held. Shortly after the federal government insisted that the umbrella committee model was unconstitutional, the Equality Party initiated a lawsuit against Quebec's referendum legislation. Following the pattern of the 1980 referendum, Bill 150 channels campaign expenditures through two umbrella committees. The Equality Party's challenge is set down for hearing in Quebec Superior Court on June 29th.

The $9 Million Ceiling

The federal government has now amended Bill C-81 to introduce some limits on committee expenditures. Without limiting the number of registered committees that can be formed, the government has conceded a spending limit which would hold every committee to 56 cents per voter in each federal riding. Under that formula, any committee which intended to be active nation-

ally would be entitled to spend approximately $9 million in the referendum campaign.

Unfortunately, the debate on Bill C-81 failed to address vital questions of principle. In terms of democratic process, what are the differences, if any, between a national referendum and a parliamentary campaign? Are limits on participation fundamentally inconsistent with the concept of direct democracy? Does fairness mean the same thing in a vote on the nation's future as it does in a parliamentary context?

Finally, do we want a level playing field in politics? In any event, how can it be achieved? If we put limits on the use of money, why not also on the use of celebrity, reputation and status?

Referendum or not, questions which were barely articulated in the debate about Bill C-81 will require answers before the next federal election.

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Legal Report is a regular feature of Canada Watch.

CW UPDATE

The Month in Review

by David Johnson

Bourassa Rejects Full Sovereignty

In media interviews published in early June, Premier Robert Bourassa indicated that his government's preferred outcome of the current round of constitutional negotiations is an agreement on renewed federalism which could be put to the people of Quebec for approval via a provincial referendum. Should such an agreement not be forthcoming, though, Bourassa indicated that the government of Quebec would still not be prepared to propose any form of "out and out sovereignty" as a viable option for the province. In reflecting on the economic uncertainties and problems which would probably ensue from a total rupture with Canada, Bourassa commented that he had "no intention, at this critical juncture in our history, of playing the sorcerer's apprentice or the kamikaze."

An option which the premier is apparently contemplating is that of holding a referendum on some form of sovereignty-association. Bourassa suggested that his government may consider pursuing an initiative designed to promote Quebec sovereignty in numerous policy fields while ensuring that Quebec remains part of a common economic association with the rest of Canada, with this association administered by a common parliament. Left unsaid, however, is the political reality that the creation of any such constitutional structure would require the agreement of the federal and all provincial governments.

Federal Referendum Legislation Approved

On June 23, Bill C-81, An Act to provide for referendums on the constitution of Canada, received royal assent and came into force.

This legislation empowers the federal government to call a referendum, in any or all provinces. The duration of a referendum campaign ranges from a minimum of 36 to a maximum of 45 days. No referendum, however, can be officially called until Elections Canada has completed its necessary administrative preparations. This process may take 2-3 months and thus the earliest date for a national vote would be late September. Provisions concerning the establishment of campaign committees and their expenses elicited most debate within the Commons and the media. Committees will be forbidden from accepting any campaign contributions from out of country sources and they will be limited to making expenditures not exceeding 56 cents per elector per electoral district in which the committee intends to be active. This means national committees will be able to spend up to $9 million each. However, the legislation allows for the creation of an unlimited number of referendum committees. The government argued that any limitation on the number of committees would violate the Charter's guarantee of freedom of association. (See the article by Jamie Cameron in this issue.)

Quebec Referendum Dates Altered

On May 14, 1992, the government of Quebec introduced amendments to the Quebec Referendum Act designed to curtail the pending referendum process by four weeks.

According to Bill 150, approved by the National Assembly last June,

the government of Quebec is obligated to hold a referendum on Quebec sovereignty by October 26, 1992. The amendments to the referendum legislation have the effect of substantially shortening this referendum period from 84 to 47 days, with 29 days devoted to the campaign proper. For a referendum to be held on October 26, the National Assembly now has to be convened by September 9 at the latest. An enumeration would then commence, to be concluded by September 26. The referendum question itself will have to be unveiled by September 12, and would be subject to 35 hours of debate in the Assembly. The official campaign would then begin on September 27. Were these amendments not made, the government of Quebec would be obligated to introduce the referendum question by August 4. Through this shift in dates the government of Quebec is effectively giving itself and all other constitutional actors, but most especially the federal government, five extra weeks to prepare their constitutional strategies and positions leading up to a very historic autumn.

Quebec Referendum Law Challenged

The Equality Party of Quebec, under the leadership of Robert Libman, filed a motion in the Quebec Superior Court on May 26, challenging the constitutionality of various elements of that province's referendum legislation.

At a Montreal press conference both Libman and party counsel Julius Grey asserted that provisions of the Referendum Act violate the Charter rights of freedom of association and expression. The act stipulates that all parties, groups and individuals wishing to formally campaign and make expenditures in a referendum campaign must organize themselves into two omnibus campaign committees for the purpose of advocating the Yes or No option. Once comprised, these committees must adhere to the strict expense regulations mandated by the Act. The Equality Party has argued that such requirements violate their freedom of association in that they may be forced to associate with certain groups with which they would wish not to be associated. In turn, they are not entitled to exist as a separate campaign entity, free to engage in independent expenditure-making. This restriction is viewed as a violation of the Equality Party's freedom of expression guaranteed under the Charter. A first court date is scheduled for June 29.

David Johnson is an adjunct professor of political science at the University of Toronto.

Canada Watch Calendar

June 23	House of Commons adjourns for summer recess (subject to being recalled on 48-hours notice)
June 28	PM meets with territorial and aboriginal leaders in Ottawa
June 29	PM meets with premiers (excluding Robert Bourassa) in Ottawa
June 30-July 2	Queen Elizabeth in Ottawa for Canada Day celebrations
July 6-8	G-7 Meeting in Munich, Germany (PM to attend)
July 9	Conference on Security and Cooperation in Europe, Helsinki Finland (PM to attend)
July 11	Prime Minister Mulroney returns from Europe
July 15	Parliament resumes sitting to debate constitutional proposals
July 25-Aug. 9	Olympic Games, Barcelona
Late August	Quebec Liberal Party Convention expected to define party policy for fall referendum
August 27-28	33rd Annual Premiers' Conference, Charlottetown, hosted by Premier Joe Ghiz
September 12	Last day for Premier Bourassa to announce referendum question for October 26 referendum
September 21	House of Commons scheduled to resume sitting