CONSTITUTIONAL
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CONSTITUTIONNEL

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Constitutional Forum

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SYMPOSIUM REPORT
**After Allaire and
Bélanger-Campeau**

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Springtime in Edmonton is short but delicious. The smell of emerging greenery wafts along the Saskatchewan river valley, by the University of Alberta. It was in the spring of 1991, after the Allaire and Bélanger-Campeau reports, that the Centre for Constitutional Studies gathered together twenty scholars from across Canada and a variety of disciplines to think about constitutional reform. The spring seemed well-suited for the endeavour; a window of opportunity to think afresh about matters that had become bogged down in entrenched and oft-stated positions.

The idea for the symposium, conceived originally by Alan Cairns, was to gather together scholars to think imaginatively about our future constitutional prospects in a closed session. In this way, rhetorical stances could be displaced with genuine dialogue. Participants were asked to come, not with prepared papers, but only with their thoughts on a number of questions circulated before the meeting. The following is a report of that discussion. Because of the closed nature of the symposium, the identity of speakers generally remain anonymous. Some of the participants, however, have kindly offered their views arising out of the symposium, and they follow this report.

I. The Current Crisis

There appeared to be agreement that we were facing a constitutional crisis. There was no consensus, however, about its causes or what solutions to look for to resolve it. The crisis was characterized as: a conflict of nationalisms; clashing and irreconcilable cultural differences over such matters as the Charter and the Free Trade Agreement; an identity crisis which required finding a way to accommodate our colonizer and colonized past, and; a matter grounded in symbolic rejections.

The participants were despondent about the fact that we were still embroiled in these "macro-constitutional" disputes which wore at our very essence as national communities. Not only were many issues implicated in the current debate awkwardly being framed in constitutional terms (such as the jurisdictional claims over immigration) but many other important issues, such as the increasing numbers living in poverty, were being neglected in the face of the ongoing crisis. There was even expressed boredom with the current debate.

The participants acknowledged that it was useful to distinguish between long term and short term constitutional reform. Disagreement existed over which strategy to pursue. For some, it was important that we forget about Québec's deadline for renewed federalism, sometime in October 1992. Rather, Canada should take the time necessary to resolve its long term concerns, despite the October deadline. Others agreed that we would have to find a new covenant upon which to base constitutional reform expressed, perhaps, through a new preamble. That new covenant would expressly accept the principle of equality of peoples.

The short term solvers advocated a more pragmatic and less foundationalist approach. This might mean tackling a handful of issues dossier by dossier, in order to forge a consensus over a small number of issues: what Dale Gibson characterizes in his comments as "son of Meech".

Another short term solution identified was the "stick and carrot" approach. The stick is the threat of no economic association with Canada should Québec secede, and the carrot is the promise of sovereignty for Québec over cultural matters. It was suggested that this was not, however, a solution that could last beyond the short term.

To what extent would partisan party politics direct the short term agenda? One participant expressed concern that, with the short term approach, immediate electoral interests direct the agenda for change. It also over-emphasizes the necessity for change. To the extent that issues of Parliamentary reform are being driven by the

Reform Party agenda, and clutter up an already heavy portfolio of constitutional reform, this observation was on target.

Regarding the solutions to the crisis, some projections saw two-way traffic on jurisdictional issues, together with some aspects of the Reform party agenda (i.e. loosening party discipline in the House of Commons) and a reformed senate. Another forecast was for symmetrical decentralization, essentially the agenda of groups such as the Business Council on National Issues. It was predicted that this decentralization would not be accompanied by the financial resources to the provinces to provide those public services. This could be sold, essentially, as a way of lessening government regulation, like the Free Trade Agreement and privatization initiatives.

While this decentralization would be welcomed in Québec as a way of responding to Québec's legitimate demands, it could lead to a massive backlash in the rest of the country. Indeed, others argued, there is simply no reason for Canada outside of Québec to decentralize. It is the fear of being drawn economically into the United States that animates Canadian nationalism and the championing of strong central institutions. As free trade expands economic links southwards, lessening the links with the rest of Canada, there will be even fewer economic constraints for Québec to remain in Canada. It is a reason to conceive of some other, new arrangement between Canada and Québec.

II. Issues of Self-Determination

Many of the symposium participants saw Canada as moving towards irreconcilable claims to self-determination. Québec, of course, makes the claim vis-à-vis the rest of Canada, and First Nations make the claim vis-à-vis both Canada and Québec. The debate concerned the question of who had the authority to define the boundaries of acceptable claims to self-determination. For example, as Stephen Scott maintains in his comments, if Canada is divisible, so must be Québec.

Scott's argument sits well with aboriginal communities in Québec, who themselves face serious threats to their language, way of life, and livelihoods. It may be that, as a result, aboriginal peoples in Québec and the Québec government are moving towards irreconcilable conflict. This is not so, claimed other voices from Québec. Québec has a well-grounded and recognized right to self-determination. Moreover, the Québec National Assembly has recognized aboriginal communities as distinct societies with a right to self-government, the first provincial government to ever do so.¹ While the concept

¹See Québec, Assemblée nationale, *Journal des Débats* à la p.2570-71 (20 mars 1985)

of self-determination is admittedly a vague, even awkward concept, it is also a useful one in the current context.

III. Aboriginal Issues

An aspect of the identity crisis identified by the participants is the emerging realization that Canada's legal and constitutional arrangements are premised upon colonial and racist concepts. For First Nations, therefore, there is no difference between English and French Canada. They both have been colonizers of aboriginal communities, exploiters of natural resources, and both have the same conception of time and economics, much of it alien to aboriginal ways of thinking.

The symposium participants explored the ways in which aboriginal issues have been traditionally perceived, and how they may be resolved in the future. Everyone agreed that aboriginal issues had now become of prime concern to all regions in the country. Aboriginal issues were reported to be a high priority item on some lists; the New Democratic Parties in British Columbia and Saskatchewan could be seen as powerful advocates for aboriginal self-government. With the great potential of the NDP coming to power in those provinces by the end of 1991, there could be a discernible swing at the provincial level in favour of self-government for First Nations. In some respects, aboriginal concerns were of greater prominence in those provincial NDPs than the threat of Québec sovereignty. Even the Reform Party, it was suggested, could be a powerful ally to First Nations. Preston Manning, prior to his entry into politics as Reform leader, had done a lot of consulting work on economic development issues with Indian bands and, therefore, had a lot of experience on aboriginal issues. While aboriginal self-government may be acceptable to Manning, it was pointed out, this would not be accompanied by financial assistance to native bands. In other words, Manning is in favour of devolution of power to First Nations without financial solutions.

The time appears ripe for resolving, constitutionally, the self-government issue. The Royal Commission on Aboriginal Peoples, whose mandate at the time of the symposium was being drafted by former Chief Justice Brian Dickson, would deal with social and economic issues. This would leave the broader issue of constitutional reform to this round of constitutional negotiations. It was suggested that, by dealing with the aboriginal issues now, we could find a way out of our constitutional quagmire. By doing away with the racist premise of the present legal regime, we could welcome constitutionally the equality of all peoples. It would require a responsiveness to the identity of others, and a respect for their differences. If we fail to recognize those

differences, it was argued, we would be incapable of recognizing the ethno-national background of any group in Canada.

IV. Process Issues

The discussion then turned to equitable processes that could be employed to make more meaningful public participation and input into constitutional change. The issue of a constitutional convention or constituent assembly, which had dominated the procedural debate until then, was one mechanism available. There appeared to be agreement amongst many in the group that a constituent assembly would be unnecessary if we only mildly reformed our ongoing constitutional arrangements. Rather, a constituent assembly would be useful if we were undertaking wholesale changes to the constitutional regime.

Two types of constituent assemblies were identified: (1) an assembly directly elected by popular vote, and (2) an assembly constituted by delegations from elected legislatures. The Dominion colony of Newfoundland had experience with the former type in 1946-48, and the provinces of Canada and the maritimes with the latter type in 1864-66.

The Bélanger-Campeau Commission was proffered as a hybrid of the two types; one-half of it constituted by representatives of the National Assembly, the other half chosen by the Premier of Québec from a list compiled by both main parties in the Assembly. Through this process, many groups, such as business, labour and the artistic community were over-represented while many other groups were not represented at all — aboriginal peoples, the poor, women, and ethnic groups were given little or no representation on the Commission.

The north has also experimented with a constitutional assembly in the Western Constitutional Forum. The Forum was responsible for developing a constitutional formula for the groups living in the western region of the Northwest Territories. The Forum had three representatives from the legislature, each representing one of the distinct ethno-national groupings in the north, and representatives from each of the constitutionally-recognized aboriginal groups.

It was recognized that, in the end, an assembly alone would not guarantee success. First, it would be naive to think that no politicians would run for election in the first type of assembly, therefore, we would likely be confronted with many of the same types of individuals, and party pressures, as we do today. Second, with very little tradition of democratic consultation regarding constitutional matters, we would still need politics to

amend the constitution: negotiations likely would still take place in private. Finally, as long as we continued to exclude aboriginal groups from those negotiations, it would be no different than, as one participant described it, "moving furniture around a house".

With regard to the participation of Québec in the process of constitutional change, it was concluded that negotiations likely would not take place if there was something unacceptable to Québec on the table. The package of reform, therefore, will do little to insult Québec's constitutional sensibility. Much of the feedback obtained from the the Canadian public by the Spicer Commission, as well, would have to be ignored or dealt with in some other manner and at some later time.

If there was anything on the table for Québec, it is likely that Bourassa will, as promised, hold a referendum. The group then turned to the issue of referenda in the rest of Canada. On the one hand, it was felt that if Bourassa holds a referendum, the federal government will be forced to consult the public through a referendum as well. This scenario was characterized by one participant as "the mother of all dice rolls". There was proposed the novel idea of three referendums to ratify constitutional reform: one for Québec, one for the "rest-of-Canada", and one for aboriginal peoples. Lastly, there could be thirteen dice rolls — federal, provincial and territorial referenda.

V. Institutional Reform

The group identified two matters of institutional reform which likely would arise in this round of negotiations. The first concerned Senate reform, which one participant described reluctantly as likely to be "dragged onto the agenda". The second concerned Parliamentary reform, which may have come to outstrip Senate reform on the agenda. Parliamentary reform has come to predominate perhaps largely because of the rise in popular opposition to the Goods and Services Tax and the rise in popularity of the Reform Party, whose call for looser party discipline and more free votes in Parliament has gained a fair measure of support. Parliamentary reform can be achieved, however, without constitutional amendment but, rather, by simple majority amendment of Parliamentary rules and modification of party practices. Senate reform likely would remain, therefore, a priority item as far as some provinces were concerned.

The value of an elected Senate, argued one participant, was the way in which it cut back on the influence of the provincial Premiers in national politics. Particularly if Québec were to secede, there would have to be some counter-balance to the new power of the premiers and the influence of the largest region in the country, Ontario.

A reformed Senate, argued another, could take on a number of important functions that are of contemporary concern to Canadians. This Triple E Senate would be empowered to monitor the three E's of (1) Equalization, as provided for in s. 36 of the *Constitution Act, 1982*, (2) Economic union, reducing barriers to interprovincial trade, and (3) the Environment.

No consensus on Senate reform appeared easy to reach — Québec was in principle opposed to all three tiers of the Triple E Senate. Equality, as a consociational principle, could be accommodated in other ways than strictly through numbers. For example, a reformed Senate could guarantee that no majority could trump minority (francophone, anglophone or aboriginal) interests. In the north, for example, double or concurrent majorities are needed to affect change regarding an aboriginal group. Most models of reform have built in concurrent majorities for legislation affecting Québec's areas of traditional concern: language and culture.

VI. Official Languages

It appeared, at the time of our gathering, that public and political sentiment desired the swift abandonment of Canada's Official Languages regime. In its stead would appear the Swiss model of regional accommodation — English outside of Québec, French inside Québec — otherwise, minority language rights would be accorded only where numbers warrant. But this may be less likely than some advocates realize. The official language regime has been constitutionalized in ss. 16-22 of the *Constitution Act, 1982*. Minority language education rights are also found in s. 23 of the *Charter*. Their provisions cannot be subject to legislative override, nor can they be amended without triggering the unanimity requirement. While some modifications to the official languages regime may be made administratively, it is unlikely that these constitutional guarantees will be modified unless complete unanimity is achieved — an unlikely strategic task for this round of reform.

It was suggested by one participant that no dissolution of language rights be permitted, even if this meant dissolving the federation. It was considered unlikely, by others, that language rights, for either Anglophones in Québec or Francophones outside of it, would be of sufficient importance so as to block constitutional accommodation with Québec.

VII. Constitutional Options

The symposium participants turned to a discussion of the constitutional options which lay down the road ahead. A preliminary list of six options was introduced. They included: (1) the status quo, (2) radical decentralization,

(3) asymmetrical federalism with institutional reform, (4) confederal (Canada-Québec) union, (5) loose sovereignty-association between two nation states, and (6) re-balancing of the division of powers. To these were added: (7) a "market model" which removes jurisdiction from both levels of government, and (8) an expanded *Charter* with social and economic rights. The administrative option of re-aligning fiscal federalism, making more tax room available to the provinces, was also introduced.

To some participants, the first option (status quo) was unacceptable while others observed that the second option (radical decentralization) likely was unacceptable to the mass of the Canadian public outside of Québec. Others suggested that the *status quo* should not be ruled out if sufficient symbolic gains were made. Refining the status quo through (6) a re-balancing of the division of powers, seemed to be a likely scenario. This could be achieved with either (a) concurrency with provincial paramountcy or (b) a two-way transfer of powers between the two levels of government.

VIII. Federalism Under Fire

We have long presumed that constitutionalized federalism provides us with all the flexibility necessary to amend, even re-create, our constitutional arrangements. As far as Québec is concerned, the idea of federalism has been losing its relevance. Federalism appears particularly incapable of handling the bilateral nature of the demands emerging from Québec. Federalism is also under fire from the environmental movement who see the destruction of the environment as a concern that calls for the dismantling of provincial, and even federal, borders.

The principle of federalism, explained one participant, embodies notions of self-rule and shared-rule. The economic reality of Canada means that self-rule alone is insufficient to guarantee national sovereignty. The principle of federalism permits both forms of rule to be accommodated. What was needed was a more flexible formula; a confederal rather than a federal arrangement. Federalism, argued another, creates a marketplace of political options. Where else, but under a federal regime, could Québécois simultaneously elect politicians with such diametrically opposed political visions as Prime Minister Trudeau and Premier Levesque? Federalism was, therefore, a concept alive and well, adaptable, flexible and amenable to change through administrative arrangements.

Could federalism accommodate sovereignty-association and, if so, would federalism be so global a concept so as to lose any real meaning? Moreover, argued participants from Québec, the reality of economic links with the rest

of Canada alone need not justify a federal arrangement. Those economic links are not, and need not be, exclusively with Canada. With the free-trade agreement, and increasing resource trade with the United States, Québec is well on its way to transforming the flow of its trade southward, and therefore need not be economically dependant on the rest of Canada. This is an avoidance, argued others, of increasing economic integration and globalization. Globalization makes all states small states; we must choose between re-integration or disintegration.

Federalism, ultimately, is a flexible notion. It has permitted the establishment of special status for Québec financially, but not constitutionally, in such matters as pensions and immigration. Despite the *Alberta Government Telephones* case, Québec still exercises control over telephones and intra-provincial communications. The puzzling thing is that we cannot appear to be able to recognize constitutionally what federalism has achieved administratively.

IX. Conclusion

It would have been too much to expect any great consensus to have been achieved amongst such a diverse group, many of whom had never met each other. If the one day and a half of wide-ranging discussion taught us anything, it is that much work needs yet to be done to bridge our differing perspectives.

Canada is a country constructed of multiple "communities of meaning". With no overarching theoretical construct to guide our deliberations, we must struggle to reconcile both our pasts and our futures together. We can only begin to do so by listening to each other. If the symposium achieved anything at all, it was an opportunity to engage in meaningful dialogue about the people, their government, and their constitution.

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