CANADA WATCH
Practical Analysis of Constitutional and Other Key National Issues

Accord's Contradictions May Produce Backlash

by Kenneth McRoberts

Public criticism of the new constitutional agreement seems paradoxical. The complaints of English Canadians, especially in western Canada, that the agreement sacrifices their aspirations to Quebec's interests are matched if not exceeded by the cries of Quebec nationalists that it is an essentially English-Canadian document that totally ignores Quebec's longstanding aspirations. As it happens, both sides are right. Throughout the constitutional debate of the last few years English Canada and Quebec have pursued fundamentally different agendas. Rather than directly accommodating each of these agendas the agreement ultimately serves to frustrate each of them.

Different Agendas in English Canada and Quebec

In English Canada, the predominant focus has been upon Canada's national institutions. There has been concern with preserving the powers of the federal government and strengthening the *Charter of Rights and Freedoms*. But the greatest attention has been upon schemes to make the federal government more responsive to the interests of "Outer Canada" (western and Atlantic Canada), especially through reform of the Senate along "Triple E" lines.

In Quebec, for decades now the primary concern has been to expand the powers of the Quebec government so that it can be more effective as the "national" institution of Quebec. This objective has been central not just to the *souverainiste* ambitions of the Parti québécois but to most schemes for a "renewed federalism." The most dramatic case is, of course, the Allaire Report, which the Liberal Party adopted as official policy in March of last year. Under this document only five jurisdictions would remain exclusively federal; its proposal for the Senate is no less than abolition. When the joint parliamentary committee on constitutional reform (Beaudoin-Dobie) presented its report Robert Bourassa felt obliged to denounce its failure to transfer sufficient power to the provinces and to decry its adherence to "un fedéralisme dominateur."

On this basis, one might well have imagined that the constitutional negotiations would produce a trade-off that responded directly to each agenda: a reformed Senate based on equal provincial representation coupled with a devolution of powers to Quebec. With new provincial powers Quebec might have had to accept a diminished role for its M.P.s (and perhaps its senators) when it came to votes on federal measures that would not apply in Quebec but that would have been acceptable. On this basis, "asymmetry" might well have been made less objectionable out-

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side Quebec since, under these conditions, Outer Canada would have dominated the national parliament.

Rejecting Each Other's Agenda

However, this was not a normal bargaining process. First, one of the parties, Quebec, was not even present at the table until close to the end, resulting in confusion over what in fact Quebec wanted. When Bourassa finally joined the negotiations, the terms of the deal had already been set; it was too late to advance effectively Quebec's position. All Bourassa could hope to do was to limit the damage.

More fundamentally, neither side was in the mood for such a trade-off since each fundamentally rejected the other's project. For Quebec, a "Triple E" Senate entrenched a principle — equality of the provinces — which directly denied Quebec's claims for a distinct status. Within this same principle of provincial equality English Canada had difficulty accepting devolution of powers to Quebec. Nor were many English Canadians prepared to accept a general devolution of powers to all provinces, given their commitment to a strong federal government. The result, then, was not an accommodation of each other's agenda but a mutual frustration of them.

Limits to the Reforms

Thanks largely to Quebec's resistance, Outer Canada gets a reformed Senate which has little real power. What had been acceptable to Ontario on July 7 clearly was not acceptable to Quebec, once it became an active party in the negotiations. If that were not enough, central Canadian dominance of the federal government is enhanced through additional seats in the House of Commons.

Thanks to English-Canadian resistance, the Quebec government gets little by way of additional powers. To placate English-Canadian concerns, the "distinct society" clause of the Meech Lake Accord has been circumscribed and now appears in a "Canada clause" where it stands as one of several references to values and features of Canadian society. Although the agreement does explicitly assert provincial jurisdiction in a few areas, unlike the Meech Lake Accord, this amounts to an affirmation of existing provincial jurisdiction.

"... it is indeed possible for both Quebec and Outer Canada to claim that they have been "humiliated." In terms of their original agendas, each of them has been."

To be sure, it can be argued that Quebec has gained in terms of its influence within institutions in Ottawa. Quebec's representation in the House of Commons has been increased and there is the guarantee it will not fall below 25 percent. Quebec government-appointed Francophone Senators will, in concert with Francophone Senators from other provinces, exercise a veto over laws affecting the French language and culture. Yet, this was not at the heart of Quebec's agenda.

Thus, it is indeed possible for both Quebec and Outer Canada to claim that they have been "humiliated." In terms of their original agendas, each of them has been.

The Road Ahead

As a consequence, ratification of the accord is not a certainty, especially in Quebec where the presence of well-organized opposition forces promises a vigorous pre-referendum debate.

By the same token, if the accord should be adopted some of its measures may end up working against "national unity" — once it becomes fully apparent just how limited they are. One can imagine the outcry in Western Canada when, for the first time, the new Senate exercises its new role of protecting Outer Canada's interests only to be massively outvoted in a joint sitting by the House of Commons, more than five times larger and dominated by central Canadian interests. By the same token, what will be the reaction in Quebec when it becomes clear that Quebec's newly affirmed "exclusive jurisdiction" over cultural matters within the province has no impact whatsoever on the activities in Quebec of the federal government's cultural institutions? For that matter, what would be the reaction in Quebec if, as some Quebec observers claim, the reference in the "Canada clause" to the "vitality and development" of Quebec's Anglophone community should, despite the "distinct society" clause, lead to court restrictions on Bill 101?

In short, the accord may prove sufficient to ease Canada out of its present constitutional crisis, favoured by both a massive government selling campaign and extreme popular fatigue with the whole constitutional question. But one can only wonder what might have happened if English Canada and Quebec had squarely faced each other's agenda and worked out an arrangement that genuinely accommodated their separate objectives.

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

Unity Referendum Looks Winnable

Main trouble spot likely to be western Canada

by Patrick J. Monahan

The new unity package agreed to in Ottawa on August 22 has achieved what seemed virtually impossible just weeks before. Not only has the package secured the unanimous agreement of all Canadian governments, it appears to stand a good chance of being approved by the electorate in a national vote this fall.

The unity package has already been subject to attack by nationalist forces in Quebec and by the Reform Party in the west. But the package has at least two major things working in its favour.

"With constitutional fatigue running rampant in all parts of the country, the chance to bring an end to this fractious debate is an overwhelming attraction to the package."

Unlike the Meech Lake Accord, these proposals respond, at least in part, to the constitutional demands of all parts of the country. True, no single group or constitutency obtained everything it wanted out of the negotiations. But the fact that everyone had to compromise only strengthens the perception that this is a balanced and reasonable set of proposals.

Second, these proposals promise an end to the seemingly interminable constitutional discussions that have plagued the country for close to three decades. Unlike Meech, which contemplated a "second round" of negotiations to deal with a variety of unfinished business, these proposals are presented as the final chapter of the constitutional saga. With constitutional fatigue running rampant in all parts of the country, the chance to bring an end to this fractious debate is an overwhelming attraction to the package.

Quebeckers Should Ratify

In the days following the August 22 agreement, media attention was focused on the fight that the proposals will encounter in Quebec. But it seems hard to believe that Quebeckers will ultimately turn down a package that would represent a major gain over the status quo.

Quebec critics have focused attention on the fact that the package fails to meet the demands of the Allaire Report for major transfers of powers to the province. But while the transfer of powers is relatively modest, Quebec's role in federal institutions in permanently enhanced and protected. Quebec gains a guarantee of 25 percent of the seats in the House of Commons in perpetuity; the six senators from Quebec, appointed by the Quebec premier, will have a veto over all federal laws which "materially affect" language and culture; the provincial government gains a veto over the appointment of the three Quebec judges to the Supreme Court of Canada; and none of these guarantees can be changed without Quebec's approval. Quebec also obtains all the elements of the failed Meech Lake Accord.

Of course, anything can happen in a referendum campaign. But voting against the package would mean passing up these major gains, in exchange for renewed uncertainty about the province's political future. No doubt the referendum fight in Quebec will be tough. But one has to assume that Quebeckers, renowned for their political savy, will opt for ratification.

Western Reaction Big Question Mark

What of the prospects in the rest of Canada? In both Ontario and the Maritimes, where constitutional fatigue is running high and there has never been an identifiable constitutional agenda, the package would seem likely to carry. The biggest attraction in these regions is simply the prospect of closing the constitutional file for the forseeable future.

The biggest potential trouble spot is likely to be western Canada. In the days immediately following the announcement of the agreement, critics in British Columbia had a field day pointing out that Mike Harcourt had agreed to a reduction of the province's representation in the House of Commons.

"No doubt the referendum fight in Quebec will be tough. But one has to assume that Quebeckers, renowned for their political savy, will opt for ratification."

What will also be a hard sell in the West are the guarantees for Quebec in the Senate, House of Commons, and the Supreme Court. The Western agenda in this round was to strengthen its political clout in national institutions. Rather than achieve this goal, the agreement appears to reinforce the predominance of Central Canada in Ottawa.

At this stage it is unclear whether these objections will be sufficient to scuttle the deal in western Canada. Working in favour of ratification is the fact that Newfoundland Premier Clyde Wells, the staunchest opponent of Meech Lake and of "special status"

for Quebec, is on side for this package. Plus, westerners are as tired of this debate as are Canadians elsewhere. A key question is whether the Reform Party will campaign vigorously against the deal, thus providing a focus for western opposition.

The coming campaign will undoubtedly be full of unforseen twists and surprises. But the biggest surprise of all would be if Canadians pass up a historic opportunity to settle their constitutional future once and for all.

Patrick Monahan is Director of the York University Centre for Public Law and Public Policy and is Associate Professor at Osgoode Hall Law School, York University.

Canada and NAFTA

by David Leyton-Brown

NAFTA (the North American free trade agreement) should not be evaluated in terms of the overall economic and political effects on Canada of free trade. Rather it should be judged in terms of the actual stakes for Canada in the negotiations — what Canada sought to achieve, and to avoid.

In the Canada-U.S. free trade agreement (FTA), which came into force in 1989, Canada pursued the anticipated benefits of increased investment, industrial restructuring, and economic growth resulting from (more) secure and enhanced access to the U.S. market, on which we depend for over 75 percent of our exports. However, Canada paid a considerable price in the negotiations for those benefits. Indeed, public disagreement over the balance between the benefits and costs underlay the federal election campaign of 1988, and the ongoing public debate about the effects of the FTA on Canada's economy and society.

"In order to protect its interests, Canada could not afford not to take part in the NAFTA negotiations."

Having entered into that complex of benefits and costs, Canada would have been severely disadvantaged if the benefits had been lost or diluted, without any reimbursement or reduction in costs. That would indeed have occurred, if the United States and Mexico had entered into a separate bilateral free trade agreement, giving Mexico, with its lower-cost labour, preferential market access comparable to Canada's. Furthermore, separate Canada-U.S. and Mexico-U.S. trade agreements would have created a "hub-and-spokes" arrangement, whereby the United States would enjoy preferential access to the markets of both of its partners, but each of them would have only competitive access to the U.S. market, and a lesser degree of access to each other. In order to protect its interests, Canada could not afford not to take part in the NAFTA negotiations.

Canada's Objectives in the NAFTA Negotiations

Accordingly, Canada entered into the NAFTA negotiations with the primary objective of preventing the erosion of the benefits achieved, and paid for, in the FTA. It also sought to achieve further benefits in terms of increased access to the U.S. market or improvements to the FTA, while resisting U.S. attempts to reopen "unfinished business" with Canada that it was unable to achieve in the FTA, or to push Canada for further concessions as the price for participation in NAFTA. Finally, it sought increased access for Canadian goods, services and investment to Mexico, which with the prospect of economic growth could in the long term be transformed into a major market.

The Implications of NAFTA for Canada

In the light of these objectives, what then are the implications of NAFTA for Canada? Some modest improvements were made to the FTA with regard to access to the U.S. market (for example, government procurement), and most notably in clarification of rules of origin (for example, regarding definition of North American content). Efforts to worsen the FTA bargain in several areas were successfully resisted: the screening of new foreign acquisitions was maintained, at the same

thresholds; the exemption for cultural industries under the FTA was preserved; and Canada's agricultural supply management systems in the dairy, egg, and poultry sectors were exempted. Substantial barrier-free access to Mexico was achieved for Canadian goods and services, and for Canadian investment in financial and other sectors.

In some contentious areas, however, Canadian negotiators yielded to U.S. pressure, or at best simply moderated that pressure. The level of North American content required for automotive goods to qualify for duty-free entry to the United States has been raised, against Canada's wishes, from the 50 percent level provided in the FTA, to 62.5 percent. This will advantage the big-three North American automobile producers, and disadvantage the Japanese- and Korean-owned automobile assembly operations in Canada, though it is argued that the newly clarified rules of origin will make the 62.5 percent content threshold easier to reach, and less subject to harassment. NAFTA provides duty-free access only to clothing and textiles containing exclusively North American-made fibres and yarns, which denies Canadian apparel companies the opportunity to use (cheaper) imported fabrics. To offset this, Canada achieved an increase in the allowable quota for products not meeting this requirement, at least for the first five years. The dispute settlement provisions of the FTA remain, and are in some ways strengthened, but the commitment to negotiate a new system of rules on subsidies and countervailing duties within five to seven years has been replaced by a sense that the NAFTA system will be permanent.

In short, NAFTA isn't perfect, but it could have been a lot worse. The alternative to NAFTA is not no free trade, but separate Mexico-U.S. free trade.

In short, NAFTA isn't perfect, but it could have been a lot worse. The alternative to NAFTA is not no free trade, but separate Mexico-U.S. free trade. Because the least desirable outcome would have been a bilateral agreement that extended access to the U.S. market to Mexico without any compensating benefits to Canada, the Canadian bargaining position was not strong. Canada made some gains, and avoided some losses, but most important, it was part of the process.

There will again be intense political debate about the merits of free trade, but the real political battle this time will not be in Canada, but in the United States. In both countries, the key to economic success, as well as to political victory, will be the provision of adequate and appropriate adjustment assistance, to ease the transition, and prepare workers, and therefore companies, for the more internationally competitive economic environment that lies ahead.

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RATIFYING NAFTA: PROBLEMS LIE STATESIDE

by David Johnson

Ratification of the North American free trade agreement (NAFTA) faces its greatest challenge in the U.S. Congress if the agreement is to become law by January 1, 1994; legislative endorsement in Canada and Mexico should, in comparison, be relatively problem free.

Although agreement in principle was reached on August 12 with respect to a treaty, full agreement on the official text is not expected until mid-September. A formal signing of this text by the Canadian prime minister and the presidents of the United States and Mexico is not expected until late fall. The agreement must then receive legislative authorization in each country.

"Assuming that the government brings forward implementing legislation sometime early in 1993, final ratification by the House and Senate will likely follow by next April or May. What this means is that the federal government will have adequate time to secure passage of ratifying legislation well before it needs to call the next election."

THE CANADIAN PROCESS

The federal government has suggested that implementing legislation will be ready for introduction into the House of Commons by the late fall. This timetable may be somewhat optimistic given the Canadian experience with the Canadian-U.S. free trade agreement (FTA). Following the signing of the FTA on October 4, 1987, enabling legislation was not ready for introduction in the House of Commons until May 24, 1988 — a period of roughly eight months. Once in the House the legislation moved quite expeditiously, receiving approval on third reading on August 31 — following 13 weeks of legislative review and debate. (After approval in the Commons the then Liberal-dominated Senate obstructed the passage of the Bill in the upper house. With the Conservatives now firmly in control of the Senate, it will not be a factor in this process.)

Assuming that the government brings forward implementing legislation sometime early in 1993, final ratification by the House and Senate will likely follow by next April or May. What this means is that the federal government will have adequate time to secure passage of ratifying legislation well before it needs to call the next election. (The federal government has until December 5, 1993 to issue writs for the next election.)

THE AMERICAN PROCESS

The American ratification process is governed by the "fast track" trade treaty procedure established by U.S. law in which Congress relinquishes its rights to amend such treaties once signed by the president. When the approved text of the NAFTA is released, the final stages of the fast track procedure will be initiated.

The president must give Congress 90-days' notification of his intent to sign the trade deal. (During this period members of the Congress may request amendments to the agreement.) After 90 days, the president signs the pact and sends it to Congress for legislative ratification. Congress will then have a maximum of 90 "sitting" days in which to analyze, debate, and ultimately vote on the deal without amendment — what is known as a straight "up or down" vote. In both houses approval is based on a simple majority vote.

According to this schedule, a final legislative determination on the agreement would be expected sometime prior to June 1, 1993 when the fast track negotiating authority expires. This timeline is complicated, of course, by the November U.S. elections.

Should President Bush be re-elected, the ratification process should proceed as outlined, with a final Congressional vote expected by June 1, 1993. Should the Clinton-Gore team be successful, though, there is the possibility that the new president may seek to renegotiate certain elements of the agreement. Should this occur, the entire negotiation process would start afresh, with the president also requiring a congressional extension of the fast track negotiating authority.

"Regardless of whether a Republican or Democratic president submits the deal to Congress, most American political analysts expect the agreement to face a rough ride through Congress with an uncertain future on any final votes."

Regardless of whether a Republican or Democratic president submits the deal to Congress, most American political analysts expect the agreement to face a rough ride through Congress with an uncertain future on any final votes. The outcome is complicated by the fact that candidates for the House of Representatives this November may commit themselves to securing changes to the agreement, and then may feel

compelled to oppose the agreement if these changes cannot be obtained.

The Mexican Process

It is in Mexico where the NAFTA pact should witness the smoothest passage to ratification. Under Mexican treaty law, once the president has agreed to a proposed treaty, it will be transmitted to the Mexican Senate for approval. This will probably occur in the fall session of the Senate. Within this House, ratification requires a two-thirds vote of approval and since President Salinas' Institutional Revolutionary Party holds 61 of the 64 Senate seats, acceptance of the agreement is a foregone conclusion.

NAFTA Goes to Washington

Given all of the above, the North American free trade agreement will probably have received legislative ratification in Canada and Mexico by late spring 1993. If the deal is going to encounter ratification problems they will most likely occur in Washington.

Whereas the ratification of the FTA became caught up in Canadian electoral politics in 1988, this time around it is the American elections which raise the biggest question marks.

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The New Constitutional Deal At a Glance

by David Johnson

Parliamentary Reform

- The Senate will be elected with six members for each province and one each representing the territories.
- The Upper House will have an absolute veto power, by simple majority vote, over natural resource taxation legislation.
- Laws materially affecting language and culture will have to receive the support of a double majority in the Senate, including the support of a majority of all Francophone members.
- In other cases a Senate defeat of legislation approved by the Commons will trigger a joint session of the two houses in which legislation will be sustained by a simple majority vote of the whole Parliament.
- The method of selecting senators will be left to the discretion of provincial governments. Quebec has indicated that the National Assembly will appoint the Senators for Quebec.
- A total of 42 seats will be added to the House of Commons, with Ontario and Quebec being granted 18 each, British Columbia 4 and Alberta 2, bringing

Table 1 Existing House of Commons Compared to House of Commons with Full Representation by Population

Province	Population (Percent)	Current Seats	Seats Distributed on Full Rep. by Pop. Basis	Deviation from Rep. by Pop. in Current House
Ontario	10,084,885 (36.9)	99	109	-10
Quebec	6,895,963 (25.3)	75	75	0
Nova Scotia	899,942 (3.3)	11	10	+1
NB	723,900 (2.7)	10	8	+2
Manitoba	1,091,942 (4.0)	14	12	+2
BC	3,282,061 (12.0)	32	35	-3
PEI	129,765 (0.5)	4	1	+3
Sask.	988,928 (3.6)	14	11	+3
Alberta	2,545,553 (9.3)	26	27	-1
NFLD	568,474 (2.1)	7	6	+1
NWT	57,649 (0.2)	2	1	+1
Yukon	27,797 (0.1)	1	0	+1
Total	27,296,859 (100.0)	295	295	

total Commons representation to 337.
- Quebec will receive a constitutionally guaranteed 25 percent share of Commons representation in perpetuity.

Aboriginal Self-Government

- The inherent right of aboriginal self-government is constitutionally recognized.
- All governments committed to negotiating the precise powers, jurisdiction and resources of aboriginal governments.
- There will be a five-year delay on the legal enforceability of self-government claims before the courts.
- No new land rights are created though the recognition of the inherent right; all legislation authorized by aboriginal governments must conform to laws that are essential to the preservation of peace, order and good government within Canada.
- Aboriginal governments possess the power to pass laws in order to safeguard and develop their languages, cultures, economies, identities, and traditions.
- All aboriginal governments are subject to the Charter but these governments are entitled to make use of the notwithstanding clause.

The Division of Powers

- The deal largely replicates the July 7 Accord.
- Provincial governments may opt out of future shared-cost programs, with full fiscal compensation, provided they develop compatible programs meeting national objectives.
- A transfer of jurisdiction over labour-market training and culture to the provinces with the proviso that federal authority will be maintained over major cultural institutions and unemployment insurance.
- The federal government consents to relinquish authority, on provincial request, over: forestry, mining, tourism, recreation, housing, and municipal and urban affairs.
- Federal and provincial regulations respecting telecommunications are to be streamlined; both orders of government may develop co-arrangements respecting immigration and regional development policy.

The Meech Lake Provisions

- The pact enshrines most of the conditions of the Meech Lake Accord.
- Quebec is recognized as a distinct society.
- All provinces are given a veto power with regard to future constitutional reforms to federal institutions.
- The federal government is mandated to select Supreme Court justices from lists provided by the provinces.

Table 2 Proposed House of Commons and Extent of Deviation from Representation by Population

Province	Proposed Seats	Seats Distributed on Full Rep. by Pop. Basis	Deviation from Rep. by Pop. in Proposed Commons
Ontario	117	124	-8
Quebec	93	85	+8
Nova Scotia	11	11	0
New Brunswick	10	9	+1
Manitoba	14	13	+1
BC	36	40	-4
PEI	4	2	+2
Saskatchewan	14	12	+2
Alberta	28	32	-4
NFLD	7	7	0
NWT	2	1	+1
Yukon	1	1	0
Total	337	337	

Table 3 Proposed Parliament (House Plus Senate) and Extent of Deviation from Representation by Population

Province	Proposed Seats	Seats Distributed on Full Rep. by Pop. Basis	Deviation from Rep. by Pop.
Ontario	123	147	-24
Quebec	99	101	-2
Nova Scotia	17	13	+4
New Brunswick	16	11	+5
Manitoba	20	16	+4
BC	42	48	-6
PEI	10	2	+8
Saskatchewan	20	14	+6
Alberta	34	37	-3
NFLD	13	8	+5
NWT	3	1	+2
Yukon	2	1	+1
Total	399	399	

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The Harms That Men Do Live After Them

by Beverley Baines

I had not realized how harmful the current constitutional accord is for women until I attended a constitutional briefing session at Queen's Park recently. While there, I heard ten good reasons for women to vote "no" in a constitutional referendum.

FIRST Although violence against women is escalating, the new accord makes no reference whatsoever to woman abuse, nor to ways of halting it. But women see violence as a fundamental, or constitutional, issue.

SECOND There will be only two references to women (or, more accurately, "female persons") in the new accord. One appears in the Canada Clause that will give women and men equality rights again. However, the Canada Clause contains other fundamental values as well, and the most recent draft differentiates among them such that some appear to be constitutive (parliamentary democracy, aboriginal rights, and Quebec's distinct society), while others are merely commitments. Among the latter a further distinction is made between the official-language minorities to whom Canadians and their governments are committed and racial, ethnic, and gender equality seekers to whom Canadians — but not our governments — are committed. These distinctions create a hierarchy of rights that not only devalues gender equality but also jeopardizes existing Charter-based sex equality rights.

THIRD The only other reference to women is contained in the aboriginal rights provisions, which state that aboriginal women will retain their present guarantee of equality rights in section 35(4) of the 1982 Constitution Act. However, this guarantee applies only to their existing aboriginal and treaty rights. In a significant omission, aboriginal women were not guaranteed equality rights in the context of the inherent right to aboriginal self-government. Instead, they were told to negotiate these rights at one of the constitutional conferences on aboriginal issues to be held no later than 1996 and every two years thereafter. That said, the Native Women's Association of Canada, which had argued for subjecting the inherent right of aboriginal self-government to the sex equality rights provisions in the Charter, has not been assured of attendance at any such conference, despite a Federal Court decision declaring their entitlement to participate.

"There is no guarantee that the courts will be able to protect our equality rights. Nor is there any basis for believing that women will have a say in future constitutional negotiations."

FOURTH There is no reference to the disabled in the Canada Clause, an omission that could have consequences for the Charter-based rights of disabled women.

FIFTH While Nova Scotia, British Columbia, and Ontario each have promised that three of their six senators will be women, they refuse to entrench this commitment in the constitution. Further, these nine women senators will constitute 14 percent of the new sixty-two member Senate, precisely the same percentage as women constitute today in the present 112-member Senate. In numerical terms, however, this is likely to translate into fewer women in Parliament.

SIXTH There was not even the remotest hint of a promise — neither for today, nor for the foreseeable future — that women should constitute at least half of the members elected to the considerably enlarged House of Commons.

SEVENTH While Quebec received a constitutional guarantee that three of the nine Supreme Court of Canada judges will be drawn form the civil law tradition, there is no mention of the need for women judges, let alone a guarantee that they constitute fifty percent of the court. Yet as recently as eighteen months ago, the Prime Minister treated the retirement of the first woman appointed to the court, Madame Justice Bertha Wilson, as the occasion to replace her with a male judge.

EIGHTH The Social Charter for which Premier Rae takes credit is not justiciable, which — if upheld — means that it gives us empty rights and unremediable responsibilities.

NINTH While existing national social programs may be protected, future national social programs are not. The only social program currently on the national agenda (and it has been there forever) is daycare, which therefore will be vulnerable not only to funding considerations but also to any individual province's political wisdom, such as it is.

TENTH Although the present Senate has not had any occasion in recent memory to veto legislation imposing new taxes on natural resources, that — along with french language and cultural rights — will be the only kind of legislation over which the newly constructed Senate will have an absolute veto. But the

only government bill that the Senate actually vetoed in the past thirty years — the abortion bill — will no longer be subject to an absolute veto by the new Senate. In depriving the Senate of the power to defeat any future attempts at re-criminalizing abortion, the message is clear: when the democratic process works for women, the first ministers will intervene to prevent it from happening again.

In the face of this lengthy and quite possibly incomplete list of the harms that the new constitutional accord holds for women, Mr. Rae wants Ontario women to forgive and forget. We should forgive his failures on our behalf because he tried his best to persuade the other first ministers to support gender equity. It is not his fault that they refused to cooperate, is it?

Of course the word "forget" did not actually cross Mr. Rae's lips but the words "unity" and "Canada" did, with some frequency. Despite the palpable anger in the room, the Premier nevertheless persisted in urging women to put their own concerns aside in order to support the accord.

To what end? There is no guarantee that the courts will be able to protect our equality rights. Nor is there any basis for believing that women will have a say in future constitutional negotiations. Put simply, these risks are unacceptable.

Perhaps it is time to demand that the Premier of Ontario and the other first ministers give us a women's province — one in which at least 52 percent of the legislators and judges must be women. Then we could vote "yes" in their constitutional referendum.

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WESTERN REPORT

Something Not So Funny Happened on the Way to Senate Reform

by Roger Gibbins

If you strip away the details from past proposals for Senate reform, the basic objective has been to create an effective regional counterweight to the demographic dominance of Ontario and Quebec in the House of Commons. Thus, it is bitterly ironic that the new agreement on Senate reform will strengthen central Canadian dominance, and more specifically Quebec's dominance, of the national political process.

It has always been assumed that there would have to be compromise if Senate reform were to be achieved, but it was also assumed that some of the compromising would be done by opponents of reform. A reformed Senate was seen as the bitter pill that Quebec might be prepared to swallow in return for more powers, constitutional recognition as a distinct society, a veto on constitutional amendments, guaranteed representation on the Supreme Court, and so forth. As it turned out, Senate reform was a sweetener for Quebec, and a bitter pill for the west.

Effectiveness Gutted

The constitutional package has trivialized the Senate. It will only be able to delay money bills temporarily and, in the case of virtually all other legislation, a Senate "veto" will result in a joint sitting of the combined Parliament in which M.P.s will outnumber senators by a margin of greater than five to one.

The Senate has an absolute veto in only two cases. The first and insignificant case is with respect to *new* federal taxation on natural resources, something that might come along once in a generation. Even here, it is worth noting that a new national energy program would likely be passed by an equal Senate with the support of Ontario, Quebec, New Brunswick, Nova Scotia, PEI and one Senator picked up from elsewhere. The new Senate is not "NEP-proof," but then neither should it be.

Quebec's Power Is Enhanced

The second, non-trivial case is the need for a double-majority with respect to legislation touching on matters of language and culture. Here, the six Senators likely to be appointed by the Quebec government, who will dominate any francophone contingent, will have an absolute veto, the extent of which depends on how broadly "culture" is defined. If we adopt the definition suggested by Marcel Masse, who once said that culture included "anything touched by the human intellect," then the powers of the Quebec cabinet *in the Parliament of Canada* could be extensive.

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

Power Shift in the House of Commons

If the new Senate has been trivialized, the size and the power of the House of Commons have been increased. How does the west fare in this shift? Before the deal, the four

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

If we move to greater representation by population in the House, the situation is unlikely to improve for the west. Most of the available seats for redistribution will be locked up in Quebec, and Ontario, even with its "signing bonus" of 18 additional seats, will still have the most compelling claim for more seats. Alberta and British Columbia may be able to cannibalize Manitoba and Saskatchewan, but there will be no significant shift of seats to the region as a whole.

"When the next 'Canada Round' is opened up in a few years to respond to renewed demands from nationalists in Quebec, western Canadians should not come to the table."

The 0.1 Percent Solution

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

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

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

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

QUEBEC REPORT

Bluffing All the Way

by Guy Laforest

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

Bourassa's Post Meech Strategy

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

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

The Retreat Begins

In the past year, Robert Bourassa has dismantled piece by piece the strategy that he had orchestrated after the failure of Meech. From a clear rejection of negotiations with 11, the Liberal government has moved to the following positions: a return to the constitutional table if all the elements of Meech were included in the new package; later on, the return was conditional upon securing the "substance" of Meech; then, negotiations not only with 11, but with 17 partners around the table became acceptable if the "substance" of Meech was granted. When all the partners except Quebec reached an agreement on July 7 in Ottawa, Mr. Bourassa asked for clarifications on the distinct society and on the creation of new provinces; he also expressed reservations about the parts of the deal that concern the Senate and the native peoples. In the absence of documents, it would be an act of pure faith to affirm that Mr. Bourassa had been given these "clarifications," when he chose in late July to return to the constitutional table.

"In a matter of a few hours, without producing the shadow of a document, Mr. Bourassa appears to have been successful in convincing most of his fellow Liberals."

At the constitutional conference in Ottawa, August 18 to 22, Mr. Bourassa retreated on four major fronts. As I argued in the first issue of *Canada Watch*, Mr. Bourassa was condemned to agree with the others once he had committed himself to the negotiating process of the Canada Round. On Wednesday, August 19, Mr. Bourassa accepted the principle of an equal Senate, thus giving his indirect assent to the vision of those like Jim Horsman who believe that there are ten equal provinces in the Canadian nation. The principle of an equal Senate is the institutional supplement of a political culture insisting on individual and provincial symmetry, cherished by Pierre Trudeau and fostered by the *Charter of Rights and Freedoms*. The Allaire and Bélanger-Campeau reports stated the opposition of Quebec to this vision of Canadian federalism.

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

The Sales Pitch Begins Early

A week later, after two more days of negotiations in Charlottetown, the partners in the Canada Round have yet to publish the text of their agreement in principle. Mr. Bourassa did not wait for such formalities. He rushed back to Québec City to sell the deal to his cabinet, to his caucus, and to the Liberal Party. In a matter of a few hours, without producing the shadow of a document, Mr. Bourassa appears to have been successful in convincing most of his fellow Liberals. Having attended the special congress of the Liberals in Québec City, I had the opportunity to smell the atmosphere of Gaullism. The Liberals were asked to give a blind vote of confidence to their leader and they delivered accordingly. Not all of them did. Jean Allaire, the author of the now-defunct constitutional position of the party, and Mario Dumont, the president of the powerful youth-wing, dared to express their dissent in public.

"Considering that citizens are tired and that the agreement will be supported by the machinery of two governments, it is quite possible that the "Yes" side will triumph. Canadian federalists would thus have obtained their peace, until the next election in Quebec ..."

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

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

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

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

LEGAL REPORT

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

by Jamie Cameron

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

SCHACTER V. CANADA: THE TEST CASE

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

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

The question, in the Chief Justice's view, was not "whether courts can make decisions that impact on budgetary policy", rather it was "to what degree they can appropriately do so." Mr. Schacter was denied relief because the court concluded, in the circumstances, that unemployment benefits intended for adoptive parents should not be extended to natural fathers.

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

REMEDIAL CHOICE AND INSTITUTIONAL CONSEQUENCES

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

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

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

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

mit new resources, tens of thousands of charges were stayed.

Enforcing the Charter has institutional consequences in a variety of contexts. What the courts must decide is whether enforcement should take priority over other objectives, including the institutional consequences of doing so. The Supreme Court of Canada had made enforcing the Charter its priority long before *Schacter* was decided.

Expanding the Arsenal

What then does "reading in" imply for institutional relations? Despite endorsing it, Chief Justice Lamer acknowledged that choice of remedy acquires a new dimension when an unelected judiciary reads new provisions into democratically enacted legislation. He indicated that such a step should therefore be taken only in the clearest of cases.

Will the courts accept the Chief Justice's invitation to rewrite legislation, or will "reading in" be regarded as an exceptional remedy, available only in narrow circumstances? It all depends on how the judiciary assesses the relative importance of enforcing the Charter and preserving equilibrium between the legislatures and the courts.

Where reading in is perceived as intrusive of legislative function, the remedial issue can be pre-empted by a finding that the Charter has not been violated. It is doubtful that a violation would have been found in Schacter, had the issue been open to the court.

Yet *Schacter* has already been followed: in *Haig v. Canada*, the Ontario Court of Appeal granted a declaration adding "sexual orientation" to section 3 of the Canadian *Human Rights Code*, as one of its prohibited grounds of discrimination.

Reading in expands the arsenal of remedial tools the Supreme Court of Canada has employed to enforce the Charter. *Schacter* is consistent with a jurisprudence that seeks the attainment of that objective at the expense of democratic authority. Until the judiciary's powers are challenged, that trend can be expected to continue.

Jamie Cameron is Associate Professor and Assistant Dean at Osgoode Hall Law School. Legal Report is a regular feature of Canada Watch.

CW UPDATE

The Month In Review

by David Johnson

Fall Referendum on National Unity Deal

The national unity deal agreed to on August 22 in Ottawa will be put to a non-binding national referendum on October 26. Although the exact wording of the question has not yet been unveiled, it will probably consist of a single question asking whether voters approve of the entire reform package. Where provincial referenda are mandated by law, as in Quebec, Alberta, and British Columbia, the referendum will be conducted under provincial auspices; in all other areas, the new federal referendum legislation will operate. Though no referendum result can legally bind the provincial legislatures, the results of this vote will undoubtedly be politically binding on the premiers and the prime minister.

For details of the national unity agreement, please see the overview by David Johnson on page 19 of this issue.

NAFTA Agreement in Principle

On August 12, trade representatives for the governments of Canada, the United States, and Mexico agreed in principle to a North American free trade agreement (NAFTA). If the agreement receives legislative ratification, North America will become the world's richest trading bloc, bringing together 360 million persons into a U.S.$6.6 trillion common market. The agreement builds on the Canada-U.S. Free Trade Agreement by calling for the general elimination of most tariffs between the countries over the next 10 to 15 years.

Canada currently exports slightly more than Cdn.$500 million in goods to Mexico. Auto parts, newsprint, steel, and wheat constitute the bulk of these goods. Canada currently imports some Cdn.$2.6 billion in goods from Mexico. Cars, auto parts, computers, and crude petroleum constitute the bulk of this trade.

For analysis on the process of ratification and the impact that this agreement might have on Canada, see the articles by David Johnson and David Leyton-Brown beginning on page of this issue.

Equality Party's Claim Rejected

On July 30, Mr. Justice Pierre Michaud of the Quebec Superior Court rejected a Charter challenge brought by the Equality Party against Quebec's referendum legislation. The court ruled that legislative provisions compelling all campaign participants to group together under one of two competing umbrella committees, with each committee subject to rigorous expenditure restrictions, infringed on freedoms of association and expression. The court held, however, that such infringements were reasonable and demon-

strably justifiable in order to ensure that the referendum was conducted on a level playing field. On August 13, the Equality Party announced that it would appeal this decision. Recall that the federal government refrained from imposing any restrictions within its referendum legislation on the campaign activities of "third parties" on the ground that such restrictions would constitute violations of the Charter.

Landmark Charter Rulings

In two decisions released over this summer, the courts have reaffirmed the legitimacy of the practice of "reading in" — that is, the ability of courts to interpret legislation to extend rights and entitlements not explicitly enumerated in legislation.

In *Schachter v Canada*, released on July 9, the Supreme Court affirmed that the *Charter* permits courts to "read in" to legislation. In this case, though, the court refused to read into the Unemployment Insurance Act a right to natural fathers to claim U.I. benefits. The court held that natural fathers were numerically larger than adoptive fathers (who were already entitled to benefits) and thus "reading in" a right for natural fathers would substantially alter the legislative framework. Note that prior to this decision Parliament had already extended U.I. benefits to natural fathers, albeit for a shorter period than had hitherto been granted to claimants.

On August 6, the Ontario Court of Appeal, in following the Schachter doctrine, ruled in *Haig v. Canada* that discrimination on the basis of "sexual orientation" was prohibited under the Canadian Human Rights Code notwithstanding the omission of this term as an illegal ground of discrimination within the legislation. The court took the initiative to read "sexual orientation" into the federal rights code as a necessary provision designed to protect a historically disadvantaged group — namely, homosexuals.

For additional commentary on these developments, please see the article by our legal analyst, Jamie Cameron, on page 25 of this issue.

Canada Watch Calendar

August 22	Agreement-in-principle on unity package by first ministers, territorial and aboriginal leaders after four-day conference
August 29	Informal text of constitutional package agreed to in Charlottetown after two-day conference
September 3	Quebec National Assembly to debate amendments to Bill 150; government proposes October 26 referendum on federal proposals rather than sovereignty
September 8	Last day to give notice of motion in House of Commons for text of national referendum question to be held on October 26
September 9	Last day to table question in Quebec National Assembly for Quebec's October 26 referendum
	Notice of motion from the federal government of text of national referendum question to be held on October 26
September 10	House of Commons resumes sitting. Tabling of constitutional agreement and national referendum question in House of Commons. Start of debate on referendum question.
September 15	Two Manitoba by-elections, with Premier Gary Filmon's legislative majority at stake
Mid-September	First Ministers' Conference expected to finalize formal legal text of unity deal
September 19	Federal referendum campaign formally begins
September 27	Quebec referendum campaign formally begins
Late September	Expected release of formal text of North American Free Trade Agreement
October 26	Canada-wide referendum on unity proposals

The Constitution:
Year of Decision

September 23 & 24, 1992

This conference will provide informed and independent analysis of the new national unity package.

Speakers include:

Michael Adams
Maude Barlow
Senator Gérald Beaudoin
Alain Gagnon
Roger Gibbins
Peter Hogg
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Coming in the October Issue of Canada Watch

- Former Alberta Premier Peter Lougheed gives his assessment of the proposed unity deal
- All the latest developments and analysis of the Unity Referendum Campaign