

aspirations and struggle to achieve ideals. So one drawback of the politics of constitutional rights is that it encourages us to accept an emaciated, juridical conception of ourselves.

A second drawback of the politics of constitutional rights is that such politics are inimical to important political practices such as negotiation, persuasion, bargaining and compromise. Rights are "things" which, like a sports car or pneumonia, people either have or lack. They are not things, "like speed afoot or sensitivity to the feelings of others", that people possess in greater or lesser degree. As a result, disputes about rights tend to become very intransigent, and inhospitable to reasoned argument. I claim that homosexuals should have constitutionally-entrenched equality rights; you deny it. Where do we go from here? Into a shouting match? From a rights perspective, crucial questions tend not to get asked, let alone answered, much less answered in a way that appeals to rational argument and pertinent evidence rather than sheer assertion.

Finally, the politics of constitutional rights exacts a price which is, except in rare cases, not worth the gain. Political actors have only so much time, skill, effort, and money to

spend. Every expenditure of resources on securing recognition of rights leaves fewer resources for the pursuit of substantive objectives in the rough-and-tumble forum of democratic politics. Important objectives like day care programs, Native self-government, and a guaranteed annual income, are not going to be achieved through the politics of constitutional rights. They will be achieved, if at all, only by sustained, intelligent political participation.

Our polity is often described as a liberal democracy. If I were to summarize my view of the politics of constitutional rights, exhibited at its worst in the Meech Lake process, I would say that it is preoccupied with the liberalism and largely unconcerned with the democracy. And that is precisely the central drawback of the politics of constitutional rights.

---

**T.C. Pocklington**, Department of Political Science, University of Alberta.

1. (1988) 14 *Canadian Public Policy* 121.

---

---

## WOMEN IN THE AFTERMATH OF MEECH LAKE

Susan Jackel

As we look ahead to the future of Canada in the wake of the Meech Lake Accord's collapse, my concern grows as we witness the accelerating disintegration of longstanding institutions and accommodations. I was one of the Accord's early critics, yet I am a lifelong Canadian nationalist; this country's survival in one form or another matters a great deal to me. I did not want to see the Accord die, since its basic purpose was so manifestly right and necessary. Yet along with many others active in women's organizations in Anglophone Canada, I was deeply disturbed by the manner of its introduction to the Canadian people: a deal done behind closed doors by the self-styled modern day Fathers of Confederation — eleven able-bodied white men who had apparently learned nothing from the constitutional debates of 1980-82. For Canada's excluded majority — women, native people, the disabled, visible minorities, the poor — this deal exposed with humiliating clarity our marginality and irrelevance in the Canadian political system. The Accord's defeat at the hands of this popular resistance was not, in the short term at least, a victory for Canada. Far better that our

political leaders had recognized early on what was behind this widespread restiveness, and found mechanisms that would have at one and the same time addressed the critics' substantive concerns, and also confirmed that the people have a vital stake in our constitutional arrangements. Sheer boneheaded arrogance prevented this, and so supporters and critics alike have to hope that despite the acrimony of the debate, the seeds for the regeneration, if not the transformation, of our national political community lie in the new voices that united with Elijah Harper to say "no" to Meech.

During the 1980-82 exercise, virtually every branch of Canada's multifaceted women's movement underwent a crash course in constitutional law and the intricacies of federal politics. Led by groups such as the Ad Hoc Committee on the Constitution, the National Action Committee on the Status of Women, the Canadian Advisory Council on the Status of Women, and the National Association of Women and the Law, women entered

decisively into the formulation and defense of two key sections in the *Charter* that would entrench constitutional guarantees of equality between men and women. Keep in mind that this was happening as the Equal Rights Amendment in the United States was in its death throes. The short-term effect of this experience on women activists was total exhaustion: all that organizing and struggle just to insert and maintain a principle that should have passed without question. The longer term effect was energizing and empowering. Women discovered that they could play this constitutional game as well as anyone, especially now that the game was to be dispersed more widely into the courts as well as the provincial and federal legislatures. To a handful of idealists, it seemed as though the promise of the democratic franchise was finally on the verge of realization; or, at the very least, it had been worthwhile getting all those women through law school, after all.

If there was such a utopian view of the *Charter's* promise for women, it was quickly tempered by the evasions of provincial governments during the three-year waiting period before section 15 of the *Charter* came into force; and it was further dampened by a string of less than enlightened lower court judgments on equality issues between April 1985 and May 1987. No less alarming was the Supreme Court decision in June 1987 insulating Ontario separate school boards from equality rights obligations. Hence, the suspicion, soon hardening into anger, with which the organized women's movement in English Canada greeted the Accord in June and early July 1987.

I am acutely aware that the discrete arguments and events related to women's groups' involvement in the Meech debates are largely unknown at best, and grossly misunderstood at worst, by all but a handful of devoted Meech-watchers. This is, indeed, a large part of women's perennial experience and frustration: that despite more than a century of articulation, women's voices are systematically unheard or misheard in our traditional political discourse, dominated as it is by federalism and parliamentary conventions. The native people have exactly the same complaint, with even more justice behind them: white women at least have had access, of sorts, to education, the professions, the press and other avenues of public participation for the last half century or more. Still, when I look at how the press reported women's submissions to the parliamentary hearings in late August 1987, I wonder whether total disregard might not have been better. Here was a large and, therefore, significant constituency voicing concerns about certain phrases in the Accord, and also voicing, in no uncertain terms, their distress at the rushed pace and

undemocratic structure of the process. Soon, however, the "story" of women's criticisms of the Accord became, as far as the media were concerned, the titillating spectacle of Francophone and Anglophone women diverging in public on the impact that the distinct society clause might have on equality rights, and the remedies required to head off any hypothetical dangers. Wrongly and irresponsibly, the press overlooked the explicit endorsement in the majority of Anglophone women's briefs of Québec's five basic demands, including the recognition of Québec as a "distinct society". And so one observed an all-too-familiar scenario wherein, as soon as women's concerns could be viewed through a convenient and dismissive lens — women can never agree on anything — their substantive objections, as well as their substantial agreement on many points, were lost to sight.

A related causality at this early stage in the proceedings — although dramatically confirmed towards Meech's closing months and weeks — was women's insistence that the entire process was illegitimate; that it should never have happened this way, and must never happen this way again. In the measured but pointed phrases of the Federation des femmes du Québec, at the conclusion of their brief to the Parliamentary hearings: "We hope future consultations on the Constitution will give us an opportunity to intervene in time to influence the direction of government policy. We also hope we will be given reasonable notice. We have found it extremely stressful to have to prepare our presentation in such a rush on an issue as fundamental as the Meech Lake Accord."

Throughout the intensive summer and fall of 1987, and indeed throughout the entire three years of the debate, women's groups from Québec and the rest of Canada struggled to understand one another's situations and points of view about the real meaning of the distinct society clause for women. Many national organizations that had formed in the 1960s and 1970s, and were wholly or substantially Anglophone in membership, had spent much of the late '70s and early '80s trying to expand their membership into Québec or, at the very least, establishing formal links with corresponding Québécoise groups. A start had been made in restructuring executives and communications to ensure meaningful Francophone participation, or constructing alliances and opportunities for dialogue where parallel organizations made more sense. Many friendships were formed during this period that were severely strained by the Meech debates. Major organizations like NAC and CRIAW went through agonizing struggles to arrive at a position on Meech that would recognize the legitimacy of Québec's position, and yet take account of the concerns of Anglophone women. Never was the specificity of feminist

politics more clearly illustrated. What prevented total rupture were the foundations of mutual respect and common political purpose that had been laid, however incompletely, during the decade leading up to Meech. In the end, compromises of sorts were arrived at, and, in the process, Anglophone women, in particular, gained a vision of a distinct society where the equality of women and men is widely and irrevocably accepted as a fundamental characteristic of that society. This, needless to say was and is a revolutionary discovery for women in the provinces and territories outside Québec as women and as Canadians — a beacon of hope for our future.

*"The effect of women's opposition to the Accord, however diffuse and in many instances ill-informed it was, was far more profound than has so far been recognized by our mainstream political scientists and pundits."*

I have spoken of the impact of Meech on women's groups, and now I will speak briefly about the role of Anglophone women's groups' resistance on the overall outcome of Meech, before moving on to a consideration of where we go from here. From my reading of the commentary that has arisen around Meech in English Canada, I think that the effect of women's opposition to the Accord, however diffuse and in many instances ill-informed it was, was far more profound than has so far been recognized by our mainstream political scientists and pundits — Alan Cairns always excepted. As is now widely recognized, there was a fatal miscalculation in the ratification process laid out by the Fathers of Meech. They had apparently assumed that ratification by provincial legislatures would be immediate and automatic — in which case, the provision for such ratification seems in retrospect either hypocritical or silly. (To a few of us, discounted and disregarded at the time, that aspect of the process was suspect from the very beginning.) But a funny thing happened on the way to final approval of the Accord: the New Brunswick election, followed by the Manitoba election, in which opposition to the Accord by provincial status-of-women organizations was explicit and extremely influential. Neither of these elections, of course, should be interpreted as a referendum on Meech. On the other hand, it should not be overlooked that at the provincial level, and especially in those two provinces, Manitoba and New Brunswick, women's groups are pervasive and highly active. And women do, after all, constitute at least half the eligible voters in elections, thanks to the daring move of an earlier

generation of male parliamentarians toward genuine democracy in Canada through the enfranchisement of women.

Similarly, I think two other factors have not been sufficiently remarked on. One was Frank McKenna's genuine and principled reservations about the Accord on the grounds that women and native people had been excluded from its construction, reservations that led him to adopt a strategy of delay in order to allow time for remedies to be evolved, remedies such as the "parallel resolution" or the insertion of a "Canada clause" or *Charter* protections. McKenna, too, made a fatal miscalculation in radically underestimating the intransigence of Mulroney, Murray and company. But, in the meantime, his delay, reinforced by Filmon's dilemma and then turnaround in Manitoba, gave time for all citizens' groups critical of the Accord to develop and promulgate their case. In the end it was native peoples, personified by Elijah Harper, who were the effective executioners of the Accord; but here, too, I think the support of Manitoba women's groups for the native cause during the Accord's final days, while possibly not decisive, was not insignificant either. Nor will that alliance between Manitoba women's and native groups, born of common cause and developed over nearly three years, easily dissipate, unless some Machiavellian type finds a way to divide and conquer, through resurrecting section 12(1)(b) or its equivalent. Moreover, I make this prediction with reference not only to Manitoba and New Brunswick politics, but to emerging political coalitions throughout English Canada. Québec after Oka and James Bay II may be a different story.

Where do women fit into the aftermath of Meech? Having alluded to the revolutionary model that Québec society holds out for us all, in according such a remarkable degree of sexual equality to our Québécoise sisters, I will make a few more wildly hopeful projections for our common future. I think we do have to be hopeful. The strains on Canada on other scores — economic, environmental, geopolitical — are so severe that we have no margin for despair about our ability to recover from the damage done by the Meech debates. But I think also we have to be daring in our thinking; to project in terms of transformation, not just a little tinkering at the margins. In saying this, I do not suggest for a moment that as true Canadians we would be anything but prudent and cautious, in Robert Bourassa's oft-repeated formulation, in the methods we use to bring this transformation about. Thus, we can look forward, in anticipation or horror as the case may be, to much more talk: more hearings, more colloquia and conferences and forums, more think pieces for the journals and the popular

media. The chattering classes of Canada will not lack for employment for as long as Canada may chance to endure.

If we have learned anything from the Meech debacle, it is that an aroused Canadian citizenry will no longer stand for backroom deals and high-pressure labour-style negotiations in re-making our constitution. Nor do we any longer have the luxury of a staged-in agenda, in which there is a Québec round followed by a native peoples round followed by a multicultural round followed by a round for disabled people, with women and the poor being told to wait their turn while the more severely disadvantaged take priority.

What I particularly want to urge on you is the further lesson that we can learn from many people, of whom the most authoritative, in traditional political-punditry terms, is Alan Cairns. I agree with Professor Cairns that the consciousness of Canadians vis-à-vis their relations to the state has radically changed during the past decade, straining our existing structures and political dynamics not merely to, but past, the breaking point. Thanks largely to the women's movement, and to feminist theorizing, the personal has become political and the political very personal. And yet

where in the musings of our professional academic pundits, except for a handful of feminist political theorists — Catharine MacKinnon, Carole Pateman, Lynda Lange, Jill Vickers — and a few mavericks like Alan Cairns, is there an awareness of the huge gap between old-style understandings and new-style definitions of citizenship, the state, and the exercise of political participation and responsibility? In the multiplicity of think-tanks and colloquia and special journal issues that will no doubt proliferate through the next several years, it seems to me that it must be the so-called minorities — women, who of course are not a minority, and those other excluded groups who are minorities — whose voices must be present, and listened to, and heard. For increasingly it is precisely these groups who are developing a vision of a possible future together in which objectives, values and processes, other than those that poisoned our relations during Meech, are available as foundations for a transformed Canadian political community.

---

Susan Jackel, Department of Canadian Studies, University of Alberta.

---

---

## FIRST NATIONS AND ABORIGINAL RIGHTS

Andrew Bear Robe

### ABORIGINAL LAND CLAIMS

Any discussion today regarding land claims in Canada must begin with the proprietary concept of *Indian title*, which essentially means the full and complete aboriginal ownership, occupation and dominion over the North American continent. Aboriginal title essentially means the same as Indian title; both bespeak of an independent legal interest in land which must be satisfied by the Crown before it can claim unencumbered title to any piece of land in North America. Under the Canadian *Constitution* of 1982, aboriginal title can be asserted not only by Indians, but the Inuit and Metis as well. In any case, the Indian title is recognized and protected both by the British Imperial and Canadian Crowns through such Executive acts as the *Royal Proclamation of 1763*, s.109 of the *Constitution Act, 1867*, i.e. *Indian Trusts and Interests*, the *Rupert's Land and North-Western Territory Order of 1870*, the pre- and post-Confederation land cession and peace treaties, the Natural

Resources Transfer Agreements of the 1930s respecting the prairie provinces<sup>1</sup> and the more recent comprehensive land claims settlements for the northern regions. All of the foregoing executive undertakings must be read together in order to arrive at the common law and statutory pronouncements regarding Indian title and the associate aboriginal and treaty rights arising therefrom.

As a direct result of the dangerous and volatile situation created at Oka, Québec this past summer, between the Mohawks and the citizens of Québec, everyone in Canada that has expressed an opinion on the subject agrees that the federal land claims policy must be substantially revamped. That policy must now show fresh approaches, new attitudes and more flexible logic if Canadians are to enjoy calmer and lasting peaceful relations with aboriginal peoples. Firstly, the federal government and its huge bureaucracy can begin to appreciate the rich historical perspective of Indian land claims instead of attempting to fit those issues into narrow