CANADA WATCH

Practical and Authoritative Analysis of Key National Issues

Choice and Reproductive Technology

by Jamie Cameron

The New Frontier

Medical science is poised to liberate reproduction from the biological constraints that have governed for centuries. A few weeks ago, after a post-menopausal European woman gave birth to twins, it was announced that the fertilized eggs of a white woman had been transferred to the womb of a black woman. In addition, it appears that eggs can be harvested from aborted female fetuses, and that it may be possible, before long, to transplant fetal ovaries into the bodies of mature but infertile women.

According to *The Economist*, "an ecstasy of panic" is sweeping Europe; analogies to "the Frankenstein syndrome" and *Brave New World* abound. Yet it is the social implications of these technologies, not the biological opportunities they offer, that threaten us the most. By permitting novel configurations that break some genetic connections and create others, biology challenges existing conceptions of family, parenthood, and reproductive roles. Directly at stake is the social control of reproduction.

To some extent we may be trapped, in responding to these technologies, by our own rhetoric. Not that long ago, after a debate that transformed our political, legal, and

Continued, see "Choices" on page 70.

"Business As Usual": Will It Do?

by Kenneth McRoberts

The Chrétien government's strategy for dealing with Canada's myriad problems has been clear ever since the Liberals took office. As the recent throne speech confirmed, the strategy amounts to "business as usual" with a Liberal twist, providing Canadians with government that is competent, honest, and, within the limits of the possible, responsive.

The Chrétien Style

As with past Liberal governments, this one is to be mildly progressive. Thus, it is prepared to see at least some value in a continued social and economic role for the state, and even professes to have compassion for

Continued, see "Business As Usual" on page 72.

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Articles

Regular Features

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"Choices," continued from page 69.

moral values, the right to seek an abortion emerged. Having accepted that it is "logical fallacy to confuse fetuses with actual people," are we now compelled to permit the use of reproductive material from aborted fetuses?

Such a prospect offends the instinct that at the core of our being is a genetic code that belongs, uniquely and exclusively, to each of us. Appropriating fetal genetic codes is a violation of the self — its individuality and human integrity.

Thus are strongly held instincts running up against the social and biological choices that the new technologies offer. But if it is unclear that logic forces us into unconditional acceptance of all reproductive choices, it is equally unclear that the state should exercise coercive and regulatory power over reproduction.

By establishing the Royal Commission on New Reproductive Technologies in 1989, Canada had the foresight to anticipate these dilemmas and prepare for this frontier. Headed by Dr. Patricia Baird, the royal commission released its final report ("the Baird report") in late 1993.

The Baird Report

The royal commission's mandate was chequered by infighting, which culminated in the dismissal of four dissident commissioners (five remained), and a boycott of its work by prominent women's organizations unalterably opposed to the technologies. Those who vowed a boycott were vindicated nonetheless: under the Baird report, Canada's answer to Europe's "ecstasy of panic" would be an orgy of regulation.

The report initiates its message of regulation with the pronouncement that Canada must respond "decisively and comprehensively" to control the new reproductive technologies. The message is sustained, throughout the course of its two-volume report, by the commission's proposal for a framework of regulation.

To summarize its findings, the federal government should assert control, in the first instance, by criminalizing unacceptable practices, such as preconception — that is, surrogacy — agreements. Otherwise, pervasive control of procedures, treatments, and research related to assisted conception should be assumed by a new National Reproductive Technologies Commission (NRTC).

"... it is the social implications of these technologies, not the biological opportunities they offer, that threaten us the most."

The NRTC would set social and health care policy on assisted reproduction issues, license and monitor access to assisted insemination and assisted conception services, establish professional standards for the delivery of those services, and oversee medical and scientific research. Six subcommittees would be created to discharge the NRTC's mandate of "comprehensive regulatory responsibility."

One difficulty with the proposal for a national regulatory agency, even one that would consult with provinces and self-regulating agencies, is that health care is a provincial responsibility under our constitution. Though the delivery of provincial health care services in recent years has grown increasingly dependent on federal funding, the regulatory authority that would accrue to the central government under this scheme is unprecedented.

It is also unique: no other medical service is regulated in this way. The Baird report's rationale is that "reproduction is easily distinguishable from other matters of human health." National regulation is necessary because reproduction has "particular social significance, has particular ethical, political and economic dimensions, and creates particular legal relations and responsibilities."

With few exceptions, however, the momentum of recent years has been to decriminalize and deregulate choices related to reproduction. The right to an abortion was by no means the sole objective of a movement that sought to validate the autonomy of women's choices and free them from the coercive authority of the state.

Ironically, the Baird report would re-regulate and re-criminalize certain aspects of reproductive health care. To what extent was the royal commission informed, in doing so, by the values and achievements of that movement?

Here, the report founders, stating weakly that "framing a need or desire in the language of 'rights' may not be the most helpful way." Once they are characterized as needs and desires, rather than as values or entitlements, reproductive choices yield easily to the "larger context of societal limitations and individual responsibilities." By discounting reproductive autonomy in this way, the commission sets up a one-sided equation that presumptively favours regulation. That presumption prevails throughout the report.

In fairness, the commission specifically rejected the demand issued by some organizations for a moratorium on in vitro fertilization (IVF). Though buried as a theme, the report acknowledges that the ability to have children is not a luxury or a frill, and that these services are "as important or more important than many other services provided in the health care system." The report's recommenda-

tions would enhance access to IVF (which, at present, is funded only by Ontario, and tenuously at that).

Having decided that assisted conception should in principle be funded, the royal commission articulates criteria that are at odds with a health care system based on principles of universality and access. Under the report, access to IVF would be determined by the cost-benefit criteria of "evidence-based medicine." Whatever the merits of this approach may be, the fairness of imposing the burden of new access criteria exclusively on one group of health care consumers is open to question.

Moreover, while some procedures are subject to a cost-benefit analysis, social and ethical considerations are invoked to reject others. Gestational surrogacy is a case in point. The Baird report is absolutely opposed to preconception agreements, even in cases where an infertile woman may have no other option.

What is at stake, pure and simple, is social control of reproduction. In the commission's view, gestational surrogacy "reinforce(s) social attitudes about motherhood," diminishes "the dignity of reproduction," and undermines "society's commitment to the inherent value of children." At least some of those considerations apply, with equal or better force, to abortion.

In the end, the Baird report fails to rationalize the many double standards and contradictions it supports. Why should reproductive technologies be judged by a standard of evidence-based medicine when other health care services are not? Then again, why are some reproductive technologies governed by cost-benefit analysis, and others by ethical and social values?

One of the report's themes is that health care services should not be denied for discriminatory or non-medical reasons. Why, then, should same-sex female partnerships have access to donor sperm when gay males would be denied the opportunity of a gestational surrogacy?

Finally, why should the scales have been weighted, virtually at all points along the way, so heavily in favour of regulation, and so lightly on the side of choice?

Conclusion

The Royal Commission on New Reproductive Technologies invested substantial time and resources in proposing solutions to difficult questions. While its contribution should be valued, the Baird report's recommendations are not self-executing. Before it is implemented, the underlying assumptions of this report should be debated and placed in perspective.

The new frontier is not just about reproductive technologies. Also at stake in the royal commission's endorsements of evidence-based medicine and regulatory control of access is a vision of health care policy. In addition, the call for a national agency raises thorny issues, which were last debated during the Charlottetown referendum, about the relative merits of national standards and provincial autonomy.

Last but not least, we need to ask whether everything we might object to should be regulated. Addressing its own mandate, the royal commission stated that "the complexity and delicacy of the human reproductive system necessitate a strong element of caution when scientific or technological intervention is contemplated." Should equal caution be exercised when regulatory intervention of this scale and magnitude is contemplated?

Perhaps we can respond to the new technologies in ways that are less intrusive of choices that should, whenever possible, be left to individuals.

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"Business As Usual," continued from page 69.

those in economic or social distress. As such, it is relatively free from the neo-liberal drive that coloured the Tory government, especially as defined under Kim Campbell's ill-fated leadership.

At the same time, of course, the Chrétien government is to be sufficiently stable and predictable to inspire business confidence. In the end, there was no question that the Liberals would proclaim the NAFTA, however minuscule the last-minute concessions that they were able to extract from the Clinton administration. The "progressivism" of the new government is to be limited to the margins. But in contemporary Canada even that would be a distinctive stance in marked contrast to the direction that some provincial governments are taking—most notably the Alberta government of Ralph Klein, now embarked on a massive rollback of the state.

In drawing upon the Liberal past, the Chrétien style of government, in fact, harks back to earlier times than the Trudeau regime. Chrétien's readiness to delegate responsibility to his ministers and their senior civil servants evokes the managerial style of the Pearson days. And, unlike Trudeau, Chrétien takes office with the benefit of political instincts that have been finely honed over 25 years in federal politics. The quintessential career politician, Chrétien is free to approach matters in a much more pragmatic and open-ended fashion than could Trudeau with his clearly defined agenda of change.

Suiting the Public Mood

So far, this approach has served the Chrétien government quite well. It was able to act resolutely in clearing away some of the leftover Tory baggage, cancelling the Pearson airport deal and the helicopter contract. It has been able to implement a modest infrastructure program. And its "down-to-business" manner seems even to have induced a new readiness among provincial governments to approach matters in a constructive fashion.

By the same token, the Chrétien government's stance may well suit the popular mood. Not surprisingly, survey after survey demonstrates that Canadians are first and foremost preoccupied with the economy. If some Canadians share the Tory fixation on reducing the deficit, many more are fearful over the dislocations being produced by Canada's economic restructuring. For them, the Chrétien government's modest plans for economic stimulation and job training offer some hope. At the same time, the Liberals can credibly offer all Canadians relief from the one topic with which most of them have lost all patience: the constitution and Canada's national unity saga.

"But can 'business as usual' with a Liberal twist really do it? Can the Chrétien government really stare down Canada's problems on this basis? The odds are not good."

But can "business as usual" with a Liberal twist really do it? Can the Chrétien government really stare down Canada's problems on this basis? The odds are not good.

Intractable Economic Problems

First, the Chrétien government's modest initiatives may not be sufficient to lead the Canadian economy out of its present slump. Global and continental forces of economic restructuring may well keep the upper hand, reinforced by continuing recession in the United States and elsewhere. Second, and partly as a result, political and economic pressures to downscale the state may be irresistible despite any lingering social progressivism of the Liberal leadership. Already the Liberals have launched a massive overhaul of social policy with a view to cut costs. Within the House, the Reform caucus will be relentless in its demand for radical spending cuts to reduce the deficit. In this, Reformers will be egged on by Ralph Klein's example on their Albertan home turf.

The Return of the "National Unity" Question

Finally, despite the best of Liberal efforts to ignore it, the hated constitutional question may well be back on the national agenda! The Bloc québécois leader of the Official Opposition, Lucien Bouchard, has made it clear that his party intends to make the constitutional issue a focus, although not an exclusive one, of its interventions. This will make it exceedingly difficult for the other parts of the House to ignore the question, as Preston Manning acknowledged by voicing his fear that the House would be dragged into "the constitutional swamp."

Even if the Bloc québécois federalist opponents do succeed in ignoring it, the constitutional question would be unavoidable should the Bloc's provincial ally, the Parti québécois, be elected to the provincial Quebec government. Most observers are predicting precisely this outcome for the provincial election that in effect must be held by September of this year.

If the constitutional question should be at centre stage once again, the Chrétien Liberals would be singularly ill-placed to offer any new approach to dealing with it. They will largely be bound by the Trudeau strategy for "national unity." And they would be severely handicapped by Chrétien's personal implication

in the 1982 constitutional patriation over the objections of not only the Quebec government, under PQ control, but a good many Quebec federalists. In any event, after the last two colossal failures at constitutional revision, the prospects for securing any accommodation of Quebec within the federal system seem exceedingly remote, even if the Chrétien government were prepared to try new approaches.

In effect, on the constitutional front as well, the Chrétien government can offer no more than "business as usual" or, more precisely, the status quo. In the crunch, the status quo might well prevail. Discredited as it may be, a majority of Quebeckers may find the status quo preferable to the "adventure" of Quebec sovereignty. Nonetheless, this would be only after a protracted struggle over the "national" question that, like English Canada as a whole, the Chrétien government is ill-prepared to fight and fervently wishes to avoid.

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NATIONAL AFFAIRS

Back to the Constitutional Barricades?

by Patrick J. Monahan

With Opposition Leader Lucien Bouchard's defence of Quebec sovereignty highlighting the first week of the new Parliament, media commentators were widely predicting a return to the constitutional barricades. Even as Prime Minister Chrétien reaffirmed that he had been elected to talk about the economy rather than the constitution, pundits questioned how long Chrétien could hold off from uttering the dreaded "c" word.

Indeed, Chrétien himself seemed unable to entirely resist the temptation to begin slugging it out with Bouchard, claiming that the BQ leader's preference for the term "Quebec sovereignty" rather than the harder-edged "separation" displayed weakness and lack of courage. Even Reform party leader Preston Manning got into the act, asking the prime minister whether he was about to be drawn back into the constitutional swamp. Manning's "constitutional swamp" question earned him some media headlines, in contrast to the near silence that had greeted his earlier "constructive criticism" of the throne speech.

It was, as philosopher Yogi Berra would have said, "déjà vu all over again." Judging from the reaction to Bouchard's maiden speech as opposition leader, Canadians seemed on the verge of yet another of the seemingly endless "constitutional rounds" that had so fatigued and frustrated the country over the past decade.

But, in this case at least, appearances were somewhat deceiving. Contrary to the impression created in the opening days of the new Parliament, there is no reason to believe that Canadians are about to be plunged back into the constitutional camp.

Much Ado About Nothing

In one sense, it was difficult to understand what the fuss was all about. Bouchard's defence of Quebec sovereignty was certainly well argued and calmly presented. But the presentation was so low-key that Bouchard barely even hit 5.0 in the political Richter scale. Bouchard's matter-of-fact delivery seemed almost like that of a lawyer arguing "the case for Quebec sovereignty" in front of the judges of the World Court in The Hague, rather than an opposition leader opening a throne speech debate.

"Bouchard supports Quebec Sovereignty" blared the headlines in the English-Canadian newspapers. It was hard to fathom precisely why this solemn declaration was deemed worthy of such wall-to-wall coverage. The BQ's *raison d'être* from the moment of its formation has been the promotion of a sovereign Quebec. We should be surprised that Lucien Bouchard supports Quebec sovereignty?

On the other hand, with the media having now "discovered" that Bouchard isn't totally happy with Canadian federalism, any future speeches by the BQ leader are unlikely to create such shock waves. Bouchard's support for sovereignty, having been well and duly reported, is instantly rendered yesterday's news. Bouchard will have difficulty cracking the front pages again sim-

Continued, see "Barricades" on page 74.

"Barricades," continued from page 73.

ply by declaring that Quebec should be free.

That is not to deny that Bouchard and his 53 BQ seatmates in the Commons will not strive to document the injustices suffered by Quebec at the hands of the rest of Canada. One of the BQ's big complaints so far is that Quebec hockey players are insufficiently represented on the Canadian team competing at the Winter Olympics in Norway. No doubt this alleged discrimination by the hockey coaches (one of whom happens to be a Quebecker himself) is just the thin edge of the wedge. Wait until Bouchard finds out that the Canadian downhill ski team hasn't got a fair proportion of Quebec skiers either!

But these claims for a larger share from the federal pork-barrel are not only tiresome, they are also prone to backfire. Every time Bouchard complains that Quebec has been shortchanged, he runs the risk of someone demonstrating that he has his facts wrong, or that Quebec's shortfall in one area was more than made up by the benefits it received in another.

Don't Change the Channel

The throne speech signalled that the government is sticking to its strategy of keeping the agenda focused on the economy and on jobs. There is certainly going to be enough to talk about on the economic front, beginning with Finance Minister Paul Martin's first budget in February.

The February budget will be the first major political hurdle for the new Chrétien government. It will provide the opposition with its first big opening to inflict some damage, particularly if Martin follows through on some of his early trial balloons and initiates any major tax increases. If Bouchard persists in blathering on about sovereignty in the midst of the budget debate, he risks marginalizing the BQ and leaving the opposition field wide open for Manning's Reformers.

The only way that Bouchard might deflect attention back onto the sovereignty debate is if the government falls into the trap of appearing to muzzle the opposition leader. This might be the result, for example, if the government continues to question Bouchard's right to raise the sovereignty issue in the House of Commons. Foreign Minister André Ouellet trotted out this line of argument in response to Bouchard's opening speech in the Commons.

"Whether or not the constitutional issue reasserts itself on the national political agenda in 1994 appears to depend more on events in Quebec City than on those in Ottawa."

The principal immediate effect of Ouellet's argument was to permit an indignant Bouchard to garner yet another day's worth of headlines denouncing the anti-democratic tendencies of the government. For Ouellet and the rest of the Liberal Cabinet, a far more effective tactic would be to instruct Bouchard that he is to talk about nothing but Quebec sovereignty in every Commons speech. This would produce instant boredom among the national press gallery, and guarantee that Bouchard's interventions would be ignored. As someone once said, if a tree falls in the forest, but there is no one who hears it, who is to say that the tree fell at all?

Quebec Election Key Turning Point

Whether or not the constitutional issue reasserts itself on the national political agenda in 1994 appears to depend more on events in Quebec City than on those in Ottawa.

With a provincial election due by the fall, the Liberals under new Premier Daniel Johnson are facing an uphill battle against the Parti québécois. Every indication is that the 1994 Quebec election may turn out to be a replay of the 1976 campaign. That election saw an unpopular two-term government being turfed out of office by an opposition offering more effective government and promising that the sovereignty issue would be decided in a later referendum.

The big trump card for the PQ is that they can assure Quebeckers that a vote for them isn't necessarily a vote for sovereignty. They can also paint Daniel Johnson's Liberals as the defenders of the "status quo" — secure in the knowledge that every Quebec premier elected in the past 30 years has promised to obtain "new powers" for the province of Quebec.

One small word of advice for Daniel Johnson: don't schedule the election for November 15, 1994. That just happens to be the 18th anniversary of René Lévesque's 1976 electoral triumph over Robert Bourassa. When you're facing odds like Johnson's, you should at least try and make sure fate is on your side.

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QUEBEC REPORT

QUEBEC'S NEW PREMIER

by Alain Noël

"Yes," explained Daniel Johnson's closest associate in the Bourassa cabinet last December, "I do know what Mr. Johnson ... wants to do ... Mr. Johnson is a ... a man who ... has a good ... a very good idea of ... of the state ... I have difficulties answering this question." André Bourbeau, who organized Daniel Johnson's leadership "race" and is now Quebec finance minister, was replying to a journalist who suggested that the ideas Daniel Johnson meant to promote in politics seemed far from obvious. If it were not for the deficit, noted another observer at about the same time, it would be hard to see what Daniel Johnson stands for.

Given the lack of opponents in his bid for the leadership of the Quebec Liberal party, Daniel Johnson did not have to outline his views precisely. His early lead thus reinforced the impression that he has few specific ideas beyond his general commitment to fiscal rigour, market solutions, and Canadian federalism. This perception was confirmed by Johnson's sudden preoccupation with poverty, unemployment, and Quebec nationalism.

In fact, few politicians are as transparent as Quebec's new premier. A typical conservative, Daniel Johnson represents one of the two ideological camps that coexist within the Quebec Liberal party. Had Industry and Commerce Minister Gérald Tremblay remained in a leadership race he could not win, the differences between the two camps would have been brought forth. Against Johnson, who would have insisted on the deficit, on privatization, and on changes in social programs, Tremblay would have stressed his commitment to job creation, industrial policy, and training. With a more nationalist opponent, Johnson also would have been more up front about his commitment to the constitutional status quo.

With Daniel Johnson as leader, the Quebec Liberal party thus affirms its more conservative orientations against a Parti québécois that years in opposition have brought closer to its social-democratic roots. Quebec Liberals, however, have learned from Kim Campbell's failure. In his inaugural speech, Daniel Johnson did not even pronounce the word "deficit" and emphasized job creation, which he called the "daily battlefield" of the government. The new premier also reduced the Cabinet from 28 to 21 members, and indicated he would accomplish more than what Kim Campbell did during her short summer of public relations. The announcement of a crackdown on cigarette smuggling, a major irritant for Quebec voters, was the first signal of Johnson's attempt to show a break with Bourassa's tergiversations.

For all his calculated concern for jobs and poverty, Daniel Johnson remains a conservative more preoccupied by the fiscal deficit than by unemployment, faithful to market solutions, and likely to cut back on social programs. So far, the renewal proposed by the new premier has more to do with style than content, and his Cabinet does not contrast markedly to that of Robert Bourassa. Though Johnson and his party may well borrow every page from the Liberal party of Canada strategy book, they will nonetheless remain in a position that differs markedly from that of Jean Chrétien last fall.

First, for all the changes they may claim, the Quebec Liberals are the incumbent party with more than eight years in office, and a very high level of dissatisfaction in the electorate. Given the difficult economic situation, it is hard to see how a team composed mostly of the same players could shift perceptions rapidly.

Second, the message that voters apparently want to hear — some form of commitment to fight unemployment — is not Daniel Johnson's most natural, instinctive message. The coming months will show how far the new leader can go to cast himself as a Liberal with a plan to create jobs.

Third, Daniel Johnson's opponent is not on the right, but on the left. When Jean Chrétien raised the jobs issue, he faced a Conservative party that could not easily challenge him on this ground. The Parti québécois, in contrast, can credibly promise to do more; full employment was placed at the core of the party's program a few years ago, at a time when Daniel Johnson was content to bet on exports and foreign investments. As he tries to convince Quebeckers that decisive action must be undertaken to fight unemployment, Johnson risks running his campaign on a Parti québécois issue.

The elections of Bill Clinton and of Jean Chrétien marked a shift away from the conservative politics of the 1980s. Meanwhile, the circumstances of a leadership race that never was led the Quebec Liberal party to affirm the strength of its conservative camp. Aware of the problem, Liberal strategists seek to present the new Liberal leader as a Quebec version of Jean Chrétien. The image, however, may not sell.

In their first major meeting after Johnson's nomination, the Liberals applauded a jazzy video produced

Continued, see "Quebec's New Premier" on page 76.

"Quebec's New Premier," continued from page 75.

by a marketing agency, celebrated their new leader and their new team, and derided an opposition they castigated as a bunch of old guys, of politicians from yesteryear. Does this sound familiar?

From now to this fall, many things can happen. Daniel Johnson could prove a good premier and win back the support that Liberals have lost in recent years. The last months of the Bourassa government gave a new meaning to the notion of *laissez-faire*; at one point this fall, the *Conseil du Patronat*, Quebec's main employer association, wondered whether there was still a government in Quebec. A decisive and effective Daniel Johnson could make a difference. Jacques Parizeau could also make mistakes and lose support that remains fragile. Parizeau, however, is now careful to stick to prepared speeches and stress his team, which is, indeed, very strong. He can also count on Lucien Bouchard and the Bloc québécois to return the support they received from the Parti québécois.

Quebec now has a new premier, a new middle-of-the-road party (with Jean Allaire, Mario Dumont, and almost no one else), a new prime minister in Ottawa, and new sovereigntist MPs in the House of Commons. All the same, the next political fight will be a classic one, between federalists and sovereigntists, and between the centre-right and the centre-left. The major actors and ideas are well known, and, given the economic situation, abrupt opinion reversals are not very likely. The odds remain against Daniel Johnson.

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WESTERN REPORT

The New Parliamentary Face Of Reform

by Roger Gibbins

The opening of the new session of Parliament has treated Canadians to some strange scenes. Undoubtedly, one of the strangest was the pancake breakfast hosted by the Reform party for Bloc québécois MPs; papers across the country carried the photograph of Preston Manning and Lucien Bouchard sharing a can of maple syrup. On a more substantive note, the highlights have included the attempt by the Bloc to carve out a legislative role as the defender of the Canadian social conscience, and the decision by Reform to expand into Quebec.

"Yet over the past seven years we have seen progressive movement away from a focus on regional discontent and toward one on populist reforms, fiscal restraint, and social conservatism. There is unquestionably a national constituency for all three, and it is that constituency that Reform hopes to nurture and tap."

How do we make sense out of such developments? In the case of the Bloc's new role, as the protector of Canadian social programs, perhaps the best thing is to recognize that the role is nonsensical. Indeed, it may even be offensive. After all, how can one defend Canadian social programs while proposing to destroy Canada?

Reform on the Plains of Abraham

But what do we make of the plans by Reform to expand into Quebec? Is there any more sense to be found here, or is Reform simply responding to the mythology of national politics? Is the party expanding because Canadian tradition makes it clear that a party with candidates in only nine provinces is not truly a national party?

I suspect that the decision to expand is based in part on a narrower set of strategic interests. The odds are reasonably good that Quebec will hold a sovereignty referendum during the life of the present Parliament. If Reform is to be a player in the referendum debate, it needs to be an officially registered party on the Quebec political scene. It makes sense, then, to expand into Quebec to avoid being sidelined during a debate that the Reform party will argue, correctly, is really a debate for all Canadians.

Of course, Reformers may also believe that there are populist votes to win in Quebec, and that Reform has the potential to be a significant partisan player in the province quite apart from the referendum issue. If this is, indeed, the case, then the Reformers are responding to hubris rather than to any realistic assessment of the Quebec political environment.

The Purge of Regionalism

There is, however, a more substantive message to be read into Reform's Quebec expansion. The decision marks the final abandonment of regional discontent as an explicit electoral base for the party. When Reform was founded in 1987, its very foundation was regional discontent. The slogan of the new party was "the west wants in," and its policy principles reflected a primary concern with the nature of regional representation in national institutions.

Yet over the past seven years we have seen progressive movement away from a focus on regional discontent and toward one on populist reforms, fiscal restraint, and social conservatism. There is unquestionably a national constituency for all three, and it is that constituency that Reform hopes to nurture and tap.

However, any campaign to do so outside the west is handicapped by an understandable perception that Reform is at heart a regional party devoted to promoting the interests of western Canada. What better way, then, to signal the end of this western preoccupation than to expand into Quebec? Can Reform really be serious about regional angst if it is devoting its resources to building a bridgehead in Quebec? Thus, the target audience for the expansion is not Quebec itself, but the Ontario and Atlantic electorates.

The task will be to convince Canadians outside the west that this transformation has taken place when 51 of the 52 Reform MPs are from the west. The test for Manning's leadership will be to keep Reform MPs focused on national issues and to approach issues like parliamentary reform, the deficit, and social policy as would MPs from Mississauga or Halifax. This will not be easy, although to date both Manning and his party have had considerable success in shedding their regional costumes.

Lessons To Be Drawn from Alberta?

Although the federal budget has yet to be tabled in the House, it appears that the Liberals will leave a considerable opening for Reform on issues of the debt and deficit. There is no sign that the Liberals are about to launch the draconian assault on the deficit envisioned by Reform during the 1993 election, and, thus for Canadians for whom are the deficit is an acute concern, Reform may be the only serious player in the game.

At the same time, the Reform party and Preston Manning will have to keep a wary eye on the Alberta provincial scene to see how Premier Ralph Klein's determination to reduce the budget by 20 percent over the next three years plays with the provincial electorate. If Klein looks as though he will survive a growing storm of opposition, then Reform's resolve to stake out a similar position on the federal deficit will be strengthened. However, if the storm threatens to cripple Klein's prospects for re-election, then Reform might be well advised to soft-peddle their approach to the federal deficit.

Of course, neither Manning nor his party are likely candidates for policy moderation. But then, maybe their parliamentary experience will inject a note of caution, as many of the strongest Reform supporters fear.

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

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ECONOMIC REPORT

Reforming Unemployment Insurance

by Fred Lazar

In 1940, the first *Unemployment Insurance Act* was passed by Parliament. The primary objective of this Act was to provide insurance against the risk of income loss due to unemployment. From a rather modest beginning, the unemployment insurance (UI) program has grown in scale and scope.

In 1992, $19 billion was paid out under the UI program to about 3.7 million persons who experienced some interruption in their employment income during the year. These payments accounted for 36 percent of the $52.8 billion in total federal government transfers to persons in 1992, and 21 percent of total government transfers to persons ($89.7 billion). Aggregate UI payments are expected to exceed $20.5 billion in 1993.

Changes to the Act during the 1950s and 1960s, and culminating in the 1971 revisions, marked a turning point for the UI program, as it moved further away from insurance principles toward horizontal equity and income support. The 1971 revisions increased benefits significantly and eased the eligibility rules to enable a larger proportion of the unemployed to qualify for benefits. As a result, unemployment insurance became the major component of the social welfare system in Canada in

Continued, see "Reforming Unemployment" on page 78.

"Reforming Unemployment," continued from page 77.

the early 1970s. However, the 1971 revisions also represented the high point in the program's movement in this direction.

Revisions during the 1980s, and thus far in the 1990s, have tried to integrate the UI program into more active labour market policies aimed at facilitating adjustments, promoting economic growth, and reducing the natural rate of unemployment. The 1990 revisions (Bill C-21, November 18, 1990) set the stage for the UI program to become an integral component of the labour force development strategy introduced in April 1989 by the federal government. The amendments permitted a redirection of UI premiums toward active adjustment assistance — for example, work sharing, job creation, training, and developmental assistance. The federal government has approved expenditures of $2.21 billion of UI funds for active adjustment assistance programs in fiscal year 1993-94. This contrasts to the $425 million spent on these programs in 1989-90.

The expenditures for 1993-94 on active adjustment assistance programs represent about 11 percent of total expected spending under the UI Act. Section 26.2 of the Act permits a ceiling of 15 percent of total UI funds to be allocated to the programs covered by sections 24, 25, and 26. Thus, even without additional revisions, there is scope to redirect further funds toward these programs.

In a time of fiscal constraint, UI premiums provide the government with a revenue source for expanding training and other active labour market programs. Therefore, it is not surprising that UI funds are looked upon as an attractive source of financing for any new training initiatives or for an expansion of existing programs. But should UI funds be used for this purpose? What should be the objective of the UI program?

Should it be restructured to become an insurance program as was the intent of the original UI Act? Instead, should its focus be directed toward equity, income support, and social assistance? Or should the income support and insurance roles be downplayed, and the active labour market role be augmented?

"With unemployment rates in double digits and with the national unemployment rate exceeding 7 percent for almost 20 consecutive years and expected to remain above this level for the rest of this century, a sharply focused UI program not only is warranted, but also can play a key role in the inevitable reform of the social welfare system in Canada and in the reform of the current system of fiscal federalism."

I favour the direction in which the UI program was evolving up to and including the 1971 revisions. The UI program should be the cornerstone of the social welfare system in Canada. Its goal of providing income support during periods of unemployment can be compatible with generating a more "equitable" distribution of income. Furthermore, the UI program should be revamped to make it an automatic fiscal stabilizer once again. Currently, the UI program operates more as a fiscal destabilizer, since premiums tend to be increased during periods of high unemployment. Premium rates were increased in the midst of the last recession in 1990 and 1991. They were increased further in 1992 and most recently by the new Liberal government, even though the economic recovery is sputtering along and unemployment rates continue in the 11 percent range.

There are at least three fundamental problems with the UI program as it has evolved and as critics of the program would like to see it further develop. First the mandate to make the UI program self-financing, regardless of the unemployment rate, considerably weakens, and as suggested, even destroys its stabilization role. Second, permitting the use of UI funds for programs other than unconditional income support confuses its role in the eyes of the public and so makes the program susceptible to poor decisions.

Third, the payoffs to government support of training may be overestimated. It has been over 30 years since the passage of the *Technical and Vocational Training Assistance Act* by the federal government, and since that time tens of billions of dollars have been spent by the federal and provincial governments on various types of training programs. Yet one would have good reason to question the efficacy of these programs and the apparent change in the training "mission" in each decade.

During the past 40 years, the national unemployment rate has tended steadily upward at the peak of each successive cycle. Unemployment continues to be disproportionately experienced by those between the ages of 15 and 24, Canadians in Quebec and the Atlantic provinces, and workers without a high school diploma. The sharply higher unemployment rates today primarily reflect substantially longer spells of unemployment, thus suggesting that despite the massive expenditures on training, the labour market adjusts more slowly.

Let me emphasize that it is desirable to have one or, at most, two permanent objectives for a government program and periodically

finetune the program in order to better attain the objective(s). Establishing or adding new objectives risks confusing the public and producing an inferior outcome to one involving setting up entirely new programs. Each program should be judged on its own merits and if its objective(s) no longer ranks (rank) high among government priorities, then the program should be either scaled back or terminated.

With unemployment rates in double digits and with the national unemployment rate exceeding 7 percent for almost 20 consecutive years and expected to remain above this level for the rest of this century, a sharply focused UI program not only is warranted, but also can play a key role in the inevitable reform of the social welfare system in Canada and in the reform of the current system of fiscal federalism.

Moreover, the UI system tends to transfer income from workers who are less prone to becoming and remaining unemployed to those who are more likely to become unemployed and remain unemployed for longer periods of time.

If every participant in the labour market faced the same probability of becoming unemployed, and when unemployed experienced the same duration of unemployment, there would be no need for UI as either an income redistribution or an insurance program. Individuals would adjust their savings behaviour accordingly and real wages would adjust in the labour market to reflect the same, anticipated unemployment experience.

But the burden of unemployment is not distributed equally among all participants on the labour market. Certain groups of individuals are more likely to become unemployed than others, and within these groups certain individuals are more likely to experience longer or more frequent spells of unemployment. Many within these groups are low-wage earners. Therefore, UI can spread the burden of unemployment by redistributing income and the redistribution of income is likely to be in the direction of low-income individuals and households.

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LEGAL REPORT

Freedom To Discriminate? The Malcolm Ross Case

by Bruce Ryder

Discrimination Versus Expression

Discrimination and expression are concepts that have demonstrated imperial tendencies in the Charter era. Discrimination now encompasses all rules or practices that have the effect of promoting group-based disadvantage, intentionally or unintentionally, discretely or systemically. Expression now encompasses all human activity that conveys a meaning short of violence. Discriminatory words and non-violent actions convey a meaning, and thus count as expression. If they have the effect of creating barriers to equality, they also count as discrimination. The area of overlap between discriminatory and expressive acts is thus large and growing, and subject to the contradictory constitu-

> *"A teacher in the public school system, like other professionals or holders of the public trust, can quite properly be expected to uphold the ideals of a secular, multicultural society, including a commitment to equality."*

Continued, see "Freedom to Discriminate" on page 80.

"Freedom to Discriminate," continued from page 79.

tional mandates of prohibition and protection.

Heated controversies at the clashing boundaries of freedom of expression and equality rights are increasingly common features of the Canadian legal landscape. One of the best examples of this clash, and of the lack of any consensus on the principles that ought to mediate it, can be found in the competing and diverse responses of the judges in the *Malcolm Ross* case.

Decisions in the Ross Case

Ross is a New Brunswick school teacher better known as an active propagator of anti-Semitic propaganda. Outside of the classroom, Ross has made a secondary career of hate promotion through the publication of books and articles positing, among other things, a Jewish conspiracy to destroy Christianity. After the local school board failed to take effective disciplinary action against Ross, a Jewish parent, David Attis, filed a complaint with the Human Rights Commission alleging that the continued employment of Ross deprived Jewish and other minority students of equal educational opportunity.

The board of inquiry member, Professor Bruce, found that Ross's publications and statements had "contributed to the creation of a poisoned environment" in the school district and had "greatly interfered" with the provision of education services to Attis and his children. As a result, the school board was ordered to transfer Ross to a non-teaching position, and to terminate his employment immediately if he published any further attack on Jewish people.

The four judges who heard appeals of the board's decision reached three separate results. On the first appeal, to the New Brunswick Queen's Bench, Creaghan J. upheld the removal of Ross from the classroom but struck down the "gag order" on the grounds that neither the complaint nor the evidence established that hate promotion by a person in a non-teaching position would have a negative impact on equal access to education services.

On further appeal to the New Brunswick Court of Appeal, a 2 to 1 majority of the court struck down the board's order in its entirety as a violation of Ross's freedom of expression guaranteed by section 2(b) of the Charter. Hoyt C.J. (Angers J.A. concurring) argued that the evidence failed to establish a "pressing and substantial" basis for interfering with Ross's freedom of expression outside of his employment responsibilities.

In a dissenting judgment, Ryan J.A. would have upheld the removal of Ross from the classroom and the gag order on the grounds that the "continued discrimination publicly promoted by Ross" was incompatible with public employment with the school board as "a role model to children." Hoyt C.J.'s majority opinion implicitly disagreed with the Bruce-Creaghan-Ryan holding that active and public hate propagandizing is incompatible with the fulfillment of a teacher's responsibility to accord his or her students equal access to education.

Expression and Public Office

There are a number of questionable features of the New Brunswick Court of Appeal decision that ought to be subject to a searching inquiry by the Supreme Court of Canada on appeal. One is the assumption that a teacher's activities outside of school can be safely ignored in assessing any impact on educational equality. The evidence of the perceptions and experiences of Jewish students indicated that the very public nature of Ross's hate promotion did in fact contribute to the poisoning of their educational environment. Fear and apprehension are not conducive to learning, but Ross's activities virtually ensured that Jewish students would experience these emotions on contact with him. Although the evidentiary basis for its conclusion was thin, the board of inquiry's assessment of the evidence left it with "no hesitation" regarding the discriminatory effects of his public hate promotion. This factual finding is insulated from judicial interference by the finality clause in the New Brunswick *Human Rights Act*.

Another problem is the too-simple equation of freedom of expression with the right not to be dismissed from public office by a human rights tribunal. A teacher in the public school system, like other professionals or holders of the public trust, can quite properly be expected to uphold the ideals of a secular, multicultural society, including a commitment to equality. In this sense, freedom of expression does not mean that the public expression of hate is irrelevant to the kinds of employment to which one is entitled. Thus, for example, the Court of Appeal decision does not mean that Ross has a *right* to be a teacher as well as a hate propagandist on the side. His removal from the classroom by order of the human rights tribunal may have been set aside, but the school board could almost certainly dismiss him from employment with just cause if he continues to violate the school board's multicultural policies and the New Brunswick teachers' Code of Professional Conduct. Moreover, such an action by the school board would not be subject to the *Charter of Rights and Freedoms*, unless it could be said to be dictated by government. Hoyt C.J.'s opinion leads to the odd conclusion that an employ-

ers' powers to take disciplinary action against employees appear to be much broader than the state's ability to sanction discriminatory actions by public employees.

Freedom To Discriminate?

Perhaps the most controversial element of Hoyt C.J.'s reasoning in the *Ross* case is the assumption that the Charter guarantee of freedom of expression is capable of protecting as fundamental rights activities that are prohibited by Canadian anti-discrimination statutes. In other words, in the *Ross* decision, freedom of expression has trumped the prohibition on discrimination. It is fair to say that this is not the usual understanding of how conflicts are resolved between expression and discrimination in human rights legislation.

Ordinarily, discrimination that is accomplished through expression is not a legally protected activity for that reason. If it were, legal prohibitions on discrimination would be ineffective. For example, prohibitions in Canadian human rights legislation on discriminatory signs, discriminatory employment advertisements, and sexual harassment all target activity that is often purely expressive. The fact that the statements "no Indians need apply" or "sleep with me or you're fired" express ideas has not prevented them from being sanctioned as discrimination. Presumably this is because preventing discriminatory effects is more important in a democracy than protecting the expression through which it is accomplished.

The question that arises, of course, is whether the type of expression at issue in *Ross* can be distinguished from other kinds of discriminatory statements that do not stand a chance of being protected as the exercise of Charter freedoms. Ross's public promotion of hate was found to have discriminatory effects, and this factual finding had to be accepted by the appellate court, so his case cannot be distinguished on that basis. The bottom line, then, is whether protecting anti-Semitic speech is more important than preventing its discriminatory effects. Is protecting anti-Semitic speech more important than, say, protecting the right to say "no Indians need apply"? Hoyt C.J. seemed to think so, since he euphemistically described Ross's views as "religious" views that are being suppressed because they are "not politically popular." This is obviously a value judgment. For others, anti-Semitism, far from being a politically unpopular idea, is an oppressive social practice that has a lengthy history associated with unprecedented violence. On this view, anti-Semitic speech should be no more entitled to immunity from prosecution under anti-discrimination law than other kinds of prohibited speech with discriminatory effects.

Bruce Ryder is an Associate Professor at Osgoode Hall, York University. Legal Report is a regular feature of Canada Watch.

CW UPDATE

The Month in Review

by Michael Rutherford

Turmoil in Quebec Construction

The Quebec government tabled legislation on November 11 that would partially deregulate the province's construction industry. Bill 142 would legalize the use of non-unionized and out-of-province workers on residential construction sites. The legislation touched off province-wide illegal strikes and altercations on construction sites. On December 14, the Quebec government introduced emergency back-to-work legislation. Bill 158 was passed by a 64 to 20 margin over the protests of the opposition Parti québécois.

Reproductive Technology Report

The Royal Commission on New Reproductive Technologies submitted its long-awaited report to the federal government on November 15. The $28.2 million report recommended strict regulation for many reproductive procedures.

CUPE and OFL Snub Ontario NDP

On November 18, delegates to the Canadian Union of Public Employees' national convention in Vancouver voted to sever ties with the Ontario NDP. Four days later, at an Ontario Federation of Labour convention in Toronto, delegates voted in favour of a motion to withhold support from the Ontario NDP unless it repealed its social contract law.

Blood Inquiry Opens

Canada's tainted blood tragedy will be the subject of a public inquiry that opened in Ottawa on November 22. Leading the investigation is Mr. Justice **Horace Krever** of the Ontario Court of Appeal.

Provincial By-Elections

Liberal candidate **Bruce Crozier** won an easy victory in the riding of Essex South in an Ontario by-election on December 2. Parti québécois candidate **Serge Menard** took a seat from the governing Liberals in a December 13 Quebec by-election in Laval-des-Rapides.

Pearson Privatization Cancelled

The Mulroney government's contract to privatize two terminals at Toronto's Pearson Airport was cancelled by the Chrétien government on December 3. The move followed a scathing review of the deal by investigator **Robert Nixon**, who said that the public interest was not served by the contract.

Minimum Corporate Tax in Ontario

Ontario has become the first province to introduce a minimum corporate tax. On December 8, Finance Minister **Floyd Laughren** announced that the tax would apply only to large corporations and would be phased in over three years, reaching a level of 4 percent of profits in 1996.

Natives Can Log in Clayoquot

The B.C. government reached a two-year agreement with native groups on December 10 that allows native logging in Clayoquot Sound. The **Nuu-chah-nulth Tribal Council**, representing five native groups that have land claims pending in the area, will be allowed to cut about 70,000 cubic metres of trees annually.

New Quebec Sovereigntist Party

A group led by former Liberal **Jean Allaire** announced on December 13 that it was forming the **Parti Action Québec** and would field candidates in the upcoming provincial election. The party will campaign on a conservative economic platform and push for a sovereign Quebec to maintain some form of political association with the rest of Canada.

Canada Yields at GATT Talks

The federal government announced on December 13 that it would replace import quotas protecting Canada's egg, dairy, and poultry producers with tariffs to be gradually reduced over 15 years. Canada's concession came at the world trade negotiations, which took place in Geneva under the auspices of the general agreement on tariffs and trade.

Charest Replaces Campbell

Jean Charest became interim leader of the federal Progressive Conservative party following **Kim Campbell**'s resignation on December 13.

Newfoundland Proposes New Income Scheme

On December 14, Newfoundland Premier **Clyde Wells** proposed a new system of guaranteed annual incomes that would be coupled with much stricter rules on collecting unemployment insurance. Newfoundland awaits federal approval for the scheme.

Chrétien Shuffles de Chastelain, Nephew

The federal government announced on December 15 that Admiral **John Anderson**, Chief of Defence Staff, would be replaced by his predecessor in the post, General **John de Chastelain**. De Chastelain was to be recalled from his posting as Ca-

nadian ambassador to the United States. **Raymond Chrétien**, the former No. 2 official in the Department of External Affairs and the prime minister's nephew, was to take over as ambassador to the United States.

More Fisheries Closed

On December 20, federal Fisheries Minister **Brian Tobin** closed all but one of the major Atlantic cod fisheries and cut quotas for other species. Canada and the United States reached an agreement on January 2 for a five-month shutdown of the Georges Bank fishery off Nova Scotia.

First Ministers Meet

Prime Minister **Jean Chrétien** had his first formal meeting with provincial premiers in Ottawa on December 21. They reached agreement on the formula for allocating spending under the $6 billion national infrastructure program and recommitted themselves to a June deadline for an interprovincial trade agreement.

Liberals Replace Crow

The federal government replaced Bank of Canada governor **John Crow** with the bank's senior deputy governor, **Gordon Thiessen**. In making the announcement on December 22, Finance Minister **Paul Martin** said that the Liberal government remained committed to keeping inflation low.

Ontario and Quebec Reach Trade Deal

Ontario and Quebec reached an agreement to open their borders to out-of-province construction workers, companies, and materials. The accord, signed in Hull on December 24, brings to an end a construction trade war between the two provinces.

PWA Rejects Air Canada Offer

On December 26, **PWA Corp.** turned down **Air Canada**'s latest offer to buy the international routes of PWA's subsidiary, **Canadian Airlines International Ltd.** Air Canada wants to block a proposed alliance between PWA and **AMR Corp.** of Fort Worth, Texas.

NAFTA Comes Into Force

The North American free-trade agreement between Canada, the United States, and Mexico came into force on January 1. Prime Minister **Jean Chrétien** announced on December 2 that "significant improvements" to NAFTA had been negotiated and Canada would proceed with the deal. The side deals to NAFTA included a non-binding pledge by the three countries to establish a code on subsidies and anti-dumping measures as well as a clarifying joint statement on water exports. Canada also issued a unilateral declaration on energy security.

U.S. Accepts Lumber Tariff Ruling

The **U.S. Commerce Department** announced on January 6 that it will eliminate border duties on Canadian softwood lumber exports. The announcement came in the wake of a December 17 Canada-U.S. trade panel ruling that found no "rational basis" for the tariffs.

Canada Will Debate Peacekeeping

Prime Minister **Jean Chrétien** will not make any assurances that Canadian peacekeepers will stay in Bosnia past April. He told UN Secretary-General **Boutros Boutros-Ghali** on January 9 that a renewed commitment of soldiers will only be made after a full parliamentary debate.

Johnson New Premier of Quebec

Daniel Johnson became premier of Quebec on January 11, replacing the retiring **Robert Bourassa**. Johnson had been acclaimed leader of the Quebec Liberal party on December 14.

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Supreme Court Watch

A digest of recent significant decisions of the Supreme Court of Canada

The Queen v. D.O.L. November 18, 1993

The criminal defendant, who was charged with the sexual assault of a minor, sought a declaration that section 715.1 of the *Criminal Code*, which permits the use of videotaped evidence, violates the Charter. The Supreme Court of Canada held that section 715.1 did not infringe the defendant's right to a fair trial or violate the presumption of innocence.

The Queen v. Litchfield November 18, 1993

The respondent was a family physician charged with 14 counts of sexual assault involving several female patients. Before trial, a judge ordered that the counts be severed and different trials be held depending on the physical nature of the assault. The Supreme Court of Canada allowed the Crown's appeal from the respondent's acquittal. In doing so, the court held that procedure should not govern substance in ways that result in a trial process that is fundamentally flawed.

Levogiannis v. The Queen November 18, 1993

An accused charged with touching a child for a sexual purpose challenged section 486(2.1) of the *Criminal Code*, which permits a complainant under the age of 18 years to testify behind a screen. In upholding that provision, the Supreme Court of Canada found that the absence of face-to-face confrontation between the accused and his complainant did not infringe any principle of fundamental justice or otherwise violate the presumption of innocence.

Symes v. The Queen December 16, 1993

The appellant, a self-employed woman practising law as a partner in a law firm, challenged Revenue Canada's decisions rejecting her claim that wages she paid her nanny should be deductible from personal income, under the *Income Tax Act*, as business expenses. The Supreme Court of Canada held, L'Heureux-Dubé and McLachlin JJ. dissenting, that her child care expenses were not deductible. The court found that she failed to prove that tax provisions relating to child care expenses violated her right to equality under section 15(1) of the Charter.

Canada Watch Calendar

Dec. 2	Ontario Liberals win easy victory in provincial by-election.
Dec. 3	Pearson privatization deal is cancelled by the Liberals.
Dec. 13	Parti québécois takes seat from Liberals in provincial by-election.
Dec. 13	Parti Action Québec formed as new sovereigntist party in Quebec.
Dec. 14	Jean Charest replaces Kim Campbell as PC party leader.
Dec. 21	First Ministers' meeting in Ottawa.
Dec. 22	Liberals choose Gordon Thiessen to replace John Crow as Bank of Canada governor.
Jan. 1	NAFTA comes into force.
Jan. 11	Daniel Johnson becomes premier of Quebec.
Jan. 17	House of Commons resumes sitting.