

will be far more productive of intelligent concessions to Québec.

*"There is a critical failure to appreciate the fact that the removal of Quebec from the Canadian federal equation will almost certainly destabilize the entire federation."*

Unfortunately, Canadians are not asking themselves this question. Tragically, the very horrors that may well flow from the secession of Québec are seen not as reasons for negotiating, but are rather triumphantly put forward as facts demonstrating that this eventuality could never come to pass. It is all rather like the argument that there is no need for nuclear arms control, because a nuclear war would be so horrible that no-one would ever start one.

So what does this particular presumptuous foreigner believe that Canada should be doing? The answer is,

critically, that it should be doing something, anything, rather than simply waiting for the blow to fall while denying that any arm is raised against it. On my assessment, Canada faces probably its gravest constitutional crisis. Big problems require big responses. Time has passed by solutions of the type offered by Meech Lake, and was never even on the same road as the risible Spicer Commission. When a nation faces disintegration, the only option is reintegration, and this is a work of constitutional creation, not tinkering. Eighteen sixty-seven comes around again next year and, the sooner Canada realizes it, the better.

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[Professor Craven's views are more fully set out in "Of Federalism, Secession, Canada and Québec" forthcoming in the *Dalhousie Law Journal*. His book on succession in Australia is *Succession: The Ultimate States Right* (Carlton, Victoria: University of Melbourne Press, 1986)].

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## CANADA AFTER MEECH

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and

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### INTRODUCTION

This comment is divided into two parts. First, we will review the events surrounding the formulation and subsequent demise of the Meech Lake Accord. Second, we will try to identify, and comment upon, some of the effects of the failure to reach agreement on the principles contained in the Accord.

### THE PROCESS

April 17, 1982, was an extraordinarily important date in Canadian history. On that day, Canada's quest for sovereignty from Great Britain was realized. By affixing her signature to the *Canada Act, 1982*, Queen Elizabeth patriated the *Canadian Constitution*, making Canadians solely responsible for any future changes in their constitutional regime. At the same time, the very nature of Canada was

changed from a country ruled by the principle of parliamentary sovereignty to one governed by the rule of constitutional supremacy.

Long sought-after constitutional reform had been achieved. In spite of the blustery weather conditions, there were smiles all around. Only one factor cast a damper on this moment. Québec was not a signatory to the constitutional agreement. Québec had, through its referendum on sovereignty provided the impetus for reform. And yet, while celebrations were going on in Ottawa, Québec was preparing to exercise its legal right to opt-out of significant parts of the Constitution.

A constitutional impasse ensued. Eventually new governments came to power in both Québec City and Ottawa. These governments, headed by Robert Bourassa and Brian Mulroney, wanted a deal that would end Québec's

constitutional isolation. The beginning of the process to achieve such a deal began in May of 1986 when Gil Remillard, Québec's Intergovernmental Affairs Minister, spelled out the five conditions for Québec's acceptance of the 1982 Constitution:

1. Recognition of Québec as a distinct society.
2. A greater provincial role in matters of immigration.
3. A provincial role in appointments to the Supreme Court of Canada.
4. Limitation on the federal spending power.
5. A veto for Québec on constitutional amendments.

On the 30th of April, 1987, the eleven first ministers — gathered in a cabin by the shore of Meech Lake and, hidden from the prying eyes of aboriginal groups, women's groups, and special interests groups of all sorts, they struck a deal on the future of Canada. Québec's five demands were incorporated in what became known as the Meech Lake Accord.

It became clear that the other nine provinces wanted many of the same things that Québec wanted and, consequently, all the provinces were willing to carve up the Canadian pie. The Prime Minister wasn't going to stop them — he was, quite simply, desperate for a deal. A month later the first ministers met again in the Langevin Block in Ottawa and sealed the deal. On June 3rd, 1987 the Constitutional Accord was signed and the process of selling it to the country began.

This should have been easy. After all, they had the unanimous agreement of all the provincial premiers. Now all the premiers had to do was pass resolutions in their provincial assemblies ratifying the deal. The first ratification came from Québec on June 23rd, 1987. There were 3 more years to obtain the ratification of the other nine provinces and the federal government. The process of ratification went smoothly at first. The federal government and seven more provinces joined Québec in ratifying the accord. Only New Brunswick and Manitoba remained and there seemed to be plenty of time to obtain those ratifications. Then the process hit some unforeseen snags. New governments took office in Manitoba — Gary Filmon's minority government replaced the government of Howard Pawley — and in New Brunswick — Frank McKenna replaced Richard Hatfield. From the outset McKenna was an opponent of the Accord while Filmon was coping with the problems of a minority government. In Newfoundland, Clyde Wells' Liberals replaced Brian Peckford's Conservatives. Ultimately, Wells revoked Newfoundland's ratification of the agreement.

As of June, 1990 — the last month for ratification — three provinces were holding out. A meeting of first ministers was held in Ottawa in an attempt to salvage the Accord. Finally, on June 9th, an agreement was concluded which provided that the Accord would be put before the legislatures in New Brunswick, Newfoundland and Manitoba. New Brunswick ratified the agreement but the legislatures in Manitoba and Newfoundland did not. In large measure the Accord was rejected because of the defiance of Elijah Harper, an aboriginal Canadian, who refused to give the unanimous consent necessary for Manitoba to debate the measure.

*"The fact that one native person was able to do that which Clyde Wells, Gary Filmon and others were unable to do was an act which has emboldened and strengthened the resolve of native peoples to demand that their constitutional aspirations and concerns now be moved to the top of the constitutional reform agenda."*

After the frenetic activity of the spring, a summer to "cool down" was needed. Canada needed time to heal the emotional scars which accompanied the Meech Lake fiasco. But it was not to be. A number of important events have transpired since the failure of Meech Lake? These include:

- (1) The establishment by Premier Bourassa of the Bélanger-Campeau Commission to receive submissions and make recommendations in relation to Québec's constitutional future. Commissions have been created in Alberta, New Brunswick and Manitoba as well.
- (2) At this summer's Western Premiers' conference, the Premiers attempted to develop a unified strategy for future negotiations with the federal government.
- (3) At the annual Premiers' Conference in Winnipeg, the Premiers made it clear that they would not accept separate constitutional negotiations between the federal and Québec governments. Premier Bourassa was not in attendance.
- (4) The Oka crisis and the claims of aboriginal peoples for some form of sovereign recognition. Indeed, this one event — the Oka crisis and related aboriginal protests, particularly, the one at Kahnisetawke — heightened tensions and increased the level of anxiety of all Canadians regarding the future of their country.

- (5) The dramatic defeat of the Peterson government in Ontario. We must keep in mind that David Peterson had been hailed as a "modern father of Confederation" just weeks before.
- (6) The decision of Premier Frank McKenna of New Brunswick to ask the Maritime Premiers to consider some form of economic union.
- (7) The reelection of the Filmon government in Manitoba.
- (8) The setting up by the Federal Government of the twelve member Citizen's Forum on Canada's Future.

## THE RESULTS

What has been the effect of the failure to reach agreement on the Meech Lake Accord? A number of consequences can be identified:

### 1. THE EMPOWERMENT OF CANADA'S ABORIGINAL PEOPLES

The stand-off at Oka, and other related native protests, may be seen as a logical outcome of the failure to reach an agreement on the Meech Lake Accord. Aboriginal Canadians had requested for years that their claims to sovereignty be put on the constitutional table for resolution. However, at least since 1984, the obsession of the federal government has been to bring Québec into the "constitutional family." While clearly an important moral, if not legal, objective, this objective sounded a sour note with Canada's native community. The exclusion of their concerns from the Meech Lake Accord, and their dismissal with the refrain "wait till the next round", has produced to a volatile political situation.

The empowerment which native peoples felt at the failure of the Meech Lake Accord cannot be underestimated. The fact that one native person was able to do that which Clyde Wells, Gary Filmon and others were unable to do was an act which has emboldened and strengthened the resolve of native peoples to demand that their constitutional aspirations and concerns now be moved to the top of the constitutional reform agenda. Recent polls may strengthen the native position. In an October 30, 1990 G&M/CBC Poll, 55% of Canadians think that the government is not doing enough to settle native land claims.

Over the summer months, the issue of sovereignty did consume the Québec government and people of Québec but the sovereign claims being considered were those of the native peoples in Québec. The irony of this situation cannot be lost on Premier Bourassa and the Québec people. To further their sense of discomfort is the fact that, as some

reports suggest, approximately 95% of the territory of the province of Québec is subject to land claims by native peoples. This might indeed lead to a collective sense of insecurity on the part of Francophone Québécois.

### 2. INCREASING DEMANDS FROM THE PROVINCE OF QUÉBEC

While aboriginal claims may have the effect of pushing Québec's sovereign aspirations to one side for the moment, the reality is that this issue remains the central challenge to Canada's future as a federal state. The Bélanger-Campeau Commission will be reporting in the spring of 1991 with proposals for reform. The rejection of the Meech Lake Accord by English Canada has served to heighten feelings of Québec nationalism. It is predictable that the proposals which come forth from this Commission will be more "sovereignty oriented" than many English Canadians would like. In the same G&M/CBC Poll, 63% of Québécois saw separation from Canada as either very likely or somewhat likely. Only 37% of Québécois thought things should remain as they are today.

*"Greater decentralization is inevitable; the real question is how much decentralization we can tolerate and still have, in more than name only, a federal state."*

One thing that seems to have slipped the attention of many people is that Québec's five demands prior to Meech Lake were seen by the people and government of Québec as an "opening gambit". Québec saw the Meech Lake Accord as the beginning of serious constitutional negotiations, not the culmination of them. Their 1985 discussion paper stated:

Constitutional discussions should be reopened with the clear understanding that a comprehensive review of the *Constitution* must eventually be proceeded with. The process that is beginning will only be truly meaningful if it includes key elements which evidence a new spirit of dialogue.

Now that Meech Lake has failed, we can only presume that the demands of Québec will be considerably more far reaching than they were prior to June of 1990. The areas in which Québec will seek greater jurisdiction can be readily identified: (1) communications; (2) interprovincial and

international trade; (3) taxation; (4) external affairs; (5) limitations on the federal spending power; (6) a veto over all proposed constitutional amendments; (7) retention of the opting-out provision in the *Charter*, if the *Charter* is to apply at all; (8) jurisdiction over the appointment of all superior court judges; (9) consent to any Supreme Court of Canada appointments from the province of Québec; (10) greater control over language policies and greater protection for linguistic minorities outside Québec; (11) a Senate to which members are appointed by the provincial government. We might add here parenthetically that Québec has never been interested in an elected Senate; (12) immigration; and (13) recognition of Québec as a distinct society. We must recognize that a number of these areas are ones over which all provincial governments would be happy to have greater jurisdiction.

Furthermore, it is clear that Québec is not interested in "re-building the traditional relationship at either the economic or political level". Premier Bourassa continues to be attracted to the European Community model as a workable one for a reconstituted federal state. While the outline of this model has not been constructed, his vision of Québec as a "nation-state within Canada" provides us with some insight as to what a future Québec proposal might look like. Greater decentralization is inevitable; the real question is how much decentralization we can tolerate and still have, in more than name only, a federal state.

*"Our leaders simply cannot conceive of what they can do next on the national level to move constitutional negotiations forward and, hence, they have retreated to regional strategies designed to ensure they get their share of the pie."*

The reality is that strong feelings of nationalism exist in Québec. They are not going to disappear. The difficult issue for constitutional reformers is how to accommodate creatively these feelings of nationalism while retaining the basic structure of a federal state.

The price Québec will demand to remain within the federal system will be high. As columnist William Johnson of the *Montreal Gazette* noted last June: "The price will never be lower than Meech." Whether the rest of Canada is interested in paying the price is difficult to predict, although we sense a hardening of resolve on the part of many

Canadians. The use of the notwithstanding clause by Québec to exempt Bill 178 from the *Charter* and the awarding of the CF-18 contract to a Québec firm have had a profound impact on many westerners. Many may simply be prepared to say "let Québec go."

### 3. THE REGIONALIZATION OF CANADA

We have seen since the failure of Meech Lake, in more pronounced fashion than ever before, the "regionalization of Canada". This regionalism has taken two forms. First, the politics of regionalism have become the main focus of established political parties and leaders. We have seen some recent examples. The Western Premiers met in July 1990 and the main focus of their discussions concerned strategies for ensuring that the Western provinces got their "share of the pie" when it came to further negotiations with the federal government. Saskatchewan Premier Devin: was quoted as saying: "It's time Western Canada spoke up with a united voice. We are increasingly frustrated at seeing deals with central Canadian provinces and Ottawa." Premier McKenna of New Brunswick has recently called for a Maritime economic union to increase the bargaining power of that region. It seems that since Meech, the predominant strategy of the provinces is a limited, and we would say selfish, one focusing on the enhancement of regional interests at the expense of a national vision. This, we believe, demonstrates the paucity of creative solutions to our current crisis. Our leaders simply cannot conceive of what they can do next on the national level to move constitutional negotiations forward and, hence, they have retreated to regional strategies designed to ensure they get their share of the pie.

Secondly, we have seen the growth of regional protest parties in the federal political arena. These parties — the Reform Party and the Bloc Québécois — have sprung up and, indeed, flourished by responding to the deep dissatisfaction expressed by many in relation to the current state of politics in Canada. The Reform Party existed prior to the Meech Lake crisis but its popularity and attractiveness has grown since the failure of Meech. In addition, we see the creation of a second new party, the Bloc Québécois. This party was born directly out of the failure of Meech Lake and appears to capture the sense of frustration many Québécois feel. These parties, at present, attract support by espousing what we would describe as regional interests: western alienation, suspicion of the East and the federal government, a desire for a larger "say" in the economic decisions that affect westerners lives and, in Québec, a desire to create a new deal for Francophones. They exploit negative feelings and emotions. This results in greater

tension, and further fragmentation of the Canadian polity. While the politics of regionalism has its place, there is an attendant danger that the larger, collective interests of the country — the interests of Canada, if you like — are not articulated and are forgotten in the rush to pursue the politics of regional self-interest.

Further, suppose in the next federal election the Bloc Québécois wins 35 seats in Québec and the Reform Party 30 seats in the West. It is very likely that a minority government would result in Ottawa with a highly factionalized Parliament. Effective government would become more difficult if not impossible. This does not auger well for constitutional reform which generally requires a strong federal government to initiate discussions and bring the provinces to the table. At a time when a strong voice is required to articulate a national vision, such a voice would be muted or, more likely, would speak in a number of tongues.

#### **4. HEIGHTENED PUBLIC CYNICISM ABOUT POLITICS AND POLITICIANS**

We are undoubtedly witnessing a heightened level of public dissatisfaction and cynicism about politicians and the political process. One senses a national collective response: "we're fed up with the lot of you and we're not going to take it any more." This response is obviously not exclusively generated by the Meech experience, but Meech was the "last straw". The image of the Prime Minister gambling with the future of the country in such an apparently cynical manner alienated Canadians even further from the political process and the process of Meech Lake. The most visible victim of this growing alienation, to date, has been David Peterson, but there will be others.

Recent Polls confirm this. Eighty-four percent of those polled think the country needs a leader with vision. One of the few things that many Canadians — 75% — agree on is that the present political leadership cannot get us out of the dilemma in which we find ourselves.

This alienation was in part generated by the public's exclusion from the Meech debate, at least at a meaningful stage. After the deal was reached, Canadians were confronted with a *fait accompli*. They were told that the deal could not be changed. Politicians probably misjudged the degree of outrage felt by Canadians over this approach to constitutional reform.

One can contrast the dearth of public involvement in the

Meech Lake process with the period leading up to the adoption of the 1982 *Constitution*. Prior to 1982, there was extensive public input, particularly during the Joint Senate/House Committee hearings, from hundreds of individuals and groups. It was not only the opportunity to present one's views that was important but the time at which these views were sought and the context in which they were sought. They were solicited at a time in the process of negotiation when it was clear that the opportunity existed to have some impact on the substance of the proposed reforms. Furthermore, it had been made clear that the federal government sought out public input in an attempt to ensure the *Charter* was a document that commended itself to the largest number of Canadians possible. In addition, the lobbying efforts of aboriginal groups, women's groups, and ethnic groups "paid-off", in the sense that changes were made to accommodate their concerns.

It is our belief that, in 1982, we forever altered the process required to bring about constitutional change in this country. That was a fact that the Prime Minister and premiers simply failed to appreciate. Executive federalism has its limits even in this country, and those limits were exceeded in the Meech Lake negotiations.

The creation of the Citizen's Forum can be seen as a belated attempt, on the part of the federal government, to involve the public in the process of constitutional reform. The Prime Minister in setting up the Forum stated that it was time for "soul searching" and that the Forum would cross the country to find out how Canadians felt about their constitution.

Where Canada goes after Meech depends upon political will and creativity. The exercise of this will, in a spirit compromise, may produce a reformulated constitution which will provide the basis for Canada's constitutional and political development into the next century. At this juncture in our history, however, political will and creativity seem to be in short supply.

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